In the Privy Council.

No. 61 of 1915.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED .. .. (*Suppliant*) *Appellant,*

AND

HIS MAJESTY THE KING .. .. .. (*Respondent*) *Respondent,*

AND

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, NOVA SCOTIA, NEW BRUNSWICK AND BRITISH COLUMBIA .. .. *Intervenants.*

ADDITIONAL PAPER.*

In the Supreme Court of Canada.

In the Supreme Court o Canad

Appellant's Factum.

Appellant's Factum.

Part I.

1. This is an appeal by The Bonanza Creek Gold Mining Company, Limited, from the judgment of the Honourable Mr. Justice Cassels, sitting in the Exchequer Court of Canada, pronounced on the 28th day of April, 1914, dismissing without costs the Petition of Right of the Appellant.

The case came before the learned Judge for argument pursuant to his order made on the 14th day of March, 1914, whereby he directed that certain questions of law set up by the Respondent in paragraphs 1 and 2 of the Respondent's answer to the Petition of Right should be raised, heard and determined, and that, pending the final determination of such questions of law, all other proceedings in the action should be stayed.

* Printed subject to Appellant's objection.

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In the Supreme Court of Canada.

Appellant's Factum —*continued.*

2. The facts upon which the questions of law referred to are raised are developed in the Petition of Right and the Reply (the allegations in which are for the purposes of this appeal to be taken as established), and in admissions of fact agreed upon by the parties, and may briefly be summarized as follows :—

In the month of July, 1898, one J. J. Doyle and his associates made application to the Department of the Interior for Canada through the Mining Recorder at Dawson in the Yukon District for a certain hydraulic mining location on Bonanza Creek which is referred to in the proceedings as the Doyle location ; and in the month of November in the same year one C. A. Matson and his associates made similar application for the grant of an adjoining hydraulic location on Bonanza Creek, which is referred to in the proceedings as the Matson location.

Notice of these applications was posted in the office of the Gold Commissioner at Dawson, but action upon them by the Government was deferred for several months, and while the applications were still pending, a number of individuals conceived the idea of locating placer mining claims in the portions of the lands covered by said applications adjacent to Bonanza Creek, in the majority of cases not for the *bona fide* purpose of mining, but in order to prevent the inclusion of these claims in the applicants' territory and to compel the applicants to purchase the said claims in order to obtain access to the slope of the Creek valley,—it being essential to successful hydraulic operations upon the locations that the operators should have access to and the right to operate upon the hillside or a considerable portion thereof in the immediate neighbourhood of the stream, in order to enable them to wash away the face of the slope to get into the ground at the rear and also to provide a dumping ground for the refuse dirt washed down from the higher portions of the locations.

On the 10th June, 1899, Her late Majesty, Queen Victoria, represented therein by the Minister of the Interior of Canada, granted to Doyle and his associates a lease for a term of twenty years of a portion of the property applied for by them, and on the 5th January, 1900, granted them a further lease of the balance of the said property ; and on the 13th January, 1900, Her late Majesty granted a lease to Matson and his associates of the tract of land covered by their application,—excluding, however, in each case so much thereof as had been taken up and entered for under the regulations in that behalf as placer mining claims, the entries for which had not been cancelled by the Mining Recorder at the date of the respective leases.

3. When these several leases were granted it was found that so many placer mining claims had been located in the front portion of the hydraulic claims as to render their operation very difficult if not impossible, and accordingly on the 9th January, 1900, a formal agreement collateral to the Doyle leases was drawn up and executed between Her late Majesty represented by the Minister of the Interior of the one part, and Doyle and his associates of the other part, by which it was agreed that if any placer mining claims whatever within the tract of land included in the application of Doyle and his associates should at any time become forfeited to the Crown because of non-compliance of the entrant with the conditions of entry, or revert or be

surrendered to the Crown for any reason or cause whatsoever, the land comprised in the said claim or claims should be leased to the said Doyle and his associates on the same conditions as contained in the original lease, subject to certain provisions not material on this appeal. On the 15th January, 1900, a similar agreement was executed between Her late Majesty and Matson and his associates with reference to the land included in the Matson location.

These agreements together with the original leases subsequently became vested in the Appellant by assignments and this petition was launched to recover damages in respect of breaches of the said agreements, as well as to recover damages for other wrongs suffered by the Petitioner and its predecessors in title.

