

In the Privy Council.

CANADIAN
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No. 37 of 1931.

APPELLANT'S CASE.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

IN THE MATTER OF A REFERENCE ARISING OUT OF THE TRANSFER
OF THE NATURAL RESOURCES TO THE PROVINCE OF SASKATCHEWAN.

BETWEEN :

THE ATTORNEY GENERAL FOR THE PROVINCE OF
SASKATCHEWAN and THE ATTORNEY GENERAL
FOR THE PROVINCE OF ALBERTA - - - *Appellants*

AND

THE ATTORNEY GENERAL FOR CANADA - - - *Respondent.*

CASE OF THE APPELLANTS.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 3rd day of February, 1931, answering certain questions submitted to the Court for hearing and consideration by the Governor General of Canada in Council under the provisions of section 55 of the Supreme Court Act. RECORD. p. 47.

2. The Dominion of Canada entered into an agreement with the Province of Alberta dated the 14th day of December, 1929, and an agreement with the Province of Saskatchewan dated the 20th day of March, 1930, respecting the transfer of natural resources to the said Provinces, the agreements being approved and confirmed by appropriate Acts of the provincial legislatures, the Parliament of Canada and the Parliament of the United Kingdom. The Acts approving and confirming the agreement with the Province of Alberta, provided that the Province should, in addition to the rights accruing to it under the agreement as Appx. p. 169. RECORD. p. 8. B. N. A. Act 1930. s. 2.

- Appx. originally executed, be entitled to such further rights, if any, with respect
p. 169, l. 9. to the subject matter of the said agreement as were required to be vested
in the Province in order that it might enjoy rights equal to those which
might be conferred upon or reserved to the Province of Saskatchewan
under the agreement relating to that Province. The Act of the United
B.N.A. Act Kingdom further provided that the said agreements should have the
1930, s. 1. force of law, notwithstanding anything in the British North America
Act 1867, or any Act amending the same, or any Act of the Parliament of
Canada, or in any Order in Council or terms or conditions of union made
or approved under any such Act as aforesaid. 10
- RECORD.
p. 14, l. 24. **3.** The agreement with the Province of Saskatchewan provided for
the submission to the Supreme Court of questions to be agreed as to the
rights of Canada and the Province respectively, before the first day of
September, 1905, in or to the lands, mines or minerals (precious or base),
now lying within the boundaries of the Province, and as to any alienation
by Canada before the said date of any of the said lands, mines or minerals
or royalties incident thereto. The agreement further provided for the
p. 14, l. 35. appointment of commissioners to inquire whether any, and, if any, what
p. 14, l. 8. consideration, in addition to agreed sums based on the population of
the Province, should be paid to the Province in order that the Province 20
might be placed in a position of equality with the other Provinces with
respect to the administration and control of its natural resources either
as from the first day of September, 1905, or as from such earlier date,
if any, as may appear to be proper, having regard to the answers to the
questions submitted.
- p. 4, l. 24. **4.** For the purpose of the submission the following facts were
agreed :—
(a) The area now lying within the boundaries of the Province
of Saskatchewan formed a part of Rupert's Land and the North
Western Territory which were admitted into and became a part 30
of the Dominion of Canada under Order in Council of June 23rd,
1870.
(b) From the coming into force of the said Order in Council
until September 1st, 1905, portions of the said area were from
time to time alienated by the Dominion of Canada.
and the term "lands" in the questions submitted was stated to mean and
include "lands, mines, minerals and royalties incident thereto."
- 5.** The questions submitted and the answers made by the Court are
as follows :—
p. 48, l. 3. **1.** Upon Rupert's Land and the North Western Territory 40
being admitted into and becoming a part of the Dominion of
Canada under Order in Council of June 23rd, 1870, were all lands
then vested in the Crown and now lying within the boundaries of
the Province of Saskatchewan vested in the Crown :—
(a) in the right of the Dominion of Canada ?
Answer : Yes.

or (b) in the right of any Province or Provinces to be established within such area? RECORD.

