

COMMISSIONER'S REPORT

IN THE MATTER OF

The Commission, under the provisions of Part I of the Inquiries Act, to inquire into claims that have been put forward against the Dominion Government from time to time on behalf of the estate of the late John Ross for the recovery of certain advances made by the said John Ross as a banker to the contractors constructing sections 3, 6, 9 and 15 of the Intercolonial Railway.

TO

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL,

Between:

JOHN THEODORE ROSS, of Quebec, assignee of the claims of Frances Ella Ross, of the City of Quebec, of Annie Ross, wife separated as to property of John V.F. Vasey-Fitzgerald being, with himself, the heirs at law of the late John Ross, of the City of Quebec,

Claimant;

-and -

HIS MAJESTY THE KING,

Respondent.

WHEREAS, by an Order in Council of the 6th July, 1934, it was provided as follows:

"The Committee of the Privy Council have had before them a report, dated 28 April, 1934, from the Minister of Justice, submitting that claims have been put forward against the Dominion Government from time to time on behalf of the estate of the late John Ross for the recovery of certain advances made by the said John Ross as a banker to the contractors constructing sections 3, 6, 9 and 15 of the Intercolonial Railway.

The Committee, on the recommendation of the Minister of Justice, advise that the Honourable L. A. Audette, retired judge of the Exchequer

John Theodore Ross
20/5/35

Court of Canada, be appointed a Commissioner, under Part I of the Inquiries Act, to inquire into these claims, and to report whether in his judgment the estate of the late John Ross has any justiciable claim against the Crown in the premises."

WHEREAS the undersigned, L. A. Audette, has been duly nominated, constituted and appointed Commissioner, under the Great Seal of Canada, to conduct the said inquiry and report thereon to His Excellency the Governor General in Council.

The undersigned, L. A. Audette, acting in pursuance of the authority and power vested in him by the said Order in Council, the Inquiries Act and his Commission, has the honour to report as follows:

The first hearing of the matter was proceeded with, at Quebec, on the 18th December, 1934, when the Commissioner acquainted the parties with the full scope of the submission by the Commission and directed the claimant to file a statement of claim setting forth his claim and the Crown to produce a statement in defence or answer thereto.

Mr. J. O. Gagnon, K.C., and Mr. John M. Home appeared for the claimant, and Mr. E. Baillargeon, K.C., appeared for the Crown.

The parties having complied with the Commissioner's direction as to the manner of proceeding and having filed pleadings, the matter was finally proceeded with at Quebec on the 8th May, 1935.

It was agreed by the parties, at my suggestion, that, with the object of saving costs which would be very heavy if evidence were adduced in respect of these claims, counsel for the Crown, as in the case of a demurrer, should, with all proper reserves, admit, for the purpose of the argument, all matters of fact set forth in the statement of

claim. That was done. And my inquiry must be directed towards ascertaining and determining whether upon the facts alleged being taken as admitted, there is or is not a justiciable claim against the Crown, in the premises.

Therefore, having duly entered upon and made such inquiry as aforesaid and upon hearing what was alleged by counsel for the respective parties, the undersigned submits the following:

By the statement of claim the estate Ross formulates and presents two branches, two counts or subject of claim.

One claim is in respect of all rights and interests of the contractors Bertrand and Berlinguet in, or incident to, the several contracts for the building of sections 3, 6, 9 and 15 of the Intercolonial Railway: the Berlinguet contract bearing date of 25th May, 1870, and being for sections 3 and 6 and the Bertrand contracts, for sections 9 and 15, bearing date of 26th October, 1869, and 15th June, 1870, - the said contractors having assigned all such rights to Messrs. Glover & Fry and Dunn & Home, who in turn assigned them to the late John Ross.

The second claim or count is with respect to monies alleged to have been advanced to the contractors Berlinguet and Bertrand by the late John Ross as banker.

These assignments, it will be noticed, only cover the rights of the contractors, - quae contractors, in the execution of their contract.

At the hearing, I called the attention of claimant's counsel to the fact that the statement of claim did not disclose that the late John Ross had ever advanced any monies to the contractors; but that it only stated that John Ross had advanced monies to Messrs. Glover & Fry and to Messrs. Home & Dunn, the said John Ross not being thereby connected with advances of monies to the contractors and I allowed them

to state their position upon the matter, which they did by amending paragraphs 78 and 84 of their statement of claim which now read as follows:

"78. That the said John Ross advanced large sums of money to the said Messrs. Glover and Fry and Dunn and Home which sums of money were to be used, and were in fact used, for the financing of the prosecution of the works as aforesaid on sections 3, 6, 9 and 15: the said advances being thus made by the late John Ross to Messrs. Glover and Fry and Dunn and Home in their capacities of sureties and bankers to the contractors.

