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BETWEEN:

SALMO INVESTMENTS LIMITED.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—"Public work"—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c)—The Relief Act, 1933, 23-24 Geo. V, c. 18—Projects proposed and carried out pursuant to agreement entered into between the Governments of Dominion and Province for financial assistance in carrying out relief measures are not "public works" within the terms of the Exchequer Court Act.

Under the authority of The Relief Act, 1933, 23-24 Geo. V, c. 18, an agreement was entered into between the Government of the Dominion of Canada and that of the Province of British Columbia, which provided for the carrying out of certain relief projects by the Government of the Dominion, pursuant to certain conditions.

The Province proposed that the Dominion should initiate work upon a certain highway known as the Spokane-Nelson highway. The nature and extent of the project were determined by the authorities of the province which owned the highway; the actual work was carried out by the men on the strength of the project recruited or selected by a Department of the Government of the Dominion.

In the carrying out of the project burning operations were necessary, and a fire started on the project spread to timber lands owned by the suppliant, causing damage.

The suppliant alleges that the loss of the timber was due to the negligence of the officers and servants of the respondent.

The matter comes before the court on an order upon consent of the parties that the points of law raised in the pleadings should be heard in advance of the trial.

Held: That the project was not a "public work" within the terms of the Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (*c*) as in force in 1934.

2. That the project was in reality a provincial work; the fact that it took the form of highway improvement carried out by and under the direction of the Dominion, does not alter the substance of the arrangement entered into and its real purpose, which was to render financial assistance to the province in carrying out necessary relief measures.

ARGUMENT on questions of law raised in the pleadings.

The argument was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

E. F. Newcombe, K.C. for suppliant.

Edward Miall, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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THE PRESIDENT, now (March 30, 1939) delivered the following judgment:

The suppliant in this petition of right proceeding is the owner of certain lands and timber limits in the Kootenay District, in the Province of British Columbia, which were burned over in July, 1934, owing, it is alleged, to the negligence of the officers and servants of the respondent, causing a loss of standing timber of the value of more than $24,000, it is claimed. By consent of the parties it was ordered that the points of law raised by the pleadings should be heard in advance of the trial. The relevant facts appear in a written Statement of Facts, signed by counsel for the parties. The action is grounded on s. 19 (*c*) of the Exchequer Court Act, R.S.C., 1927, c. 34, as in force in 1934, and which gave the Exchequer Court exclusive original jurisdiction to hear and determine, *inter alia*, the following matter:

> Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

The facts of the case are quite unusual.

By Chap. 18 of the Statutes of Canada, 1932-1933, 23-24 Geo. V, there was enacted "The Relief Act, 1933." The reasons for the enactment are set forth in the preamble to the Act, but so far as we are here concerned its purpose was to enable the Governor in Council to "support and supplement the relief measures of the Provinces and grant them financial assistance in such manner and to such extent as the Governor in Council may deem expedient," should the Provinces "require assistance in carrying out necessary relief measures and to meet financial conditions as the same may arise." By sec. 2 of the Act the Governor in Council was empowered, notwithstanding the provisions of any statute or law, to "enter into agreements with any of the provinces respecting relief measures therein," upon such terms and conditions as might be agreed upon. Additional powers were granted the Governor in Council but I need not enumerate them.

In August, 1933, under the authority mentioned, an agreement was entered into between the Government of the Dominion of Canada and the Government of the Province of British Columbia, therein referred to as the

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"Dominion" and "Province" respectively. Paragraph 2 of the Agreement is as follows:

The Dominion will assume responsibility for the care of all "physically fit homeless men," and will for that purpose organize and execute relief projects consisting of works for the general advantage of Canada which otherwise would not have been undertaken at this time. The conditions under which these relief projects will be carried out are the following:

(1) Shelter, clothing and food will be provided in kind and an allowance not exceeding twenty cents per diem for each day worked will be issued in cash.

(2) Eight hours per day will be worked; Sundays and Statutory Holidays will be observed, and Saturday afternoons may be used for recreation.

(3) Persons leaving voluntarily except for the purpose of accepting other employment offered or for the reason that they no longer require relief and those discharged for cause will thereafter be ineligible for reinstatement.

(4) Free transportation will be given from place of engagement and return thereto on discharge except for misconduct.

