No. 61 of 1915.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED - - - - *Appellant*

AND

HIS MAJESTY THE KING - - - - *Respondent*

AND

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

Case for the Respondent.

RECORD.

1. On 10th June, 1899, Her late Majesty Queen Victoria, represented and acting by the Minister of the Interior of the Dominion of Canada, leased to John J. Doyle and his associates a certain parcel of land in the Yukon Territory, for the purpose of the lessees carrying on, upon the said parcel of land, the business of hydraulic mining. (Lease No. 2.). p. 33.

2. On 5th January, 1900, Her said late Majesty, represented and acting as aforesaid, leased to the same Doyle and his same associates a certain other parcel of land, also in the Yukon Terri-10 tory, for the purpose of the lessees carrying on upon the said parcel of land also the business of hydraulic mining. (Lease No. 8.) p. 36.

x P 19097 75 7/15 E & S

A

RESPONDENT'S CASE.

RECORD.

p. 37, l. 14.

3. Out of the area of the second of these parcels of land were excluded all existing, uncancelled entries of placer mining claims within the same area.

p. 39.

4. On the 9th January, 1900, the same parties entered into an agreement, which, so far as presently material, may be described compendiously as providing that the uncancelled placer claims, excluded from the area of Lease No. 8, should, as the same from time to time revested in the Crown, become part of the leased territory, on the performance of certain prescribed conditions by the Syndicate. 10

p. 41.

p. 42, l. 12.

5. On 13th January, 1900, Her said late Majesty leased to C. A. Matson and his associates a third parcel of land, also situate in the Yukon Territory, for the purposes of these lessees carrying on upon it the business of hydraulic mining. This lease contained a similar exclusion of existing placer mining claims within the area of the parcel covered by it. (Lease No. 9.)

p. 44.

6. On 15th January, 1900, an agreement was made between the Crown and these lessees, similar to that made between the Crown and the Doyle Syndicate with regard to Lease No. 8, providing that as the excepted placer claims became revested in the Crown, they 20 should become part of the leased territory, on the performance of certain prescribed conditions by the Syndicate.

p. 30.

7. On 23rd December, 1904, the Appellant Company obtained, from the executive authorities of the Province of Ontario, Letters Patent professing to be issued under the authority of the Ontario Companies Act, incorporating the Appellant as a Company and fixing its head office at the City of Toronto (the capital of the Province of Ontario), and authorising it to carry on the business of mining.

p. 4, l. 23.

8. The Appellant Company claims to have become the assignee of all the estate, right, title and interest of both the Doyle Syndicate 30 and the Matson Syndicate under the leases and agreements hereinbefore referred to, and in the Yukon mining properties to which the same relate.

RECORD.

9. Alleging a great number of "wrongful acts and omissions" on the part of the Dominion Government and its officers, all of which are alleged to have taken place in regard to the mining properties to which the aforesaid leases and agreements relate, and many of which are alleged to have taken place before the Appellant Company became the assignee of the rights of the Doyle and Matson Syndicates respectively, the Appellant Company in January, 1908, p. 4. filed a Petition of Right in the Exchequer Court of Canada, claiming large damages against the Crown in respect of the 10 various "wrongful acts and omissions" with which it charged the Government and its officers.

10. As already stated, all these claims arose out of the dealings of the Government in respect of the lands in the Yukon Territory to which the leases and agreements relate. The Appellant did not p. 53, l. 10. carry on the business of mining elsewhere than in the Yukon Territory, and, beyond having what is called a "head office," and holding certain meetings in Ontario, did no business whatever in Ontario.

11. Among other defences set up by the Crown to the Appellant p. 18, ll. 16-26. 20 Company's Petition of Right were those stated in the first and second paragraphs of the Answer; these may be broadly stated in the following terms:—

(*a*) The Appellant Company had no power or authority to carry on the business of mining beyond the territorial limits of the Province which gave it corporate existence, or, in the course of attempting to do so, to acquire enforceable rights of action.

(*b*) The position of the Appellant Company in that respect could not be improved, or its power or authority 30 augmented, by any extension to it of comity or *quasi*-comity on the part of the Yukon authorities, or by such recognition of its *status* as was alleged to have taken place on the part of the executive authorities of the Dominion of Canada.

