

Supreme Court of Canada
Murphy v. The King, (1917) 55 S.C.R. 550
Date: 1917-03-22

James William Murphy and Robert Sedgwick Gould (Defendants) Appellants;

and

His Majesty The King (Plaintiff) Respondent.

1917: February. 6; 1917: March 22.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Yukon Territory—Gold Commissioner—Mining recorder—Powers and authority—Yukon Placer Mining Act, R.S.C. 1906, c. 64, s. 3, 4, 5 and 6, as amended by 7 and 8 Edw. VII., c. 77, s. 25.

Under the Yukon Placer Mining Act, R.S.C. 1906, c. 64, ss. 3, 4, 5 and 6, as amended by 7 & 8 Edw. VII., c. 77, s. 25, the Gold Commissioner had all the powers and authority of a mining recorder throughout the whole Territory, without any direction to that effect by the Commissioner of the Yukon Territory (ss. 3 and 5) since the Governor-in-Council had appointed only one Gold Commissioner for the Territory at the date of the grant; or such direction, if necessary, should be presumed to have been given.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C.R. 81), was allowed.

APPEAL from the judgment of the Exchequer Court of Canada¹, maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that a water grant was issued in error and improvidently and should be declared null and void.

The questions in issue on the present appeal are fully stated in the above head-note and in the judgments now reported.

F. T. Congdon K.C. for the appellants.

W. D. Hogg K.C. for the respondent.

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THE CHIEF JUSTICE.—The claim of the Crown in this suit is to set aside a water grant in the Yukon Territory made to the appellant on the 8th Oct. 1909.

The Yukon Placer Mining Act, R.S.C. 1906, c. 64, as amended by 7 & 8 Edw. VII., c. 77, provides:—

¹ 16 Ex. C.R. 81.

Sec. 3.—The Governor in Council may appoint gold commissioners and acting and assistant gold commissioners for the purpose of carrying out the provisions of this Act; but mining recorders and mining inspectors and deputies thereto shall be appointed by the commissioner subject to the approval of the Governor in Council.

Sec. 4.—The Commissioner may, by proclamation published in the Yukon Official Gazette, divide the territories into districts to be known as mining districts, and may, as occasion requires, change the boundaries of such districts.

Sec. 5.—The Gold Commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

Sec. 6.—A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector.

Sections 54 to 58 provide for the adjudication on any application for a water grant by a mining recorder who is then empowered to make the grant.

It is admitted that all necessary proceedings were regularly taken under the Act except that the adjudication on the application was held before the Gold Commissioner and it is claimed that this was contrary to the statute inasmuch as he had not been directed by

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the Commissioner to act as a mining recorder for the district.

The Act does not provide for any such direction. Sec. 5 provides that the Gold Commissioner shall have jurisdiction within such districts as the Commissioner directs

and within such districts shall possess also all the powers and authority of a mining recorder.

There was, I think, no necessity for any direction at all because at the date of the grant only one Gold Commissioner had been appointed by the Governor in Council. The statute contemplates the appointment of more than one gold commissioner as appears from other than the sections above quoted, for instance section 79 which provides that affidavits

may be made before any Gold Commissioner anywhere within the Territory.

When there are several gold commissioners appointed, the Commissioner is to direct in which districts each shall have jurisdiction and of course it was never intended that there should be a gold commissioner for each district as there is a mining recorder. In the districts directed by the Commissioner each gold commissioner exercises jurisdiction and by sec. 5 has within those districts the powers of a mining recorder. Where there is only one gold commissioner appointed there can be no division of jurisdiction and the only possible direction of the Commissioner would be that he should have jurisdiction in all the districts; if this were necessary it would amount to saying that the gold commissioner appointed by the Governor in Council could have no jurisdiction without being further appointed by the Commissioner. The Judge of the Exchequer Court

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does indeed attempt a distinction between certain duties of the Gold Commissioner under the statute and those of a mining recorder. He says:—"An analysis of the statute shews that the Gold Commissioner had certain duties to perform as Gold Commissioner but was not clothed with the powers of a mining recorder until appointed by the Commissioner." Passing by the fact that the statute says nothing about any appointment of the Gold Commissioner by the Commissioner such an interpretation of section 5 must apply to all the duties of the Gold Commissioner who would have no jurisdiction either as to the special duties imposed on him by the Act or as to the powers of a mining recorder.

