

BETWEEN

THE CANADIAN PACIFIC RAIL- }
 WAY COMPANY } PLAINTIFF;

190
 June 30.

AND

HIS MAJESTY THE KING.....DEFENDANT.

*Canadian Pacific Railway Co.—Construction of branch line—Subsidy—
 Agreement to pay—Ascertainment of amount—“Cost”—“Equipment.”*

By 3 Edw. VII, chap. 57, sec. 2, it was provided that the Governor in Council might grant to the Canadian Pacific Railway Company in aid of the construction of a certain branch line, a subsidy of \$3,200 per mile, where the line did not cost more on the average than \$15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of \$15,000 per mile, such subsidy not exceeding in the whole the sum of \$6,400 per mile. By the 1st section of the Act the expression “cost” was defined to mean the “actual necessary and reasonable cost”, to be determined by the Governor in Council upon the recommendation of the Minister of Railways and Canals and upon the report of the Chief Engineer of Government Railways. The Minister of Railways and Canals under authority of the Governor in Council entered into a contract with the plaintiff respecting the construction of the said branch line and the subsidy therefor, by which it was agreed that the Crown would “in accordance with and subject to the provisions of secs. 1, 2 and 4 of the Subsidy Act pay to the company so much of the subsidies or subsidy hereinbefore set forth or referred to, as the Governor in Council, having regard to the cost of the work performed, shall consider the company to be entitled to in pursuance of the said Act.”

Held, that inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor in Council, the plaintiff company was not entitled to any relief in this proceeding, and that the decision of the Governor in Council was not open to review by the court.

THIS was a claim for a railway subsidy.

The matter came before the court in the form of a Spécial Case, stated between the parties pursuant to Rule 111.

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Argument
 of Counsel.

The facts of the case are stated in the reasons for judgment.

March 5th, 1906.

The special case was now argued.

Dr. Travers Lewis, for the plaintiff, contended that the course of federal legislation with reference to railway subsidies indicated that it was the intention of Parliament to include the cost of equipment in the computation of "necessary and reasonable" cost unless it was expressly excluded by the terms of such legislation. From 1882 down to 1894 the phraseology of the Acts remained the same. In 1894 provision was made for computation of cost by the Engineer, and in 1897 provision for the first time was made that "equipment" should be excluded from the computation. This provision occurs also in the Act of 1899. But in 1901 and 1903 Parliament omits the latter provision entirely. It is under the Act of 1903 that the plaintiff company claim that it was the duty of the Chief Engineer to include the cost of the rolling stock and other equipment of the branch line from Moosomin to Elkhorn in the neighbourhood of the Pheasant Hills. If that is done the cost of construction will be established to exceed the sum of \$15,000 per mile, and the additional subsidy should be allowed as provided in the Act. He cited *Farmer's Loan Company v. St. Jo. and Denver City Ry. Co.* (1); *Jones on Railroad Securities* (2); *Titus v. Mabee* (3); *Williamson v. New Jersey Southern Ry. Co.* (1); *R. v. Great Bolton* (5); *Hyde v. Johnson* (6); *Rickett v. Metropolitan Railway Co.* (7); *Potter's Dwaris on Statutes* (8); *Harcastle on Statutes* (9); *Lehman v. Robinson* (10).

(1) 3 Dillon C. C. 412.

(2) Sec. 154

(3) 25 Ill. 257.

(4) 28 N. J. Eq. 280.

(5) 8 B. & C. 74.

(6) 2 Bing. N. C. 776.

(7) L. R. 2 H. L. at p. 207.

(8) P. 189.

(9) 1901 ed. pp. 142, 143, 146.

(10) 59 Ala. 219.

The contention of the plaintiff company is that the rolling stock was part of the railway as a concrete whole. That is the meaning of the word "railway" in *The Railway Act, 1903*, secs. 117, 118 (g).

E. L. Newcombe, K.C., for the defendant, argued that the subsidy to be paid under the Act was for the "construction" of the branch railway in question, and if "construction" is distinct from "equipment" then the latter cannot be considered in determining the right to further subsidy. The definition of a "railway" in *The Railway Act, 1903*, does not apply here.

