

IN THE EXCHEQUER COURT OF CANADA.

1919
December 13.

IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES LIVINGSTON,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Petition of Right—Constitutional Law—Powers of Minister—Contract, ratification by Order-in-Council—R. S. C. 1906, ch. 24, sections 2a, 35, 41, 42.

The Minister of Militia entered into a contract with suppliant whereby he agreed that articles of military clothing required by cadets of Royal Military College including repairs should be exclusively obtained from suppliant, the prices therefor to be paid out of the public funds of Canada. The contract which was for a term of over four years, was never authorized or ratified by an Order-in-Council.

Held, that where a contract involving payments out of the public funds is made by a Minister of the Crown for a term of years without the authority of the Governor General in Council, and has never been approved by them, the Crown cannot be made responsible therefor on a petition of right.

2. The fact that the Regulations of the Royal Military College provided for a deposit, in moneys by Cadets, to pay for articles covered by this contract, which money was payable to the Receiver General of Canada did not have the effect of validating the contract so as to make it binding upon the Crown.

PETITION OF RIGHT to recover from the Crown damages for breach of contract made by a Minister of the Crown but without authorization or ratification by Order-in-Council.

The case was set down for hearing upon questions of law, but at the argument it was decided that the

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hearing should be treated as if it were trial of the action.

The case was tried at the City of Ottawa, before the Honourable Mr. Justice Sir Walter Cassels, on the 28th day of November, 1919.

Mr. Whiting, K.C. and *C. W. Livingston* for suppliant.

Mr. Plaxton for respondent.

The suppliant, in his Petition of Right in substance alleges that from 1898 to the date of the contract sued on he had always supplied the Royal Military College at Kingston from year to year with various articles of clothing and similar articles, without written contract. In 1911, after negotiations with the Department of Militia, a contract was signed. The contract is given at length in the Petition of Right and the principal sections thereof are reprinted here as follows:

“MEMORANDUM OF AGREEMENT made this
9th day of August, A.D., 1911,

BETWEEN

HIS MAJESTY THE KING, REPRESENTED BY THE
HONOURABLE MINISTER OF MILITIA OF THE DO-
MINION OF CANADA,

OF THE FIRST PART,

AND

CHARLES LIVINGSTON, doing business in the
City of Kingston, under the style of C. LIVING-
STON & BRO., MERCHANT TAILORS.

OF THE SECOND PART.

WITNESSETH, (1) The Party of the Second
Part contracts and agrees with the Party of the

First Part to furnish the articles of clothing, and repair the clothing of the Cadets of The Royal Military College, as set out in the price list hereto annexed, dated February the first, 1911, at the several prices shown and contained in the said price list.

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(2) The Party of the First Part agrees with the Party of the Second Part that the articles of military clothing required by the Cadets of the Royal Military College, including repairs as shown in the price list before mentioned, *the cost of same being payable from Public Funds*, shall be obtained from the Party of the Second Part exclusively.

(5) It is agreed that the Commandant may annul this contract at any time, subject to the approval of the Honourable Minister of the Department of Militia and Defence, if the conditions of same are not complied with.

(6) This contract to be in force from the date of its approval until the 30th of June, 1915, and hereafter from year to year. It shall terminate at any 30th June after 1914, provided 6 months notice to that effect is given by either of the Parties hereto.

(8) It is agreed that the prices in the price list, hereto annexed, shall be subject to yearly revision by the Honourable the Minister of Militia and Defence, the year in such cases to run from the 1st of July to the 30th of the following June; provided that such revision shall only be made upon the recommendation of the Commandant, and that the

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Party of the Second Part, shall have at least three months' notice in advance of the change of prices.

SIGNED, SEALED AND DELIVERED the day and year above mentioned.

(Sgd.) C. Livingston,
F. W. Borden."

They further allege that the contract was acted on in good faith by both parties until the 1st of April, 1912, when the Department of Militia purported to cancel the said contract by letter and without notice or just cause; and that the work was given to other contractors. All past work was paid for and that the said contract was binding upon the crown; and he sues for damages for breach of contract.

The Crown in its defence in substance, alleges that the agreement and contract in question, if made between suppliant and Minister of Militia and Defence as alleged, was not binding in law upon the Crown and that it should have been specifically authorized by an Order-in-Council, which was not done; that there was no appropriation of public moneys voted by Parliament and payable from public funds to meet the payments provided for in the contract and that any payments made to the contractor were paid and expended under the direction of the Commandant of the Royal Military College and out of moneys received from Cadets of said college under regulations covering the same and were not paid or payable out of public funds. They further state that the contract in question was not of a routine or departmental nature as would enable the Minister to fix liability upon the Crown.

