

IN RE GUARANTEE OF BONDS OF THE GRAND
TRUNK PACIFIC RAILWAY COMPANY.

1909

*Dec. 13.

*Dec. 24.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

*Statutory contract — Construction — Bonds of railway company —
Government guarantee.*

The Government of Canada, in a contract with the Grand Trunk Pacific Railway Co., published as a schedule to and confirmed by 3 Edw. VII. ch. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75% of the cost of construction of the Western division of its railway. By a later contract (sch. to 4 Edw. VII. ch. 24) the Government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75% of such cost of construction.

Held, that this second contract only imposed upon the Government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75%.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration.

By 3 Edw. VII. ch. 71 a contract between the Government of Canada and representatives of the Grand Trunk Pacific Railway Co. (which was incorporated in the same session) was confirmed and printed as a schedule to the Act. Section 28 of said contract is as follows:

“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

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff and Anglin JJ.

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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 eighteen 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 cost of construction may have exceeded the said respective sums per mile."

In the following year a further contract was entered into confirmed by 4 Edw. VII. ch. 24, and printed as a schedule thereto. By section 5 of such contract it is provided that

"Notwithstanding anything in the said contract mentioned above 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 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 (75) 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 (\$13,000) per mile."

The contracting parties not being able to agree on the manner in which the Government was to implement its guarantee of bonds under this second contract the questions were submitted to the Supreme Court of

Canada for an opinion thereon in the following manner:

“Certified copy of a report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 22nd November, 1909.

“On a memorandum dated 5th November, 1909, from the Minister of Justice, submitting—with reference to the agreement of 29th July, 1903, set forth in the schedule to the “National Transcontinental Railway Act” (3 Edw. VII. ch. 71), as the said agreement is amended or modified by the further agreement of 18th February, 1904, set forth in the schedule to the Act, 4 Edw. VII. ch. 24, intituled, ‘An Act to amend the National Transcontinental Railway Act,’—that no agreement having been made between Your Excellency’s Government and the Grand Trunk Pacific Railway Co. as to the manner in which Your Excellency’s Government shall implement, for the purposes and subject otherwise to the provisions of the said contract, its guaranty of the bonds of the company issued or to be issued for the cost of construction of the said Western division so as to make the proceeds of the said bonds a sum equal to ‘seventy-five per centum of the cost of construction of the Western division, ascertained as provided in the said contract of 29th July, 1903 (3 Edw. VII. ch. 71, schedule), but not exceeding in respect of the prairie section thirteen thousand dollars (\$13,000) per mile,’ and differences having arisen as to the true interpretation of the fifth clause of the said agreement of 18th February, 1904, it has been agreed between Your Excellency’s Government and the company that the questions thus arising between the Government and the company may be conveniently determined by means of a reference to the Supreme

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Court of Canada in the exercise of the powers vested in Your Excellency in Council under the 'Supreme Court Act,' subject to appeal.

"The Minister having regard to the facts hereinbefore stated, therefore, recommends that the following questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of section 60 of the 'Supreme Court Act,' viz:

"(a) Is the Government, in the absence of an agreement between the Government and the company as to the manner of the implementing, liable, upon the true construction of the said fifth clause of the agreement of 18th February, 1904, to implement its guaranty of the bonds of the company so issued or to be issued for the cost of construction of the said Western division and guaranteed or to be guaranteed by the Government pursuant to the said agreement of 29th July, 1903, as amended by the agreement of 18th February, 1904, so as to make the proceeds of the said bonds so guaranteed or to be guaranteed 'a sum equal to seventy-five per cent. 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 (\$13,000) per mile?"

"(b) Would the obligation of the Government under the said fifth clause of the agreement of 18th February, 1904, be satisfied by the guaranteeing of additional bonds of the company to be issued for the cost of construction of the said Western division to an amount which will realize upon sale a sum of money sufficient to make the said proceeds so equivalent?

"(c) Would the obligation of the Government

under the said fifth clause be satisfied by the guaranteeing of the bonds of the company to be issued for the cost of construction of the said Western division, in such manner as may be agreed upon, to such an amount as will produce a sum sufficient to make the proceeds of all the bonds of the company issued or to be issued for the cost of construction of the said Western division and guaranteed or to be guaranteed by the Government, including such additional bonds as may be guaranteed for the purpose of discharging any obligation of the Government arising under the said fifth clause, a sum equivalent as aforesaid?