4. The Appellant is a Company duly incorporated by Letters Patent dated 23rd December, 1904, issued by the Lieutenant-Governor of Ontario, pursuant to the Ontario Companies Act, by which the Applicant was created and constituted a corporation for the purposes and objects following that is to say:—

(A) To carry on either as principal, agent, contractor, trustee or otherwise and either alone or jointly with others, the businesses of mining and exploration in all their branches; and

(B) To apply for, purchase, lease or otherwise acquire patents and patent rights, trade marks, improvements, inventions and processes and to exercise, develop and grant licenses with respect thereto and very wide powers incidental to the said purposes were set forth in the said Letters Patent.

The head office of the company was fixed at the City of Toronto, but the Letters Patent did not in any manner specify within what geographical limitations the powers of the company should be exercised.

Shortly after its incorporation the appellant by assignments duly filed in the office of the Minister of the Interior became possessed of and entitled to all the estate, right, title and interest of Matson and his associates and Doyle and his associates in the mining properties in the leases above referred to, and also all their rights under the leases and under the collateral agreements.

On the 24th December, 1904, the Dominion Government issued to the appellant a Free Miner's Certificate under the regulations then in force, and accepted from the appellant the sum of $100, being the amount of the fee required for such license, and subsequently renewed said license and accepted the fees for such renewals, so long as the regulations governing mining in the Yukon required the owners of a hydraulic concession to hold a Free Miner's Certificate. The Dominion Government also through the Territorial Secretary of the Yukon Territory issued to the appellant a license under the Yukon Ordinance, Chapter 59 (Ordinances of the Yukon Territory, 1902) to carry on business in the Yukon, and accepted from the appellant the sum of $500 as the fee for such license.

5. Upon assuming control of and attempting to operate the properties comprised in the said leases, the appellant found that the Department of the Interior, notwithstanding the collateral agreements under which the lessees were to have the right of leasing the reverted placer mining claims within the boundaries comprised in the applications for the hydraulic concessions,

In the Supreme Court of Canada.

ppellant's actum -*continued.*

and in violation of these agreements, had been permitting reverted and lapsed placer claims to be relocated, and notwithstanding the protests of the appellant, the Department of the Interior in disregard and violation of the said agreements continued to permit such reverted and lapsed claims to be relocated by individuals with the result that the operations of the appellant were most seriously interfered with and the appellant suffered loss and damage amounting to a very large sum of money.

6. On the 16th March, 1907, His late Majesty, King Edward VII, represented by the Minister of the Interior, entered into an agreement with the appellant which, after reciting the granting of the leases above referred to, to Doyle and his associates and to Matson and his associates, further recited that the leases and all interests therein of Doyle and his associates and Matson and his associates had become vested in the appellant and proceeded to lease to the appellant certain reverted placer mining claims.

Part II.

1. The suggestion that there was any lack of capacity in the appellant to accept the assignment of the leases and collateral agreements from Doyle and Matson and their associates or to carry on mining operations in the Yukon territory or to recover damages for the breach of the said agreements, was made for the first time in the statement in Answer filed in behalf of the respondent to the Petition herein.

Paragraphs 1 and 2 of the said statement in Answer are as follows :—

> 1. The respondent denies that the suppliant has now or ever has had the power either under Letters Patent, License, Free Miner's Certificate, or otherwise, to carry on the business of mining in the District of the Yukon, or to acquire any mines, mining claims or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations.
>
> 2. Should a Free Miner's Certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect—that there was no power to issue a Free Miner's Certificate to the suppliant, a company incorporated under Provincial Letters Patent, and that there was no power vested in the suppliant to accept such a certificate.

The learned Judge of the Exchequer Court proceeded to consider the objections so raised as a matter of law and upon such objections, as the appellant submits, erroneously dismissed the Appellant's Petition.

