

HIS MAJESTY THE KING (RESPONDENT).. APPELLANT;

1927

AND

*Nov. 12.

*Dec. 16.

DOMINION BUILDING CORPORATION LIMITED (CLAIMANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Claim against—Reference by Minister to Exchequer Court—Jurisdiction—Motion for permission to withdraw reference—Appeal to Supreme Court of Canada—Jurisdiction—Exchequer Court Act, R.S.C. 1906, c. 140, s. 82—Claim not arising “in connection with the administration of” the Minister’s department (Exchequer Court Act, s. 38)—Order in Council purporting to direct withdrawal of reference—Res judicata—Pleadings—Restriction of statement of claim to claim as referred to the court—Amendment.

The claimant presented, in a letter to the Minister of Railways and Canals, a claim for damages for breach of an alleged contract for sale by the Crown to claimant’s assignor of certain land occupied by the Canadian National Railways. The contract involved the erection by the purchaser of a 26 storey building, four floors of which were to be leased to the Canadian National Railways, and five floors to the Department of Customs and Excise, and it was apparent from the claimant’s letter that the successful financing of its project depended on these leases being entered into, and that the failure to obtain them was the substantial basis of its claim. Several cabinet ministers took part in the negotiations for the alleged contract, and it was the subject of cabinet discussions and Orders in Council. The Acting Minister of Railways and Canals, purporting to act under s. 38 of the *Exchequer Court Act*, referred the claim, as set out in claimant’s letter, to the Exchequer Court. The Crown subsequently moved for permission to withdraw the reference, or, alternatively, for the statement of claim to be struck out, on the grounds: (1) that the reference was not authorized by s. 38, and was, therefore, *ultra vires* of the Minister of Railways and Canals; (2) that an Order in Council purporting to direct the withdrawal was effective, if the reference had been validly made; and (3) that the statement of claim as delivered was not within the purview of the reference authorized. The motion was dismissed ([1927] Ex. C.R. 101) and the Crown appealed.

Held, this Court had jurisdiction to hear the appeal, under s. 82 of the *Exchequer Court Act*; the rejection of the first and second grounds of the motion was tantamount to allowing a demurrer by the claimant to two prospective defences of the Crown, and effectively excluded them from the issues; moreover, the first ground challenged the Exchequer Court’s jurisdiction, and the judgment affirming that jurisdiction was a final judgment.

Held, further, that the claim did not arise “in connection with the administration of” the Department of Railways and Canals, within s. 38 of the *Exchequer Court Act*; the project was a governmental undertaking.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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ing, as distinguished from a merely departmental transaction; the Minister of Railways and Canals, if he executed the contract, was acting, not in the exercise of his administrative powers as such minister, but in the execution of a special authority deputed to him by the Government; the reference was, therefore, unauthorized, and the Exchequer Court had no jurisdiction to entertain the claim. On this ground, the appeal was allowed.

Dealing with the other grounds of the Crown's motion, it was *held*, that its contention that the reference had been withdrawn by Order in Council, was successfully met by claimant's answer of *res judicata*, this contention having been rejected by the Exchequer Court on a previous motion; that, as to the statement of claim, in so far as it might substantially depart from or exceed the claim set out in claimant's letter, it transcended the jurisdiction of the Exchequer Court, which was restricted to the very claim referred to it by the Minister; but the objection in this respect (if a proper subject of appeal to this Court) presented matter for the exercise of discretion as to amendment, rather than a ground for striking out the claimant's pleadings or otherwise summarily determining its action.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1) dismissing its motion for an order granting leave to withdraw a reference to that court of the claim against His Majesty presented by the claimants, or, alternatively, for an order striking out the statement of claim filed. The material facts of the case, and the grounds of the motion, are sufficiently stated in the judgment now reported. The appeal was allowed.

Lucien Cannon K.C. and *C. P. Plaxton K.C.* for the appellants.

G. H. Kilmer K.C. and *R. V. Sinclair K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The Crown appeals from an order of the Exchequer Court dismissing a motion made on its behalf that it be permitted to withdraw the reference to that Court of a claim against His Majesty presented by the claimants, or, alternatively, that their statement of claim be struck out. The Acting Minister of Railways and Canals, purporting to do so under s. 38 of the *Exchequer Court Act*, referred to that Court this claim, then before

him in the form of a letter from the claimants, demanding payment of \$981,000 damages said to have arisen from breach of an alleged contract for the sale by the Crown to their assignor of a certain property occupied by the Canadian National Railways, situate at the northwest corner of King and Yonge streets in the city of Toronto.

