

1933
 Jun. 27.
 1934
 Apr. 7.

BETWEEN:

WILLIAM CHIPMAN..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Jurisdiction—Exchequer Court Act—Rideau Canal Act—British North America Act—Crown as Trustee—Statute of Limitation—Non-Assignability of claim against the Crown.

Held: That the Exchequer Court has jurisdiction to entertain an action arising out of the taking of lands under the Rideau Canal Act, 8 Geo. IV, c. 1.

2. That the Crown can only be constituted a trustee by express statutory provisions or a contract to which the Crown is a party.
3. That a claim against the Crown, in the absence of acquiescence, is not assignable.

PETITION OF RIGHT by the suppliant claiming compensation for lands taken by the Crown under the provisions of the Rideau Canal Act.

The action was heard before the Honourable Mr. Justice Angers, at Ottawa.

R. V. Sinclair, K.C., for suppliant.

F. P. Varcoe, K.C., for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. now (April 7, 1934) delivered the following judgment:

This is a petition of right by which the suppliant seeks to recover from the Crown the sum of \$5,600 in the following circumstances.

The Canada Company, assignor to the suppliant, in virtue of an assignment filed as exhibit K, of the right, title, claim and demand it might have against the Crown for compensation under the Rideau Canal Act or otherwise, was incorporated by charter issued under the Great Seal of the United Kingdom of Great Britain and Ireland on the 19th day of August, 1826. A copy of the charter appears in the Appendix to the Journal of the House of Assembly of Upper Canada (1835), filed as exhibit E.

This charter was granted in pursuance and under the authority of an Act which came into force on the 27th day of June, 1825, entitled "An Act to enable His Majesty

to grant to a Company, to be incorporated by charter, to be called 'The Canada Company', certain lands in the Province of Upper Canada, and to invest the said Company with certain powers and privileges and for other purposes relating thereto" (6 Geo. IV (Imp.), ch. 75): see exhibit E.

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The Canada Company was thus incorporated for the purpose of acquiring from the Crown, in right of the Province of Upper Canada, the whole of the Crown reserves and one half of the Clergy reserves in those townships which, on or before the 1st of March, 1824, were actually laid out in the several districts of Upper Canada, except such portions of the Crown and Clergy reserves granted or demised on lease, or occupied on the licence or promise of the Government, or appropriated to public or clerical purposes, or occupied without disturbance for ten years, or which might be peculiarly convenient or necessary for the public service or for ecclesiastical objects such as the erection of churches, school houses or parsonage houses, with small pieces of land to be used as burying grounds, yards or gardens.

Previous to the issuing of the charter, namely, on the 26th of November, 1824, an agreement had been made between the Earl of Bathurst, His Majesty's Secretary of State for the department of the Colonies, and a Committee of subscribers to the company to be incorporated for the sale of the aforesaid lands to the company, providing *inter alia* for the appointment of Commissioners to ascertain the quantity of lands to be purchased by the company, the price to be paid therefor and the mode of payment: see exhibit E.

Another agreement was made between The Earl of Bathurst, on behalf of His Majesty's Government, and subscribers of the company to be incorporated, on the 23rd of May, 1826, by which a block of land in the territory purchased by the Crown from the Indians was substituted to and in lieu of the lands which, under the first agreement, were to be taken from the Clergy reserves and by which the terms of payment were modified and certain conditions, immaterial herein, were added; this new agreement is also to be found in exhibit E.

Among the lands alleged to have been purchased by The Canada Company from the Crown, pursuant to the afore-

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said agreements and for which it received a patent, was a lot described as lot number five (5) in the Sixth concession of the Township of South Crosby, in the County of Leeds, containing two hundred acres, as appears by a copy of the patent dated the 2nd of November, 1832, filed as exhibit D.

