Supreme Court of Canada

Black *v*. The Queen (1899) 29 SCR 693

Date: 1899-10-03

Henderson Black and Others (Defendants)

Appellants

And

Her Majesty The Queen (Plaintiff)

Respondent.

1899: May 17, 18; 1899: Oct. 3.

Present:—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Suretyship—Postmaster's bond—Penal clause—Lex loci contractûs—Negligence—Laches of the Grown officials—Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929-1965 C. C.

In an action by the Crown on the information of the Attorney General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the officers of Canada" (31 Vict. ch. 37; 35 Vict. ch. 19) and "The Post Office Act" (38 Vict. ch. 7;)

*Held,* Sir Henry Strong C.J. dissenting, that the right of action under the bond was governed by the law of the Province of Quebec.

*Held,* further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada.

*Held,* also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute.

Appeal from the judgment of the Exchequer Court of Canada[[1]](#footnote-2) in favour of the Crown in an action on the information of the Attorney General for Canada upon a bond executed by the defendants as security for the due performance of his duties by the postmaster of St. John's, in the Province of Quebec.

A statement of the facts and questions at issue in the case appears in the judgment of His Lordship the Chief Justice.

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*Hogg Q. C.* and *Madore* for the appellant. The bond discloses no primary obligation but is for a penal sum only; it is in fact a wagering contract; see Arts. 1131 and 1927 C. C. The bond insures due and faithful performance of the postmaster's duties and in default for even the slightest sum there is liability to pay at least $1,600, or perhaps $3,200, if each surety is liable separately for the penal sum of $1,600 stipulated; see Art. 1933 C. C. The bond is to be construed according to the laws of the Province of Quebec which are binding on the Crown; *The Exchange Bank of Canada* v. *The Queen[[2]](#footnote-3)*; see also Arts. 1994 (10) 2032 and 2086 O. C. There is no exception in favour of the Crown under Arts. 1053 and 1054 C. C., and the Crown is liable for torts; *Attorney General of The Straits Settlements* v. *Wemyss[[3]](#footnote-4)*. This case is ruled by Arts. 1929-1965 C. C. relating to "Suretyship," and the Crown is bound by the acts of its officers and servants; *Kenney* v. *The Queen[[4]](#footnote-5)*. The Grown officers had been for a long time aware of misconduct of the postmaster and shortage in his accounts, but his offences were condoned and he was not discharged from his office. No notice of these circumstances was given to appellants and consequently they were relieved of further liability as sureties; *Phillips* v. *Foxall[[5]](#footnote-6)*. The guarantee was founded on the trustworthiness of the servant so far as that was known to both parties. So soon as his dishonesty was discovered the whole foundation of the contract as regards the sureties failed and the Crown should have then dismissed him. By continuing him in office, without the knowledge or assent of the surety, the Crown took the risk of all losses arising from any future dishonesty; see *Sanderson* v.

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*Aston[[6]](#footnote-7)*; *Enright* v. *Falvey[[7]](#footnote-8)*. This continuance in office after the offences were discovered was equivalent to a re-engagement after each offence so far as the sureties were concerned, and they should not be held liable for defalcations which occurred after each such default where they were left in ignorance of the defalcations. The rule that the Crown cannot be bound by laches or negligence of its officers is not applicable in the present case inasmuch as the rights of the parties are governed by the contract and its implied terms The Crown must be affected by the breach of contract when the breach is caused by the negligent acts of the Crown's servants.

The appellants were discharged by the acts of the Crown which prevented them obtaining subrogation in rights and privileges against the principal or his estate; see Arts. 1956 and 1959 C. C. After the death of the post master the sureties were notified that there were no defalcations, excepting for $40 which was more than covered by a balance of salary, consequently the sureties permitted the widow to obtain the life insurance and balance of salary, amounting in all to $1,480.37, before the investigation which led to the discovery of defalcations amounting to $4,288, too late to allow the sureties the benefit of the insurance money and balance of salary, or to be subrogated in the rights and privileges of the Crown.

The defalcations were in respect of the Savings Bank Branch, while the bond relates only to the duties of the postmaster, as such and not to his acts respecting the Savings Branch; therefore as the breaches were with respect only to the Savings Bank Branch the action does not lie on the bond, which moreover is not made in accordance with the Acts under which it purports to be given, and is

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contrary to the laws of Quebec respecting suretyship; Arts. 1131, 1132 and 1929 C. C. We also refer to *Société d'Agriculture du Comté de Verchères* v. *Robert[[8]](#footnote-9)*; *Attorney General* v. *Black[[9]](#footnote-10)*; and *Railton* v. *Mathews[[10]](#footnote-11)*.