(5) No military discipline or training will be instituted; the status of the personnel will remain civilian in all respects.

The relief projects contemplated by this paragraph were to be for the general advantage of Canada and apparently would have no application to the particular relief project with which we are here concerned, from which ensued the damage to property alleged and claimed by the suppliant, and which I shall presently explain.

Paragraph 4 of the agreement is follows:

The Dominion may initiate such works for the general advantage of Canada as may be decided upon by the Dominion, and the Province may propose other works of a similar character for the purpose of providing occupation for physically fit homeless men.

It was, I assume, under this provision of the agreement that the Province proposed that certain work be carried out upon a highway owned by the Province, and soon to be mentioned, but there was no declaration by the competent authority, Parliament, that this proposed work was for the general advantage of Canada. Paragraph 5 of the agreement is as follows:

The Province will provide all rights of way or other property whether now owned by the Province or private individuals which may be required for the proper execution of the aforesaid projects.

Paragraphs 6, 7 and 8 of the agreement, as summarized in the Statement of Facts, provided for the Province making available for the use of the Dominion without charge during the period of the agreement all relief camps established by the Province, camp equipment, tools, stores and

supplies thereat or held in reserve therefore, such machinery as might be necessary and available for the proper execution of the projects and the apparatus for such machinery, and the assistance of such members of the permanent engineering staff of the Province as could be made available from time to time as required.

It is agreed that the Province, upon the recommendation of the Chief Engineer of the Department of Public Works of the Province, requested and agreed that the Dominion should initiate work upon a certain highway, called the Nelson-Spokane highway, extending from a certain point in the Province to the Canada-United States boundary line, and which highway was owned by the Province. In consequence of such request and agreement the Dominion instituted a project, known as Project No. 65, the project referred to in the suppliant's petition, and which I shall refer to hereafter as "the Project."

It is also agreed that the Project involved, by arrangement with the Province, the carrying out of certain improvements, such as the grading, widening and straightening, of the Nelson-Spokane highway, and the arrangements provided that the authorities of the Province would indicate the nature of the work to be done such as the line which any re-routing of the highway would take, the extent to which the same should be widened, but the actual work would be carried out by the men on the strength of the Project.

As I understand paragraph 4 of the Statement of Facts, all personnel connected with the Project were so connected either as labourers, or in an administrative or supervisory capacity, under the terms and conditions set out in various Orders of the Governor-in-Council. The requisite labour was to be recruited from those in receipt of relief from federal, provincial or municipal sources, under the terms and conditions earlier mentioned, or as from time to time determined by the Minister of National Defence. The administrative and supervisory personnel was to be selected by the Minister of National Defence, through the officers of his Department, pursuant to such conditions as he should prescribe. It would appear therefore that while the nature and extent of the Project were determined by the authorities of the Province, the actual work was carried out by the men on the strength of the Project, who were

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recruited or selected by the officers of the Department of National Defence, the Department of Government designated by the Governor in Council to administer any relief works initiated under the authority of The Relief Act.

In the carrying out of the Project it appears that burning operations were necessary, and a fire started on the Project apparently spread to the timber lands of the suppliant, causing the alleged loss thereto. The portion of the Statement of Facts relevant to this feature of the case is expressed as follows:

> For the purpose of this argument and such purpose alone it is to be assumed that the damage claimed was sustained from a fire which originated from slash burning operations carried on by project No. 65, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

This may well be the last case to be heard in this Court involving s. 19 (*c*) of the Exchequer Court Act, as it stood prior to June, 1938. In the new s. 19 (*c*) of the Act the words "upon any public work" have disappeared. The principal point for decision here is whether the Project in question was a "public work," within the meaning of s. 19 (*c*). I was referred by counsel to many of the well known cases, decisions of the Supreme Court of Canada, which involved the construction of section 19 of the Exchequer Court Act, and particularly the meaning to be ascribed to the phrase "public work." I do not propose reviewing those authorities. This was done in a very comprehensive way, and with great clarity and force by Duff C.J. in the case of the *King* v. *Dubois* (1).

