

IN THE MATTER OF THE PETITION OF RIGHT OF  
HENRY TUCKER.....SUPPLIANT;

1902

\*March 20.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Demurrer to petition of right—Claim for services rendered as Commissioner under R.S.C. c. 115—Payment—Public office.*

A person appointed under the provisions of chapter 115, *Revised Statutes of Canada*, as a Commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise.

2. The service in such a case is not rendered in virtue of any contract but merely by virtue of appointment under the statute.
3. The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied.

**DEMURRER** to a petition of right asking payment of a sum of money for services claimed to have been rendered as a Commissioner, appointed under chapters 114 and 115 of *The Revised Statutes of Canada*, to report upon the alleged misconduct in office of a servant or officer of the Crown.

The Petition of Right was as follows:

1. That your Suppliant was admitted to the practice of law as an Advocate and Barrister, in the month of January, in the year 1885, and during all the times hereafter mentioned, he was, and still is a practising Advocate and Barrister in and for the Province of Quebec, residing in the City of Montreal.

2. That by instrument in writing under the signature of the Hon. Andrew G. Blair, Minister of Railways and Canals, your Suppliant was appointed a Commis-

1902  
 TUCKER  
 v.  
 THE KING.  
 —  
 Statement  
 of Facts.  
 —

sioner under chapters 114 and 115 of *The Revised Statutes of Canada*, said instrument being in the words following, to wit :

“ The undersigned, Minister of Railways and Canals, hereby nominates and appoints you, Henry Tucker, Barrister, of Montreal, P.Q., a Commissioner, under chapters 114 and 115 of the Revised Statutes of Canada, to investigate and report upon all charges of active political partisanship, or of improper conduct of any kind in his office, which have been preferred against G. Herbert Simpson, Superintendent of the Grenville and Carillon Canal, Town of Carillon, County of Argenteuil, or which may hereafter be preferred against him, and remitted to you by me. ”

“ And you are, as such Commissioner, by virtue of said Chapters, authorized and empowered to execute and perform all acts in and by the said Chapters authorized to be done, in holding the said investigation into the charges aforesaid. ”

“ Dated at Ottawa, this 27th day of November, A. D., 1897. ”

“ (Signed) ANDREW G. BLAIR,  
 “ *Minister of Railways and Canals.* ”

3. That at the City of Montreal on the 17th January, 1898, by letter addressed to the said Minister of Railways and Canals, your Suppliant accepted the said Commission, and from the said 17th January, 1898, until the 12th May, 1898, your Suppliant employed a large portion of his time in investigating the matters referred to him under said Commission.

4. That in connection with the said charges, one Labelle had previously been sent by the said Department of Railways and Canals to make a private report to the Department, and also previously to your Suppliant's appointment, a large amount of correspondence

had been had by the said Department with different persons in the said County of Argenteuil, and a large number of affidavits had been taken and supplied to the said Department, all of which are now in the possession of the said Department of Railways and Canals at Ottawa.

1902  
TUCKER  
v.  
THE KING.  
Statement  
of Facts.

5. That previously to commencing his own investigations, your Suppliant had to peruse and collate the report of the said Labelle, and the said correspondence and affidavits, which took a great deal of time, care and attention.

6. That in connection with said investigation your Suppliant was obliged to spend a great deal of time away from his office in Montreal, in the said County of Argenteuil, and other places, interviewing different persons, in correspondence, and in examining numerous witnesses under oath, and prepared a report of his proceedings under said Commission, the whole of which he remitted to the Department of Railways and Canals at Ottawa.

7. That your Suppliant performed a large amount of work in interviewing different parties and in taking information from the parties who were prosecuting said charges, and in travelling, which does not appear by any voucher.

8. That the nature of the service rendered by your Suppliant in said investigation were judicial as well as inquisitorial, requiring a knowledge of law and the rules of evidence.

9. That a statement of said services was rendered by your Suppliant to the said Department of Railways and Canals, on or about the said 12th day of May, 1898, and which is now in the possession of the Department of Railways and Canals at Ottawa.

10. That the said services rendered as aforesaid are well worth the sum of \$800.00, which your Suppliant

1902  
 TUCKER  
 v.  
 THE KING.  
 —  
 Statement  
 of Facts.  
 —

is entitled to have and recover for the reasons aforesaid, with interest from the 12th day of May, 1898.

