

1891 J. H. R. BIRROUGHS *et al.* (CLAIMANTS) APPELLANTS;
 *Nov. 5. AND
 1892 HER MAJESTY THE QUEEN (DE- } RESPONDENT.
 *April 4. FENDANT)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Salaries of License Inspectors—Approval by Governor General in Council—
 Liquor License Act, 1883, s. 6.*

On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by Order in Council under section 6 of the said Liquor License Act, 1883.

Held, affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor General in Council. The Liquor License Act, 1883, section 6.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the claimants' claim for \$1,578.76.

The action was brought by the appellants to recover the sum of \$1,578.76 which they alleged was due to them from the Government of Canada; the claim therefor arose under the following circumstances:—

Under the Liquor License Act, 1883, of Canada, the appellants were appointed the Board of Commissioners for the license district of the city of Quebec, and they continued in that office and capacity from the 19th day of February, 1884, until the 23rd day of December, 1885, at which time, the act having shortly before that

* PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

date been declared *ultra vires* of the Parliament of Canada by the Judicial Committee of the Privy Council, the appellants ceased to act as commissioners.

By the 6th section of the act it is provided that "A chief inspector of licenses, and one or more inspectors, shall be appointed by the Board of License Commissioners from time to time for each district, as the board may see fit, and each license inspector shall, before entering upon his duties, give such security as the board may require for the due performance of his duties, and for the payment over of all sums of money received by him under the provisions of this act; and the salary of the inspectors shall be fixed by the board, subject to the approval of the Governor in Council." Under this section the appellants appointed a chief inspector at a salary of \$1,200 and two assistant inspectors at \$400 each, per annum, and those inspectors were paid at these rates up to the time when the commissioners ceased to hold office.

The said salaries which the appellants so fixed for the inspectors were not at the time they were determined upon approved of by the Governor in Council, nor did the appellants at any time submit the salaries to the Governor in Council for approval, but the appellants commenced and continued to pay the inspectors their salaries at the said rate until the month of September, 1885, when they were notified that an order in council had been passed on the 5th September fixing the rates at which inspectors were entitled to be paid, which was lower than the salaries which the appellants had been paying the said inspectors.

All the moneys which the appellants had received in the administration of the Liquor License Act during their tenure of office was paid into the license fund and amounted to the sum of \$4,480, and it was out of this fund, under subsection 2 of section 56 of the act,

1891
BURROUGHS
v.
THE
QUEEN.

1892
BURROUGHS
v.
THE
QUEEN.
—

that the salaries and expenses of the commissioners and inspectors and other expenses were to be paid, and it appears that the appellants had as a matter of fact paid to the inspectors for their salaries the sum of \$3,431.42 which was the amount due them at the rates which the appellants had fixed for them.

The amount of license fund was not sufficient to cover all the claims on that fund for salaries and expenses under the requirements of the order in council.

When the operations under the act came to be wound up, the Government of Canada appropriated a sum of \$726.23 to be added to the amount received by the appellants into the license fund, which made a total of \$5,206.23, available for salaries and expenses; and the Department of Inland Revenue acting within the scope of the order in council of the 5th September, 1885, apportioned the said sum as follows: \$2,521.33 for the appellants as commissioners, \$1,852.66 for the inspectors and the sum of \$832.24 for contingencies.

The sum which the appellants had already paid to the inspectors, namely, \$3,431.42 was more than the Department of Inland Revenue was empowered under the said order in council to allow by the sum of \$1,578.76, and the appellants found that out of the \$5,206.23 there would only be \$942.55 left to apply upon their own salaries, instead of the \$2,521.33 which the department had appropriated for their payment.

The appellants then applied to the government for payment of this difference of \$1,578.76, and upon payment being refused they applied for and obtained a reference of their claim to the Exchequer Court under 50 and 51 Vic. ch. 16, sec. 23, and on the 18th day of November, 1890, the case came on for trial at the city of Quebec before the judge of the Exchequer Court

and judgment was afterwards rendered whereby the appellants' action was dismissed.

L. Burroughs for appellants.

Hogg Q.C. for respondent.

1892
 BURROUGHS
 v.
 THE
 QUEEN.

Sir W. J. RITCHIE C.J. was of opinion that the appeal should be dismissed but without costs.

STRONG J. (Oral)—The act under which the appellant was appointed having been declared by this court and the Privy Council *ultra vires* of the Parliament of Canada, this petition of right is not maintainable and the appeal must be dismissed.

FOURNIER J.--Les appelants formant le bureau des commissaires pour l'octroi des licences pour la vente des liqueurs, en vertu de l'acte des licences du Canada, de 1883, réclament la somme de \$1,578.76 comme leur étant due par Sa Majesté pour les causes suivantes :

Nommés commissaires des licences pour le district de licence de la cité de Québec, le 19 février 1884, les appelants en ont rempli toutes les fonctions et devoirs, jusqu'au 23 décembre 1885, époque à laquelle l'acte en question fut par jugement du Conseil privé, déclaré inconstitutionnel.

