

UNIVERSITY OF LONDON  
W.C.1  
24 OCT 1958  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

# In the Privy Council.

No. 27 OF 1896.

## ON APPEAL FROM THE SUPREME COURT OF CANADA. 29446

Between JOHN THEODORE ROSS, FRANCES ELLA ROSS, JOHN VESEY FOSTER VESEY-FITZGERALD and ANNIE ROSS - - Appellants,

AND

HER MAJESTY THE QUEEN - - - Respondent.

### Case of the Respondent.

1. This is an Appeal from the Judgment of the Supreme Court of Canada pronounced in favor of the Respondent on the 9th day of December 1895, on an appeal by the Appellants from the Judgment of the Exchequer Court of Canada.

2. The Appellants commenced their Action in the Exchequer Court by Petition of Right, to recover from Her Majesty in right of the Dominion of Canada the sum of \$231,806.00, which sum the Appellants alleged was due and payable by Her Majesty upon two several contracts for the construction of sections 9 and 15 on the Intercolonial Railway of Canada. A form of the contract and the specification for the construction of the work are printed in the record of proceedings. Rec. p. 5. Rec. p. 34. Rec. p. 25.

3. The Petition of Right of the Appellants and Statement in Defence of the Crown, are also printed in the Record. Rec. p. 5. Rec. p. 14.

4. The Appellants are the representatives of the late John Ross, of the City of Quebec, who became, on the 28th day of September 1875, the assignee of the Contractors, J. B. Bertrand & Co., of all their right and claim under the said contracts for the construction and completion of the said sections.

5. The Intercolonial Railway was a public work and undertaking of the Dominion of Canada, constructed under the provisions of the Statute of the 41733

Dominion, known as the Intercolonial Railway Act (31 Vic. cap. 13), by which the superintendence, management and control of the works of construction upon the railway were assigned to four Commissioners, who were given all necessary powers to build, construct and complete the railway and enter into contracts for that purpose.

6. On the 26th day of October, 1869, J. B. Bertrand & Co. entered into a contract with the Commissioners for the construction of section 9 for the lump sum of \$354,897·00, and therein agreed to finish and finally complete the work thereunder by the 1st day of July 1871; and on the 15th day of June 1870, the same Contractors executed another contract with the Commissioners for the construction of section 15 for the lump sum of \$363,520·50, to be completed by the 1st day of July 1872. The Contractors, however, did not complete either section, but failed in carrying out their contracts, and in or about the month of May 1873, the Commissioners, under powers contained in the contracts, took the works from the Contractors into their own hands and proceeded with the completion of the works; Section 9 being completed in November 1873, and section 15 in February 1874.

7. After the final completion of the railway by the Government in December 1875, John Ross, as assignee of the contractors, J. B. Bertrand & Co., together with a number of other contractors for the construction of other sections of the railway, presented claims against the Government of Canada for work and damages arising out of their several contracts for the building of the railway.

8. Mr. Sandford Fleming, C.E., who had been the chief Engineer of the railway during construction and up to the month of May 1880, not having during his term of office investigated the said claims, the Minister of Railways and Canals, on the 21st day of June 1880, made a report to Council, and on the 23rd day of June 1880, an Order in Council was passed based upon the said report appointing Mr. Frank Shanly, C.E., to investigate and report upon them. The report and Order in Council are as follows:—

Rec. p. 48.

Rec. p. 48.

“ Ottawa, 21st June 1880.

“ *Memorandum.*

“ The undersigned has the honour to report that a letter has been  
 “ received from Mr. Sandford Fleming, wherein he states that for  
 “ reasons given he is under the necessity of declining the position of  
 “ Chief Engineer of the Intercolonial Railway and Consulting Engineer  
 “ of the Canadian Pacific Railway, to which, by Order in Council of the  
 “ 22nd May last, he had been appointed.

“ The undersigned accordingly recommends that authority be  
 “ given for the appointment of Mr. Frank Shanly, C.E., as Chief  
 “ Engineer of the Intercolonial Railway, *for the purpose of investigating*

“ *and reporting* upon all unsettled claims in connection with the construction of the line, and that his salary while so engaged be fixed at \$541.66 a month, the engagement to be understood to be of a temporary character.

“ Respectfully submitted.

