

THE CANADIAN PACIFIC RAIL- } APPELLANTS;
WAY COMPANY (SUPPLIANTS) .. }

1906
*Nov. 30.
*Dec. 5.

AND

HIS MAJESTY THE KING (RE- } RESPONDENT.
SPONDENT)

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Navigation—Trent canal crossing—Swing bridge—Cost of construction—Maintenance—Order in council.

The C.P. Ry. Co. applied for liberty to build a bridge over the Otanabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order in council was passed providing that "the company * * shall construct either a swing in the bridge now in question * * the cost to be borne by themselves or else a new swing bridge over the contemplated canal (Trent Valley Canal) in which case the expense incurred over and above the cost of the swing itself and the necessary pivot pier therefor shall be borne by the Government."

A new swing bridge was constructed over the canal by agreement with the company.

Held, that the words "the cost of the swing itself and the necessary pair" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company.

APPEAL from a judgment of the Exchequer Court of Canada in favour of the Crown.

The suppliants by their petition of right claimed a return of moneys expended in the operation and maintenance of the swing bridge over the Trent Valley Canal and a direction that the expense thereof should be borne by the Crown in future. The circumstances

*PRESENT:—Girouard, Davies, Idington, Maclellan and Duff JJ.

1906
 CANADIAN
 PACIFIC
 RY. CO.
 v.
 THE KING.

under which such claim arose are set out in the above head-note and in the judgment on this appeal.

Chrysler K.C. for the appellants.

Newcombe K.C., Dep. Minister of Justice, for the respondent.

GIRQUARD J. concurred in the opinion of Mr. Justice Davies.

DAVIES J.—I think this appeal should be dismissed. I do not share the doubts suggested as to the meaning of the agreement with respect to the cost of the operation of the swing in the bridge. The railway company in the first instance applied for liberty to build a bridge over the Otanabee River, which was navigable, undertaking to construct a draw in the bridge should the Government at any time consider this necessary. The order in council granting the application recited the application and that the engineer in charge of the works for the improvement of the navigation while holding the construction of a swing in the proposed bridge unnecessary owing to the proposed construction of a canal, urged that provision should be made for the construction of a swing bridge over the contemplated canal on the Peterborough section of the improvements.

The order in council then went on to give the necessary consent to the construction of the bridge over the river on the plans submitted, *conditionally*

the company at the time within two months after being called upon by the Minister of Railways shall construct either a swing in the bridge now in question * * * the cost to be borne by them-

selves, or else a new swing bridge over the contemplated canal in which case the expense incurred *over and above the cost of the swing itself and the necessary pivot pier therefor* shall be borne by the Government.

An agreement was then entered into between the Government and the company in which, after reciting the application of the company for permission to construct the bridge over the river, the recital went on to declare that in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, a swing in the said bridge might not be necessary, but in that case there should be a swing bridge over the canal. The agreement then recited the conditional permission of the Governor in Council for the construction of the bridge and "for the fulfilment of certain of the said conditions" and went on to provide

that the company should either construct a swing in the proposed bridge or a new swing bridge over the proposed canal (and that) in case of a new swing bridge over the said canal the cost of the swing itself and the necessary pivot pier should be borne by the company and the balance by the Government.

I think there can be no doubt that the balance here spoken of means the balance of the cost of the construction of the bridge, abutments, approaches, etc.

No special words are used as to who shall pay for the cost of operating the swing. The learned counsel for the company frankly concedes that if the swing had been required by the Crown to have been put in the river bridge the cost of operating it would have had to be borne by the company. He does so because as he says its operation would be required for the purposes of navigation. He denies, however, that such concession applies to the swing in the canal bridge.

1906
CANADIAN
PACIFIC
RY. CO.
v.
THE KING.
Davies J.

1906

CANADIAN
PACIFIC
RY. Co.v.
THE KING.

Davies J.

The latter swing was an alternative and substituted one for the river bridge swing. Its object was precisely the same for the purposes of navigation. It was expressly for the purposes of improving the navigation at the point of the river that the canal was constructed and the condition on which the permission to build the river bridge was given at once applied. The same provision as to the construction of a swing in the river bridge which admittedly involved its maintenance and operation must, in my opinion, necessarily carry the same obligation when the alternative and substituted canal bridge was built.

The objects of the swing in both cases were the same, the facilitation of navigation and the prevention of its obstruction. The provision for it was expressly made for that object with the privilege left with the Government of choosing in which bridge the swing should be put. The obligations arising as to the operation of the swing are the same in each case and are necessarily involved in the language used.

The canal was substituted for the river and the swing in the former bridge substituted for that originally contemplated in the latter. If the construction of the latter necessarily involved its operation, as conceded, so must the substitution of the canal swing carry the same obligation, the object the parties were seeking to attain being the maintenance and improvement of the navigation and the consent to the creation of the river bridge being given conditionally on that paramount right being maintained by means of a swing in whichever bridge the Government elected it should be placed.

In short I think "the cost of the swing itself and the necessary pivot-pier" which the agreement pro-

vided the company should bear included under the circumstances and in the connection in which they were used, the operation and maintenance of the swing.

1906
CANADIAN
PACIFIC
RY. CO.
v.
THE KING.
—
Davies J.
—

IDINGTON J.—I agree that this appeal should be dismissed. I agree also in the general reasoning of my brother Sir Louis Davies, in his judgment herein, but cannot find, as he does, in the closing sentence thereof, that the operation and maintenance of the swing are covered by the expressions used in the agreement.

I fail rather to find any obligation upon respondent to bear such costs of operation and maintenance or any part of it.

MACLENNAN and DUFF JJ. concurred in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Scott & Curle.*

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