The Chief Engineer could not see his way to include the equipment, nor did the Minister, hence the Governor in Council did not grant the additional subsidy. Without an order in council the subsidy cannot be recovered.

As to distinction between "railway" and "rolling stock" see discussion of the same in *Toronto Street Railway's Case* (1).

Since 1903 the practice has been uniform not to include "rolling stock" in subsidies for railway construction.

Dr. Travers Lewis, in reply, submitted that the Act was in effect a bounty Act, and should receive a benevolent construction.

THE JUDGE OF THE EXCHEQUER COURT, now (June 30th 1906) delivered judgment.

The plaintiff company, having been paid the sum of \$435,200.00 as a subsidy towards the construction of a branch line of railway 136 miles in length from its main line to a point in the neighbourhood of the Pheasant Hills, claims that it is entitled by way of subsidy therefor to a further sum of \$.64,088.00. The statement of that claim, with the grounds upon which it is made having been referred to the court by the Minister of Railways and Canals, pursuant to the provisions of the

(1) 1904] A. C. at p. 809.

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twenty-third section of *The Exchequer Court Act*, the parties have concurred in stating a special case for the opinion of the court. The question for its decision as therein stated is whether or not the cost of "sufficient rolling stock necessary to accommodate and conduct properly and efficiently the traffic and business of the line" should be included by the Chief Engineer of Railways and Canals in estimating the amount payable to the plaintiff company in respect of its said subsidy?

The authority for the granting of the subsidy in question is contained in the Act of Parliament 3 Edward 7th, chapter 57, by the second section of which it was, among other things, provided that the Governor in Council might grant to the plaintiff company a subsidy towards the construction of a branch line from a point on the main line between Moosomin and Elkhorn northwesterly to a point in the neighbourhood of the Pheasant Hills, not exceeding 136 miles. With reference to the amount of the subsidy it was provided that a grant of \$3,200 per mile might be made where the line did not cost more on the average than \$15,000 per mile, and that where such cost exceeded on the average \$15,000 per mile a further subsidy might be given "of fifty per cent. on so much of the average cost of the mileage subsidized as was in excess of \$15,000 per mile, such subsidy not exceeding in the whole the sum of \$6,400 per mile." By the first section of the Act the expression "cost" was defined to mean "the actual, necessary and reasonable cost" including "the amount expended upon any bridge up to and not exceeding \$25,000 forming part of the line of railway subsidized not otherwise receiving any bonus" but not to include "the cost of terminals and right of way of the railway in any city or incorporated town". And it was therein further provided as follows: "And such actual, necessary and reasonable cost shall be determined by the Governor in Council upon the recom-

“mendation of the Minister of Railways and Canals ;
 “and upon the report of the Chief Engineer of Govern-
 “ment Railways certifying that he has made or caused
 “to be made an inspection of the line of railway for
 “which payment of subsidy is asked, and careful inquiry
 “into the cost thereof and that in his opinion the amount
 “upon which the subsidy is claimed is reasonable and
 “does not exceed the true actual and proper cost of the
 “construction of the railway.”

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By orders in council of the 17th day of November, 1903, and the 12th day of January, 1904, the Minister of Railways and Canals was given authority to enter into a contract with the plaintiff company respecting the subsidy mentioned and the construction of the branch line of railway referred to, and in pursuance of such authority an agreement was entered into on the 14th day of January, 1904. The ninth clause of that agreement was expressed in the following terms :

“That upon the performance and observance by the
 “company to the satisfaction of the Governor in Council
 “of the foregoing clause of this agreement, His Majesty
 “will, in accordance with and subject to the provisions
 “of sections one, two and four of the Subsidy Act, pay to
 “the company so much of the subsidies or subsidy herein-
 “before set forth or referred to as the Governor in Coun-
 “cil having regard to the cost of the work performed,
 “shall consider the company to be entitled to in pur-
 “suance of the said Act.” By the nineteenth paragraph
 of a schedule of specifications attached to the agreement it was provided that sufficient rolling stock necessary to accommodate and conduct properly and efficiently the traffic and business of the line should be provided by the company, of which the Minister of Railways and Canals should be the judge.

