Privy Council Appeal No. 23 of 1940

International Railway Company - - - - - *Appellant*

v.

The Niagara Parks Commission - - - - - *Respondent*

FROM

THE SUPREME COURT OF ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1941

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD ROMER
LORD JUSTICE CLAUSON
LORD JUSTICE LUXMOORE

[*Delivered by* LORD JUSTICE LUXMOORE]

On the 29th August 1938 the International Railway Company (hereinafter called "the Appellant Company") instituted an action in the Supreme Court of Ontario against the Niagara Parks Commission (hereinafter called "the Commission") to recover $227,538.22 representing the unpaid balance of $251,322.08 claimed to be due in respect of interest at 5 per cent. per annum from the 1st September 1932 to the 3rd June 1937 on a capital sum of $1,057,436.00

The action was heard by Kelly J. who dismissed it and ordered the Appellant Company to pay the costs.

The Appellant Company appealed from this order to the Court of Appeal for Ontario. The appeal was heard by Riddell, McTague and Gillanders JJ.A. who dismissed it with costs. On the 19th December 1939 McTague J.A. admitted an appeal by the Appellant Company to His Majesty in Council.

The Trial Judge dismissed the action of the Appellant Company on two grounds; first that the Appellant Company was not entitled to any interest in respect of the capital sum and second that even if the Company was entitled to interest the Appellant Company's only remedy was by petition of right against the Crown. The Court of Appeal for Ontario affirmed the decision of the Trial Judge on both grounds.

The Appellant Company submitted before this Board that the decisions of the Trial Judge and of the Court of Appeal for Ontario were wrong on both points.

The material facts are as follows:—By an Act of the Legislature of Ontario intituled "An Act respecting the Niagara Falls Park" (Statutes of Ontario 50 Vic. Chap. 13) three persons therein named who then constituted an unincorporated body known as the Board of Commissioners for Niagara Falls Park with two other persons to be appointed by the Lieutenant Governor in Council were incorporated under the title "The Commissioners for the Queen Victoria Niagara Falls Park" for the purpose of establishing maintaining improving and developing certain lands selected by the Commissioners thereby constituted as a public park to be called "The Queen Victoria Niagara Falls Park." The lands referred to were approved by the Lieutenant Governor and were by the Act last mentioned

vested in the Commissioners as trustees for the Province. The Act conferred on the Commissioners the necessary powers enabling them to perform the duties thereby imposed on them, the majority of such powers being subject to the control of the Lieutenant Governor in Council. These powers included one to raise a limited sum of money by the issue of debentures charged on the revenues of the Commissioners. It was expressly provided that the debentures so issued might be guaranteed by the Crown by order in Council.

On the 4th December 1891 an agreement was entered into between the Commissioners for the Queen Victoria Niagara Falls Park who are therein expressed to be acting " on their own behalf as well as on behalf of and with the approval of the Government of the Province of Ontario " of the first part and three gentlemen who were the promoters of the railway the subject matter of the agreement and are with the Company thereafter to be incorporated therein called the Company of the second part. The agreement (hereinafter referred to as the 1891 agreement) contained recitals to the effect that the Company desired to construct and operate an electric railway along the top of the west bank of the Niagara River; that the Company intended to apply for a charter of incorporation to enable it to construct and operate the said railway and other works therein specified, and to execute effectively the engagements entered into therein on the part of the Company; that the Company desired to secure the rights of way to construct the said railway through and in the Queen Victoria Niagara Falls Park the property of the Commissioners, and through and over other lands of the Commissioners, and also through and over lands held or contracted for by the Commissioners under contracts with and licenses from the owners thereof respectively.

By the operative part of the 1891 agreement (clause 1) the Commissioners licensed the Company to construct an electric railway in and through what is described as " the park proper," and on and over other lands of the Commissioners some of which are defined as " the chain reserve." The phrase " the park proper " is defined in the agreement to mean the Queen Victoria Niagara Falls Park. The agreement by clause 2 requires that the Company shall construct equip and operate the railway and shall extend the same to Chippawa Creek which is not within the limits of the park proper as defined by the agreement with sufficient sidings and equipments to meet the development of traffic.