The learned judge says in his reasons for judgment: "Turning to the statutes, for convenience I have been furnished with a copy of the "Yukon Placer Mining Act" as consolidated with the amending Acts." In case he has not referred to the statutes themselves it may not be amiss to point out that under the original statute the Governor-General in Council appointed all the officials, mining recorders as well as gold commissioners. It was only by the amending Act, 7 & 8 Edw. VII., c. 77, that the change was introduced "but mining recorders and mining inspectors and deputies thereto shall be appointed by the Commissioner." This, the only power of appointment given to the Commissioner, may have given rise to the error as to appointment of gold commissioners by the Commissioner; it does not touch them at all.

I think the Act is perfectly clear though it would have been better if in sec. 5, in place of the words "The Gold Commissioner," the words "The Gold Commissioners" or "A Gold Commissioner" had been used.

The Act, however, repeatedly refers to *the* Gold Commissioner and if one may make a surmise this is to be accounted for by the fact that there was, and for years previous to the passing of the Act had been, only one official known as the Gold Commissioner in the Yukon Territory.

The objection to the grant entirely fails and the appeal should be allowed with costs.

DAVIES J.—I concur with the reasons of my brother Anglin for allowing the appeal

IDINGTON J.—I think this appeal should be allowed and the Information be dismissed with costs here and below.

DUFF J.—The controversy on this appeal relates to the construction of certain provisions of the Yukon Act, R.S.C. 1906, ch. 64 which are as follows:—

"3.—The Governor in Council may appoint gold commissioners and acting and assistant gold commissioners for the purpose of carrying out the provisions of this Act; but mining recorders and mining inspectors and deputies thereto shall be appointed by the commissioner subject to the approval of the Governor in Council.

"4.—The Commissioner may, by proclamation published in the Yukon Official Gazette, divide the territory into districts to be known as mining districts, and may, as occasion requires, change the boundaries of such districts.

"5.—The Gold Commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

"6.—A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector."

The question can be dealt with without any further reference to the particular facts of the case in which it arises and it is this. Is an express direction by the commissioner a condition which must be complied with before a Gold Commissioner appointed by the Governor in Council under the authority of section 3 is invested with jurisdiction as gold

commissioner or as mining recorder to perform the duties and to exercise the powers committed to a gold commissioner or a mining recorder under the statutes relating to the Yukon and to mining therein?

It is contended on behalf of the Attorney-General that this question must be answered in the affirmative even where only a single gold commissioner for the whole territory has been appointed under section 3; and it was quite candidly admitted by Mr. Hogg that the practical effect of accepting this interpretation of section 5 must be that from some date in 1906 down to some date in 1912, a period of six years, no officer was invested with the powers of a gold commissioner in the Yukon although a gold commissioner had been appointed by the Governor in Council and was all that time acting as if he possessed authority and in the full belief of everybody that his acts were lawful and valid. The section is no doubt a crabbed one, but I think when the law in existence at the time the statute was passed by virtue of the orders in council then in effect touching the powers and authority of the Gold Commissioner is considered, a way is opened out of the difficulty though it is impossible to say the difficulty wholly disappears. Under that law a gold commissioner was *ex officio* mining recorder. That provision of the law is not

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explicitly repealed by the Act of 1906 and I think section 5 manifests an intention to recognize the gold commissioner's *ex officio* capacity as mining recorder.

I agree with Mr. Congdon's contention that the application of section 5 must be restricted to those cases in which more than one gold commissioner is appointed. Further than that I express no opinion upon the true construction of section 5; it may be hoped that before any further question can arise with regard to that Parliament will by a declaratory Act make the meaning of it clear.