“ (Signed) CHARLES TUPPER,

“ For Minister of Railways and Canals.”

*Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on the 23rd June 1880:—*

“ On a Report dated 21st June 1880, from the Honorable the Minister of Railways and Canals, stating that a letter had been received from Mr. Sandford Fleming, wherein he states that for reasons given he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway, to which, by Order in Council of the 22nd May last, he had been appointed.

“ The Minister accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway, and that his salary while so engaged be fixed at \$541.66 a month, the engagement being understood to be of a temporary character.

“ The Committee submit the above recommendation for Your Excellency’s approval.

“ (Certified) J. O. COTÉ,

“ C. P. C.”

9. A number of claims were referred to Mr. Shanly, who, after hearing evidence and otherwise investigating them, made reports thereon; and on the 18th July 1881, he made his report upon the claim of John Ross as assignee of the said Contractors, recommending that John Ross should be paid the sum of \$231,806.00. This report was never approved of by the Minister of Railways and Canals, nor was it acted upon by the Government; but on the 26th July 1882, by Order in Council of that date, the Intercolonial Railway claims, including the Appellants’, were referred to three Commissioners to make enquiry and to report to the Governor in Council as to the liability of Her Majesty in regard to them. John Ross presented a claim before these Commissioners, reserving his rights under the contracts, which claim was fully investigated, and by their award the Commissioners found that there was nothing due under the said contracts to him.

Rec. p. 49.

Rec. p. 63.

Rec. p. 84.

Rec. p. 63.

10. Prior to the reference of the claim by the Government of Canada to Mr. Shanly for investigation and report, John Ross had, on the 10th day of December 1879, commenced an Action by Petition of Right, which Action was stayed during the investigation by Mr. Shanly, and also while the claim was before the three Commissioners appointed by Order in Council of the 28th July 1882, as aforesaid. Subsequently John Ross died, and the Action was, by order of the Exchequer Court, revived in the names of the Appellants.

11. The following sections of the Intercolonial Railway Act, (31 Vic., cap. 13), are especially applicable to the matter in controversy :—

“ (4.) The Governor shall and may appoint a Chief Engineer to hold office during pleasure, who, under the instructions he may receive from the Commissioners, shall have the general superintendence of the works to be constructed under this Act.”

“ (18.) No money shall be paid to any Contractor until the Chief Engineer shall have certified that the work for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners.”

12. By the Statute of Canada, 37 Vic., cap. 15, the 3rd Section of the Intercolonial Railway Act, placing the construction of the road under the charge of four Commissioners, was repealed, and by the 2nd Section of the said first mentioned Act, it was enacted as follows :—

“ (2.) All the powers and duties vested or assigned by the Act hereby amended in or to the Commissioners appointed under it, shall, upon, from and after the said day, be transferred to and vested in the Minister of Public Works, and all contracts, bonds, agreements or engagements lawfully entered into by or with the said Commissioners, as such, shall inure to the use of Her Majesty, and may be enforced and carried out under the authority of the Minister of Public Works, as if they had been entered into with Her Majesty under the authority of the Act passed in the thirty-first year of Her Majesty's reign, intituled, ‘ *An Act respecting the Public Works of Canada.* ’ ”

13. By the Statute of Canada, 42 Vic., c. 7, the Department of Railways and Canals was created, and by Section 5 of that statute it is, amongst other things, enacted that :

“ The Minister of Railways and Canals shall have the management, charge and direction of all railways, works and property appertaining or incident thereto, which are or may be immediately before the coming into force of this Act under the management and

“ direction of the Department of Public Works, and to the same  
 “ extent and under the same provisions, subject to those of this Act.”