By clause 15 the Company undertook to build the railway in every respect fit for traffic not later than the 1st September 1892. By clauses 16 to 19 inclusive the Company's right to operate the railway was to begin on the 1st September 1892 and was to extend to a period of 40 years from that date at an annual rental of $10,000 with an option to the Company to extend the right for a further period of 20 years at an increased rental if demanded by the Commissioners to be fixed by arbitration if the parties should be unable to agree.

By clause 26 it is provided that if at the end of the said period of forty years, the Company was unwilling to renew, or at the end of the further period of twenty years, if the Company continued to hold for such further period, the Company should be duly compensated by the Commissioners for their railways, equipment, machinery and other works but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as stated in the agreement, but the failure before the expiration of any such term, to fix or pay the compensation was not to entitle the Company to retain possession meanwhile of the said railways, equipment, machinery and works.

Clause 29 was as follows:—

> " Subject always to the terms and provisions of this agreement, and to the rights of the commissioners as the owners in fee simple of land over which the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement, shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid, be entitled to operate, manage and control the same during the

period or periods respectively above mentioned, it being however hereby declared, understood and agreed, that at the end of the said first or second periods, as the case may be, the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for."

On the 14th April 1892 the Act referred to in the 1891 agreement was passed by the Legislature for Ontario. It is intituled "An Act to Incorporate the Niagara Falls Park and River Railway Company." The preamble contains a recital to the effect that the Commissioners of the Queen Victoria Niagara Falls Park, acting on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario, on the fourth day of December 1891 entered into the 1891 agreement which is set out in schedule B to the Act.

By section 1 of this Act the 1891 agreement was approved and ratified and declared to be valid and binding on the parties thereto each of whom was thereby authorised and empowered to do whatever was necessary to give effect to the substance and intention of the agreement and was thereby declared to have had power to do all acts necessary to give effect to it.

By section 2 the Niagara Falls Park and River Railway Company being the Company referred to in the 1891 agreement was incorporated and by subsequent sections the necessary powers were conferred on this Company to enable it to carry into effect the 1891 agreement including such powers as were necessary for the construction and operation of the railway, the purchase of lands for any of the Company's purposes and the sale and conveyance of surplus lands.

The Company incorporated by this Act duly acquired the necessary lands and built the railway. Subsequently the railway so constructed and the lands so acquired together with all rights and liabilities of the said Company became vested in the Appellant Company.

By a further Act of the Legislature for Ontario passed in the year 1927 (17 Geo. V. c. 24 re-enacted in the Revised Statutes for Ontario 1927 c. 81) it was provided that the body corporate theretofore constituted by the name of the Commissioners for the Queen Victoria Falls Park should be continued and should thereafter be known as the Niagara Parks Commission and it is by this name that the corporation was sued by the Appellant Company and it is herein referred to as the Commission.

The railway constructed under the 1891 agreement and the 1892 Act was operated by the Appellant Company and its predecessor in title for the period of 40 years from the 1st September 1892. The option to extend its operation for a further period of 20 years was not exercised by the Appellant Company and the period of operation accordingly expired on the 1st September 1932, but by agreement with the Commission the actual operation by the Appellant Company did not cease until the 12th September 1932. The Appellant Company notified the Commission before the 1st September 1932 of the fact that it did not desire to renew its franchise.

The Commission took possession of the railway pursuant to the terms of the 1891 agreement on the 12th September 1932. There was considerable delay in the appointment of arbitrators under clause 29 of the 1891 agreement and it was not until the 25th May 1935 that the arbitrators appointed thereunder made their award by a majority fixing the compensation to be paid under the 1891 agreement to the Appellant Company by the Commission at the capital sum of $179,104. This sum was fixed on the basis of the scrap value of the component parts of the railway. The arbitrators did not deal with the question of interest because it had been decided by this Board in the case of the *Toronto (City) Corporation* v. *Toronto Railway Corporation* [1925] A.C. p. 177 that the question of interest did not fall to be dealt with in arbitration proceedings but was a matter to be decided by the Courts.

