Privy Council Appeal No. 16 *of* 1918.

The Electrical Development Company of Ontario, Limited - - *Appellants*

v.

The Attorney-General of Ontario and others - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD SHAW.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT FINLAY.]

The question in this case is whether the Writ of Summons in the action was properly set aside. The action is one which raises questions as to the right to use the water of the Niagara River for the purpose of generating electricity.

By a treaty made in 1909 between His Majesty and the United States, which was confirmed by the Dominion of Canada Act of 1 & 2 George V., Cap. 28, an arrangement was made to limit the diversion of water from the Niagara River, and it was agreed that the United States might divert on their side water above the Falls for power purposes not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second, and that the United Kingdom (by the Dominion of Canada and the Province of Ontario) might do this on their side to an amount not exceeding a daily diversion at the rate of 36,000 cubic feet of water per second.

In 1887 a body called The Commissioners of the Queen Victoria Niagara Falls Park was incorporated by the Ontario Statute 50 Victoria, Cap. 13. The " Park " extended some way above and below the Falls on the Canadian side, and it is under the charge of these Commissioners on behalf of the Ontario Government. In 1899 there was passed a Provincial Act (62 Victoria, Cap. 11), which by its 36th section empowered the Commissioners to enter into agreements with any persons or companies enabling them to take water from the river for the generation of electricity, and under the powers of this statute the Commissioners, by an agreement dated the 29th January, 1903, empowered a syndicate to take water from the river sufficient to develop 125,000 electrical horse-power for a term of fifty years from the 1st February, 1903. By the 16th clause of this agreement the Commissioners agreed that they would not themselves engage in making use of the water to generate power. The Syndicate, on the 21st March, 1903, assigned the benefit of this agreement to the present appellants, the Electrical Development Company, the plaintiffs in the action, and the agreement and assignment were confirmed in 1905 by the Ontario Statute 5 Edward VII., Cap. 12. The appellants erected works for the supply of electricity, and have supplied power in Ontario and also under a licence from the Dominion Government for the export of electricity, which licence was granted under the Dominion Statute 6 & 7 Edward VII., Cap. 16.

The Hydro Electric Power Commission (the second defendant in this action) was established in 1907 by an Ontario Statute (6 & 7, Edward VII., Cap. 19), which is now embodied in the Revised Statutes of Ontario, 1914. This Commission is a Government department, and section 23 of the original statute (now section 16) provides as follows:—

> " Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office."

It is on this section that the Hydro Electric Power Commission relied on their application to have the Writ of Summons set aside, no consent to the bringing of the action having been obtained by the appellants from the Attorney-General.

In 1916 there were passed by the Legislature of Ontario two statutes (6 George V., Cap. 20 and Cap. 21). The former of these statutes recited that it was desirable to utilise to the fullest extent the amount of water which might by the treaty of 1909 be diverted from the Niagara River, that the Hydro Electric Power Commission had reported upon a scheme for its development, and that it was desirable that in the meantime the Commission should procure on the best terms available the additional power wanted. The statute then proceeded to provide that the Government might authorise the Commission to construct and operate works for the diversion of the water and the production of electric power. Section 7 is as follows :—

> " The exercise of the powers which may be conferred by or under the authority of this Act, or of any of them, shall not be deemed to be

a making use of the waters of the Niagara River to generate electric or pneumatic power within the meaning of any stipulation or condition contained in any agreement entered into by the Commissioners for the Queen Victoria Niagara Falls Park."

This section has obviously reference to the 16th section of the agreement of the 29th January, 1903, already mentioned in this judgment. The other of these two statutes (6 George V., Cap. 21) contains provisions of an ancillary nature.

The action was commenced on the 30th August, 1916, the defendants being the Attorney-General of Ontario and the Hydro Electric Power Commission, and the following is the endorsement on the Writ :—

"The plaintiff's claim is for a declaration :—

"1. That the defendant the Hydro Electric Power Commission of Ontario has not the legal right, either with or without the consent or authority of the Lieutenant-Governor in Council, pursuant to the Ontario Niagara Development Act, being the Statute 6 Geo. V., c. 20, or otherwise, to divert water from any part of the Niagara or Welland Rivers for the purpose of developing electrical or pneumatic power, and that the Lieutenant-Governor in Council has no right or legal power, pursuant to the Ontario Niagara Development Act aforesaid, or the Water Powers Regulation Act, 1916, being the Statute 6 Geo. V., c. 21, or otherwise, to make use of the waters of the Niagara River for the production of electric power, or to authorise the defendant the Hydro Electric Power Commission of Ontario to do so, or to regulate or interrupt the use of such waters by the plaintiff.

"Or, alternatively.

"2. That the covenants contained in paragraphs 16 and 20 of an agreement dated the 29th day of January, 1903, between the Commissioners of the Queen Victoria Niagara Falls Park and William Mackenzie, Henry Mill Pellatt and Frederic Nicholls, which said agreement was assigned to the plaintiff on the 21st day of March, 1903, enure to the benefit of the plaintiff according to the true, proper and original intent thereof, and that the said covenants are binding on the Commissioners of the Queen Victoria Niagara Falls Park, and on the Lieutenant-Governor in Council, the Ontario Niagara Development Act, being the Statute 6 Geo. V., c. 20, notwithstanding.

"And the plaintiff further claims an injunction to restrain the defendant the Hydro Electric Power Commission of Ontario from diverting any water from any part of the Niagara or Welland Rivers for the purpose of developing electric power."