RECORD. p. 54.

12. The Judge of the Court of Exchequer, upon the Respondent's application, deeming it expedient and convenient that these preliminary questions should be determined before the parties were put to the enormous labour and expense of a general trial of the other large, numerous and difficult issues presented by the pleadings, made the proper and necessary directions permitted by the Exchequer Court practice in that behalf, and the parties proceeded to a trial before him of the matters raised by the first two paragraphs of the Answer, on 14th March, 1914. At that date, the Judges of the Supreme Court of Canada had recently delivered their opinions in the proceeding usually spoken of as "The Companies Case." Those opinions are now reported in 48 S.C.R., at page 331.

p. 55.

10

p. 56.

13. Mr. Justice Cassels, the Judge of the Court of Exchequer, on 28th April, 1914, delivered his Judgment upon the two preliminary questions tried before him. As to the first preliminary question, viz., that as to the power of the Appellant Company to carry on business and acquire rights outside the incorporating Province, he followed what he believed to be the views of the majority of the Supreme Court Judges expressed in their opinions in the Companies Case, and concluded that the Appellant Company had no such power, or in other words no such capacity, as that contended for. Upon this ground he directed that the Petition of Right should be dismissed. In the final paragraph of his reasons for judgment he disposes in very few words of the other preliminary question. He treats it as an attempt to apply the doctrine of estoppel against the Crown, and, having held, in answer to the first question, that the Appellant Company had not the capacity for which it had contended says, in answer to the other, "I cannot understand how, when the capacity does not exist, such capacity can be created by estoppel."

20

p. 59, l. 17.

30

14. It will be convenient, before proceeding further with this history of the litigation, to make a brief reference to the statutory provisions upon which the various points in controversy are based, and to state with some precision the bearing of such statutory provisions upon the points dependent upon them.

RECORD.

15. First of all, the relevant provisions made by the Canadian Constitutional Act, usually spoken of as the British North America Act, 30–31 Vict., Cap. 3, Imp., for the distribution of legislative power between the Dominion and its constituent Provinces, may briefly be stated.

Section 91 gives the Parliament of Canada power to "make laws for the peace, order and good government of "Canada, in relation to all matters not coming within "the classes of subjects by this Act assigned exclusively "to the Legislatures of the Provinces, and for greater "certainty but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "the exclusive legislative authority of the Parliament of "Canada extends to all matters coming within the classes "of subjects next hereinafter enumerated, that is to say

* * * * *

"(2) The regulation of Trade and Commerce

* * * * *

"(29) Such classes of subjects as are expressly excepted "in the enumeration of the classes of subjects by this Act "assigned exclusively to the Legislatures of the Provinces.

"And any matter coming within any of the classes "of subjects enumerated in this section shall not be "deemed to come within the class of matters of a local "or private nature comprised in the enumeration of the "classes of subjects by this Act assigned exclusively to "the Legislatures of the Provinces."

16. Section 92 deals with the Provincial legislative powers in the following terms:—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next herein-after enumerated, that is to say, * * * *.

RECORD.

"(10) Local works or undertakings other than such as are of the following classes:—

"(*a*) * * * * works and undertakings extending beyond the limits of the Province; * * * *.

"(11) The incorporation of companies with Provincial objects, * * * *.

"(16) Generally all matters of a merely local or private nature in the Province."

17. The foregoing provisions of the British North America Act bear directly upon the power or capacity of the Appellant Company. 10

18. The exclusive legislative jurisdiction of the Parliament of Canada extends to the undertaking of the Appellant Company because, as an undertaking extending beyond the limits of the incorporating Province, it is a class of subject expressly excepted in the enumeration of the classes assigned to the Legislatures of the Province.

