

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Grand Trunk Pacific Railway Company
v. The King, from the Supreme Court of
Canada; delivered the 2nd November 1911.*

PRESENT AT THE HEARING :

VISCOUNT HALDANE.

LORD MACNAGHTEN.

LORD SHAW.

LORD ROBSON.

[DELIVERED BY LORD MACNAGHTEN.]

This is an Appeal from a judgment of the Supreme Court of Canada on a Reference by the Governor-General in Council asking a series of questions touching the meaning and effect of a provision contained in a supplementary agreement between the Government and the Grand Trunk Pacific Railway Company, which modified the original Contract between that Company and the Government.

The original Contract was dated the 29th of July 1903. It was confirmed by the Dominion Act 3, Edward VII., c. 71. It provided for the construction of a line of railway between the city of Monckton, on the coast of New Brunswick and the navigable waters of the Pacific Ocean. The proposed railway was to consist of two Divisions, the Eastern Division extending from Monckton to Winnipeg and the Western Division from Winnipeg to Prince Rupert. The

Eastern Division was to be constructed by the Government and to be Government property. The Western Division was to be constructed by the Company and to belong to the Company. Both Divisions were to be equipped, maintained, and operated by the Company. The Western Division was to be sub-divided into sections, the "Prairie" section and the "Mountain" section.

The 28th paragraph of the Contract was in the following terms:—

" 28. For the purpose of aiding the Company in the construction of the Western Division the Government shall guarantee payment of the principal and interest of an issue of bonds to be made by the Company for a principal amount, equal to seventy-five per centum of the cost of construction of the said Division as defined and ascertained in accordance with the provisions of paragraph 18 hereof, but such principal amount shall not in any case exceed thirteen thousand dollars per mile of the mileage of the Prairie section, nor thirty thousand dollars per mile of the mileage of the Mountain section, although seventy-five per centum of such construction may have exceeded the said respective sums per mile."

The 34th paragraph provided for a guarantee by the Grand Trunk Railway of Canada of an issue of bonds by the Grand Trunk Pacific Railway Company for the balance required for the construction of the Western Division. The Company was authorized to "issue a second series of bonds to be guaranteed . . . by the Grand Trunk Railway of Canada, to be a second charge on the property described in paragraph 25 (b)" (meaning 35 (b)) "and to be subject to and rank upon the said property next after the said bonds so to be issued and guaranteed by the Government."

Paragraph 35 authorised and required the Company to create the following mortgages to secure the issue of the proposed bonds:—

" (a) A mortgage which shall be a first charge upon the railway undertaking, equipment, and property, tolls, rights,

and franchises of the Company . . . to secure the payment of the said issue of first mortgage bonds guaranteed by the Government.

“(b) A mortgage, which shall be a second charge upon the property covered by the mortgage provided for by paragraph 35 (a), save and except the rolling stock constituting the equipment of the Eastern Division, to secure the bonds to be guaranteed by the Grand Trunk Railway Company of Canada as aforesaid.”

At the time when the Contract of 1903 was made the market price of the 3 per cent. stock of the Dominion of Canada was about par; soon afterwards the price of the stock began to fall and it became apparent that the proceeds of the issue of the first mortgage bonds which were to bear interest at 3 per cent. would not amount to 75 per cent. of the cost of the construction of the Western Division.

In view of the fall in the market price of Government stock and the consequent inadequacy of the fund intended to be provided under the guarantee of Government for the construction of the Western Division a supplemental Contract was made between the Government and the Company. It was dated the 18th of February 1904 and confirmed by the Dominion Act 4, Edward VII., c. 24. It removed the limitation of thirty thousand dollars per mile fixed by the Contract of 1903 in respect of the “Mountain” section, but retained the limitation fixed in respect of the “Prairie” section of the Western Division. It contained the following provision in paragraph 5 modifying the Contract of 1903:—

“5. Notwithstanding anything in the said Contract contained the Government may and shall, preserving always the proportions in the said Contract provided as between the “Prairie” and “Mountain” sections of the Western Division implement for the purposes and subject otherwise to the provisions of the said Contract its guarantee of the bonds of the said Company to be issued for the cost of

construction of the said Western Division in such manner as may be agreed upon so as to make the proceeds of the said bonds so to be guaranteed a sum equal to seventy-five per centum of the cost of construction of the Western Division ascertained as provided in the said Contract, but not exceeding in respect of the Prairie section thirteen thousand dollars per mile.

Paragraph 13 provided that, save as expressly provided by the supplemental Contract, the original Contract and each and every paragraph and provision thereof were not to be deemed to be in any way affected by the provisions of the supplemental Contract.

The form of the first mortgage bonds and the form of the second mortgage bonds were afterwards settled and ratified by Parliament, leaving however unaffected the liability of the Government under the supplemental Contract whatever that liability might be.

Differences having arisen as to the interpretation of paragraph 5 of the supplemental Contract it was agreed between the Government and the Company that the questions at issue might be conveniently referred to the Supreme Court under the provisions of the Supreme Court Act. The Government proposed a series of questions for the consideration of the Supreme Court. The questions so proposed, which are somewhat cumbrous and diffuse, may be summed up in one simple question: Does paragraph 5 contemplate any additional liability being imposed on the Company, or is it incumbent on the Government to make up the proceeds of the first mortgage bonds to their nominal or par value without recourse to the Company? The Supreme Court was of opinion that the liability on the part of the Government contemplated by paragraph 5 was a secondary liability only as guarantors, that the primary liability must fall upon the Company,

and that it rested with the Company to issue additional bonds which the Government was to guarantee.

With the utmost deference their Lordships are unable to accept the interpretation placed by the Supreme Court on paragraph 5. It seems to their Lordships that there is nothing in paragraph 5 importing that any further liability was to be imposed on the Company in respect of the first mortgage bonds, and that it falls upon the Government to implement their guarantee so as to make the proceeds of those bonds issued and to be issued equal to their par or nominal value. It would be a breach of faith with the Grand Trunk Railway Company to let in any further charge in priority to their security, and as it appears to their Lordships the Company has no power to issue bonds other than those authorised by the original Contract.

The case was fully and ably argued on behalf of the Government. It is hardly necessary to add that the learned Counsel who appeared for the Government did not argue the point which seems to be suggested in the factum of the Government that paragraph 5 is really an illusory provision, and that it is open to the Government to evade their apparent liability by refusing to come to an agreement, or abstaining from coming to an agreement with the Company.

Their Lordships therefore answer the questions proposed as follows :—

Question—

- a. "Yes."
- b. "No."
- c. "No."
- d. Substantially "Yes." It is open to the Government to implement their guarantee either by a payment in cash or in any other manner which produces the same

result without imposing any further liability on the Company.

e. This question is already answered.

f. "No."

g. This question is already answered.

Their Lordships therefore will humbly advise His Majesty that the Appeal should be allowed, and that the foregoing answers should be substituted for the answers given by the Supreme Court.

In the Privy Council.

THE GRAND TRUNK PACIFIC
RAILWAY COMPANY

v.

THE KING.

DELIVERED BY LORD MACNAGHTEN.

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