In the *Dubois* case the learned Chief Justice, in his treatment of the course of legislation upon the subject-matter which concerns us here, pointed out that the jurisdiction created by s. 16 (*c*) of Chap. 16 of the Statutes of 1887 was a jurisdiction transferred from the Official Arbitrators to the Exchequer Court, and it was by that statute that the Exchequer Court of Canada, in its present constitution, came into being, and was given jurisdiction to entertain actions against the Crown involving injury to person or property on any public work resulting from the negligence of officers or servants of the Crown. The jurisdiction of the Official Arbitrators had originally been

(1) (1935) S.C.R. 378.

constituted by section 1 of chapter 23 of the Statutes of 1870, which provided that where there was a supposed claim upon the Government of Canada "arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada" the claim might be referred by the head of the Department concerned to Official Arbitrators who had power to hear and make an award upon such claim. The learned Chief Justice also pointed out that in the Revised Statutes of 1886, the Act relating to Official Arbitrators reproduced this provision in slightly altered form, the words there being "claim . . . . arising out of any death, or injury to person or property on any public work," and "public work" is defined by section 1 thereof, and that definition the learned Chief Justice quoted fully, and it is to be found at pages 383 and 384 of the report of the *Dubois* case, and I need not repeat it. I think the language there used is precisely the same as that used in the present Expropriation Act, R.S.C., 1927, c. 64, in defining a "public work."

The learned Chief Justice was of the opinion that when the jurisdiction conferred by s. 6 of the Official Arbitrators Act was transferred to the Exchequer Court by the Act of 1887, the phrase "public work" as employed in s. 16 (*c*) of the latter statute, must be read and construed by reference to the definition given in the Official Arbitrators Act, and in the contemporary Expropriation Act. In 1917 there was enacted s. 19 (*c*), the section applicable in this case, and though the phrase "on any public work" was placed in another position in the section, and the preposition "upon" substituted for the preposition "on," that, the Chief Justice points out, did not expand the meaning of the term "public work," it remained unchanged; it was an amendment within the framework of s. 16 (*c*) of the Act of 1887, which framework was not altered by the amendment, and with that I agree.

The definition of "public work" as found in the Official Arbitrators Act and the contemporaneous Expropriation Act did not, as stated by Duff C.J. in the *Dubois* case, embrace any subject not falling within that definition. Those statutes contemplated property or works owned or controlled by the Government of Canada, something acquired, constructed, maintained or improved, by money

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voted and appropriated by the Parliament of Canada, for a specific public purpose. The present Expropriation Act does not appear to deviate from that, and s. 19 (*c*) speaks only of a "public work." The decided authorities seem to have proceeded upon that principle. It was a limited jurisdiction that was conferred upon the Exchequer Court. The liability of the Crown for injury to the person or property is limited to that occurring "upon any public work," when resulting from the negligence of any officer or servant of the Crown. A liability on the part of the Crown generally for every tort committed by its servants or employees was of course not contemplated.

I have explained the nature of the Project, and the circumstances under which it was initiated and carried out. I do not think it was a "public work" within the meaning of s. 19 (*c*). The highway was owned by the Province, the Project was proposed by the Province and was carried out by the Dominion at the request, and with the agreement, of the Province. In essence it was financial assistance rendered the Province in carrying out necessary relief measures. That it took the form of highway improvement, and was carried out by and under the direction of the Dominion, does not alter the substance of the arrangement, and its real purpose. It may have been in the national interest that the Dominion should support and supplement the relief measures of the Province but that would not, I think, make the Project a "public work" in the sense of the statute. It was really a Provincial work. I have given anxious consideration to the matter but I find myself unable to reach the conclusion that the Project was a "public work" within the meaning of the statute, though much, I have no doubt, may be said for the contrary view. The Relief Act, which authorized the expenditure in question, does not, I think, purport to extend, and did not intend to extend, the meaning of the phrase "public work," or to enlarge the liability of the Crown for any injury to the person or property caused by the negligence of its servants. I do not think I can add anything useful by any extended discussion of the matter. My opinion therefore is that the Project was not a "public work" within the terms of the relevant statute.

With that conclusion it becomes unnecessary to discuss the question as to whether or not the persons employed

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on the Project were officers or servants of the Crown. The terms of employment, applicable to some at least, were unusual, but that was because it was essentially a relief measure. If I were of the opinion that the Project was technically a "public work" I would feel obliged to hold that those employed on the Project would have to be treated as officers and servants of the Crown, regardless of the terms of employment.

This is a matter in which I think I would be justified in refraining from making any order as to costs.

Judgment accordingly.