The grant and the description of the property in the patent read as follows:

We have given and granted and by these Presents do give and grant unto the said Canada Company and their Successors forever all those certain parcels or tracts of land situate in Our said Province and containing by admeasurement One Hundred and Ten Thousand six hundred and thirty-eight acres be the same more or less Being amongst other lands lot Number five in the Sixth concession of the Township of South Crosby in the County of Leeds containing Two hundred acres To Have and To Hold the said several parcels or tracts of land hereby given and granted to the said Canada Company and their assigns forever Saving reserving and excepting to Us Our Heirs and successors to and for the use as well of Us Our Heirs and successors as of All Our loving subjects all navigable streams waters and watercourses with the beds and banks thereof running flowing or passing in over upon by through or along any of the said parcels or tracts of land hereinbefore given and granted to the said Canada Company and their assigns and also saving and reserving to Us Our Heirs and Successors all mines of gold and silver that shall or may hereafter be found on any part of the said parcels or tracts of land hereby given and granted as aforesaid.

Then the patent contains a proviso regarding lots or parts of lots, among the lands granted, which may be required by the Crown for canals, roads, forts or other public purposes; this proviso is in the following terms:

Provided also if any of the said several lots or pieces of land hereby granted by Us to the said Canada Company their successors or assigns or any part thereof shall be required for canals roads the erection of forts hospitals arsenals or any other purpose connected with the defence or security of the said Province then all and every the said lands which may be so required for any or either of the purposes aforesaid shall revert to and become vested in Us Our Heirs and Successors upon a requisition for the same being made either by an act of the Legislature of Our said Province or by the Governor, Lieutenant Governor or person administering the Government of Our said Province or by his direction and this Our grant of such lands which shall be so required shall upon and after such requisition for the same being made be null and void and of non effect so far as respects such lands any thing herein contained to the contrary in anywise notwithstanding And We do hereby declare that in any such event We Our Heirs and Successors will name one arbitrator who shall in concurrence with an arbitrator to be appointed by Canada Company or their grantees or lessees and a third arbitrator to be chosen by such arbitrators determine what price it is reasonable should be paid by Us Our Heirs and Successor's to the said Canada Company their grantees or lessees for any lands that may be so resumed by Us Our Heirs or Successors which determination shall be made by the voice of the majority of the said arbitrators.

An Act concerning the Rideau Canal was passed on the 17th of February, 1827 (8 Geo. IV, ch. 1), which provided, among other things, that the officer employed to superintend the construction of the canal should have full power and authority to enter into and upon the lands or grounds of or belonging to any person or persons, bodies politic or corporate, and to survey and take levels of the same or any part thereof and to set out and ascertain such parts thereof as he should think necessary for the proper making of the canal.

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The said act also provided that the price or compensation to be paid for lands taken for the purposes of the canal should be determined by agreement with the owners or, if no agreement could be made, by arbitration.

[The learned Judge referred to the pleadings and then continued.]

At the trial admissions were filed by the parties reading as follows:

THE PARTIES HERETO, in addition to the admissions in the Pleadings herein, make the following admissions for the purposes of this suit, only:

(1)—The Officer employed by Her Majesty to superintend the construction of the Rideau Canal, entered upon Lot (5), in the 6th Concession of the Township of Crosby, in the County of Leeds, in the new Province of Ontario, and surveyed the lands comprising 60 acres, 1 rood and 33 perches, referred to in paragraph 7 of the petition of right, being the part thereof which he deemed necessary for the making of the said Canal, and the boundaries were marked first by pickets, as shown on Burroughs' plan dated 1839 (Exhibit A) and later by boundary stones in the same positions as the pickets, as shown on Snow's plan 1850 (Exhibit B). Chewett's plan 1829 (Extract therefrom Exhibit C) shows the lands coloured red but does not show any boundary pickets or stones, although in the cases of some other lots taken boundary stones are shown on this plan.