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The motion before the Exchequer Court was based on three grounds:

1. That the reference was not authorized by s. 38 of the *Exchequer Court Act* and was, therefore, *ultra vires* of the Minister of Railways and Canals:

2. That an Order in Council purporting to direct the withdrawal of the reference was effective, if such reference had been validly made;

3. That the statement of claim as delivered was not within the purview of the reference authorized.

A question of the jurisdiction of this Court to entertain the present appeal, raised by a preliminary motion to quash, stood over to the hearing on the merits and must now be dealt with.

Under s. 82 of the *Exchequer Court Act*, in any judicial proceeding in which the amount in controversy exceeds \$500, there is a right of appeal to this Court from a final judgment of the Exchequer Court or a judgment pronounced by it upon any demurrer or question of law raised by the pleadings. In rejecting the first and second grounds of the Crown's motion, the Exchequer Court has determined that, assuming the facts to be as stated in the claimants' letter preferring the claim referred to the court, two grounds of defence, which might otherwise have been set up by the Crown, are not available to it because not good in law, inasmuch as it has held that the reference was validly made and that the Order in Council directing its withdrawal is without legal force. That is tantamount to allowing a demurrer by the claimant to two prospective defences of the Crown, and effectively excludes them from the issues to come before the court. Moreover, the first ground of the motion challenges the jurisdiction of the Exchequer Court to entertain the claim, and the judgment affirming that jurisdiction is final. We are of the opinion

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that this appeal is, therefore, competent. It is within the intendment, if not within the literal terms, of s. 82 of the *Exchequer Court Act*.

The second ground of the Crown's present motion was, in our opinion, successfully met by the claimants' answer of *res judicata*.

On a previous motion by the claimants for an order that their claim be taken *pro confesso* for default in delivery of a statement of defence thereto by the Crown, the learned President of the Exchequer Court had rejected the Crown's answer that the reference had been withdrawn by Order in Council (1). In his reasons for judgment he had said:

I am of opinion that there was no authority for the withdrawal of the Reference by Order in Council, that the reference is still effective, and that the statement of claim is properly before the Court * * *. I am not aware of any statute or other authority which enables the Crown of its own motion to withdraw a reference, * * *

In disposing of the motion now before us the same learned judge, referring to the earlier motion, said (2):

Recently the plaintiff moved for judgment upon the ground that the respondent was in default in filing a statement of defence, which was refused, and the respondent was given further time to file his defence. Upon the hearing of that motion before me, the respondent contended that the reference had been revoked by the Order in Council referred to, and I decided against this contention.

The ground that the reference had been withdrawn by Order in Council was, therefore, not open on the present motion.

The objection based on an alleged departure in the statement of claim from the terms of the reference authorized, while, no doubt, important (if a proper subject of appeal to this Court), seems to us rather to present matter for the exercise of discretion as to amendment than to afford a ground for striking the pleading from the records of the court or otherwise summarily determining the claimants' action.

The claim put forward in the statement of claim, we should perhaps assume, was intended to be that set forth in the claimants' letter upon which the reference was directed. Its purview must be gathered from the terms in which it is couched in the letter, since the document by which the reference was made reads as follows:

(1) [1927] Ex. C.R. 79.

(2) [1927] Ex. C.R. 101, at p. 104.

IN THE EXCHEQUER COURT OF CANADA

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In the matter of

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DOMINION BUILDING CORPORATION, LIMITED.....CLAIMANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.

Dated at Ottawa, this sixteenth day of September, 1926.

(Sgd.) H. L. DRAYTON,

Acting Minister of Railways and Canals.

To the Registrar of the Exchequer Court of Canada.

The "annexed claim" was the claimants' letter of the 4th of September, 1926. In so far as the claim set forth in the statement of claim may substantially depart from or exceed that contained in the claimants' letter, it transcends the jurisdiction of the Exchequer Court, which is restricted to the very claim referred to it by the Minister. For that claim only could judgment be given.