2. The learned Judge bases his dismissal of the Petition upon what he conceives to be the opinion of the learned Judges of the Supreme Court in the reference by the Governor-General in Council in the matter of the incorporation of Companies in Canada, 48 S.C.R., page 331, and expressly guards against any inference that he is giving effect to his own opinion. He says :—

> " It seems to me that on this state of facts, the proper course for me to " pursue is to give effect to the opinion of the learned Judges in the " Supreme Court. The question at issue is one of great moment to a

" large number of companies. It is a question that must be finally " decided by the Privy Council in order that the law should be settled " definitely once and for all. This can be attained by an appeal from " my judgment dismissing this petition. I wish it to be clearly under- " stood, that I am following as I conceive it my duty to do, the reasons " of the learned Judges of the Supreme Court, as I understand them, and " am not expressing any opinion of my own on this important question. " It may turn out later that the real question is not one of capacity, " but that it is a matter of internal regulation as between the share- " holders of the company and their directors. In the case of a trustee, " a trustee if recognized by a foreign country, could enter into contracts " in a foreign state, and as between the trustee and the party with " whom he contracts the contract would be valid and enforceable. " Nevertheless, the trustee might be restrained by the *cestui qui trustent*, " from imperilling the trust funds by investments beyond the state " in which the trust is to be administered. And so it may be that while " the incorporation created by a province is brought into being with full " capacity to contract beyond the confines of the province, and to enforce " their contracts if recognized by the comity of nations, nevertheless, the " shareholders of this company incorporated by a province may perhaps " have the right to restrain the directors from imperilling their funds " beyond the borders of the province. This would not in any way be a " question of capacity. I simply mention this point incidentally. I " do not see it referred to in any of the opinions of the learned Judges " of the Supreme Court."

The appellant respectfully submits that the learned Judge has misconceived the effect of the judgments in the Companies Case and that upon the reasoning contained in the judgments in that case, his conclusion should have been the other way.

There is no suggestion that the appellant company was not a duly incorporated body or that upon its incorporation it did not enter into existence as an entity clothed with corporate powers. There was no geographical limitation in its charter as to the territory in which it might carry on its operations and the appellant submits the Dominion Government has recognized its existence as a corporation and has in every way extended to it a comity equivalent to what is known as the comity of nations by virtue of which it has recognized its right to do business in the Yukon Territory, and it is submitted it is not now open to the Dominion Government to question the appellant's corporate capacity to accept the assignments of the leases and agreements in question or to maintain the Petition of Right for damages for breaches of the agreements. The appellant company further submits that upon the admitted facts it is entitled to maintain its Petition of Right and to have its claims disposed of on the merits.

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In the Supreme Court of Canada.

Respondent's Factum.

Factum for the Respondent.

Part I.—The Facts.

1. This is an Appeal to the Supreme Court of Canada from the judgment of The Honourable Mr. Justice Cassels, pronounced on the 28th April, 1914, dismissing the Suppliant's petition.

2. The Suppliant is a Joint Stock Company, incorporated by the Province of Ontario, under the Provincial Companies Act. Its Charter professes to authorise it to carry on the business of mining.

3. Being so incorporated, it purported to obtain transfers of two certain hydraulic mining locations in the Yukon Territory, theretofore issued by the Dominion Government to certain individuals, and to enter into certain agreements in respect thereof with the Dominion Government which are set out in the case, and to obtain certain certificates which are referred to in and form part of the evidence taken in the case.

4. Disputes having arisen between the Suppliant and the Government regarding the alleged rights of the Suppliant in respect of the hydraulic leases above referred to and under the agreements also referred to, the Suppliant filed its Petition of Right in January, 1908, claiming damages against the Crown.

5. In January, 1909, His Majesty filed an answer to the said Petition, which, for the present purposes may be sufficiently described as raising, amongst others not now material to be examined, two grounds of defence, presented in various aspects:

(*a*) Want of corporate capacity on the part of the Suppliant Company to carry on its business in the Yukon Territory, and, in consequence thereof, incapacity to acquire the hydraulic leases already referred to, or any rights thereunder, or to enter into the agreements with the Government in respect thereof also already referred to, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the Suppliant to carry on its business of mining in the Yukon Territory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such certificates or licenses to the Petitioner, or to confer any such rights upon the Petitioner, as the Petition of Right claims.

6. These particular grounds of defence were, in due course, directed to be determined in advance of any general trial of the Petition, and without prejudice to the other matters which the Record presented.

7. Mr. Justice Cassels, who tried these preliminary questions of law upon such evidence as the parties saw fit to present upon the particular points raised by the preliminary questions, determined them adversely to the Suppliant, and the Suppliant is now appealing from this determination of the preliminary questions.

8. It does not appear to the Respondent to be necessary or material, for the purposes of the present appeal, to examine more closely the various heads of damage claimed by the Suppliant in its Petition of Right. It seems

sufficient for the purposes of the present appeal to say of them that they are all claims for damages alleged to have been caused to the Suppliant in connection with the prosecution by the Suppliant of the business of mining in the Yukon Territory.