14. The most material clauses of the Contracts bearing upon the questions in issue, are the following :—

“ (3.) The Contractors shall commence the works embraced in  
 “ this Contract within 30 days from and after the date hereof, and  
 “ shall diligently and continuously prosecute and continue the same,  
 “ and the same respectively and every part thereof shall be fully and  
 “ entirely completed in every particular, and given up under final  
 “ certificate and to the satisfaction of the Commissioners and Engineer  
 “ on or before the First day of July, in the year of our Lord one  
 “ thousand eight hundred and seventy-one, time being declared to be  
 “ material and of the essence of this Contract, and in default of such  
 “ completion as aforesaid on or before the last mentioned day, the  
 “ Contractors shall forfeit all right, claim or demand to the sum of  
 “ money or percentage hereinafter agreed to be retained by the  
 “ Commissioners and any and every part thereof, as also to any  
 “ moneys whatever which may be at the time of the failure of the  
 “ completion as aforesaid due or owing to the Contractors; and the  
 “ Contractors shall also pay to Her Majesty, as liquidated damages,  
 “ and not by way of fine or penalty, the sum of two thousand dollars  
 “ (\$2,000) for each and every week, and the proportionate fractional  
 “ part of such sum for every part of a week during which the works  
 “ embraced within this Contract, or any portion thereof, shall remain  
 “ incomplete, or for which the Certificate of the Engineer, approved  
 “ by the Commissioners, shall be withheld, and the Commissioners  
 “ may deduct and retain in their hands such sums as may become due  
 “ as liquidated damages, from any sum of money then due or payable,  
 “ or to become due or payable thereafter to the Contractors.”

“ (4.) The Engineer shall be at liberty, at any time before the  
 “ commencement or during the construction of any portion of the work,  
 “ to make any changes or alterations which he may deem expedient in  
 “ the grades, the line of location of the railway, the width of cuttings  
 “ or fillings, the dimensions or character of structures, or in any other  
 “ thing connected with the works, whether or not such changes  
 “ increase or diminish the work to be done or the expense of doing the  
 “ same, and the Contractors shall not be entitled to any allowance by  
 “ reason of such changes, unless such changes consist in alterations in  
 “ the grades or the line of location, in which case the Contractors shall  
 “ be subject to such deductions for any diminution of work or entitled  
 “ to such allowance for increased work (as the case may be) as the  
 “ Commissioners may deem reasonable, their decision being final in the  
 “ matter. The Engineer shall have full power to dismiss any foreman,  
 “ workman or other person employed, whom he may deem unfit for

“ the duties assigned him, or who may, in the opinion of the Engineer,  
 “ be guilty of slighting the work, or of wilful disobedience of orders, or  
 “ improper, intemperate, or disorderly conduct, and the Contractor  
 “ shall forthwith supply the places of all such so dismissed and shall  
 “ not employ them again on the works.”

Rec. p. 38.

“ (6.) \* \* \* If at any time during the progress of the  
 “ works, it should appear that the force employed, or the rate of pro-  
 “ gress then being made, or the general character of the work being  
 “ performed, or the material supplied or furnished are not such as to  
 “ insure the completion of the said works within the time stipulated,  
 “ or in accordance with this Contract, the Commissioners shall be at  
 “ liberty to take any part or the whole works out of the hands of the  
 “ Contractors, and employ such means as they may see fit to complete  
 “ the works at the expense of the Contractors, and they shall be liable  
 “ for all extra expenditure incurred thereby; or the Commissioners  
 “ shall have power at their discretion to annul this Contract.”

“ \* \* \* The Commissioners, in the event of their annulling  
 “ the Contract, may forthwith or at their discretion proceed to relet the  
 “ same or any part thereof, or employ additional workmen, tools and  
 “ materials, as the case may be, and complete the works at the expense  
 “ of the Contractors, who shall be liable for all extra expenditure which  
 “ may be incurred thereby, and the Contractors and their assigns, or  
 “ creditors, shall forfeit all right to the percentage retained and to all  
 “ money which may be due on the works, and they shall not molest or  
 “ hinder the men, agents or officers of the Commissioners from entering  
 “ upon and completing the said works, as the Commissioners may  
 “ deem expedient \* \* \* .”

Rec. p. 39.

“ (9) It is distinctly understood, intended and agreed, that the  
 “ said price or consideration of Three hundred and fifty-four thousand  
 “ eight hundred and ninety-seven dollars (\$354,897.00) shall be the  
 “ price of, and be held to be full compensation for all the works  
 “ embraced in or contemplated by this contract or which may be  
 “ required in virtue of any of its provisions or by law, and that the  
 “ Contractors shall not upon any pretext whatever be entitled by  
 “ reason of any change, alteration or addition, made in or to such  
 “ works, or in the said plans and specification, or by reason of the  
 “ exercise of any of the powers vested in the Governor in Council by  
 “ the said Act, intituled ‘An Act respecting the construction of the  
 “ Intercolonial Railway,’ or in the Commissioners or Engineer by this  
 “ Contract or by law, to claim or demand any further or additional  
 “ sum for extra work or as damages or otherwise, the Contractors  
 “ hereby expressly waiving and abandoning all and any such claim or  
 “ pretension to all intents and purposes whatsoever, except as provided  
 “ in the fourth section of this Contract.”