19. The express limitation imposed by Section 92, sub-section 11, upon the provincial power of incorporating Companies, that such Companies must be Companies "with provincial objects," not only relates to the nature of the powers which the province may confer by such incorporation, but also to the territorial area within which such powers may be exercised. 20

20. It must be borne in mind that a construction of the Appellant Company's provincial charter which would even appear to warrant any mining operations outside the provincial limits is by no means a necessary construction, but is, on the contrary, an extremely forced and unnatural construction. The charter authorises the Company to engage in the business of mining. Ontario has immense mining areas within its geographical limits, 30

has a comprehensive and systematic Mining Act (now R.S.O., Cap. 32), and has incorporated hundreds of mining companies with powers expressed in the identical language of this charter. But such companies have hitherto found the legitimate sphere for their operations in the great mining fields of Ontario. It is a new and strained interpretation to put upon an Ontario Mining Company charter to say that it may be read as pretending to authorise the invasion of mining fields without the Province, or as conferring any capacity to be exercised elsewhere than in 10 Ontario.

21. The force of this argument is not in the slightest degree affected by the suggestion that a provincial company, created to carry on a provincial undertaking within provincial limits, may exercise outside those limits such subsidiary and incidental powers as are usual and necessary in the local business in which the Company is engaged.

22. Section 3 of the Ontario Companies Act, now R.S.O., Cap. 178, is not without pertinence at this point. It gives the executive authorities of the Province power to create corporations

20 " for any of the purposes to which the authority of this Legislature extends."

The charter of the Appellant Company should be read in the light of this provision, and, so read, it neither confers nor professes to confer upon the Appellant Company any such capacity as that for which it contends in the present case.

23. The next group of legislative provisions to which reference must be made also bears upon the question of the capacity of the Appellant Company to avail itself of mining privileges of any kind in the Yukon Territory, but under this group the question is 30 whether the Yukon Territory has ever been or could validly be thrown open to companies with the origin and status of the Appellant Company.

RECORD.

24. In January, 1898, before the Yukon Territory was constituted a separate Territory and given separate legislative jurisdiction, and while the whole system of gold mining in that Territory was still within the jurisdiction of the Governor General in Council, an elaborate Order-in-Council, establishing a code for the regulation of the whole subject, was passed. It is to be found at page XXXIX of the Orders-in-Council prefixed to the Statutes of Canada of that year.

25. By the first section of those regulations it was provided that every person over 18 years of age and every Joint Stock 10 Company should be entitled to all the rights of a free miner on taking out a free miner's certificate. By the seventh section, mining in the Territory was forbidden to any person not possessed of a subsisting and unexpired free miner's certificate, issued by some one of the executive officers of the Dominion of Canada named in the regulations. The regulations defined "free miner" to mean

> "a male or female over the age of eighteen years but not
> " under that age, or joint stock company named in and
> " lawfully possessed of a valid, existing free miner's certi- 20
> " ficate, and no other."

"Joint stock company" was defined to mean

> " any company incorporated for mining purposes *under a*
> " *Canadian Charter* or licensed by the Government of
> " Canada."

26. It is important to observe that no difference or distinction is suggested between the status of the authoritative source of the charter on the one hand and the status of the authoritative source of the licence on the other hand. The charter is to be "Canadian," the licence to be from "the Government of Canada." This 30 becomes important, because, in the opinion of more than one of the Judges of the Supreme Court, the word "Canadian" in the regulations is given a sort of geographical breadth so as to make the words "Canadian Charter" include a charter granted by any

of the constituent Canadian Provinces and Territories, from the Yukon itself to Nova Scotia. RECORD.

27. In June of the same year, the Parliament of Canada passed an Act to amend the Dominion Companies Act (61 Vict. c. 49), in which, it is submitted, the scope of the regulation was further elucidated. By the first section of that Act it was provided that—

> "Any joint stock company or corporation duly incorporated under the laws of the Parliament of the United
> 10 Kingdom, or under the laws of any foreign country for the purpose of carrying on mining operations may, on receiving a licence from the Secretary of State of Canada, carry on mining operations in the Yukon District and North-West Territories, and shall be entitled to the privileges of a free miner, subject to the regulations governing and affecting free miners."

28. Putting together the regulations of January and the Act of June, it would seem that—

(*a*) Mining in the Yukon was entirely forbidden to any
20 person not possessed of a free miner's certificate.