84. At the time mentioned in paragraph 83, John Ross had advanced the net sums now claimed, to wit: the net sum of \$641,465.00 as of the date of the taking over of the work by the Commissioners."

This amendment now clarifies the situation and it does now appear that the late John Ross never did directly advance any money to the contractors; but that he did advance money to Messrs. Glover & Fry and Dunn & Home who were "the securities and bankers to the contractors". This is further confirmed by paragraph 79 of the statement of claim which stated that the said John Ross held, in November 1871, security ultimately yielding \$159,000. on loans at that date amounting to \$245,000.00 made to the said four above mentioned parties.

Having briefly stated the most prominent and outstanding facts of the case, I shall now proceed with the consideration of the several intricate questions arising therefrom.

The scope of the Commission is strictly in respect of claims for the recovery of advances made by the late John Ross as banker to the above mentioned contractors.

The first claim made by the statement of claim in respect of damages, extra work, etc. arising out of the contracts which have been assigned, obviously does not come within the scope of the submission by the Commission and

the undersigned Commissioner has therefore no authority and power to deal with it. The scope of the Commission is exclusively in respect of advances of money made by the late John Ross as banker.

Even if this class of claim were to be considered, there are insurmountable objections in respect thereto which would preclude anyone claiming recovery thereunder.

First, it does not appear anywhere that these assignments of the claim against the Crown have ever been recognized and accepted by the Crown, although the assignments appear to have been served on the Crown, which, as between the Crown and subject, means nothing. A claim against the Federal Crown cannot be validly assigned, unless there is some Dominion legislation authorizing the same. On ground of public policy the Crown cannot be expected to seek out assignees of claims. See Powell vs The King (1); Malone vs The King (2) affirmed (3); Fitzpatrick vs The King (4).

This inhibition with respect to assignments of claims against the Crown must apply with greater force in cases of litigious rights such as those mentioned herein. Arts. 1582 and 1583 C.C.P.Q. See Olmstead vs The King (5).

There is more, these claims are now res judicata as having been already passed upon and decided by the Exchequer Court, the Supreme Court of Canada and the Judicial Committee of the Privy Council. See Berlinguet vs The Queen (6); Ross vs The Queen (7). See Coutlee's Digest, Appendix B. 1589. The allegation of par. 91 of the statement of claim alleging that the appellant Ross discontinued "on the representations of some of the Ministers of the Government" his appeal to the Judicial

(1) 9 Can. Ex. R. 364-374.

(2) 18 Ex.C.R. 1.

(3) 59 S.C.R. 678.

(4) 59 Ont. L. R. 331.

(5) 53 S.C.R. 450, at 453.

(6) 13 S.C.R. 26.

(7) 4 Ex.C.R. 390,

25 S.C.R. 564 and P.C.

Committee of the Privy Council seems somewhat not according to the actual facts. There was considered judgment, with reasons, given by the said Committee dismissing Ross's appeal from the Supreme Court of Canada. The appeal was not discontinued or abandoned.

Furthermore, I wish to point out that the allegation of paragraph 43 of the statement of claim is not either quite according to the actual facts.

On the 1st August, 1896, the Judicial Committee of the Privy Council on the Appeal of Ross from the judgment of the Supreme Court of Canada (ubi supra) decided that Shanly's report "was not in form or substance the final and closing certificate required" (See in Registry Supreme Court, Ottawa, the judgment and reasons for judgment on that appeal to P.C.).

Coming now to the second branch or count of the claim with respect to the recovery of advances alleged to have been made by the late John Ross as banker, to the above mentioned contractors, I am bound to find that the said Ross never did directly make advances of money to the said contractors. He made advances of money to Messrs. Glover & Fry, and Dunn & Home who were the bankers of the contractors, held securities from them for such advances and that in no way can the said late John Ross be, under the circumstances of the case, reckoned as the banker of the contractors. There was no contractual relation incident upon the obligations resulting from that of borrower and lender as between the claimant and the Crown.

However, there was and there is beyond any doubt no privity of contract as between the late John Ross and the Crown in respect of the advances of money so made to Messrs. Glover & Fry and Dunn & Home, even if the latter used such monies for the benefit of the contractors.

If there is no privity of contract between the estate of the late John Ross and the Crown, the claim is obviously not justiciable. Nihil aliud est actio, quam jus quod sibi debeatur justicio persequendi (Pandectae de Justinien, Lib. 44, tit. 7 - 43, p. 314).