(2)—The Rideau Canal was finished and opened for navigation in May, 1832. The patent to the Canada Company (Exhibit D), being one of a number of patents granted by the Crown to the Canada Company, covering the lands in question, was dated November 2nd, 1832. This patent was issued pursuant to an arrangement which is disclosed by the following instruments contained in Exhibit E, being Appendix to Journal of the House of Assembly of Upper Canada, 1835, Vol. 2, No. 39: (a) the minutes of arrangement between Lord Bathurst, Colonial Secretary, and the promoters of the company, dated 26th November, 1824; (b) amending arrangement dated 23rd May, 1826; (c) charter of the Canada Company dated 19th August, 1826. In addition reference should be made to the statute authorizing the charter, being (1825) 6 Geo. IV, chap. 75 (Imp.) (Exhibit E).

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(3)—Pursuant to the arrangement, commissioners were appointed to value the lands. The commission and instructions are contained in Exhibit E. The valuation was duly made.

(4)—A certain book of the Canada Company called "Register of Lands" contains the following entry:

| Concession | Lot | Number of Acres<br>Crown Reserve |
|------------|-----|----------------------------------|
| 6          | 5   | 200                              |

This Register was dated 30th September, 1826. This admission however implies no admission by the Attorney-General as to the nature or purpose of such Register, or as to the effect of the entry therein.

(5)—Payments to the Government were made by the Canada Company as follows: 1827, £20,000; 1828, £15,000; 1829, £15,000; 1830, £15,000; 1831, £16,000; 1832, £17,000; 1833, £18,000; 1834, £19,000; 1835, £20,000; and in each of the seven succeeding years the sum of £20,000.

(6)—No voluntary agreement was ever made for the payment of compensation in respect of the 60 acres, 1 rood, 33 perches in question nor was any arbitration had to award compensation nor has any compensation been paid in respect of the said lands. But pursuant to a certain statute, 2 Vict., chap. 19, a proclamation was issued dated 7th September, 1839, requiring claims to be filed before 1st April, 1841 (Exhibit F). Following this proclamation and notice a claim for compensation was made by the company (Exhibit G). The company was notified that the claim did not comply with the requirements of the Public notice as appears by Exhibit H. Other correspondence relating to this claim is contained in Exhibit I.

(7)—The Canada Company never entered into possession of the said lands. The purchasers of the lots comprising the 27 acres, 3 roods and 24 perches referred to in paragraph 7 of the petition of right, and their heirs, successors and assigns have been in exclusive, adverse and open possession since the respective dates when the lots were sold.

(8)—The lands in question herein were not at any time resumed by the Crown under the proviso in that behalf contained in the patent issued in November of 1832.

(9)—The Canada Company executed the instruments in favour of the suppliant, William Chipman, mentioned in the petition of right, viz., a deed dated 31st January, 1910 (Exhibit J), and an assignment dated 29th December, 1922 (Exhibit K).

The first question to examine is whether this Court is competent to entertain an action arising out of the taking of lands under the Rideau Canal Act; the Crown denies the jurisdiction.

The Rideau Canal Act, passed as aforesaid on February 17, 1827, was, by section 27 thereof, declared to be a public act. When the British North America Act came into force on March 29, 1867, the Rideau Canal Act was still in force.

Section 3 of the Rideau Canal Act enacts that "such parts and portions of land or lands, covered with water, as may be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal \* \* \* shall be forever thereafter vested in His Majesty, His Heirs and Successors."

In virtue of the statute 7 Vict., ch. 11, intituled "An Act for vesting in the Principal Officers of Her Majesty's Ordnance the estates and property therein described, etc.", the Rideau Canal became vested in the Principal Officers of Her Majesty's Ordnance in Great Britain.

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By the statute 19-20 Vict., ch. 45, the Rideau Canal was revested in Her Majesty for the benefit, use and purposes of the Province of Canada: see section VI and the second schedule.

Under section 108 of the British North America Act and the third schedule thereto the Rideau Canal became the property of the Dominion of Canada.