The first ground of the appellant's motion, and that most urgently pressed upon us, requires careful consideration.

By s. 38 of the *Exchequer Court Act* it is enacted that

Any claim against the Crown may be prosecuted by petition of right or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

The important question now presented is whether the claim which forms the subject matter of the present proceeding arises "in connection with the administration of" the Department of Railways and Canals within the meaning of the section just quoted.

In construing that section it is important to note that, while "any claim against the Crown may be prosecuted by petition of right," no doubt for convenience and to avoid the necessity of obtaining the fiat of the Governor General, which is essential to the filing of a petition of right, intra-departmental claims may be summarily referred by the presiding Minister. But such claims must

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arise "in connection with the administration of" the department and they must exclusively concern such administration.

Taking up the claim as presented in the letter of the 4th of September, 1926, we find that, while the formal demand is for a sum of \$981,000,

the amount which the undersigned (the claimants) have lost or are liable for, by reason of the cancellation of the contract

(i.e., the contract for the purchase of the lands in question), the letter in describing the claim and the circumstances in which it is alleged to have arisen, says:

It was well understood from the inception of the negotiations by the Rt. Hon. the Prime Minister, by the Rt. Hon. the Minister of Railways and Canals, the Hon. the Minister of Public Works, and by other members of the Cabinet, * * * that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by (*sic*) the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary Orders in Council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase, could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

In an earlier passage the claimants, referring to the Order in Council sanctioning the sale, had said:

It was a term of the Order in Council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the Order in Council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the Order in Council, the ground floor and three floors of the building.

It was part of the original negotiations that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by Order in Council, and an Order in Council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed, at the request of the Government, an extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned Order in Council would be passed. This Order in Council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to

have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary Order in Council to make the contract completely effective.

It is, therefore, apparent on the face of the claim, as referred to the court, that the leasing of the nine floors of the projected building—four to the Canadian National Railways and five to the Department of Customs and Excise—was an essential feature of the project of the claimants, so essential that its being successfully financed was wholly dependent on these leases being entered into and that without them the contract had no financial value to the claimants. Indeed their failure to obtain such leases is the substantial basis of the present claim, although in form it is a claim for breach of the contract of sale. The erection of the 26 storey modern fireproof office building was a term of the sale of the property to the claimants' assignor. The financing of the entire operation depended upon the claimants being assured of the two leases, one to the Canadian National Railways and the other to the Department of Customs and Excise.

Moreover, the contract, with all its terms, must be considered as a whole. It was negotiated not by the Minister of Railways and Canals alone, but

by the Rt. Hon. the Prime Minister, the Rt. Hon. the Minister of Railways and Canals, the Hon. the Minister of Public Works and by other members of the Cabinet as well as by the Canadian National Railways. The claimants' letter in effect says so. The Minister of Customs and Excise must have been a party to the negotiations, inasmuch as they covered the leasing of floor space for his department. If, therefore, the contract for breach of which damages are claimed, was entered into, by His Majesty represented by the Minister of Railways, the latter, in executing that contract, was acting, not in exercise of his administrative powers as Minister of Railways and Canals, but in the execution of a special authority deputed to him by the Government. As Minister of Railways and Canals he could not bind the Departments of Customs and Excise and of Public Works, and it may be doubtful how far he could bind the Canadian National Railways. Yet, admittedly, unless engagements to take leases for the Department of Customs and Excise and for the Canadian National Railways were assured, the contract could not be carried out; it had no financial value to the claimants or

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their assignor. The whole project was a governmental undertaking, as distinguished from a merely departmental transaction. As such, it became the subject of cabinet discussion and of Orders in Council. So, too, in communicating the withdrawal of the Crown from the project, the Minister of Railways must have acted as the agent and representative of the Government. Only in that capacity could he properly take that action in regard to such a contract.

For these reasons, we are satisfied that the claim of the Dominion Building Corporation for damages for the repudiation of the alleged contract is not a claim which arises "in connection with the administration of" the Department of Railways and Canals, within the purview of s. 38 of the *Exchequer Court Act*. It follows that the Exchequer Court is without jurisdiction to entertain it.

The appeal must be allowed. Under the circumstances there will be no order as to costs.

Appeal allowed.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent: *R. V. Sinclair.*
