

The Dominion Building Corporation, Limited - - - *Appellants*

v.

The King - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1929.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

LORD TOMLIN.

LORD THANKERTON.

[*Delivered by* LORD THANKERTON.]

The main question in this appeal from a judgment of the Supreme Court of Canada relates to the validity of a reference made on 16th September, 1926, by the Acting Minister of Railways and Canals bearing to be made by virtue of Section 38 of the Exchequer Court Act (R.S. Canada, 1906, c. 140) in the following terms :—

“ In the Matter of Dominion Building Corporation Limited Claimants, and His Majesty the King Respondent.

“ Reserving the right to plead and maintain that the said Dominion Building Corporation Limited is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation Limited, for compensation alleged to be due by reason of the allegations therein set forth.

“ Dated at Ottawa, this Sixteenth day of September 1926.

“ (Sgd.) H. L. DRAYTON,

“ Acting Minister of Railways and Canals.”

The claim thus referred was a claim for damages in respect of an alleged repudiation by the Minister of a contract to sell

certain freehold lands in Toronto at the price of \$1,250,000, and was set forth in a letter dated the 4th September, 1926, addressed to the Minister of Railways and Canals by the appellant company, as assignees of a contract alleged to have been made by the Minister with one James Forgie in July, 1925.

At the time of the alleged contract, the property in question, which consisted of a large parcel of land in an important position in the city of Toronto, stood vested in H.M. the King as represented by the Minister of Railways and Canals under a deed dated the 17th August, 1923, granted by the Imperial Bank of Montreal.

The contract of sale was alleged to have been constituted by a written offer of purchase by the said James Forgie, dated the 27th July, 1925, addressed to His Majesty, represented by the Minister of Railways and Canals, which was formally accepted and approved of by an Order of the Governor in Council, upon the report and recommendation of the Minister of Railways and Canals on the 29th July, 1925. Thereupon Forgie, on the 5th August, 1925, assigned to the appellant company all his interest in the contract.

The contract provided that the purchaser should erect on the property and adjoining lands a twenty-six storey office building, and that the Crown, represented by the Minister of Railways and Canals, should execute a lease of the ground and three next floors of the building, on specified terms, for the use of the Canadian National Railways.

Though not referred to in the contract, it appears to have been part of the negotiations that a lease of five other floors in the proposed building should be similarly executed for the use of the Department of Customs. Negotiations on this matter appear to have delayed the carrying out of the main contract for some months, but ultimately on the 1st February, 1926, an Order in Council was passed, on the recommendation of the Minister of Public Works, authorising the leasing of five other floors for the use of the Department of Customs and Excise.

On the 6th February, 1926, the appellant company notified the Minister of Railways and Canals of their readiness to complete the purchase. On the 12th February, 1926, the Minister notified the appellant company that he had decided not to carry out the agreement, and on the 4th September the appellant company lodged with the Minister the claim for damages already referred to, which was the subject of the reference here in question, dated the 16th September, 1926.

On the 24th November, 1926, the Minister of Justice, who advised that the reference was not binding on the Crown, was authorised by Order in Council to withdraw the reference, and, on the same date, withdrawal of the reference was formally notified to the Registrar of the Exchequer Court of Canada.

The validity of such withdrawal was disputed by the appellant company, and on the 3rd February, 1927, the Exchequer Court

held the withdrawal to be ineffective. The respondent thereupon moved the Court for leave to withdraw the reference or in the alternative for an order striking out the appellants' statement of claim, but this motion was dismissed by the Exchequer Court on the 2nd March, 1927, whereupon the respondent appealed to the Supreme Court of Canada. An attempt by the appellants to have the appeal quashed for want of jurisdiction was unsuccessful, and on the 16th December, 1927, the Supreme Court dismissed the motion to quash and allowed the appeal on the ground that the reference was not a valid one. The present appeal is taken by the appellant company against that judgment.

Only two questions were argued before the Board, viz.:—
 (1) Whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the Exchequer Court and (2) whether the reference was authorised by Section 38 of the Exchequer Court Act.

On the first point their Lordships agree with the judgment of the Supreme Court on the grounds stated by them. The second question involves the construction of Section 38 of the Exchequer Court Act, which provides as follows:—

“ 38. Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the Department in connection with the administration of which the claim arises.