The Appellant Company appealed from the award of the 25th May 1935 to the Court of Appeal for Ontario. On the 31st December 1935 the award with certain small variations was affirmed by that Court. A further appeal was made to His Majesty in Council and on the 23rd April 1937 it was ordered that the appeal should be allowed and that the case should be remitted to the Court of Appeal for Ontario with a direction to pronounce an order that among other things the award of the majority arbitrators should be varied by fixing the compensation to be paid to the Appellant Company at $1,057,436. This Board held (see the report of the proceedings before it 1937, 3 All E.R. p. 181) that there was no justification under the 1891 agreement or the 1892 Act for assessing the compensation at scrap value. Lord Macmillan who delivered the judgment of this Board said (see p. 188):—

> " This is fundamental—it is a railway complete with equipment machinery and works which the Company was bound to hand over to the Parks Commissioners on the 1st September, 1932, and not the components of a railway . . . . It could not legally if it had been possible in fact, have dismantled the railway at the end of the 40 years and tendered the broken up material to the Parks Commissioners in fulfilment of its obligation. That for which it is to be duly compensated is the same thing as that which it was bound to hand over, namely, its railway with its equipment, machinery and other works, a going concern, and not a mere collection of materials."

Lord Macmillan further said (see p. 190):—

> " As the dissentient arbitrator states ' a long line of cases has approved this (i.e. the principle of reconstruction cost less depreciation) as a correct method of valuing a public utility where the value of the franchise is excluded from consideration.' It is said that the present is not a case of compulsory acquisition and that this circumstance affects the nature of the compensation payable. The Company it is said is thankfully relinquishing a damnosa hereditas. But again it has to be remembered that the terms of transfer must be read as equally applicable to a transfer of a railway in 1952 when the Company's franchise definitely expired and also to a transfer in the height of prosperity. If the Company had been highly prosperous and had applied for and obtained an extension of its franchise to September, 1952, it would on the arrival of that date have had compulsorily to relinquish however reluctantly its profitable undertaking to the Parks Commissioners and the same terms of transfer construed in the same way would have been applicable."

Further this Board held following the decision in the case of the *Toronto (City) Corporation* v. *Toronto Railway Corporation* (*ub. sup.*) that the arbitrators had no power to deal with the question of interest and that the Appellant Company must seek enforcement of that claim outside the arbitration.

As already stated the two questions to be decided in this appeal are (1) whether the Appellant Company is entitled to interest on the $1,057,436 compensation fixed by this Board from the 12th September 1932 until payment of the said sum (2) whether it is competent to the Appellant Company if entitled to such interest to sue for its recovery in an action against the Commission.

Logically the second question should be decided first for if the contention of the Commission which has been accepted by both the lower Courts viz. that the Appellant Company's only remedy is by petition of right is correct then it matters not in these proceedings whether the answer to the first question is in the affirmative or the negative.

It is to be observed that the Appellant Company has not purported to sue the Commission as representing the Crown nor is the Appellant Company seeking to reach Crown property. The action is in form against the Commission a corporation created by statute with express power to sue and be sued. The action is based on a contract made by the Commission on its own behalf as well as on behalf and with the approval of the Government of the Province. The contract in this form was confirmed by the Legislature (i.e. by the 1892 Act) and is declared to be " valid and binding on the parties thereto."

In their Lordships' view the Commission entered into the 1891 agreement on the express terms that it was to be liable for its fulfilment and it is therefore unnecessary to consider further the more difficult question which would have arisen if the words " on its own behalf " had been omitted; for there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal. The words in the 1891 agreement " on its own behalf " are prima facie directed to separate liability when read in conjunction with the words that follow viz. " as well as on behalf of " the Crown. Kelly J. gave no weight to these words indeed he said he did not know what effect the words " on their own behalf " might have on the contract. He went on to say that " It is plain that the defendant Commission has no other capacity than that of Crown agent or servant." The Acts of incorporation plainly constitute the Commission as a corporation with a separate legal entity and in some at any rate of its powers it was obviously recognised that it would have contractual capacity separate from the Crown e.g. the power to make itself responsible for the monies secured by debentures issued under the Act for it is provided that the repayment of the monies secured by the debentures " may be guaranteed by the Crown." This provision would be meaningless if the Commission was not to be under any liability in the first instance.

The Court of Appeal for Ontario also appears to have ignored these important words for there is no reference to them in the judgment of McTague J.A. with which the other members of the Court of Appeal for Ontario agreed.