(*b*) No such certificate was obtainable except by—

(1) a male or female over 18 years of age;

(2) a company with a Canadian charter;

(3) a company with a Canadian licence, which might be either—

a British company incorporated for mining purposes, or

a foreign company incorporated for mining purposes.

30 (*c*) Provincial companies as such are not taken out of the original forbidden category, not being "Canadian" companies and there being no provision for licensing them.

RECORD.

29. In the same year, Parliament constituted the Yukon Territory a separate Territory and gave it certain limited legislative powers (61 Vict., Cap. 6), but there is nothing in this Act to throw any light on the point now under consideration.

30. From the date of the incorporation of the Appellant Company down to a date at which such certificates ceased to be required by law, the officials of the Department of the Interior assumed, from time to time, to issue to the Appellant Company documents in the form of free miners' certificates under the provisions of Sections 1 and 7 of the Regulations of January, 1898, already referred to. It seems probable that such officials acted upon a literal construction of the words "every joint stock company" in Section 1, omitting to observe the definition of those words which the Regulations contained. It seems manifest, however that may be, that if the words "Canadian charter" in the interpretation clause of the Regulations have been rightly interpreted in the foregoing paragraphs, this action of the Departmental officials could not effectively bring within the scope of the Regulations and confer any mining rights under them, upon a Company not falling within the descriptive category contained in the Regulations themselves.

31. In 1902 a Territorial Ordinance of the Yukon Territory, Cap. 59, called the Foreign Companies Ordinance, was passed. It provided by Section 2 that—

> "Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory or an Act of the Parliament of Canada desiring to carry on any of its business within the Territory may (through the Territorial Secretary) petition the Commissioner for a licence so to do, and the Commissioner may thereupon authorise such company, institution or corporation to use, exercise or enjoy any powers, privileges and rights set forth in the said licence."

32. By Section 3 of the Ordinance, the licence so to be issued was made evidence of the due licensing of the Company in any Court of the Territory.

33. Under the authority the Commissioner, on 7th September 1905, issued a licence to the Appellant Company, authorising it to exercise within the Territory

RECORD.

p. 52.

"all such powers, privileges and rights set out in their "*Memorandum of Association* as are within the power of "the Commissioner . . . . to authorise."

p. 52, l. 27.

34. It seems obvious that this Ordinance and the licence issued under it are not material to the present inquiry. The Commissioner of the Yukon Territory could not, nor could the
10 Ordinance under which he acted, make good any inherent constitutional defect in the capacity of the Appellant Company, nor could the Ordinance, or the licence to do business within the Territory issued under it, modify or affect the requirements of the Dominion regulations as to mining and free miners, or enlarge the class of corporations permitted to engage in mining business under those regulations.

35. For this licence, the Territorial authorities exacted from the Appellant Company a fee or $500. The payment of this fee to the Territorial authorities is shown and included among the
20 formal cash returns made by the latter to the Department of the Interior of Canada at Ottawa, but there is nothing in the return to indicate that the Appellant Company was a Provincial Company.

p. 53, l. 13.

36. No licence whatever was ever applied for or obtained, by the Appellant Company, under the provisions of the Act of the Canadian Parliament, 61 Vict., Cap. 49, already referred to.

37. From the Judgment of Mr. Justice Cassels, dismissing the Petition of Right, the Appellant Company appealed to the Supreme Court of Canada, and the Appeal was heard by that Court on the 3rd and 4th December 1914. The Court was composed of Fitz-
30 patrick, C.J., and Davies, Idington, Duff and Anglin JJ. Judgment was delivered on 2nd February 1915, and is now reported in 50 S.C.R., at page 534.

p. 89.

RECORD.

38. The scope of the argument before the Supreme Court is perhaps sufficiently indicated in the Judgments, but it will be convenient to state the points in a compendious form :—

(1) The question whether the charter of the Appellant Company conferred upon it capacity to acquire the property in the Yukon Territory comprised in the original Doyle and Matson locations, to engage in mining thereon or to acquire the causes of action set out in regard thereto in the Petition of Right.