WHEREFORE the said Suppliant prays that His Majesty be ordered and adjudged to pay unto the Suppliant the sum of \$800.00 with interest from the 12th day of May, 1898, and costs *distracts* to the undersigned Attorney.

To the Petition of Right a demurrer was filed by the Crown as follows :

The Honourable David Mills, His Majesty's Attorney-General for the Dominion of Canada, on behalf of His Majesty : Demurs to the whole of the Suppliant's Petition of Right and says that the same is bad in law on the ground that the Petition does not allege, nor do the facts set out or disclose any contract between the Petitioner and the Crown either express or implied, or any other matter giving rise to any obligation or cause of action against the Crown.

January 13, 1902.

The case was heard at Ottawa.

*E. L. Newcombe, K. C.*, in support of the demurrer, argued in substance as follows:—The demurrer filed on behalf of the Crown alleges that there is no contract or cause of action against the Crown arising upon the facts set out in the petition of right. So that the question before your lordship is a very simple one, viz: Whether the facts alleged, and which are admitted for the purposes of this demurrer, give rise to any obligation on the part of the Crown to pay the money claimed, or any sum of money, to the suppliant.

The suppliant alleges that he was employed by the Minister of Railways and Canals, by virtue of and in execution of certain powers alleged to be reposed in him, to make a certain investigation into the conduct of an officer or servant of the Crown. Those are pract-

ically all the facts upon which the suppliant relies, and I take it that the only ground upon which he undertakes to support the petition is that of contract. Now it is not a statutory action, and there is no remedy at common law. There is no express contract. Then can the suppliant say there is an implied contract here? I say that there is no power reposed in the Minister which would give rise to any contract or promise by which the Crown would be obliged.

He cites *Feather v. The Queen* (1); *Windsor & Annapolis Ry. Co. v. The Queen* (2); *Tobin v. The Queen* (3).

There was no sum of money placed at the disposal of the Minister or the Crown to pay the suppliant.

[BY THE COURT:—Was there any special grant out of which the suppliant might have been paid?]

No. But the principal point which I desire to present to the court is this, namely, that if the matter between the suppliant and the Minister is anything at all, it is a statutory appointment, and is not a contract. The appointment is statutory, but there is no provision in the statute for the payment of the person executing the appointment or commission. In other words there is no statutory action. The statutes governing the question are chapters 114 and 115, *Revised Statutes of Canada*. Chapter 114 enables the Governor in Council to appoint a commissioner; that is where the matter is of general importance. Chapter 115 provides for the appointment of a commissioner for a more particular purpose. In chapter 115 the Minister is authorized, under the authority of the Governor in Council, to appoint an officer to investigate and report. The commission in this case could not have been issued but for the statute, and the commissioner's powers, and the provision for his payment must be found

1902  
 TUCKER  
 v.  
 THE KING.  
 —  
 Argument  
 of Counsel.  
 —

(1) 6 B. & S. 257.

(2) 11 App. Cas. 607.

(3) 16 C. B. N. S. 310.

1902  
 TUCKER  
 v.  
 THE KING.  
 ———  
 Argument  
 of Counsel.  
 ———

within that statute. He cites *Comyns' Digest*, (1) ; *Todd's Parliamentary Government in England*, (2) ; *Chitty's Prerogatives of the Crown* (3), *The King v. Bower* (4), *Bacon's Abridgement*, (5). Then as to the power of the Crown to issue a commission of the kind referred to in the petition of right, see 19 *Am. & Eng. Ency. of Law*, Vo. 'Public Offices,' (6) ; *Buckley v. Edwards*, (7).

I put the case upon the ground that the employment was given in execution of a statutory power on the part of the Government, and whether the party to whom the commission issued would be compelled to execute it is not the question. If there is no provision for the payment of the officer, no statutory appropriation for it, he cannot come into court and succeed in obtaining compensation for his services.

If the suppliant had put his declaration in the form of the common law counts, viz : for work done, etc., at the request of the Crown, possibly we could not have demurred, but upon the facts alleged in the petition, clearly the Crown is not responsible in respect of the remedy sought by the suppliant.