The appeal should be allowed and the information dismissed with costs.

ANGLIN J.—The Crown in this proceeding seeks a declaration that a grant of the right to use and divert water issued to the defendants on the 8th Oct., 1909, is null and void and an order for its cancellation. This relief is asked on the grounds that "the grant was made and issued through improvidence, inadvertence and error" and without any adjudication on the application therefor by the Mining Recorder who signed it. Secs. 54-57 of the Yukon Placer Mining Act (R.S.C., 1906, c. 64), as amended by 7 & 8 Edw. VII., c. 77, s. 25,

provide for adjudication by a Mining Recorder upon any application for a grant of the right to use or divert water and for the issue of such grants with the approval of the Commissioner of the Yukon Territory.

In the case at bar the adjudication upon the defendants' application was made by the Gold Commissioner, Mr. F. X. Gosselin, and by his direction Mr. G. P. Mackenzie, a mining recorder, signed the grant to them and it issued with the approval of the Commissioner of the Yukon Territory, who appears to have had full knowledge of the facts.

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The substantial question presented is whether the Gold Commissioner had the powers and authority of a mining recorder requisite to enable him validly to adjudicate upon the defendants' application under s. 57 of the statute. If he had I attach no importance to the fact that the grant was signed not by the Gold Commissioner himself, as it might have been, but by another mining recorder acting by his direction. No improvidence, inadvertence or error in the making of the grant other than an alleged absence of jurisdiction as mining recorder in the Gold Commissioner has been suggested.

Prior to 1906 the Gold Commissioner for the Yukon Territory was appointed under the provisions of an order in council of the 7th July, 1898. By this order in council the Gold Commissioner was constituted *ex officio* Mining Recorder at the headquarters of the Government of the Territory, *i.e.*, at Dawson City, and he was empowered to appoint such additional Mining Recorders as might be necessary and to divide the Territory into such mining divisions as he deemed advisable. Under this order in council the Gold Commissioner acted as a Mining Recorder for the Dawson district and adjudicated upon all conflicting or contested applications for grants of water privileges. That this was the practice which obtained is fully established by the evidence.

In 1906 the "Yukon Placer Mining Act" was passed and it appears in the R.S.C., 1906, which came into force on the 31st of Jan., 1907, as c. 64. Secs. 3, 4, 5 and 6 of that Act are as follows:—

3. The Governor in Council may appoint gold commissioners, mining recorders and mining inspectors, and deputies thereto, for carrying out the provisions of this Act.
4. The Commissioner in Council may, by proclamation published in the Yukon Official Gazette, divide the territory into districts to be

known as mining districts, and may, as occasion requires, change the boundaries of such districts.

5. The gold commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority, of a mining recorder or mining inspector.

6. A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector.

On the 28th May, 1907, Mr. F. X. Gosselin, theretofore Assistant Gold Commissioner at Dawson, was appointed by the Governor in Council "Gold Commissioner for the Yukon Territory" and he held that office for about five years. During that time there was no other Gold Commissioner nor any Assistant Gold Commissioner appointed. The Yukon Territory had been divided into mining districts by the Commissioner of the Yukon Territory prior to 1906. No re-division or alteration of existing divisions appears to have been made under s. 4 of the Yukon Placer Mining Act.

Mr. Gosselin states that prior to the 1st April, 1912, he never had

any specific appointment or directions from the Commissioner of the Yukon Territory as to what districts within the Yukon Territory he should exercise his jurisdiction over as Gold Commissioner and the Mining Recorder,

that he acted as mining recorder because of his

construction of the "Yukon Placer Mining Act" * * * and the construction of the order in council of the 7th July, 1898, defining the powers of the Gold Commissioner * * * (and) according to the practice of the office from the earliest times.

I am quite satisfied that under s. 5 of the Yukon Placer Mining Act the authority and powers of the Gold Commissioner as Mining Recorder were territorially co-extensive with his jurisdiction as Gold Commissioner.