There is no legal connection between the said parties. The facts disclosed or invoked do not give the right to take legal proceedings in respect thereof in a court of competent jurisdiction. There is no right of action against the Crown on the alleged facts set forth in the statement of claim, - no court of law could entertain such a case. The claim is manifestly beyond the jurisdiction of a competent court of law.

The word or term justiciable mentioned in the Commission to the undersigned means amenable to the jurisdiction and liable to be tried in a court of justice, or any question or matter that may properly come before a court of justice for decision and where relief can be found.

Justiciable controversies are, in their very nature, those "the parties to which may be reached by judicial process." The word justiciable is also defined as "a case proper to be examined by a court of justice", - qui relève de la compétence des tribunaux.

There is in the premises no privity, no right of action, therefore the claim is not justiciable.

There is the question raised in the statement of claim that late Sir Hector Langevin, then a Minister of the Crown, induced the late John Ross to continue his advances. That question has been decided and settled upon the facts and the law by the judgments of the Exchequer Court and Supreme Court of Canada, denying any relief therefrom. A

Minister cannot without the authority of an Order in Council bind the Crown. The Crown speaks through Orders in Council. See Jacques Cartier Bank vs The Queen (1); The Quebec Skating Club vs The Queen (2).

The Crown, by its statement in defence, pleads prescription. Upon the question of prescription or statute of limitation, I must, in limine, state that I do not intend to deal with that question in respect of the claim made under the contract and as specially argued, at the hearing, in respect of the Ross case (3), because that class of claim is beyond the scope of the submission by the Commission and the undersigned Commissioner has no authority or power to deal with the same.

However, the prescription is pleaded and obtains clearly in respect of claims made for advances of monies, as above set forth, and such claim is declared to be absolutely and clearly prescribed.

There is still a further question upon which I must pass and that is the controversy raised by paragraph 88 of the statement of claim, which reads as follows:

"88^o - That as well for other reasons herein-above enumerated and set out, the non-payment of the sum advanced by John Ross constitutes an 'enrichissement sans cause' to the great benefit of the Government of Canada and to the prejudice of the Estate of John Ross."

This allegation of enrichment at the expense of others is not justified under the circumstances of the case. The trouble encountered by the contractors in the execution of their contract arose and resulted entirely

- (1) 25 S.C.R. 84.
- (2) 3 Ex.C.R. 387.
- (3) 4 Ex.C.R. 390.

from their inexperience and their incompetence as stated in the judgment of the Supreme Court of Canada in the Berlinguet case (ubi supra). The Crown duly paid, according to the contracts, for all the works actually executed and performed by the contractors and when the contracts were taken out of their hands. under the provisions of the contracts, the Crown actually expended a very large sum of money to complete the works and for which they obtained judgment against the contractors for a very substantial amount.

The judgment of the Committee of the Privy Council in the Ross case states that the matter of the claim of Mr. Ross "was referred to a Royal Commission on the 28th July 1882 before whom Mr. Ross appeared under protest. The Commissioners reported on the 12th of March 1884 that Messrs. J. E. Bertrand & Co. had been actually overpaid to the extent of \$175,776 or if the Government thought fit to waive their claim for diminution of work due to changes of grade and location and by the omission of the wooden superstructure for bridges to the extent of \$116,331."

A contract is the law of the parties and if the terms of the contract are not against public order, the parties must abide thereto.

In the result, were the Crown today to reimburse the estate Ross for the advances it made to Messrs. Glover & Fry and Dunn & Home, the contractors' bankers, it would pay twice for the works done. I fail to discover any reason or even equity in such a claim. The bankers, Messrs. Glover & Fry and Dunn & Home, borrowed money from the late John Ross and lent this money to the contractors. The estate should seek such refund from those to whom the money was lent. If a written agreement be made with one person only and solely in his own name, that person must bring his

action alone, although others may jointly be interested with him. Garipey vs Rochette (1).

Were the Government to admit liability in such a case it would create a precedent that might become disastrous to the country.

Therefore, after full consideration of the facts upon which the claim rests, I have the honour to find and report, under the circumstances of the case and under the terms of the submission by the Commission, that the claimant, the estate of the late John Ross, has no justiciable claim against the Crown in the premises.

And I have the honour to report accordingly.

In witness whereof, I have set my hand hereto, on this 16th day of May, 1935.



COMMISSIONER.

(1) K.B. 1818:
1 R. de L. 346:
2 R.J.R.Q. 51.

List of the documents transmitted herewith
by the Commissioner.

1. Commission, under the Great Seal, appointing
Commissioner, and Order in Council 6th July, 1934.
2. Commissioner's Oath of Office.
3. Short-hand report of the proceedings of the first
meeting, on the 18th December, 1934.
4. Amended statement of claim.
5. Further amendment of statement of claim.
6. Answer or plea by the Crown.