(2) The question whether a company with the origin and charter of the Appellant Company was within the category of those companies to which mining in the Yukon was permitted by the competent legislation bearing upon mining in the Yukon. 10

(3) Whether the right to object to the Appellant Company's status and capacity was affected, either by the granting of so-called free miner's certificates to it by the officials of the Department of the Interior, or by the licence to do business in the Yukon Territory assumed to be issued by the Yukon Commissioner, and the receipt and return to the Dominion authorities of the fee he exacted in that behalf. 20

pp. 61–63.

39. The opinion of the Chief Justice was adverse to the Appellant on all these points.

p. 64.

40. Davies, J., in a brief judgment, adheres to the opinion he had expressed in the Companies Case, 48 S.C.R. 331, that the power to incorporate companies "with provincial objects," conferred upon the Provinces by the British North America Act, was limited territorially, and therefore did not enable the Province of Ontario to confer upon the Appellant Company the power or capacity to carry on mining operations in the Yukon. He treated this conclusion as sufficient to dispose of the Case, and did not mention the other points. 30

pp. 64–79.

41. Mr. Justice Idington, in a somewhat lengthy opinion, appears to be of opinion that a company incorporated for mining

purposes by the province of Ontario, is competent to carry on that business in the Yukon. On the second point he does not appear to express any view. It would, perhaps, not to be proper to speak of what he says under the head of "recognition" regarding the third point, as he says he has formed no opinion upon it.

RECORD.

42. Mr. Justice Duff first disposes, in favour of the Appellant Company, of *the second point. He thinks* "Canadian Charter" in the regulations means a charter emanating from "any lawful authority" in Canada. But, on the main point, he holds that the charter of the Appellant Company, properly read, authorises it to carry on the business of mining only within Ontario, that its attempt to carry on the mining business in the Yukon was *ultra vires*, and that it had no capacity to enter into the contractual relations with regard thereto upon which its claims are based. His opinion is also adverse to the Appellant Company upon the third point.

pp. 79–84.
p. 79, l. 35.

43. Mr. Justice Anglin, who thought his opinion in the Companies Case had not been understood by Mr. Justice Cassels, takes some pains to restate his opinion explicitly. He says that, in his opinion, a provincial Corporation, not territorially limited by its charter or the nature of its objects, has capacity "to avail itself "of the comity of a foreign state or of another province." On the second question he agrees with Mr. Justice Duff.

pp. 84–88.
p. 87, l. 22.
p. 88, l. 48.

44. The respondent will submit that the judgment of Mr. Justice Cassels and the dismissal by the Supreme Court of the Appellant Company's appeal from it are right and ought to be affirmed for the reasons stated by the learned Judges who have supported *that view, for the reasons stated* in the Attorney-General's factum filed in the Supreme Court, and for the following among other

REASONS.

1. The Appellant's charter does not, upon any proper construction, profess to authorise the Appellant Company to mine elsewhere than in Ontario.

2. If it does, the mining business which it professes to authorise does not fall within Section 92 of the British North America Act.

3. The undertaking of the Appellant Company, upon its own construction of its charter, extends beyond the Province of Ontario.

4. Upon the construction which the Appellant Company seeks to put upon its charter the objects of the Appellant Company would cease to be "provincial" and its incorporation by the provincial authorities 10 would therefore be incompetent.

5. The statutes and regulations opening the mining field in the Yokon Territory do not open that field to to companies incorporated by the Province of Ontario.

6. The mistaken acts of the Dominion and Territorial officials, regarding, respectively, the issuing of free miners' certificates and the issuing of the Territorial license to do business in the Yukon, cannot make good the Appellant Company's inherent want 20 of capacity, or affect the determination of the present controversy.

GEO. F. SHEPLEY.
E. L. NEWCOMBE.
G. W. MASON.

No. 61 of 1915.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED - - - - *Appellant*

AND

HIS MAJESTY THE KING *Respondent*

AND

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

Case for the Respondent.

CHARLES RUSSELL & CO.,
37, Norfolk Street, Strand, W.C.,
Solicitors for the Respondent.

PRINTED BY EYRE AND SPOTTISWOODE, LTD., EAST HARDING STREET.