Les appelants avaient été nommés commissaires des licences en vertu de la sec. 6 de l'acte des licences, déclarant que :

A chief inspector of licenses, and one or more inspectors, shall be appointed by the board of license commissioners from time to time for each district, as the board may see fit, and each license inspector shall, before entering upon his duties, give such security as the board may require for the due performance of his duties, and for the payment over of all sums of money received by him under the provisions of this Act; and the salary of the inspectors shall be fixed by the board, subject to the approval of the Governor in Council.

1892
~~~~~  
BURROUGHS v. THE QUEEN.  
Fournier J. ———

En vertu de cette section les commissaires nommèrent un inspecteur en chef avec un salaire de \$1,200 et deux assistants inspecteurs avec un salaire de \$400 chacun, par année, et ces inspecteurs ont été payés à ces taux jusqu'au 10 septembre 1885, époque à laquelle les salaires fixés par les commissaires furent réduits par ordre en conseil.

Par lettre du 14 mars 1884, le ministre du revenu de l'intérieur avait été informé de ces nominations et du montant des salaires fixés qui seraient payés mensuellement pour l'inspecteur et toutes les semaines pour ses assistants, avec les fonds qui se trouveraient entre les mains des commissaires, à moins d'instructions contraires. Le département n'ayant donné aucune instruction à ce sujet, ces salaires furent payés aux taux fixés.

Le 6 août 1884, les commissaires furent informés par le département qu'il n'était pas probable que le Gouverneur en conseil s'occuperait de la considération des règlements adoptés en vertu de la 56e section de l'acte avant que sa validité n'eût été décidée par la cour Suprême.

Le 7 août 1885, après la décision de la cour Suprême, les commissaires informèrent le département, qu'ils continueraient leurs officiers en fonctions, ce qui fut approuvé par le département, par lettre en date du 14 août 1885. En conséquence, les commissaires continuèrent à payer les dépenses de leur bureau et les salaires de leurs officiers, aux taux fixés par eux, jusqu'au 10 septembre 1885, époque à laquelle ils furent notifiés par le département qu'un ordre en conseil fixant et réduisant les salaires des inspecteurs avait été adopté. Les inspecteurs furent ensuite payés suivant le montant fixé par cet ordre en conseil jusqu'au 23 décembre 1885, époque à laquelle tous procédés pour mettre à effet l'acte en question furent abandonnés en conséquence de la décision du Conseil privé.

En vertu de la sec. 61, les commissaires étaient tenus de faire rapport au ministre du revenu de l'intérieur de toutes leurs opérations pour la mise à exécution de l'acte des licences; et pendant tout le temps que le dit acte a été en force, les dits commissaires ont constamment tenu le département au fait de toutes leurs opérations.

1892  
 BURROUGHS  
 v.  
 THE  
 QUEEN.  
 Fournier J.

Depuis le 16 février 1884 au 25 décembre 1885, le montant de leurs dépenses s'est élevé aux sommes suivantes:—

|                                                     |            |
|-----------------------------------------------------|------------|
| Salaires de l'inspecteur et de ses assistants ..... | \$3,431 62 |
| Diverses dépenses.....                              | 832 24     |
| Salaires des commissaires.....                      | 2,513 34   |
|                                                     | <hr/>      |
|                                                     | \$6,777 20 |

Les dépenses diverses furent accordées par l'ordre en conseil, mais le salaire de l'inspecteur en chef et de ses assistants fut réduit à \$1,852.66 au lieu de \$3,431.42 qui avait été fixé par les commissaires, ce qui fait une différence de \$1,578.76 entre le montant réellement payé et déboursé par les commissaires et celui fixé par l'ordre en conseil du gouvernement.

Cette différence de \$1,578.76 ayant été retranchée du montant accordé comme salaire aux commissaires, \$2,521.33, il n'est resté à ceux-ci que \$942.57 à compte de leur salaire.

Leur action a pour but d'être payés de la somme de \$1,578.76 déboursée et payée par eux pour la mise à exécution de l'acte des licences; en outre de ce qu'ils ont reçu à-compte de leur salaire.

L'honorable juge de la cour de l'Echiquier a renvoyé la pétition de droit des appelants en se fondant sur la sec. 6 de l'acte des licences de 1883, citée plus haut, contenant la déclaration suivante: " And the salary of the

1892 inspectors shall be fixed by the board subject to the  
 BURROUGHS approval of the Governor in council."

v.  
 THE D'après l'exposé des faits ci-dessus, il est clair que les  
 QUEEN. commissaires ont informé régulièrement le département  
 Fournier J. de toutes leurs actions au sujet de la mise en force de  
 l'acte, qu'ils lui ont donné information du montant  
 fixé pour le salaire des inspecteurs et qu'ils ont aussi  
 demandé l'approbation requise par la sec. 6 de l'acte,  
 enfin que toute leur conduite a été marquée au coin de  
 la prudence, du jugement et de la plus grande bonne  
 foi dans tous leurs procédés.

Ne recevant pas de réponse au sujet du salaire de  
 leurs officiers ils continuèrent de les payer aux taux fixés  
 par eux, dont ils avaient informé le gouvernement en  
 lui rendant compte de leurs dépenses. Non seulement  
 les commissaires avaient raison de prendre le long  
 silence du gouvernement à ce sujet comme une preuve  
 d'approbation du taux fixé par eux, mais l'ayant informé  
 après la décision de la cour Suprême qu'ils entendaient  