*Fitzpatrick Q.C.* (Solicitor-General for Canada), and *New combe Q.C.* (Deputy-Minister of Justice) for the Crown. The post-office authorities notified the sureties that the defaults had occurred when they were first discovered, and as they took no steps to terminate their obligation they continued bound; *Shepherd* v. *Beecher[[11]](#footnote-12)*. See also *The Queen* v. *Finlayson[[12]](#footnote-13)*. We rely also on the authorities cited in the judgment appealed from[[13]](#footnote-14).

The decision in *Phillips* v. *Foxall[[14]](#footnote-15)* has no application to the Crown, which cannot be held liable for laches or negligence of subordinate officials; see *The Queen* v. *Fay[[15]](#footnote-16)*; *Jones* v. *United States[[16]](#footnote-17)*; *Frownfelter* v. *State of Maryland[[17]](#footnote-18)* at page 85; DeColyar on Guarantee p. 446.

In this case we have to consider not only the *lex loci contractus* but the *lex loci solutionis* as well; under this light the contract in question is not suretyship as governed by the Civil Code, and there can be no application of the principles decided in *The Exchange Bank* v. *The Queen[[18]](#footnote-19)*. Here there is absolute impossibility of the performance of the principal obligation by the sureties; they are merely the *portes forts* for their principal's honesty and not sureties under the Code; 16 Troplong p. 394 "Cautionnent," (ed. Delormier). They are liable for damages only.

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They cannot first require discussion of the estate of the principal, but are only entitled to their recourse over after making settlement.

The form of this bond is not known to Quebec law, but it is sufficient under the statutes and it was by these statutes that the parties intended themselves to be bound; see Lafleur on Conflict of Laws, p. 149; *Hamlyn* v. *Talisker Distillery[[19]](#footnote-20)*; and *Colonial Bank* V. *Cady & Williams[[20]](#footnote-21)*.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court on an information filed by the Attorney General of the Dominion to enforce a bond executed by Henderson Black, one of the appellants, and by John Black, deceased, (who on this record is represented by his beneficiary heirs, the appellants' Henderson Black and Mary Black), as sureties for the due accounting by one James Macpherson, formerly postmaster at St. John's, in the Province of Quebec, (amongst other things), for all moneys and property which might come into his hands by virtue of his office of postmaster. This bond was a several bond, Macpherson was one of the obligors and he and each of the sureties were severally bound in a penal sum of $1,600. At the time of the appointment of Macpherson to the office in question it was part of the duty of the postmaster to receive moneys on behalf of the Crown for deposit with the Government, in the Post-Office Savings Bank, and such continued to be his duty up to the time of his death which occurred in December, 1896, whilst he was still in office. Some time after the death of Macpherson it was discovered that he was a defaulter in all to the amount of $4,288 for moneys which he had received as postmaster from Savings Bank Depositors and had omitted to remit to

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the proper office at Ottawa as his duty required him to do. It appears indisputably that he had applied these moneys to his own use and had attempted to conceal his embezzlement by false returns to the department and by fraudulent alterations made in the depositors' pass books.

It is objected by the appellants that the bond having been executed in the Province of Quebec, its legal validity depends on the law of that province. Speaking for myself only, and in that respect I believe differing from some of my learned brothers, I do not assent to this proposition. I am willing however for the purposes of the present case to assume it to be so and to deal with the case at present as one to be governed exclusively by the Civil Code of Quebec. Then it is said on behalf of the appellants that Article 1131 applies, which says that:

A penal clause is a secondary obligation by which a person, to assure the performance of the primary obligation, binds himself to a penalty in case of its in execution.

It is contended that here there was no primary obligation as Macpherson, the principal for whom the Hendersons were mere sureties, was himself only bound by a like penalty and that there was therefore no such primary obligation as Article 1131 requires as a basis for the penalty contracted for by the sureties. The answer to this is plainly that given by the learned judge of the Exchequer Court, that the primary obligation is that which bound Macpherson, the principal, irrespective of the bond altogether, duly to account for moneys received by him for the behalf of the Crown.

Further the bond is given pursuant to the terms of a Dominion statute which Parliament had undoubted power to enact, and even if the law of Quebec as enunciated in Article 1131 would ordinarily apply

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here, the liability of the appellant is dependent on the Act of Parliament and not on the Code.

Next it is said that the laches of the Crown officers in not communicating the default of the postmaster to the sureties, by which they were deprived of the benefit of a statute which provides that sureties for Crown officers may obtain their release by giving notice of their wish to be discharged to the Crown, and allowing a certain time to elapse, is a bar to the Crown. To this it is answered that notice was given to the appellant Henderson Black, for himself and on behalf of his brother John Black, of the principal defalcation which had been discovered before Macpherson's death The evidence on this point is contradicted by Henderson Black, but the learned judge seems to treat the facts of notice as established. There is, however, a much more conclusive answer, namely, that the Crown is never bound by the laches or default of its officers. In one aspect of this doctrine it is applied in cases of tort where the rule *respondent superior* is held not to apply to the Crown. There is therefore nothing in this point.