By the second section of *The Railway Act, 1888*, clause lettered (g) it was provided that the expression “rail-

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way" should include all sections, depots, wharves, property, and works connected therewith; and by an amendment to that clause made by the first section of the Act 55-56 Victoria, chapter 27, the definition was enlarged to cover in express terms the company's rolling stock and equipment; and these words also occur in the definition of the expression "railway" as given in *The Railway Act of 1903*.

As pointed out in the plaintiff company's statement of claim section one of the Subsidy Act of 1903 defining the expression "cost" is identical with section one of the Subsidy Act of 1901, but in prior Subsidy Acts (See for example 63-64 Vict. c. 8, s. 1, and 62-63 Vict. c. 7, s. 1) there was an express provision that such "cost" should not include "the cost of equipping the railway." It is upon the omission of this provision from the Subsidy Act of 1903, that the plaintiff company, in the main, bases its claim to the further subsidy mentioned in the Act. If the cost of rolling stock and other equipment for the branch line of railway mentioned is included as part of the cost of construction of the line, such cost will exceed on the average \$15,000 per mile; but if the cost of these things is not included such cost will not on the average exceed that amount. The company's contention is that in ascertaining the cost of the line of railway for the purpose of computing the amount of subsidy payable to it the cost of the necessary rolling stock and other equipment should be taken into account. In making his report in the present matter the Chief Engineer of Railways and Canals has not done that. His report and the recommendation of the Minister in respect of the subsidy was dealt with by an order in council of the 17th day of February, 1905, whereby authority was given for the payment to the company of a balance of \$56,576. This sum, with previous payments, amounted to \$435,200, or an amount which is equal to \$3,200 per mile for the

136 miles mentioned in the Subsidy Act. In estimating the amount payable to the plaintiff company in respect of the subsidy in question the cost of "sufficient rolling stock necessary to accommodate and conduct properly and efficiently the traffic and business of the line" which the company agreed to provide has not been taken into account, and the question submitted in the case stated is, as has been seen, whether or not such cost should have been taken into account in computing the subsidy payable to the company.

Now the court has, I think, nothing to do with the question as to whether or not the Governor in Council in determining the amount of subsidy payable to the company might under the provisions of the Subsidy Act of 1903, have taken into account the cost of necessary rolling stock if he had seen fit so to do. That has not been done, and unless there were a binding obligation on His Excellency in Council to take that matter into account the plaintiff company would have no legal claim and would not be entitled to relief in this proceeding.

And first it will be seen that the Governor in Council was not bound by the statute to grant the subsidy mentioned. The Act gave authority for granting it, but did not in that respect go further. It provided also that the Governor in Council should determine what the actual, necessary and reasonable cost of the line was. And then when we come to the agreement of the 14th day of January, 1904, to which reference has been made, the obligation that was entered into on behalf of the Crown was not to pay the subsidy provided by the Subsidy Act, but to pay so much of such subsidy as the Governor in Council having regard to the cost of the work performed should consider the company to be entitled to in pursuance of the Act. That leaves the question as the Subsidy Act leaves it, for the decision of the Governor in Council. An order in council has been

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passed dealing with the matter. The company has been paid so much of the subsidy in question as the Governor in Council having regard to the cost of the work performed considered it to be entitled to in pursuance of the Subsidy Act. And that is all that the Crown became bound to pay. The question, if it is to be opened up and reconsidered is, it seems to me, one for the consideration of the Governor in Council, and I do not think that under the facts of this case his decision of the matter is open to review in this court. There is no relief to which as a matter of law the plaintiff company is entitled, and there is, it seems to me, no ground on which any judgment could be entered in its favour.

The judgment will be entered for the defendant, but there will be no costs to either party.

*Judgment accordingly.**

Solicitor for the plaintiff: *J. Travers Lewis.*

Solicitor for the defendant: *E. L. Newcombe.*

*Affirmed on appeal, see 38 S. C. R. 137.