In virtue of sections 129 and 91 of the British North America Act the Rideau Canal Act, not being repealed by the Parliament of Canada, became a law of Canada. It being so, I think that under section 19, subsection (d), of the Exchequer Court Act (R.S.C. 1927, ch. 34) this Court has jurisdiction to take cognizance of the present case: see *Henry et al v. The King* (1); *The Queen v. Yule* (2); see also *The Qu'Appelle Long Lake and Saskatchewan Railroad & Steamboat Co. et al v. The King* (3); *Consolidated Distilleries Ltd v. The King* (4).

The next question to determine is whether the south half of lot 5 taken for the canal, a part whereof was later laid out in town lots and sold by the Crown, ever became vested in the Canada Company.

To say the least the proof is most unsatisfactory; it could hardly be otherwise after a century and more.

[The learned Judge here considered the evidence on this point and continued.]

I think that so far as the portion of lot 5 which had been taken or reserved for the canal was concerned, the patent was ineffective and *pro tanto* null and void. This alone would suffice to dispose of the action as brought. If the Canada Company paid for land which it did not get, it may have had a recourse against the Crown for the recovery of the price it paid therefor; I would feel inclined however to believe that this recourse, if it existed, would now be prescribed. But, as I am not concerned with a claim of this nature, I do not think I should express an opinion on the question and will refrain from doing it.

(1) (1905) 9 Ex. C.R. 417.

(3) (1901) 7 Ex. C.R. 105.

(2) (1899) 30 S.C.R. 24 at p. 35.

(4) (1933) A.C. 508.

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But, if we assume that the grant was only null and void with respect to the portion of the lot which had actually been taken and used for the canal and that it was valid as regards the portion thereof which was later found to be unnecessary and was laid out into lots and as such sold by the Crown (with the exception of six lots) between the years 1873 and 1892, which is apparently the view taken by the suppliant (see para. 9 of the petition), has the suppliant got a claim against the respondent for the several purchase prices obtained by the Crown for the lots so sold? This is the question which I now propose to examine.

The question, in my opinion, must be answered in the negative. I do not think that the company ever had any right to claim and recover from the respondent the sums which the latter received in payment of the lots sold; needless to say, the respondent has no more right than the Canada Company, his assignor, had. If the Crown were not in a position to give to the purchasers of the lots a good and valid title thereto, the purchasers would, in my opinion, be the only ones entitled to recover from the Crown the sums disbursed for the purchase of these lots. If the company had a recourse against the Crown in consequence of the sale by the latter of lands belonging to the company, its recourse could only have been for the reimbursement of what it had paid to the Crown for the lands in question, with perhaps, in addition, interest and damages, or for compensation. But the suppliant, assignee of the company's rights, is suing for the prices received by the Crown and his claim is for the aforesaid reasons unfounded.

Even if I arrived at the conclusion that the company had in due time a claim against the Crown for the prices derived by the latter from the sale of the lots as equivalent to or in lieu of the consideration it had given to the Crown for the said lots or as equivalent to and in lieu of compensation for the taking of the lands, I think that the claim was at the time of the commencement of the proceedings herein and had been for a long time previous barred by the Statutes of Limitation: Imperial Statute 3-4 Wm. IV, chap. 42; 2 Vict., chap. 19, and R.S.O. 1927, chap. 106; R.S.C. 1927, chap. 34, s. 32; see *McQueen v. The Queen* (1).

It was argued on behalf of the suppliant that the Crown in collecting the purchase prices of lots which belonged to the Canada Company became trustee for the company. This contention, to my mind, is ill-founded. The Crown may perhaps have become a trustee of these moneys for the purchasers to whom no good and valid title in the lands passed; but there was no relation of trustee as between the Crown and the Canada Company. I see no privity between the Crown and the company or its assign, the suppliant herein, on the action as brought.