Part II.—The Judgment.

1. Mr. Justice Cassels, in the reasons given by him for determining the preliminary questions adversely to the Suppliant, proceeds upon his view of the opinions lately expressed in this Court in the matter of the Reference by the Governor-General in Council of certain questions respecting the incorporation of Companies, usually called "The Companies Case," reported in 48 S.C.R., at page 331.

2. It will be seen that Mr. Justice Cassels, in disposing of the case, has confined himself to an examination of the answers given by the various judges to the questions asked them upon reference to them, and to an application of those answers to the case before him. He has pointed out that the answers given to those questions by the Chief Justice, Sir Louis Davies and Mr. Justice Duff, require a decision against the present Suppliant of the points raised by the preliminary controversy, citing the following language of the Chief Justice: "The Parliament of Canada can alone constitute a Corporation "with capacity to carry on its business in more than one province. Com- "panies incorporated by local legislatures are limited in their operations "to the territorial area over which the incorporating legislature has juris- "diction. Comity cannot enlarge the capacity of a Company, where the "capacity is deficient by reason of the limitations of its Charter or of the "constituting power." He has pointed out that the answers of Mr. Justice Idington and Mr. Justice Brodeur would require a decision the other way. He then refers to and examines the opinion of Mr. Justice Anglin, and concludes, from the language used in that opinion, that Mr. Justice Anglin, in the specific case of a provincial company, incorporated by a province for the purpose of mining, would be confined, in the exercise of its main functions, to the province incorporating it. Upon the whole, Mr. Justice Cassels concludes that, applying to the case of the present Suppliant the reasons of the majority of the Judges of this Court for their answers in the Companies' Case those answers compel or require a judgment upon the preliminary questions raised here, adverse to the maintenance of the Petition.

Part III.—The Argument.

The Respondent will submit that the learned Judge of the Court of Exchequer has arrived at the correct conclusion, and that this appeal should be dismissed for the following, among other reasons:—

1. The Ontario Joint Stock Companies Act, under which the Suppliant obtained its Charter, enables a provincial Charter to be granted "for any of "the purposes or objects to which the legislative authority of the Legislature "of Ontario extends."

2. The legislative authority of the Legislature of Ontario has been deemed by the Legislature itself to extend to the subject of mining, but only upon lands geographically and jurisdictionally situate within the province. The province has had a Mining Act dealing with mining upon such lands since 1868, the year after Confederation.

3. A provincial charter, issued to a company formed for the purpose of mining, must find " the object or purpose " for which it was created, within, and only within, the field to which the legislature itself has deemed its authority to extend.

4. The Provincial Joint Stock Companies Act, in so far as it enables a provincial company to be created for mining purposes, is properly complementary to the Provincial Mining Act. The provincial jurisdiction is strictly co-extensive in the two matters. The latter extends to mining within the provincial jurisdiction. The former extends to creating a company for the purpose of mining within the same jurisdiction.

5. Upon the most elementary principles, a general mining charter issued under provincial authority can only authorize mining where the provincial authority extends.

6. To give the charter a broader construction and to read it as attempting to authorize the Company which it creates to mine elsewhere, would be to make the charter *ultra vires* of the province. This is neither proper nor necessary, because the charter must necessarily be read in the sense of a provincial authorization, and applied to the field in and over which the provincial authority extends, *ut res magis valeat quam pereat.*

7. It is not to be supposed that, in creating a company with general mining powers, but without stating where those powers are to be exercised, the Province of Ontario authorizes the carrying on of a mining business in Africa or South America. The charter must in every such case have the more beneficial construction which makes it accord with Ontario's actual jurisdiction.

8. We start then with a Company whose charter, in order to be valid, must be construed as limiting its mining operations to territory within the Province of Ontario. This limitation is inherent in its constitution, and cannot be made good by any comity extended from any other State. It is a fundamental law of its being.

9. Upon this view the case directly falls within the exception made by Mr. Justice Anglin in his answer to the second question in the Companies Case, which he answers, " Yes, subject to the limitations imposed by its own constitution." Properly interpreted this language means, " Yes, unless the limitations of its own constitution prevent it, in which case, No."

10. It is equally impossible for the Suppliant here to successfully invoke any license or certificate, whether issued by the Dominion Executive or by the Territorial authorities.

