
1932
Nov. 29, 30,
Dec. 1, 2, 5, 6,
7, 9, 12, 13,
14, 15.

1933
Jan. 26, 27
& 28.

1933
Dec. 29.

BETWEEN:

HIS MAJESTY THE KING,

PLAINTIFF;

AND

SOUTHERN CANADA POWER CO. LTD.,

DEFENDANT.

Damages to Canadian National Railways—Canadian National Railways Act—Action instituted in the name of His Majesty the King—Jurisdiction—Exchequer Court Act.

Held: That as the *Canadian National Railways Act,* R.S.C. 1927, c. 172, does not vest ownership of the government railways in the Canadian National Railway Company, it being entrusted only with the management and operation of the railways as an agent or mandatory for the government, they remaining the property of the Crown, an action for damages to the Canadian National Railways, brought in the name of His Majesty the King, is properly instituted.

This action was brought for the recovery of a sum of money for damages caused through the derailment of a train of the Canadian National Railways in consequence of a wash-out of the embankment between the viaduct over the highway and the bridge crossing the St. Francis River, near Drummondville, P.Q. The Court found that the dam of

the defendant company at Hemmings Falls was responsible for the wash-out of the railway embankment at Drummondville and the derailment of the train; that the accident was not the result of *vis major* nor was it caused by the fault or negligence of the Plaintiff; that consequently the defendant company is liable to the Plaintiff.

ACTION by the Crown to recover a sum of money for damages allegedly suffered by it through the negligence of the defendant company.

The action was tried before the Honourable Mr. Justice Angers, at Montreal.

Hon. J. E. Perrault, K.C.; Napoleon Garceau, K.C., and *J. P. Pratt, K.C.*, for the plaintiff.

A. Decary, K.C., and *J. Marier, K.C.*, for the defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (December 29, 1933) delivered the following judgment:

[The learned Judge stated the nature of the action and then continued.]

The first question I shall examine is whether the plaintiff was, at the time of the accident, the owner of the railway line and of the locomotive and cars which were damaged.

Up to 1899 the railway line running from Charny to Ste. Rosalie and passing at Drummondville was the property of the Drummond County Railway.

By the Statutes 62-63 Victoria, chap. 6, assented to on August 11, 1899, the Governor in Council was authorized to purchase from the Drummond County Railway Company and the latter was authorized to sell and convey to Her Majesty the whole of the railway and undertaking of the company, including its main and branch lines of railway and all buildings, fixtures and appurtenances appertaining thereto. Section 1 of the statute stipulates that upon such purchase being effected the said railway and its branch lines shall become and form part of the Intercolonial Railway and may be operated as such.

Before dealing further with this Act, I believe it expedient to mention that in virtue of section 145 of The British North America Act, 1867, it became the duty of the Government and Parliament of Canada to provide for

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the commencement within six months after the Union of a railway connecting the River St. Lawrence with the City of Halifax, in Nova Scotia (called the Intercolonial Railway in the preamble of said section) and for the construction thereof without intermission and its completion with all practicable speed.

In order to provide for the fulfilment of the duty imposed on the Government and Parliament of Canada as aforesaid, an act intituled "An Act respecting the construction of the Intercolonial Railway" was passed and assented to on December 21, 1867 (31 Vict. chap. 13).

Section 1 of this act stipulates that there shall be a railway constructed, connecting the Port of Rivière du Loup (in the Province of Quebec) with the line of railway leading from the City of Halifax (in the Province of Nova Scotia), at or near the Town of Truro, and that such railway shall be styled and known as "The Intercolonial Railway."

Section 2 of the said act says inter alia: "The said railway shall be a public work belonging to the Dominion of Canada."