Another defence which is set up is that, according to the case of *Philips* v. *Foxall[[21]](#footnote-22)* the Crown was bound to discharge the postmaster so soon as it had notice of his misconduct in office, and that having retained him they cannot call on the sureties to make good his subsequent defaults. This argument is refuted by the same rule of law that the Crown is not liable for the acts of its subordinate officers, their knowledge is not that of the Crown, and the latter is not responsible for their neglect or wrongful acts. Indeed the public business could not be properly transacted if any other rule were to prevail. The Crown has no alternative but to employ inferior officers by whom the duties of

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the public service must be carried on, and if it were the law that the Crown should be bound by their wrongful acts or by their negligence, the interests of the public would be greatly prejudiced.

There is so little in the point that there was an insurance on Black's life, the amount of which the sureties allowed his widow to receive without objection, which they would not have done if they had been informed of his acts of embezzlement, that it scarcely calls for notice It is already answered by what has been said as to the Crown not being affected by the omissions of the post-office inspectors. Moreover, the sureties had no lien on these insurance monies; at most they could only have come in competition with other creditors, for they had no right to be subrogated to the remedies of the Crown even if the Crown had, in the Province of Quebec, priority over other creditors, a question of prerogative law which the Privy Council has determined against the Crown. The learned judge rightly treated this defence also as unavailable to the appellants.

On the whole there is no error in the judgment of the Exchequer Court, and the appeal must be dismissed with costs,

TASCHEREAU J;—I: agree that this appeal must be dismissed. The case, is ruled entirely by the law of the Province of Quebec. The bond in question was on the part ofBlack a contract of suretyship. Arts. 1:131 and: 1135 of the Civil Code have nothing to do with it. This is not an obligation with a penal clause.

Now by this bond Black undertook to make up whatever; deficiencies should be found against McPherson up to the amount of $1,600 and no more. In the case of a deficiency in a smaller amount the sureties would be bound to pay that amount; but nothing more. The

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Crown cannot be taken to have intended to stipulate that $1,600 would be paid by the sureties if the deficiency were say only $200. And on the other hand, however much higher were the deficiency over $1,600, the surety was not to be liable for any sum over $1,600. On the other points in the case, I fully agree with the remarks of the learned judge of the Exchequer Court[[22]](#footnote-23). It is the law of the Province of Quebec, as of the rest of the British Empire, in the absence of an express statutory enactment to the contrary, that the Crown is not liable for the laches or neglect of its officers, and the contentions of the appellants denying it are totally unfounded.

GWYNNE and KING JJ. concurred in the dismissal of the appeal.

GIROUARD J.—I concur with Mr. Justice Taschereau.

Appeal dismissed with costs.

Solicitors for the appellant: Madore, Guerin & Merrill.

Solicitor for the respondent: E. L. Newcombe.

1. Ex. C. R. 236. [↑](#footnote-ref-2)
2. 11 App. Cas. 157. [↑](#footnote-ref-3)
3. 13 App. Cas. 192. [↑](#footnote-ref-4)
4. 1 Ex. C. R. 68. [↑](#footnote-ref-5)
5. L. E. 7 Q. B. 666. [↑](#footnote-ref-6)
6. L. B. 8 Ex. 73. [↑](#footnote-ref-7)
7. L. R. Ir. 4 C. L. 397. [↑](#footnote-ref-8)
8. 2 Legal News 51. [↑](#footnote-ref-9)
9. Stu. K. B. 324. [↑](#footnote-ref-10)
10. 10 C. & F. 934. [↑](#footnote-ref-11)
11. 2 P. Wm. 268. [↑](#footnote-ref-12)
12. 6 Ex. C. R. 202. [↑](#footnote-ref-13)
13. 6 Ex. C. R. 236. [↑](#footnote-ref-14)
14. L. R. 7 Q. B. 666. [↑](#footnote-ref-15)
15. L. R. Ir. 4 C. L. 606. [↑](#footnote-ref-16)
16. 18 Wall. 662. [↑](#footnote-ref-17)
17. 66 Md. 80. [↑](#footnote-ref-18)
18. 11 App. Cas. 157. [↑](#footnote-ref-19)
19. [1894] A. C. 202. [↑](#footnote-ref-20)
20. 15 App. Cas. 267. [↑](#footnote-ref-21)
21. L. R. 7 Q. B. 666. [↑](#footnote-ref-22)
22. 6 Ex. C R. 230. [↑](#footnote-ref-23)