

IN THE MATTER of the Petition of Right of

THE CANADIAN PACIFIC RAIL- }
WAY COMPANY..... } SUPPLIANTS;

1906
June 30.

AND

HIS MAJESTY THE KING... ..RESPONDENT.

*Canal bridge—Agreement between Crown and company as to construction—
Liability for maintenance and operation of bridge.*

In 1882 the O. & Q. Ry. Co., the suppliants' predecessor in title, applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee River, in the Town of Peterborough, undertaking at the same time to construct a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By order in council of 23rd October, 1882, and an agreement made in pursuance thereof on the 23rd of December, 1882, between the said company and the Crown, permission was given to the former to construct a bridge across the said river, on their undertaking to construct at their own cost a swing in the bridge, should the Government at any time thereafter consider that to be necessary, or in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, and a swing in the said bridge not being necessary, that there should in that case be a new swing-bridge over the said canal, the cost of the swing and the necessary pivot therefor to be borne by the said company. The canal having been constructed, it became necessary to have a new swing-bridge over the canal on the company's line of railway. This bridge was built, and the suppliant company discharged the obligation to which it succeeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. The cost of the maintenance and operation of the bridge being in dispute between the parties, the petition herein was filed to determine the question of liability therefor.

Held, that in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants having built the pivot pier and swing as part of their railway and property should maintain and operate them at their own cost.

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PETITION OF RIGHT for the recovery of money alleged to have been expended on behalf of the Crown.

A Special Case was also filed herein under Rule 111.

The facts of the case are stated in the reasons for judgment.

March 5th, 1906.

The case now came on for argument.

F. H. Chrysler, K.C. (with whom was *D'Arcy Scott*) for the suppliants, contended that while the rights of the company were acquired subject to the prior right of navigation and in such a case it might be successfully argued that an obligation to construct a swing in the bridge over the river carried with it a corresponding obligation to operate and maintain the swing, yet the case was different as to the canal. The railway was built before the canal was constructed, and apart from any agreement such as has been entered into here, the company would be entitled to damages for interference with its property; and such damages would be assessed at a sum sufficient to compensate the company for the maintenance and operation of the bridge. This position is altered by the agreement only to this extent, viz., that the company in the event that happened became liable for the cost of constructing the pivot pier and swing, but not for their maintenance and operation. (Citing *Saunby v. London Water Commissioners* (1); *Parkdale v. West* (2); *Pion v. North Shore Ry. Company* (3).

E. L. Newcombe, K.C., for the respondent, submitted that the suppliants were impliedly obliged to operate and maintain what they expressly obliged themselves to construct. That was the fair interpretation of the agreement between the company and the Crown. Their rights were subject to the paramount public right of

(1) [1906] A. C. 110.

(2) [1887] 12 A. C. 602.

(3) [1889] 14 A. C. 612.

navigation. They could not have interfered with the navigation of the river, as they plainly recognized in their original application for authority to erect a bridge; and, without considering the agreement at all, they were in no better position with regard to obstructing the canal.

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Mr. *Chrysler*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (June 30th, 1906) delivered judgment.

This matter comes before the court upon a case stated by the parties. The suppliant company by its petition alleges that they own and operate a railway between the City of Toronto in the Province of Ontario and the City of Montreal in the Province of Quebec, and that they did so own and operate the said railway during the year 1896; that in that year the Government of the Dominion of Canada excavated a cutting for the construction of the Trent Valley Canal across the right of way of the said railway at a point about a mile east of the Town of Peterborough in the Province of Ontario; that such cutting was subsequently filled with water and a swing bridge was built, partly at the expense of the Government and partly at the expense of the company, to carry the railway over the canal; that on or about the 1st day of July, 1904, the canal was opened for traffic, and since that time has remained open for traffic during the season of canal navigation; that the traffic of the canal necessitates the employment of a staff of men for the opening and shutting of the swing in the bridge; that the Government of Canada has refused to pay to the suplicants any of the expense of the operation and maintenance of the bridge, although demand therefor has been duly made; and that from the 1st day of July, 1904, up to the 31st day of October, 1905, they have expended the

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sum of \$2,795.34 in the maintenance and operation of the said bridge.

And in conclusion the suppliants ask for a direction or declaration that the amount mentioned should be paid to them and that the expense of operating and maintaining the said bridge for all time from and after the 31st day of October, 1905, should be borne by the Government of Canada ; or else that the bridge should be removed and the right of way of the suppliants' railway should, at the expense of the Government, be restored to the condition it was in prior to the construction of the canal.

The rights of the suppliants in the railway mentioned were acquired under a lease in perpetuity from The Ontario and Quebec Railway Company, to whose obligations they have in this matter succeeded.

In the statement in defence, the Attorney-General of Canada, on behalf of the respondent, alleges that on or about the 31st day of October, 1882, the Ontario and Quebec Railway Company, the predecessors in title of the suppliant company, made an application to the Minister of Railways and Canals for leave to construct a bridge for their railway across the Otonabee River, at the Town of Peterborough, and at the same time stated that they would undertake to construct a draw in such bridge in case the Government should at any time thereafter determine the same to be necessary for the purposes of navigation. It is also alleged that by an order of the Governor-General in Council, dated the 23rd day of October, 1882, and an agreement executed in pursuance thereof dated the 22nd day of December, 1882, and made between The Ontario and Quebec Railway Company of the first part and Her late Majesty Queen Victoria of the second part, permission was given to the company to construct a bridge to carry their railway across the Otonabee River, on their undertaking to construct at their own cost a swing in the bridge, should the Govern-

ment at any time thereafter consider that to be necessary, or in case of the carrying out of the then proposed canal for the improvement of the Trent River navigation, and a swing in the said bridge not being necessary, that there should in that case be a new swing-bridge over the said canal, the cost of the swing and the necessary pivot-pier therefor to be borne by The Ontario and Quebec Railway Company.