Since its construction the Intercolonial Railway has always been the property of the Crown. We find it defined in the following statutes: 44 Vict. chap. 25, s. 122, An Act to amend and consolidate the Laws relating to Government Railways; R.S.C. 1886, chap. 38, s. 67, An Act respecting Government Railways; 54-55 Vict., chap. 50, An Act respecting the Intercolonial Railway; R.S.C., 1906, chap. 36, s. 80, An Act respecting Government Railways; R.S.C., 1927, chap. 173, s. 83, An Act respecting Government Railways. The several sections of the acts above referred to, which define the Intercolonial Railway, with the exception of section 122 of chapter 25 of 44 Victoria and section 67 of chapter 38 of the Revised Statutes of Canada of 1886, which are somewhat less explicit, stipulate that all railways, branches and extensions thereof, etc., *vested in Her or His Majesty*, as the case may be, *under the control and management of the Minister* (i.e. the Minister of Railways and Canals), and situated in the Provinces of Quebec, Nova Scotia and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway.

It may perhaps be noted that the Intercolonial Railway which, according to the statute 31 Vict., chap. 13, was to connect the Port of Rivière du Loup, in the Province of Quebec, with the line of railway leading from the City of Halifax, in the Province of Nova Scotia, at or near the Town of Truro, was later extended, in the Province of Quebec, from Rivière du Loup to Hadlow, as appears from the definitions in sections 122 of 44 Vict., chap. 25, and 67 of chap. 38 of the Revised Statutes of Canada of 1886. Hadlow is situated between Lévis and Charny, a short distance east of the latter place, reference to which is made from time to time in the testimonies of some of the witnesses.

The statute 62-63 Victoria, chap. 6, previously referred to, which authorized the Governor in Council to purchase the Drummond County Railway was to come into force as soon as another act, namely an "Act to confirm an agreement entered into by Her Majesty with the Grand Trunk Railway Company of Canada, for the purpose of securing the extension of the Intercolonial Railway System to the City of Montreal," (62, 63 Vict. chap. 5) was brought into operation by the Governor General's proclamation. A proclamation was issued, dated the 21st of September, 1899, declaring that the said act (62-63 Vict. chap. 5) would come into force on the 26th of the same month; a copy of this proclamation was filed as exhibit 1.

Pursuant to the authorization conferred by the statute 62-63 Victoria, chap. 6, an Order in Council was passed on November 4th, 1899, recommending the purchase by the Governor General in Council from the Drummond County Railway Company of the whole of its railway and undertaking; a copy of this Order in Council was filed as exhibit 3.

By deed in private writing dated November 7, 1899, a duplicate whereof was produced as exhibit 2, the Drummond County Railway Company sold to Her Majesty the whole of its undertaking and railway, including its main line and branches and their connection, and namely "the line of railway extending from Ste. Rosalie, a point on the Grand Trunk Railway in the Province of Quebec, to a point on the western side of the Chaudière River where the said line of railway connects and joins with the Grand

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Trunk Railway." The point referred to is Chaudière.

The Drummond County Railway has since been the property of the Dominion of Canada and has formed part of the Intercolonial Railway.

By the statute 9-10 Geo. V, chap. 13, assented to on June 6, 1919, the Canadian National Railway Company came into existence. This statute is now chapter 172 of the Revised Statutes of Canada, 1927.

In virtue of section 3 of chapter 172 (section 1 of chap. 13 of 9-10 Geo. V), the Governor in Council may nominate such persons as may be deemed expedient, not less than five nor more than fifteen (increased to seventeen by 21-22 Geo. V, chap. 8, s. 1), to be directors of the company and, upon such nomination being made, the persons nominated and their successors, and such other persons as may from time to time be nominated by the Governor in Council are incorporated as a company under the name of Canadian National Railway Company. Then the directors appointed by the Governor in Council are, under the statute, deemed to be the company.

Section 19 of said chapter 172 contains the following provisions, reproduced literally from the statute 9-10 Geo. V. chap. 13, section 11:

> 19. The Governor in Council may from time to time by Order in Council entrust to the Company the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein, and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to the termination or variation from time to time in whole or in part by the Governor in Council.