“ (2) If any such claim is so referred no fiat shall be given on any petition of right in respect thereof.”

While the Crown does not concede the conclusion of a valid and binding contract of purchase, it was agreed that for the purpose of the present question the validity of the contract may be assumed, as that issue would appropriately be contested in the reference.

The appellant company maintain that the claim arose “ in connection with the administration ” of the department of Railways and Canals, and they found on the fact (1) that the property was vested in the Crown, as represented by the Minister of Railways and Canals, (2) that it was occupied by the Canadian National Railways, of whose properties the Minister has charge and direction, (3) that the offer was addressed to the Minister, who still holds the deposit money, (4) that the approval of the Governor in Council was obtained by the Minister, and (5) that the repudiation, out of which the claim arises, was made by the Minister.

The respondent relied on the grounds of the decision of the Supreme Court in his favour, which held that Section 38 (1) is confined to claims which exclusively concern the administration of the department, whose head exercises the power of reference, and that an examination of the terms of the present claim disclosed (1) that the leases to the Canadian National Railways and to the Department of Customs and Excise were essential to the financing of the whole project, that without them the contract

had no financial value to the appellants, and that the failure to obtain such leases is the substantial basis of the claim, and (2) that the negotiation of the contract, and the whole project, was a governmental undertaking as distinguished from a merely departmental transaction, and that the Minister of Railways and Canals, in executing and repudiating the contract was merely acting as the agent and representative of the Government under a special authority deputed to him.

In their Lordships' opinion the construction of Section 38 adopted by the Supreme Court is too narrow a one. The allocation of classes or items of Government business may be statutory, or customary, or under a particular allocation.

The Department of Railways and Canals was created by the Department of Railways and Canals Act (R.S. Canada, 1906, c. 35) and under Section 7 the Minister has

"the management, charge and direction of all Government railways and canals and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls on the public canals and of matters incident thereto, and of the officers and persons employed in that service."

Under the Canadian National Railways Act, 1919, the Canadian National Railway Company was created as an independent Corporation, consisting of a board of directors, nominated by the Governor. Under Section 11 the Governor in Council was empowered to entrust to the Company

"the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide."

Such management was to continue during the pleasure of the Governor in Council.

By Order in Council dated the 20th January, 1923, the Canadian Government Railways, defined for the purpose of Section 10 of the Act of 1919, to include certain specified railways and "as a general designation all other railways and branch lines, the title to which and to the lands and properties whereon such railways are constructed, is vested in His Majesty," were "entrusted in respect of the management and operation thereof" to the Company in terms of the Act.

The effect of Section 11 of the Act was *inter alia* to entrust to the Company in respect of management and operation,

"all properties, works, powers, rights and privileges incidental to those designated and commonly used, operated and enjoyed in connection therewith."

In their Lordships' opinion, while the effect of the Act of 1919 was to transfer to the Canadian National Railway Company the management and use of the subjects in question for the purpose of operating the railways, it did not transfer to the Company the administration of the ownership rights in the property. That remained with the Minister, though the interest of the Company in the use of the property would naturally be kept in view. A Minister normally has to consult other Departments or other interests, or even get the approval of the Government, in connection with matters properly appropriated to his administration.

In their Lordships' opinion the negotiations and conclusion of the contract of sale in the present case were properly part of the administration of the Minister of Railways and Canals, and the incidental matters of the leases do not affect that position for the purposes of Section 38 of the Exchequer Court Act. If the contract is assumed to be a binding contract, the Order in Council of the 29th July, 1925, shows that it was treated as properly matter for his administration, and its repudiation, out of which the claim arises, was equally part of his administration. Further, even if the matter were originally not a departmental but a government one, their Lordships would be of opinion that it was appropriated to the Department of Railways and Canals by the Order in Council, and was thereby made part of the Minister's administration for the purposes of Section 38.

Their Lordships are therefore of opinion that the reference of the 16th September, 1926, was a valid one, and they will humbly advise His Majesty that the appeal should be sustained, that the judgment of the Supreme Court of Canada should be reversed with costs and that the judgment of the Exchequer Court of Canada should be restored. The respondent will pay the costs of this appeal.

In the Privy Council.

THE DOMINION BUILDING CORPORATION,
LIMITED,

v.

THE KING.

DELIVERED BY LORD THANKERTON.

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