*S. P. Leet, K.C.*, contra : The cases cited by counsel for the Crown, are all cases decided under American law and with reference to peculiar State or municipal constitutions and I submit that that they do not apply to British and Canadian institutions, nor to a class of public servants such as the suppliant was. While under our law there are important distinctions between the rights of the Crown and those of the subject, the right of the Crown to avail itself of the property or service of its subjects without remuneration does not appear to be one of those which has ever

(1) Vol. 7, p. 61

(2) Vol. 2, p. 434

(3) P. 81.

(4) 1 B. & C. at p. 587 ;

(5) Vol. 6, p. 420.

(6) P. 525.

(7) [1892] A. C. 387.

been formally asserted by the Crown, and so far as the cases quoted by counsel for the Crown and my research go, it has never before been pleaded by the Crown in defence to an action by a subject.

When we come to look at the case in this court of *Hall v. The Queen* (1) we get down to something outside the broad domain of prerogative law and find a case in point. That case is authority for the proposition that where the Crown has received the benefit of services rendered at the request of its officer, acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same.

As to the question of there not being any special appropriation for the payment of the commissioner appointed under the statute in question, I submit that that question is covered by section 16 of *The Petition of Right Act* (R. S. C. ch. 136). That section reads as follows:—

“The Minister of Finance and Receiver-General shall pay out of any moneys in his hands for the time being lawfully applicable thereto, or which are thereafter voted by Parliament for that purpose, the amount of any moneys or costs which had been so certified to him to be due to any suppliant.”

If the claim is one for which a petition of right will lie it is not necessary that any appropriation should have been previously made to satisfy a judgment rendered thereon.

In order to determine whether the services rendered would impose a liability irrespective of the question of whether any appropriation had been made, we must look to the nature of the office created by chapter 114 of *The Revised Statutes of Canada*, and of the services intended to be rendered thereunder. Chapter 115 is

1902

TUCKER

v.  
THE KING.Argument  
of Counsel.

(1) 3 Ex. C. R. 373.

1902  
 TUCKER  
 v.  
 THE KING.  
 ———  
 Argument  
 of Counsel.  
 ———

only an amplification of chapter 114. Chapter 114 enacts that when the Governor in Council deems it expedient to cause an inquiry they may confer powers upon the "Commissioner or person, etc." Chapter 115 gives the "Minister presiding over the department" the right to appoint under the authority of the Governor in Council. The appointment in question was clearly under chapter 115 for investigating and reporting upon the conduct of a person in the service of the Department of Railways and Canals, and is therefore connected with the administration of that department. Within the meaning of the judgment in the case of *Wood v. The Queen* (1) it was "work of a kind that might properly be executed by the officers and servants of the Department." That case decided that where the contract was executed, the written contract provided for by the statute was not necessary in order to entitle the suppliant to recover for his services. As to the character of the employment, the relation of the suppliant towards the Crown was that of a servant or employee rather than that of an officer, and the question of whether or not a special appropriation was made for this particular service is not material. (He cites *Chitty on Prerogative*, (2); *Comyn's Digest*, (3); *Bacon's Abridgement*, (4); *Doutre v. The Queen* (5).

*E. L. Newcombe, K.C.*, replied, citing *Throop on Public Officers*, (6).

THE JUDGE OF THE EXCHEQUER COURT now (March 20th, 1902) delivered judgment.

The question raised by the demurrer in this case is whether or not a commissioner appointed under chapter

(1) 7 S. C. R. 634.

(2) P. 344.

(3) Vol. 5, p. 188.

(4) Vol. 8, (d) 78.

(5) 9 App. Cas. 745.

(6) P. 443

115 of the *The Revised Statutes of Canada* (1) can recover from the Crown compensation for services rendered by him as such commissioner, no provision having been made therefor by Parliament, and there being no arrangement or agreement with the Crown or the Minister in respect thereto.

1902  
 TUCKER  
 v.  
 THE KING.  
 —  
 Reasons  
 for  
 Judgment.  
 —

The commissioner in this case was an advocate and barrister for the Province of Quebec; but he was not employed as a barrister or advocate, but was appointed by the Minister of Railways and Canals, under the statute referred to, a commissioner to investigate and report upon all charges of active political partizanship or of improper conduct of any kind in office which had been preferred or which might be preferred against G. Herbert Simpson, Superintendent of the Grenville and Carillon Canal, and remitted to the commissioner by the Minister.

