Privy Council Appeal No. 71 *of* 1921.

Neil F. Mackay - - - - - - - - *Appellant*

v.

The Attorney-General of British Columbia and others - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1922.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT HALDANE.]

This appeal arises out of proceedings taken in the Supreme Court of British Columbia in order to enforce an award. The appellant alleges an agreement, expressed to have been made between the King in right of the Province, represented and acting by the Minister of Public Works, and the appellant, dated the 23rd August, 1916, under which certain lands in the City of Vancouver, on the recital that the Lieutenant-Governor in Council of the Province had deemed it necessary to acquire them, were contracted to be sold by the appellant to the Sovereign, at a price to be determined by arbitration. Under this agreement, the award sought to be enforced was made. Since then the Government of the Province has changed, and the new Ministers have refused to advise the agreement to be carried out, alleging among other things, that there was no evidence that its execution had been authorised by the Lieutenant-Governor in Council, or that it was sealed with the seal of the Department of Public Works.

By Section 3 of the Public Works Act of the Province (amended in 1914) the Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty, of lands for purposes which would include those in controversy, and all contracts for so acquiring them are to be valid. By Section 37 the Minister, in this case the Minister of Public Works, is to have power to enter into any contract required for carrying out the provisions of the Act, but no such contract is to be binding on him unless signed by him and sealed with the seal of his Department.

After the award had been made, the appellant's solicitors wrote to the then Premier of the Province, requesting payment of the amount of the award, which had been properly made, so far as its form was concerned. The then Premier, who was still in office but was about to resign it, replied that, so far as his Government were concerned, they were satisfied with the award, and would recommend it to their successors for payment of its amount, but that, being an out-going Government, they were not in a position to place before the Lieutenant-Governor a special warrant for payment. He agreed, however, to pay a share of the expenses of arbitration already incurred.

A little later on the appellant presented a Petition of Right for payment of the amount awarded, but the new Government refused the Petition on the ground that there was no record that the execution of the agreement to purchase had been authorised by the Lieutenant-Governor in Council, and that the agreement was not sealed with the seal of the Department of Public Works, nor had there been any accepted plans for the construction of the public works for which the land was said to have been required.

On the 19th January, 1920, the submission to arbitration was made a rule of the Supreme Court of the Province, and the present proceedings were commenced to enforce the award. Gregory, J., dismissed these proceedings, on the ground that the agreement did not constitute a submission to arbitration. It is, however, unnecessary to enter into this question, if the Court of Appeal, to which the case was carried, were right in a further reason for which they dismissed the appeal. The Chief Justice, Galliher and Eberts, JJ., held, McPhillips, J., dissenting, that no agreement could be validly made by the Minister of Public Works, unless an Order in Council had first been passed providing for the acquisition of the land, and that the appellant had failed to prove that any such Order in Council had been passed. The Chief Justice said that, although it had been suggested that the transaction had the approval of the Cabinet, there was no suggestion that it had the assent or had ever been brought to the notice of the Lieutenant-Governor. McPhillips, J., held that an Order in Council was not a condition precedent to the making of a binding agreement; that the agreement contained a well-constituted submission to arbitration; and that the Crown was, in the circumstances,

estopped from denying the validity of the agreement and the award.

With the view of McPhillips, J., as to the Order in Council not being required, their Lordships are unable to agree. Under Section 3 of the Public Works Act, it is only the Lieutenant-Governor in Council to whom power to enter into such a contract as that before them is given. The character of any constitution which follows, as that of British Columbia does, the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament, that is to say, should not act individually, but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorised it, either directly, or under the provisions of a statute. It follows that in the present case, no such contract could have been made, unless Section 3 authorised it. If authority be wanted for this proposition, it will be found in *Churchward* v. *The Queen* (L.R. 1865, 1 Q.B. 173) and in the decision of this Board in *Commercial Cable Company* v. *Government of Newfoundland* (1916, 2 A.C. 610). The vital preliminary question is, therefore, one of fact; was an Order or Resolution passed by the Lieutenant-Governor in Council authorising the contract

It was contended before their Lordships that it ought to be presumed that an Order in Council had been passed, so as to satisfy the provisions of the Statute. But it appears from the affidavit of the Deputy Provincial Secretary that all Orders in Council, made by the Lieutenant-Governor in Council, are recorded in his office, and that no such Order authorising the acquisition of the land in question is to be found. Moreover, all the learned Judges in the Court of Appeal appear to have regarded no such Order as having been made, and it does not appear that this was disputed before them. Under these circumstances, their Lordships must hold that no such Order nor any Resolution amounting to it, existed, and it is accordingly not necessary to enter upon the point made as to the seal. If so, this ends the case. For the mere assent of the Ministers of the day to the contract could not, as has already been pointed out, under a constitution, such as that of British Columbia, make the contract a legally binding one, and accordingly the basis on which the claim under the arbitration proceedings was rested, disappears.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the hearing before this Board. No costs appear to have been given in the Courts below, and it is therefore unnecessary to deal with these costs.

In the Privy Council.

NEIL F. MACKAY

v.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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