Having regard to the circumstances and to the provisions

of ss. 3 and 4, I should, if necessary, require to consider very carefully whether, although it speaks of "*the* Gold Commissioner," the provision of s. 5 prescribing a direction by the Commissioner of the Yukon Territory was meant to apply unless the Governor in Council, under the power conferred by s. 3, should appoint more than one Gold Commissioner, as

it was probably expected that he would when the statute was enacted. Until that had been done there could be no purpose in having the Commissioner of the Yukon Territory direct within what mining districts the sole Gold Commissioner should act. It was certainly not intended by Parliament that any part of the Yukon Territory should not be subject to the jurisdiction of a Gold Commissioner, nor can I think that it was intended that while the Governor in Council had appointed only one Gold Commissioner for the Territory the Commissioner of the Yukon Territory should have the power to restrict his jurisdiction to particular mining districts. If the construction of s. 5 for which counsel representing the Attorney-General contends should prevail and no direction under that section was given by the Commissioner of the Yukon Territory to Mr. Gosselin, from the date of his appointment in May, 1907, until the 12th of April, 1912, though appointed sole Gold Commissioner for the Yukon Territory as a whole, he had no jurisdiction therein and all his acts not only as Mining Recorder but as Gold Commissioner were invalid. Before accepting a construction of s. 5 which would entail consequences so disastrous, I would have to be convinced that it is not open to any other.

But this case may be disposed of without determining that the provisions for designation by the Commissioner of particular districts as those within

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which a Gold Commissioner shall exercise his office was inapplicable. Since it was clearly intended that every mining district in the Yukon Territory should be subject to the jurisdiction of a Gold Commissioner, the Commissioner of the Yukon Territory had no discretion under s. 5, if applicable, but was obliged to direct that the sole Gold Commissioner appointed should exercise jurisdiction throughout the whole Territory. Such a direction would be the veriest formality. No form of direction having been prescribed, it should be inferred from the facts that Mr. Gosselin acted as Gold Commissioner for five years under the direct supervision of the Commissioner of the Territory and that his acts as Gold Commissioner and Mining Recorder were continually under the consideration of the Commissioner, who expressly approved in writing of grants made upon some 64 applications for water privileges, of which this was one, adjudicated upon during that period by him; that he had been however informally it matters not, directed by the Commissioner of the Yukon Territory to act as Gold Commissioner throughout the Territory, as his predecessors in office had done. It is true that Mr. Gosselin himself appears to have thought that no direction from the Commissioner of the Territory was

necessary—that under the statute and the order in council of 1898 his commission from the Governor in Council made his official status complete. The Commissioner of the Territory, however, was not examined as a witness and we do not know that he entertained the same view, and in the absence of evidence to that effect it should not be assumed that he did. On the contrary, we should rather presume that if his duty required that he should give a direction under s. 5—as it clearly would if that section were applicable—that that duty was discharged, though it

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may have been in some manner so informal that it escaped Mr. Gosselin's notice, as it well may have since no change was made in the practice which had theretofore prevailed. It is consistent with Mr. Gosselin's evidence that something may have transpired which would satisfy sec. 5 as a general direction, but which he would not regard as a

specific appointment or direction from the Commissioner.

If the Crown desired to exclude the inference of performance of his duty by the Commissioner of the Yukon Territory I think the burden was upon it to adduce that officer's evidence to negative it. The case is one to which the maxim *omnia praesumuntur rite esse acta* applies with peculiar force. Either because the direction prescribed by sec. 5 of the Yukon Placer Mining Act was not necessary under the circumstances, or because, if it was requisite, there is a cogent presumption that it was given, which has not been rebutted, I would uphold the grant made to the defendants.

I would, therefore, with respect, allow this appeal with costs and dismiss the information also with costs.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the court below.

Appeal allowed with costs.

Solicitors for the appellants: Fred T. Congdon.

Solicitors for the respondent: Hogg & Hogg.