Acting under the authority conferred upon him by section 11 of chapter 13 of 9-10 Geo. V, the Governor in Council on the 20th of January, 1923, entrusted to the Canadian National Railway Company the *management and operation* of, among other lines, the Intercolonial Railway, as appears from a duly certified copy of an Order in Council filed as exhibit 4.

It seems obvious to me that under the Statute incorporating the Canadian National Railway Company, the latter

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is not vested with the ownership of the Government Railways, but that it is only entrusted with the management and operation of the railways, which remain the property of the Crown. See *Dominion Building Corporation* v. *The King* (1).

If we refer to the sections of the act relating to the "Powers of the Company" and to "Finance," we see, among other things, that the company cannot abandon any lines and cannot issue securities without the approval of the Governor in Council; this is surely not consistent with the right of ownership.

Now if we turn back to section 15 of the act (chap. 172), relating to the costs of administration and operation of the railways, we find the following stipulations:

15. Notwithstanding anything in the Government Railways Act or the Consolidated Revenue and Audit Act, all expenses incurred in connection with the operation or management of the Canadian Government Railways, under the provisions of this Act, shall be paid out of the receipts and revenues of the Canadian Government Railways.

2. In the event of a deficit occurring at any time during any fiscal year the amount of such deficit shall from time to time be payable by the Minister of Finance out of any unappropriated moneys in the Consolidated Revenue Fund of Canada, the amounts paid by the said Minister under this section to be included in the estimates submitted to Parliament at its first session following the close of such fiscal year; and in the event of a surplus existing at the close of any fiscal year such surplus shall be paid into the said fund.

The receipts and revenues of the Government railways are the property of the Government; the Canadian National Railway Company merely has the administration or management of these funds and out of them it pays the operating and administrative expenses; if there happens to be a deficit in any fiscal year, it is paid out of the unappropriated moneys in the Consolidated Revenue Fund of the Dominion; if, on the contrary, there is a surplus, it must be paid into the said fund.

The Canadian National Railway Company is in fact only an agent or mandatory for the Government.

It has been argued on behalf of the defendant that, under section 33 of the act, the action should have been brought in the name of the Canadian National Railway Company and that it should have been taken before the Superior Court of the Province of Quebec.

(1) (1930) App. Cas. 90, at 96.

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The material provisions of section 33 read as follows:

33. Actions, suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

2. * * * * * * * * * *

3. Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the Company, be a court of competent jurisdiction under the provisions of this section.

The first paragraph of section 33 is not imperative, but merely permissive: it uses the word "may." It does not deprive His Majesty of the right to sue in his own name. It may be that the action could have been taken in the name of the Canadian National Railway Company, but I am not called upon to express any opinion on the subject and I shall refrain from doing it.

Having reached the conclusion that His Majesty had the right to institute the action in his name, the question of jurisdiction raised by the defence offers no difficulty: under section 30, subsection (*d*) of the Exchequer Court Act (R.S.C., 1927, chap. 34) the Court has concurrent original jurisdiction in Canada in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. Moreover it is well established law that His Majesty can choose his tribunal: See Chitty on Prerogatives, p. 244; *Cawthorne* v. *Campbell, Lowndes et al* (1); *Attorney-General* and *Humber Conservancy Commissioners* v. *Constable* (2); *Attorney-General* v. *Walker* (3); *Farwell* v. *The Queen* (4). I have no hesitation in saying that this Court has jurisdiction to take cognizance of the present case.

[The learned Judge here considered the evidence adduced at the trial of the action and found that the defendant company was liable to the Plaintiff in the sum of $80,923.20 and costs.]

Judgment accordingly.

(1) (1790) 1 Anstr. pp. 205 and 208, in note.
(2) (1879) L.R., 4 Ex. Div., p. 172.
(3) (1877) 25 Grant, p. 233; (1878-1879) 3 O.A.R., 195.
(4) (1893) 22 S.C.R., 554.