On the 7th September, 1916, notice was given of a motion on behalf of the Attorney-General that the Writ of Summons should be set aside as against him, on the grounds that the Writ has no statement endorsed thereon of the nature of the claim made against the Attorney-General, and that if the action is brought against the Attorney-General as representing the King, the King can only be proceeded against by Petition of Right. On the same day notice was given on behalf of the other defendants, the Hydro Electric Power Commission, of a motion that the Writ of Summons should be set aside as against them, on the ground that the consent of the Attorney-General, required by the Power Commission Act (section 16) to an action being brought against the Commission, had not been first obtained. Orders

setting aside the Writ were made by the Master upon each motion, and these orders were affirmed by the Judge and by the Appellate Division of the Supreme Court of Ontario. The present appeal is brought to have these orders set aside, in order that the action may proceed.

The question raised by this appeal is whether the defendants in the action are entitled to have it summarily stopped upon the grounds stated in the two notices of motion.

The ground and the only ground on which the motion to set aside the Writ was made on behalf of the Hydro Electric Power Commission was that the action had been brought without the consent of the Attorney-General. This appears from the notice of motion in the Court below. And in the respondents' case on the present appeal it is stated that the sole question in issue on the appeal, so far as the Hydro Electric Power Commission is concerned, is whether the provision that no action shall be brought against the Commission without the consent of the Attorney-General is *intra vires* of the Ontario Legislature.

The appellants argued that, if this provision on its true construction applied to actions in which the right of the Commission to do the acts complained of is challenged on the ground that they are *ultra vires* of the Commission, such an enactment would itself be *ultra vires* of the Provincial Legislature. The appellants contended that it is essential to the working of the Constitution of the Dominion under the British North America Act that the provincial courts should have power in the first instance, and subject, of course, to appeal, to determine whether any particular act which is challenged could be competently authorised by the Ontario Legislature.

The appellants further contended that, properly understood, the section relied on does not apply to an action bringing in question the validity of any proceedings of the Commission as *ultra vires* and beyond the scope of its authority, but only to actions for acts done and omitted to be done in the exercise of the powers entrusted to the Commission.

Their Lordships think it undesirable to express any final opinion upon the construction of this section and its effect upon the present action until the precise nature of the claim of the plaintiffs in the action has been formulated. In their Lordships' opinion it is impossible to treat the appellants' contentions as to the section in question on this point as merely frivolous. They raise points of importance which ought not to be dealt with in this summary fashion, and which demand serious consideration in the ordinary course of law. The action must, therefore, proceed as against the Hydro Electric Commission, but the present decision will not prejudice the right of the Commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts, so far as necessary, have been ascertained.

In support of the motion to set aside the Writ as against the Attorney-General of Ontario it was argued that he ought not to have been joined as a defendant at all, and that any claim

against the Crown should have been brought forward by Petition of Right. It was urged that the decision in *Dyson* v. *The Attorney-General* (1911, 1 K.B. 410) has no application to any case in which relief might be sought by Petition of Right, and that the declaration asked for by the endorsement on the Writ must have been intended merely to lay the foundation for a subsequent Petition of Right and a claim for damages. Their Lordships' attention was drawn to section 33 of the Ontario Judicature Act, 1914, Cap. 56, under which an opportunity may be given to the Attorneys-General for Canada and for the Province to be heard before any decision is given on cases involving Constitutional questions. It was pointed out that in proceedings under that section the Attorney-General does not become a party to the action, and it was urged that there was no justification for making him a defendant with the object of binding the Crown by any decision on fact or law which may be arrived at in the action.

The question of the limits within which the decision in *Dyson's* case is applicable raises points of nicety and some difficulty for the determination of which it is highly desirable that the Court should have before it a precise statement of the grounds on which a declaration is sought against the Attorney-General. The elaborate argument advanced on behalf of the Attorney-General for Ontario has failed to satisfy their Lordships that it is so clear that no declaration can be made against the Attorney-General under the circumstances of this case as to make it right that the action should be summarily stopped as against the Attorney-General. It will, of course, be open to him to allege as a substantive defence to the action that on the facts there was no justification in point of law for making him a party, but their Lordships do not think that this question ought to be decided until pleadings have been delivered and evidence taken so far as may be necessary. All that their Lordshhips decide is that the plaintiffs' claim ought not to be disposed of in a summary application such as the present.

The Appellate Division gave judgment for the Attorney-General on the ground that the action did not fall within the authority of *Dyson's* case, but also added some observations to the effect that the claim must fail upon the merits. This point was not properly raised by the notice of motion, and their Lordships do not propose to express any opinion upon it because, whatever difficulties there may be in the way of the ultimate success of the appellants' case, it is not, in the judgment of their Lordships, so clearly bad as to make it right that the appellants should by a summary order be prevented from having it tried in ordinary course.

Their Lordships will humbly recommend to His Majesty that this appeal should be allowed, that the orders of the Courts below should be set aside, and the action remitted to the Supreme Court to be proceeded with in the ordinary way.

There will be no costs of this appeal. The costs in the Courts below of and incident to these motions should be costs in the cause.

In the Privy Council.

THE ELECTRICAL DEVELOPMENT COMPANY OF ONTARIO, LIMITED,

v.

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS.

DELIVERED BY VISCOUNT FINLAY.

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