 maintenir en office leurs officiers, ils reçurent une lettre  
 en date du 14 août 1885, les informant que leur décision  
 à cet égard était approuvée. N'était-ce pas là une ap-  
 probation formelle et une ratification de la fixation du  
 salaire? Si le gouvernement avait eu l'intention alors  
 de ne pas confirmer les salaires n'était-il pas absolument  
 de son devoir d'en informer les commissaires et de leur  
 dire en même temps qu'il consentait au maintien des  
 officiers, mais à un taux moins élevé. Les commissaires  
 pas plus que les officiers ne pouvaient s'imaginer que  
 le gouvernement avait l'intention de les conserver,  
 mais à un taux réduit dont il ne fut nullement alors  
 question. Ces officiers ont dû présumer que puisque  
 le gouvernement retenait leurs services, c'était aux  
 mêmes conditions que par le passé, c'est-à-dire au salaire  
 fixé par les commissaires qui leur avait été payé jusqu'a-  
 lors sans aucune difficulté. Malheureusement l'appro-

bation du Gouverneur en conseil requise par la section 6 de l'acte des licences de 1883, pour la détermination des salaires n'ayant pas été donnée, je me vois bien à regret forcé de déclarer que cette formalité était nécessaire pour légitimer la réclamation du salaire. Cependant les commissaires ayant fait toutes les démarches nécessaires pour l'obtenir ce n'est pas à eux d'en supporter la responsabilité, mais au ministre du revenu de l'intérieur qui a négligé de se conformer à la demande des commissaires. Il faut espérer que le département indemniserà les commissaires d'une perte qu'ils ne devraient pas subir.

1892  
BURROUGHS  
 v.  
THE  
QUEEN.  
 Fournier J.

TASCHEREAU J.—I am of opinion that this petition of right was rightly dismissed. I have come to that determination not without regret, as it is clearly in evidence that the petitioners were certainly led into error by the officers of the Crown, and paid these inspectors solely with the intention of effectually putting an act of Parliament into force, in performance of their duties. I think in law, however, that they have no right of action, though their claim should, in my opinion, receive a favourable consideration from the Crown. I agree with the judgment of the Exchequer Court.

The salaries of the inspectors could only become a charge upon the license fund after the sanction and approval of the Governor in Council of such salaries had been obtained therefor, and there is no evidence that the salaries as fixed by the appellants were ever approved of as required by the statute, so that any sums of money paid by the appellants without such approval were paid illegally, and the appellants must take the consequences of their illegal action.

The appellants were expressly warned shortly after their appointment by letter of the commissioner of



1892  
BURROUGHS  
v.  
THE  
QUEEN.  
Taschereau  
J.

Inland Revenue that in fixing the salaries of the inspectors, the salaries so fixed were subject to the approval of the Governor in Council, and that when the salaries should be submitted to the department, the Governor in Council would consider the matter; and more especially were the appellants notified by the letter of the commissioner of Inland Revenue of the 6th August, 1884, to the appellants, wherein amongst other things the commissioner says, "In districts where the revenue accrued upon applications for licenses and license fees is sufficient to meet all anticipated expenditure, the chairman of such boards will probably feel little hesitation in accepting the responsibility of authorizing disbursements on account of the expenses of the board and of the salaries and expenses of the inspectors, always bearing in mind that the inspector's salary is subject ultimately to the approval of the Governor in Council, and therefore that any advance on account of it must leave a reasonable margin for any possible divergence of view between the board and His Excellency in Council as to the value of the services rendered." The appellants cannot now be allowed to say that they never had any notification from the Department of Inland Revenue as to the fixing of the salaries even if such notification were necessary. And the fact that the appellants went on for nearly the whole time of their official tenure paying the salaries to the inspectors as fixed by themselves, with the knowledge of the Department of Inland Revenue, cannot, it seems to me clear, be construed into an approval of their conduct under the statute so as to bind the Crown.

The approval as required by the 6th section of the statute cannot be inferred from the mere inaction or silence of the Minister of Inland Revenue. That section requires actual approval by the Governor in Council. The minister, therefore, in fact had no authority

under the statute to approve, and as the learned judge in the court below puts it, what he could not do directly he could not be held to have done indirectly. *Queen v. McGreevy* (1) and *Queen v. Smith* (2).

1892  
 BURROUGHS  
 v.  
 THE  
 QUEEN.  
 —  
 Taschereau  
 J.  
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Neither can the delay which took place between the time when the appellants first notified the department that they had fixed the salaries and the time when the salaries were fixed and sanctioned by the Governor in Council, be taken to be an admission on the part of the Crown that the salaries fixed by the commissioners had the approval of the Crown.

PATTERSON J. concurred.

*Appeal dismissed without costs.*

Solicitors for appellants: *Belcourt, MacCracken & Henderson.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*