11. As to any such pretended authority, its issue was *ultra vires* and void *ab initio*. The Dominion Act, 61 Vic., Cap. 49, provides that any Joint Stock Company, incorporated under the laws of the United Kingdom, or under the laws of any foreign country, for the purpose of carrying on mining operations may, on receiving a license from the Secretary of State, carry on

operations in the Yukon District. Apart from the question as to whether such a license could supply the inherent constitutional defect already pointed out, it seems quite clear that this legislation does not apply to any provincial company.

12. The Suppliant is not incorporated under the laws of Great Britain, nor under the laws of any foreign country.

13. This legislation is exhaustive. It may be conceded that the Dominion Parliament might itself charter a company to mine in the Yukon District by a Special Act, or might pass a general law under which such a company might be incorporated. If the mining company obtains its powers elsewhere, this legislation enables the Executive to extend the necessary comity to it, but only in the two cases provided for, in both of which it is manifest that some authority, sovereign in itself, has granted a power exercisable outside the country of origin. Even this legislation would not extend to a British or foreign company whose operations, by the terms of its charter, were confined to the country of origin, and it does not apply to a provincial company at all.

14. Nor does the Suppliant derive any assistance from the fact that a license has been issued by the Territorial authorities under the Consolidated Ordinances Y.T., 1902, Cap. 59. In the first place, such a license cannot supply, nor does the ordinance profess that it supplies, any defect in the constituent powers of the licensed company.

15. Nor can it possibly have any significance in or bearing upon a controversy between the Suppliant and the Crown in right of the Dominion; it is purely *res inter alios acta.*

16. This license may well have been required by the Territorial authorities as a condition precedent to the turning up of a single bucket of soil in the District, but it cannot be effective either for another purpose or to clothe the licensee with a new character in its relations with the Dominion Crown. Its use on the present occasion may be illustrated as follows:— The Suppliant is claiming damages against the Crown in right of the Dominion. The Crown has answered: "Every transaction of the whole series out of "which your alleged claims arise was *ultra vires* of you the Suppliant, and "could give rise to no claim against the Respondent." It would be absurd to reply: "But the officials of the Yukon consented to my operations in "that territory, and received a license fee in respect of them."

17. The Suppliant has in this case sought to invoke the principle of estoppel. This principle the Suppliant has endeavoured to apply upon two separate grounds:

(A) It relies upon the circumstance that the Territorial officials in the Yukon who received the payment made by the Suppliant in respect of the extra Territorial license fee referred to in the fourteenth, fifteenth and sixteenth paragraphs hereof remitted the same to and the same was received by the Department of the Interior at Ottawa.

(B) It relies upon the fact that, after the Suppliant's acquisition from the original lessees of the mining locations upon which the Suppliant's operations have been carried on, the supplemental agreements

In the Supreme Court of Canada.

Respondent's Factum —*continued.*

which form part of the case were entered into between the Dominion Crown authorities and the Suppliant.

18. The first answer to the Suppliant in respect of the principle of estoppel is applicable to both grounds. It is essential to any estoppel by conduct that the conduct relied upon must have taken place with full knowledge on the part of the person sought to be estopped of the particular fact or matter which it is sought to prevent him from setting up. Applied to this case, it was necessary for the Suppliant to show full knowledge by the Dominion Crown authorities of the fact that the Suppliant was a Provincial Company and of the constitutional and inherent limitation upon the powers of the Suppliant which it is now sought to prevent those authorities from relying on. But there can be no pretence upon the present evidence that the Dominion authorities had any knowledge whatever as to where the Suppliant's charter had been obtained or within what limits it was inherently authorized to operate. The first principle of estoppel is therefore lacking.

19. It is well established that the doctrine of estoppel is not applicable as against the Crown either in respect of the acts of its officers or in respect of such inherent want of capacity or power as existed here. The rights of the Crown cannot, on the one hand, be taken away by the ignorant or negligent conduct of its officers ; nor, on the other hand, can such ignorant or negligent acts add anything to the powers of such a company as the Suppliant, or, by any species of estoppel, give it any fictitious additional capacity.

20. Reference will be made upon these points to Robertson, Civil Proceedings against the Crown, p. 576 ; Lib. VI, Cap. 4.

Everest & Strode on Estoppel, 2nd Ed. p. 8.

In the Privy Council.

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