“ (11) And it is further mutually agreed upon by the parties Rec. p. 40.  
 “ hereto that cash payments, equal to 85 per cent. of the value of the  
 “ work done, approximately made up from the returns of progress  
 “ measurements, will be made monthly on the certificate of the  
 “ Engineer, that the work for or on account of which the sum shall be  
 “ certified has been duly executed and upon approval of such certificate  
 “ by the Commissioners. On the completion of the whole work to the  
 “ satisfaction of the Engineer a certificate to that effect will be given,  
 “ but the final and closing certificate including the per cent. retained  
 “ will not be granted for a period of two months thereafter. The  
 “ progress certificates shall not in any respect be taken as an  
 “ acceptance of the work or release of the Contractor from his respon-  
 “ sibility in respect thereof, but he shall at the conclusion of the work  
 “ deliver over the same in good order, according to the true intent and  
 “ meaning of this Contract and of the said specification.”

15. Prior to the trial of the Action the parties agreed upon a statement of admissions, which statement is as follows:—

“ *Statement of Admissions by both parties.*

“ It is admitted—

“ 1. That the contracts mentioned and referred to in paragraphs Rec. p. 23.  
 “ 2 and 3 of the Petition of Right, were entered into by the said  
 “ J. B. Bertrand & Co., for the construction of sections 9 and 15  
 “ of the Intercolonial Railway, copies of which contracts are produced  
 “ marked ‘ A ’ and ‘ B.’

“ 2. That the said Contractors began and prosecuted the works  
 “ and executed a large amount of work in respect of the contracts and  
 “ of the said sections of the Intercolonial Railway.

“ 3. That Sandford Fleming was Chief Engineer of the Inter-  
 “ colonial Railway when the contracts were entered into, and up to  
 “ the month of May 1880, when an Order in Council was passed on  
 “ the 22nd of May 1880, which is herewith submitted, marked ‘ C.’

“ 4. That the late John Ross, the original suppliant herein,  
 “ duly became by assignment, in or about December 1876, the  
 “ assignee of and entitled to all the rights, moneys, claims, remedies,  
 “ contract price and extras of the said original Contractors, J. B.  
 “ Bertrand & Co., in respect of or arising out of the said contracts  
 “ and works, which assignment was, on the 22nd of December 1876,  
 “ duly signified to the Crown; and the said late John Ross, as such  
 “ assignee, presented a large claim for balance of contract price and  
 “ extras; and the said other suppliants above named as the sole heirs  
 “ at law of the said John Ross, who departed this life on or about

“ 10th September 1887, became and are now entitled to the said  
 “ rights, moneys, claims, remedies, contract price and extras of the  
 “ said J. B. Bertrand & Co., in respect of the matters aforesaid.

“ 5. The said Fleming as such Chief Engineer, during the  
 “ progress of the work by the Contractors, furnished them with pro-  
 “ gress estimates of the work done under said contracts, which were  
 “ paid ; but he gave no final certificate in respect of the said contracts  
 “ for sections 9 and 15, as required by the Statute. The work  
 “ was finished on section 9 in November 1873, and on section 15  
 “ in February 1874.

“ 6. An Order in Council and report are herewith produced  
 “ marked ‘D.’ The effect and admissibility of such paper and  
 “ Mr. Shanly’s appointment are to be discussed.

“ 7. The claim of the said late John Ross, as such assignee,  
 “ with those of other Contractors on the said Railway, came before  
 “ Shanly.

“ 8. The said Shanly made and duly forwarded to the Minister  
 “ of the Department of Railways and Canals the certificate or report,  
 “ a true copy of which is produced by the Crown, marked ‘E.’

“ 9. That the said certificate or report duly reached the Minister  
 “ of the Department of Railways and Canals on or about its date.