“(d) Is the Government bound upon the true construction of the said fifth clause of the agreement of 18th February, 1904, to provide and pay to the company a sum of money which, when added to the proceeds of the bonds of the company issued or to be issued for the cost of construction of the said Western division, and guaranteed by the Government pursuant to the authority of the said agreement of 29th July, 1903, as amended by the said agreement of 18th February, 1904, will aggregate a sum equal to seventy-five per centum of the cost of construction of the Western division ascertained as provided in the said agreement of 29th July, 1903, but not exceeding in respect of the prairie section thirteen thousand dollars (\$13,000) per mile?

“(e) If so, will the Government be entitled as guarantor to call upon the company, as being primarily liable to pay for the construction of the said Western division, for reimbursement in respect of such sum of money so provided and paid, and will such sum fall within or be covered by the security provided for by paragraph 35 (a) of the agreement of 29th July, 1903 (3 Edw. VII. ch. 71, schedule)?

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“(f) Is it competent to the Government and the company to agree that the implementing for the purpose of the said fifth clause shall be by way of guarantee by the Government of additional bonds of the company, and if it be so agreed, would the obligation of the Government be satisfied by the guaranteeing of such additional bonds as may be agreed upon between the Government and the company?”

“(g) Does the said fifth clause of the agreement of 18th February, 1904, upon its true construction, require the Grand Trunk Pacific Railway Company, for the purpose of enabling the Government to carry out the implementing of its guaranty of the bonds referred to in said clause, to undertake any further obligation by way of an additional issue of bonds otherwise; or is it intended that the Government shall without any further obligation being imposed upon the Grand Trunk Pacific Railway Company, implement its guaranty of the bonds referred to in the said clause 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 agreement of 29th July, 1903, but not exceeding in respect of the prairie section thirteen thousand dollars (\$13,000) a mile?”

“The Committee submit the same for approval.”

“RODOLPHE BOUDREAU,”

“*Clerk of the Privy Council.*”

Shepley K.C., for the Government of Canada.

Laflaur K.C. and *Biggar K.C.*, for the Grand Trunk Railway Co.

The court answered the questions submitted as follows:

Question (a).	Answer No.	
“ (b).	“ Yes.	
“ (c).	“ Yes.	
“ (d).	“ No.	
“ (e).	The answers to the previous questions make it unnecessary to give any answer to this question.	
“ (f).	Answer Yes.	
“ (g).	“ Yes to first part; no to second.	

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ANGLIN J.—I would qualify the answer to the first part of question “g” by adding thereto these words: “If the company desires to take advantage of the provisions of the agreement of 1904 as to the implementing of the Government guarantee.”

The following reasons were given for the categorical answers to said questions.

THE COURT.—It is desirable, perhaps necessary, that a few words should be added to the categorical answers given by the court to the series of questions put to it upon the true construction of the contracts made between His Majesty and the Grand Trunk Pacific Railway of 29th July, 1903, and 18th February, 1904, respectively.

The keynote to the answers to these questions is to be found in the determination whether or not the additional liability assumed by the Government under the 5th clause of the amended agreement of 1904 remained a secondary liability by way of guarantee of bonds to be issued by the G. T. Pacific Railway Company sufficient in character and amount to realize 75% of the

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cost of construction of the Western division ascertained as provided in said contract, but not exceeding in respect of the prairie section \$13,000 per mile, or whether such additional liability was of a primary character and obliged the Government to make up in cash or its equivalent outside of the guaranteed bonds any deficiency that might arise between the proceeds of the bonds and the 75% of the cost of the railway.

We had no hesitation in reaching the conclusion that the extended liability the Government agreed to assume by the agreement of 1904 was a secondary liability only and not a primary one. The result of such a holding was, of course, that the only liability of the Government was to guarantee bonds of the company the proceeds of which would produce a defined amount.

But it was evident that much would depend upon the character of the bonds which the parties to the contract should eventually agree upon issuing.

The time for payment and the rate of interest they should bear would largely govern and determine the proceeds they would realize.

These and other details of the form and character of the bonds were left to mutual agreement, and such an agreement must under the terms of the contract be come to before the Government obligation became exigible.

These remarks will explain the answers to some of the questions which without them might be held to be ambiguous.

Mr. Justice Idington desires to add to the foregoing, in which all the members of the court agree, the following paragraph for himself:

Whilst agreeing in the proposition of the judgment of the court that the obligation of the Crown was that

of guarantor, and he proceeds on such assumption, he does not understand the Crown limited absolutely to the device of bonds to make good something which is of necessity to be the subject-matter of future agreement and conceivably may be more advantageous for both parties than that, but in any case subject to the usual constitutional limitations.

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