Kelly J. in his judgment referred to the Commission not only as being the agent or servant of the Crown but also as " an emanation of the Crown." The latter phrase is also used by McTague J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the Courts below. If it is intended to refer to the Commission in some capacity other than that of agent or servant it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word " emanation " is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is " that which issues or proceeds from some source " and it is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognisable character. The words seems first to have been used by Day J. in *Gilbert* v. *Trinity House* 17 Q.B.Div. p. 795. In his Judgment in that case Day J. said (p. 801):—

> " The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority."

The learned Judge in the passage quoted seems to use the word as synonymous with servant or agent and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word " emanation."

Their Lordships are for the reasons above expressed of opinion that the Appellant Company's action against the Commission is competent and that the Commission is properly sued under the 1891 agreement.

It follows therefore that the question whether interest is recoverable by the Appellant Company upon the compensation paid under the 1891 agreement falls to be determined.

The claim of the Appellant Company to interest on the compensation money from the date when the Commission entered into possession of the railway was in each of the Courts below as it was before this Board based

upon the equitable principle applicable to cases of vendor and purchaser or quasi vendor and purchaser which requires the purchaser when completing the contract to pay interest on the amount of the purchase money from the time when the purchaser takes possession of the subject matter of the contract.

Kelly J. refused the claim to interest because he held that the 1891 agreement was a contract with an owner of land whereby the other party agreed to construct and equip a railway on the owner's land and to deliver possession of the complete railway to the owner on a fixed day retaining only a right to be compensated. The Court of Appeal for Ontario appear to have adopted this view. Their Lordships do not think that this constitutes an accurate summary of the 1891 agreement. The agreement contemplated that the Appellant Company would buy lands and rights over lands belonging to owners other than the Commissioners as in fact the Appellant Company or its predecessor did. These other lands were it is true of comparatively small value but they were the property of the Appellant Company and must in the events that have happened be conveyed to the Commission in the appropriate manner. Further the whole of the equipment of the railway had to be handed over. Much of such equipment would not pass with the land although it formed part of the railway as a going concern. It is true that the 1891 agreement is not primarily an agreement for the sale of land but it can properly be described as one for the transfer of the railway as a going concern. It cannot be properly described as an agreement for the supply of work and materials.

The learned Judge appears to have thought that what he describes as the rule in *Birch* v. *Joy* (3 H. of L. p. 565) applies only to cases of sale and purchase of land but this is plainly not correct. The equitable rule was established many years before the decision in *Birch* v. *Joy* which was decided in 1852. The true rule is that if in cases where Courts of Equity would grant specific performance the purchaser obtains possession of the subject matter of the contract before the payment of the purchase price he must in the absence of express agreement to the contrary pay interest on his purchase money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject matter of the contract and also of the purchase money. The rule was applied in 1727 to the sale of a reversionary interest not in land (see *Exparte Manning* 2 P.Wms. p. 410); In 1807 it was applied to a sale of growing timber. In such a case the purchase price bears interest because the purchaser gets the benefit of the growth (see the 14th Edition of Sugden's Vendors & Purchasers at p. 631). In the same year the rule was applied to the purchase of an annuity (see *Twigg* v. *Fifield* 13 Ves Jun. p. 517). In that case the sale was under the Court and took effect from the confirmation by the Court of the Master's report. Lord Eldon held that the purchase price must bear interest from that date because the purchaser then got the annuity. Sir Samuel Romilly who was Counsel for the vendor appears from the report to have argued that the rule as to interest on purchase price applied only to sales of land but this argument was not accepted. In 1827 the rule was applied to the sale of a leasehold public house with its stock in trade as a going concern (see *Dakin* v. *Cope* 2 Russ. p. 170). There are no doubt many other cases to be found in the books. The most important decision however so far as the present case is concerned is to be found in the case of the *Toronto (City) Corporation* v. *The Toronto Railway Corporation* already mentioned. In that case Lord Cave (at p. 193) said:—

> "The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established and has on many occasions been applied to compulsory purchases and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case."