By their reply, the suppliant states that public moneys were annually voted for said contract by Parliament and refer to the Auditor General's reports and the public estimates; and that, even if the Minister of Militia had not inherent power to bind the Crown with respect to the contract in question, which is not admitted, the contract was ratified and approved of by Parliament by granting the moneys as aforesaid and by the fact that the suppliant was paid out of such grants and that the contract, to be binding, did not require the Order-in-Council.

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The facts are stated in the reasons for judgment of the Honourable Mr. Justice Cassels which follows:

Cassels, J., now this (13th December, 1919) delivered judgment.

Reasons for
Judgment.

A Petition of Right filed by one Charles Livingston in the City of Kingston, Merchant, claiming that on the 9th August, 1911, an agreement was entered into between His Majesty the King, represented by the Honourable, the Minister of Militia, of the first part, and the petitioner of the second part, whereby the party of the first part agreed with the party of the second part, that the articles of military clothing required by the cadets of the Royal Military College, including repairs, as shown in the price list before mentioned, the costs of the same being payable from public funds, shall be obtained from the party of the second part exclusively. The agreement is set out *in extenso* in the petition of right.

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The agreement provided by section 6, is as follows:

“6. This contract to be in force from the date
“of its approval until the 30th June, 1915, and
“hereafter from year to year. It shall termin-
“ate at any 30th June after 1914, provided six
“months’ notice to that effect is given by either
“of the parties hereto.”

The allegations in the petition are, that on the 1st April, 1912, the Department of Militia and Defence purported by a letter dated April 1st, 1912, to cancel the said contract without notice and without just cause.

The petitioner admits that all sums due him for work performed up to the cancellation of the contract have been paid, but he claims by his petition damages for breach of the contract.

By the 10th paragraph of his petition of right he alleges, as follows:

“10. That in addition to the damages claimed
“in paragraph 9 hereof, the suppliant claims to
“be entitled to damages which arise in the fol-
“lowing manner: The suppliant had been ac-
“customed to sell to the Cadets of the Royal
“Military College many articles of clothing and
“merchandise other than military supplies em-
“braced in the contract in question, particular-
“ly civilian clothes and furnishings at the end
“of the college terms, as since April 1st, 1912,
“the Cadets were not required to come into the
“suppliant’s store in connection with the pur-
“chase of military supplies, a large part of this
“trade has been lost as a direct result of

“the cancellation of the said contract. The
“suppliant claims damages for such loss.”

This claim on the hearing was abandoned.

The Crown filed a defence in which they claimed the contract was not binding, the contention being that it had not the approval of the Governor-in-Council, as required by law.

It was agreed between the parties that the questions of law involved should be argued, and the case was set down to be heard on the legal questions, and came on for argument on the 28th November, 1919.

On the opening of the case it was suggested by Counsel for both sides that in lieu of the points of law being argued, the hearing should be treated as if it were a trial of the action, it being agreed that no further evidence other than what appeared of record could be adduced; and it was also agreed that in the event of the Court being of opinion that the plaintiff was entitled to damages, the question of *quantum* of damages should be referred.

For the purpose of the trial it was also admitted that the agreement in question never received the approval of the Governor-in-Council.

After the best consideration that I have been able to give to the case, I am of opinion that the contention of the Crown is well founded. I do not think it was within the powers of the Minister to enter into a contract binding the Crown for a term of years without the approval of the Governor in Council.

I do not think the Regulations of the Royal Military College, Rules 14 to 22, affect the case. The funds referred to are payable to the Receiver Gen-

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eral. The contract in question provides for the payment out of the public funds.

Reference may be had to the *Consolidated Revenue and Audit Act*¹, the *Act relating to the Royal Military College*², the *Militia Act*³, and also *Jacques Cartier Bank v. The Queen*⁴.

The petition is dismissed with costs.

Solicitor for suppliant: *C. W. Livingston.*

Solicitor for respondent: *T. J. Rigney.*

¹ R. S. C., 1906, ch. 24, sections 2 (a), 35, 41 and 42.

² R. S. C., 1906, ch. 43.

³ R. S. C., 1906, ch. 41.

⁴ (1895), 25 Can. S. C. R. 84, especially at page 88.