The commissioner's right to compensation depends upon his appointment as a commissioner, and not upon any employment as an advocate or barrister, and the question is not concluded by the case of *The Queen v. Doure* (2).

If there were nothing more in the case than the employment of the suppliant by the Minister to render some service to the public, whether as an advocate or otherwise, there would, I think, be a good deal to be said in favour of the view that a promise should be implied against the Crown to pay the suppliant for such service, and that he might recover therefor upon

(1) The Minister presiding over any department of the civil service of Canada, may appoint at any time, under the authority of the Governor in Council, a commissioner or commissioners, to investigate and report upon the state and management of the business, or any part of the business, of such department, either in the inside or outside service thereof, and the conduct of any person in such service, so far as the same relates to his official duties.

(2) 9 App. Cas. 745.

1902  
 TUCKER  
 v.  
 THE KING.  
 —  
 Reasons  
 for  
 Judgment.  
 —

a *quantum meruit*. (*Wood v. The Queen*, (1); *Hall v. The Queen*, (2); *The Queen v. Henderson*, (3); *Doutre v. The Queen*, (4).

But here the appointment was made under a statute in which there is no provision for compensation for any service that might be rendered by the commissioner, and in accepting the appointment, he must, I think, be taken to have relied upon the honour and good faith of the Crown and of the Minister, and not upon any legal obligation on the part of the Crown to pay for his services. It is true of course that the duties of the commissioner were of a temporary nature and that in this respect the appointment lacked one of the usual characteristics of a public office; but in other respects it partook of that character rather than of a mere employment to render a service under a contract express or implied. In fact it is clear that the service was not rendered in virtue of any contract, but by virtue of the appointment under the statute, and no provision being thereby or otherwise made for the payment of the commissioner for his services as such commissioner, no promise on the part of the Crown to pay therefor is to be implied from the appointment and from the rendering of such services.

To come to this conclusion it is not necessary to hold the view that the commissioner was bound to accept the office or position of commissioner without compensation for his services. I do not think that he was under any such obligation. Much less was he under any obligation to incur the necessary expenses of executing the commission without an indemnity therefor. But no claim is made for any such expenses and no question in respect thereof arises upon the petition filed. The suppliant was, I think, free to

(1) 7 S. C. R. at p. 637.

(2) 3 Ex. C. R. 373.

(3) 28 S. C. R. 425.

(4) 9 App. Cas. 745.

accept or refuse the office or position of commissioner as he saw fit, and to stipulate for payment for the service to be rendered. But having accepted it without any stipulation as to compensation, and no provision therefor being made by the statute or otherwise, he must, I think, as has already been said, be taken to have relied upon the good faith of the Crown and Minister.

1902  
 TUCKER  
 v.  
 THE KING.  
 Reasons  
 for  
 Judgment.

It was contended for the Crown that the commissioner could not recover anything for his services even if there had been a promise to pay unless money had been appropriated by Parliament for the service. I am not satisfied that the contention could be supported, but as it is not necessary at present to determine the question I content myself with referring to the case of *Collins v. The United States* (1), in which it was held that the provision of the United States Constitution Art. 1, s. 9, cl. 7 that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is exclusively a direction to the officers of the treasury, and that it neither controls courts, nor prohibits the creation of legal liabilities (2).

It was mentioned by counsel during the argument, and I may, I think, add that the real controversy between the parties is as to the amount of compensation to be paid. The suppliant is unwilling to accept what the Crown is willing to pay; the Crown is unable to accede to the suppliant's demands, and the parties having been unable to accommodate their differences, or to come to terms, the suppliant has filed his petition and the Crown has demurred. The parties are at present at arm's length, and the question is one of legal obligation, or no legal obligation, on the part of the Crown to pay the suppliant for the services he rendered as a commissioner.

(1) 15 Ct. of Cls. 22.

(2) 19 Am. & Eng. Enc. of Law,  
534.

1902  
TUCKER  
v.  
THE KING.  
Reasons  
for  
Judgment.

On the facts set out in the petition I think there is no such legal obligation, and there will be judgment for the respondent upon the demurrer to the petition.

*Judgment accordingly.*

Solicitor for suppliant : *S. P. Leet.*

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

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