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I do not think that the Crown can be placed in the position of a trustee by implication; the Crown can only be constituted a trustee by the express provisions of an Act of Parliament or a contract to which the Crown is a party: *McQueen v. The Queen* (1); *The Hereford Railway Co. v. The Queen* (2); *Rustomjee v. The Queen* (3); see also *Henry et al v. The King* (4); *Kinloch v. Secretary of State for India* (5).

Reverting for a moment to the question of compensation, it is admitted that no agreement was ever made in this respect and that no arbitration was ever had to fix and award compensation for the taking of the lands in question: see paragraph 6 of the admissions. But the Canada Company apparently considered at one time that its recourse against the Crown was one for compensation in consequence of the expropriation of the south half of lot 5. Pursuant to an Act intituled "An Act to limit the period for owners of lands making claims for damages already occasioned by the construction of the Rideau Canal and for other purposes therein mentioned" (2 Viet., chap. 19) a proclamation dated the 7th of September, 1839, was issued enjoining all persons having claims for damages sustained in consequence of the canal, locks, etc., being constructed in or upon the lands of any of them to prefer and prosecute such claims in due course of law on or before the 1st of April, 1841, and notifying them that upon their failure so to do such claims would forever afterwards be barred and precluded; a copy of this proclamation was filed

(1) (1886) 16 S.C.R., 1.

(3) (1876) 1 Q.B.D., 487;

(2) (1894) 24 S.C.R., 1.

(1876) 2 Q.B.D., 69.

(4) (1905) 9 Ex. C.R., 417.

(5) (1882) L.R. 7 App. Cas. 619.

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as exhibit F. Annexed to the copy of the proclamation is a copy of a notice, containing information about the preparation of the claims, and a list of the newspapers in which it was published.

A claim, in the form of a letter, was addressed by the Canada Company to Major Bolton, superintendent of the Rideau Canal, in accordance with the directions contained in the notice aforesaid, bearing date the 9th of March, 1841: see exhibit G. Obviously the claim does not conform with the requirements of the notice.

On the 27th of March, 1841, the Government arbitrator wrote to the Commissioners of the Canada Company notifying them that the company's claim was unaccompanied by a diagram and a certificate of a surveyor as to the extent and nature of the damage, as required by the notice, and that it was doubtful if the claim could be entertained; a copy of the letter was produced as exhibit H. Two copies of letters, both dated April 3, 1841, from the Government arbitrator, to Major Bolton, were filed as exhibit I; to one of them is annexed an abstract of the claims received between March 1 and April 1, 1841, included in which is the claim of the Canada Company. The letters show that the Government arbitrator wanted advice concerning the company's claim. At the bottom of the first letter is a note stating that the matter was referred to the Commanding Royal Engineer, with a recommendation that it be submitted for legal opinion to the Attorney-General at Toronto. What happened, we do not know. Apparently the company did not press its claim. It is quite possible that it expected another letter from the Government arbitrator, seeing that his letter of March 27 (exhibit H) did not state positively that the claim could not be entertained, but merely said that it was doubtful if it could be. Be that as it may, I think it was up to the company to file a claim complying with the requirements of the notice published in pursuance of the proclamation aforesaid. By failing so to do, I am afraid that the company lost its recourse against the Crown for compensation, if ever it had one.

It was further urged on behalf of the respondent that the assignment by the Canada Company to the suppliant is not effective against the Crown and that the only person

who could sue on the present claim was the company itself; this contention appears to me well founded; on grounds of public policy a claim against the Crown, in the absence of acquiescence, is not assignable; the Crown cannot be expected to seek out the assignees of claims against it: see *Powell v. The King* (1); Audette, Practice of the Exchequer Court, 2nd Ed., 112, no. 27; *Arbuckle v. Cowtan* (2); see also *The Queen v. McCurdy* (3).

Other questions have been raised which I do not deem expedient to discuss, seeing that the action, for the reasons above set forth, fails.

The suppliant is not entitled to the relief sought by his petition and the latter is accordingly dismissed with costs.

*Judgment accordingly.*

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