One of the matters in dispute in the Toronto case was whether the Toronto Railway Corporation was entitled to interest on the compensation payable to it for its railway. The material facts were as follows:—In 1891 the Toronto Corporation having agreed to take over certain street railways

belonging to the Toronto Street Railway Company invited tenders for the purchase of an exclusive right to operate these railways for a period of 20 years extendible to 30 years in certain events. One of the conditions provided that at the termination of the period of operation the Toronto Corporation might take over all the real and personal property necessary to be used in connection with working the railways at a value to be determined by arbitration. On the 1st September 1891 the Toronto Corporation assigned the railway and property acquired by it from the Toronto Street Railway Company to the persons who made the successful tender, the condition above referred to being incorporated in the assignment. Shortly after the assignment the Legislature of Ontario passed a statute (55 Vic. c. 99) whereby the assignment was declared to be valid and binding upon all parties for the full period of 30 years from the 1st September 1891. By the same Act the Toronto Railway Company was incorporated and empowered to take over from the successful tenderers the agreement of the 1st September 1891 and all the property rights and privileges comprised therein. The statute contained a provision that if the Toronto Corporation desired to exercise the right of taking over the property necessary to be used in the working of the railway at the termination of the said period of 30 years it should give notice of its intention so to do and might at once proceed to arbitrate in the manner specified in the conditions to which reference has already been made. The Act further provided that if the award should not be effective by the date when the 30 years' term expired the Toronto Corporation might take possession of the railway and all the property and effects thereof real and personal necessary to be used in connection with the working thereof on payment into Court either of the amount of the award if made or if not made upon paying into Court or to the Company such a sum as a Judge of the High Court of Justice of Ontario might order. The Toronto Railway Company took over the railway and its property and carried on the undertaking during the whole of the period of 30 years. The Toronto Corporation gave notice of its intention to take over the railway and its property but on the expiration of the 30 years' period the arbitration for fixing the compensation payable to the Toronto Railway Company had not been concluded. An application was made to the Court when an order was made giving the Toronto Corporation the right to take possession of the railway and its property on payment to the Toronto Railway Company of $1,000,000 and into Court of $500,000 to abide the event of the arbitration. This order was complied with on the 31st August 1921 when the Toronto Corporation took possession of the railway and its property. On the 30th January 1923 a majority of the arbitrators awarded that the value of the Toronto Railway Company's railway was $11,188,500. There was considerable litigation in relation to the award and there was ultimately an appeal to His Majesty in Council. The arbitrators had awarded to the Toronto Railway Company interest upon the $11,188,500 from the date when the railway was taken over to the date of the award. When the matter was before the Court of Appeal for Ontario the Court varied the award by striking out among other things the allowance of interest on the $11,188,500 on the ground that though it was equitable that interest should be paid from the time of taking possession there was no warrant for including it in the award.

The only difference between the facts of the Toronto case and the present is that in the former case the Corporation had an option of taking over the railway at the end of the franchise period, while in the present case there is no option the Commission being bound to take over the railway when the franchise period expired. Kelly J. sought to distinguish the Toronto case from the present solely by reason of the existence of the option. The Court of Appeal for Ontario does not appear to have accepted this view for McTague J.A. said in his judgment that it seems quite clear that the equitable rule as to interest applies in cases involving the sale of lands which include equipment and buildings all as part of a railway undertaking and he cites the *Toronto* case in support of this opinion. Their Lordships are of opinion that the present case cannot properly be distinguished from

the *Toronto* case, and their Lordships' opinion (as stated by Lord Cave), in regard to the operation of the general rule to which their Lordships in that case referred and ought to have been followed. For these reasons their Lordships are of opinion that the appeal of the Appellant Company should be allowed and the judgments of Kelly J. and the Court of Appeal for Ontario discharged and that judgment should be entered for the Appellant Company for a sum equivalent to interest at 5 per cent. on the sum of $1,057,436 from the 12th September 1932 to the 3rd June 1937 credit being given by the Appellant Company for the sum of $23,783.86 already paid by the Commission in respect of interest and that the Commission should pay to the Appellant Company the costs of this appeal as well as the costs of the action and the costs of the appeal to the Court of Appeal for Ontario. Their Lordships will humbly advise His Majesty accordingly.

(13002) Wt. 8194—7 10 5/41 D.L. G. 336

In the Privy Council

INTERNATIONAL RAILWAY COMPANY

v.

THE NIAGARA PARKS COMMISSION

DELIVERED BY LORD JUSTICE LUXMOORE

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