The Government constructed the proposed canal for the improvement of the Trent River navigation, and it was not necessary to have any swing in the bridge that the railway company had built across the Otonabee River. On the other hand it became necessary to have a new swing-bridge over the canal on the line of the railway. That bridge has been built, and the suppliant company has discharged the obligation to which it succeeded to pay the cost of the pivot pier and of the swing and superstructure of the bridge. The bridge having been built, it has to be maintained and operated, and the main question to be determined is whether the expense of such maintenance and operation should be borne by the suppliant company or by the Crown.

The first clause of the agreement of the 22nd day of December, 1882, to which reference is made in the statement of defence is as follows :—

“ If at any time hereafter the Minister of Railways  
 “ and Canals for the time being shall by notice in writ-  
 “ ing require that the said company, its successors or  
 “ assigns so to do, then the said company, its successors  
 “ or assigns, shall or will within two months thereafter  
 “ construct either a swing in the said proposed bridge, or  
 “ *a new swing-bridge over the said proposed canal*, in  
 “ either case upon plans to be approved by the Chief  
 “ Engineer of Canada, the cost in the case of a swing in  
 “ the said proposed bridge to be borne by the said com-  
 “ pany, its successors or assigns, *and in case of a new*

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“*swing-bridge over the said canal the cost of the swing itself and the necessary pivot pier to be borne by the said company, its successors or assigns and the balance by Her Majesty or Her successors.*”

Now it will be seen that the agreement makes provision only for the cost in each case of the structure to be built, and is silent as to the cost of its maintenance and operation. It is conceded, however, that if the company had been required, in the interests of navigation, to put a swing in the bridge over the Otonabee River, the expense or burden of operating and maintaining the swing would have fallen on the company. The rights of the company were acquired subject to the prior right of navigation, and the obligation to construct the swing in the bridge over the river carried with it as an incident the obligation to operate and maintain the swing. But with reference to the canal and the railway it is said that the case is different; that as the railway was first built and operated the company would, apart from any agreement, have been entitled to damages for any interference, in the construction of the canal, with their rights, and that such damages would have included a sum sufficient to compensate the company for the operation and maintenance of the swing-bridge in case the company had operated and maintained it. And that seems to me to be a fair statement of the position that the parties would have occupied except for the agreement referred to. Then it is said that the position mentioned is altered by the agreement to this extent only that the company in the event that happened became liable for the “cost of the swing itself and the necessary pivot pier” while the balance of the cost was to be borne by the Crown. And it is contended that the result is that the expense of operating and maintaining this swing bridge over the canal falls upon the Crown and that the suppliant company is entitled to compensation for the expenses it has incurred in that behalf.

The word "balance" used in the clause of the agreement that has been cited refers to the balance of the cost of construction, and does not include the cost of operating or maintaining the swing-bridge. In addition to constructing "a swing" and the "necessary pivot pier" which, as I understand the matter, constitute the swing-bridge in question, it was necessary to excavate the prism of the canal and no doubt to do other work incident thereto. It would not have been fair or reasonable that any part of the cost of such excavation or other work should fall on the railway company; and against that the agreement provides by limiting their liability to the cost of the swing and of the pivot pier and by throwing the balance of the cost, whatever it might be, on the Crown. But that balance, as stated, was the balance of the cost of construction only. Nothing is mentioned in the agreement as to the expense of maintaining and operating either the swing over the canal or over the river. It is clear, however, that the public right of navigation existed long before the railway was built. In giving the company authority to carry their railway across the Otonabee River provision was made to protect that public right of navigation as it then was and as it might be when certain proposed works were carried out. But as it was uncertain at the time whether the river would be used or a new canal or channel constructed the condition on which the company were given leave to construct their bridge over the river was put in the alternative in the terms that have already been cited. If it became necessary to put a swing in the bridge the company were to bear the cost thereof. If on the other hand it became necessary to put a swing-bridge over the proposed canal the company were to bear the cost of the swing itself and of the necessary pivot pier. In neither case is any provision made as to the cost of operating the swing or maintaining the bridge. It seems to me, how-

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ever, that in each case equally the expense of operating and maintaining the thing that the company was under an obligation to build was something that the company had to bear. If a swing had been put in the company's bridge over the river it would have become a part of the bridge that the company were bound to maintain and operate. But how does that case differ from the other so far as the pivot pier and the swing are concerned? These are the property of the company; they form part of their railway. The company has paid for them. They have been constructed in pursuance of an obligation undertaken in recognition of a public right of navigation either by the river or by the canal mentioned. And that right was anterior to any right that the suppliant company or their predecessors acquired in the railway. In my opinion the suppliant company are liable to bear the expense of maintaining the pivot pier and swing mentioned and of operating the swing.

The first question submitted in the stated case for the opinion of the court is as follows:—"Is the Canadian Pacific Railway Company liable to bear the expense of maintenance and operation of the said bridge?"

Limiting my answer and the word "bridge" to the swing and pivot pier mentioned, I answer that question in the affirmative; and having done so, it becomes unnecessary to answer any of the other questions submitted.

If the expense mentioned should, as it seems to me it should, be borne by the suppliant company, they are not entitled to any portion of the relief sought by the petition.

There will be judgment for the respondent, and the costs as usual will follow the event.

*Judgment accordingly.\**

Solicitors for the suppliants: *Scott & Curle.*

Solicitor for the respondent: *E. L. Newcombe.*

\*Affirmed on appeal, see 38 S. C. R. 211.