“ 10. Subsequently, by Order in Council of the 28th July 1892,  
 “ a copy of which is submitted herewith marked ‘F,’ the claim of  
 “ the said John Ross, as such assignee, with other claims, was referred  
 “ to three commissioners to inquire and report upon.

“ 11. The said late John Ross was called upon by the Com-  
 “ missioners to appear before the said Commission and give evidence ;  
 “ and witnesses were examined in reference to the said claim.

“ 12. The Commissioners made their Report herewith submitted  
 “ and marked ‘G.’

“ 13. The effect and admissibility of the last-mentioned Order in  
 “ Council, the Commission thereunder, and of what was done there-  
 “ under by the parties, as well as the said Report, are to be discussed.

“ 14. The evidence taken in the case of Robert H.  
 “ McGreevy *v.* The Queen may be used herein as far as applicable.  
 “ Dated at Ottawa, the 14th day of November 1894.



16. The principal and substantial question, both in the Exchequer Court and in the Supreme Court of Canada by the Crown, was, and the question to be determined upon this Appeal is: Is the Report of Mr. Shanly of the 18th day of July, a certificate within the requirements of the Statutes and of the 11th clause of the Contracts?

17. The matter of the Petition of Right was tried before Mr. Justice Burbidge, in the Exchequer Court of Canada, on the 20th day of January 1895, and on the 22nd day of May following, Judgment was pronounced in favour of the Crown, to the effect that the Suppliants (Appellants) were not entitled to any portion of the relief sought by the Petition of Right. The said learned judge stated that he felt bound to follow the decision of the Supreme Court in the case of *The Queen v. McGreevy*, 18 Canada Superior Court Reports, and to declare that the Suppliants were not entitled to the relief, but added that if it were open to him to form and express his own view as to whether the Crown was liable on Mr. Shanly's Report or not, he would still be of opinion that the Crown was not liable. Rec. p. 85.  
Rec. p. 90.

18. The Appellants then appealed to the Supreme Court of Canada. On the 1st day of October 1895, the Appeal came on to be argued before a quorum of that Court, composed of the Chief Justice Sir Henry Strong, and Justices Taschereau, Gwynne, Sedgewick and King, and on the 9th day of December 1895, the said Court gave judgment dismissing the Appeal of the Appellants, the Chief Justice dissenting. The reasons of their Lordships and the formal Judgment of the Supreme Court are printed in the Record. Rec. p. 103.  
Rec. pp. 103  
to 111.

19. The Respondent submits that the Judgment appealed against is right and should be affirmed for the following, amongst other—

#### REASONS:

1. Because Mr. Shanly was not appointed and did not become the Chief Engineer of the Intercolonial Railway within the meaning and intention of the 4th section of the Statute 31 Victoria, chapter 13, nor within the meaning and intention of the Contracts, and was not therefore authorized to give certificates for payment under the Contract.
2. Because the Report and Order in Council of the 21st and 23rd days of June, 1880, authorized Mr. Shanly only to investigate and report upon the unsettled claims arising out of the construction of the line of railway; and the Report which he made on the 18th day of July 1881, is a Report to the Minister of Railways and Canals after investigation, with a recommendation for payment, and not a certificate

which, even if given by the Chief Engineer, would have been insufficient as a certificate within the contracts of the Statute.

3. Because Mr. Shanly in his Report ignored the requirements of the Contracts, and gave or recommended the allowance of prices to the Contractors not warranted by the Contracts, and at variance with the express provisions thereof.
4. Because the Report of Mr. Shanly was never approved of by the Minister of Railways and Canals, and was therefore of no effect or value as a certificate under the Section 18 of the Intercolonial Railway Act and the subsequent legislation.
5. Because the Contractors were only entitled to a final certificate for payment upon the completion by themselves of the work under the contracts, and having failed to complete the work, there was no justification or authority for the Engineer granting a certificate for the payment of any money to them.
6. Because the reasons of Burbidge, J., and of the majority of the Judges of the Supreme Court are correct.

C. ROBINSON.

W. D. HOGG.

In the Privy Council.

No. 27 OF 1896.

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ON APPEAL FROM THE SUPREME  
COURT OF CANADA.

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ROSS

*v.*

THE QUEEN.

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**Case**

*OF THE RESPONDENT.*

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