Answer : No.

or (c) to be administered for any Province or Provinces to be established within such area?

Answer : No.

or (d) to be administered for the benefit of the inhabitants from time to time of such area?

10 *Answer* : Not otherwise than as sharing in any benefit which might accrue to them under the dispositions of the Parliament of Canada. (The learned Chief Justice answered this question : "No.")

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1st, 1905?

Answer : No.

6. The British North America Act, 1867, provides the framework not only for the original Canadian Confederation but for the Confederation formed by the admission into the Union of Prince Edward Island, British Columbia, Rupert's Land and the North Western Territory. By section 146 the Queen was empowered by Order in Council having statutory effect to admit Rupert's Land and the North Western Territory into the Union on such terms and conditions as were expressed in an address from the Parliament of Canada and as the Queen might approve "subject to the provisions of this Act." Appx. pp. 9-42. p. 35, l. 16.

7. The provisions of the Act distinguish between the legislative power and the proprietary rights of the Dominion and the Provinces.

The material provisions are, in substance, as follows :—

30 (1) By section 91 the Parliament of Canada may make laws for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the Provinces and has exclusive legislative authority in relation (inter alia) to the public debt and property (heading 1) and to Indians and lands reserved for the Indians (heading 24). p. 23, l. 30.

40 (2) By section 92 in each Province the legislature may exclusively make laws in relation (inter alia) to the amendment from time to time of the constitution of the Province, except as regards the office of Lieutenant Governor (heading 1), to the management and sale of the public lands belonging to the Province and of the timber and wood thereon (heading 5), property and civil rights in the Province (heading 13), and generally all matters of a merely local or private nature in the Province (heading 16). p. 25, l. 6.

(3) By section 95 the Parliament of Canada and the provincial legislatures have concurrent powers of legislation in relation to p. 27, l. 12.

- RECORD. agriculture and immigration, with overriding power in the Parliament of Canada.
- p. 28, l. 34. (4) By section 108 property enumerated in the third schedule became the property of the Dominion. Such property included
p. 41, l. 12. canals, public harbours, military roads, public buildings, ordnance property, armouries and lands set apart for general public purposes.
- p. 29, l. 1. (5) By section 109 all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties were declared to belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same. 10
- p. 29, l. 30. (6) By section 117 the several Provinces retained all their public property not otherwise disposed of in the Act subject to the right of the Dominion to assume any land or public property required for fortifications or for the defence of the country.
- p. 30, l. 1. (7) By section 118 each of the original Provinces became entitled to receive half-yearly from the Dominion for the support of their governments and legislatures specified sums varying to a certain extent with the population of the Provinces. 20
- 8.** The Appellants submit that the intention of the Imperial Parliament as expressed in these provisions was that each Province of Canada should have the paramount title to and the beneficial interest in and the management of the public lands within its borders. Only for specified purposes was the beneficial interest given to the Dominion and where, as in the case of lands reserved for the Indians, the administration was conferred upon the Dominion, as soon as the purpose for which the administration had been given was fulfilled, such lands reverted to the Crown in right of the Province, as was decided by the Judicial Committee in *St. Catharine's Milling and Lumber Company* against *The Queen* reported in [1888] 14 Appeal Cases at page 46. This principle applies not only to the original Provinces but to the other Provinces and Colonies in North America which subsequently entered Confederation and in *The Attorney General of British Columbia* against *The Attorney General of Canada* (reported in [1888] 14 Appeal Cases at page 295, and known as "*The Precious Metals Case*"). Lord Watson in delivering the judgment of the Judicial Committee said (at page 304 of the report): "Their Lordships do not think it admits of doubt, and it was not disputed at the Bar, that section 109 of the British North America Act must now be read as if British Columbia was one of the Provinces enumerated therein." Indeed, the principle has been applied to parts of Rupert's Land, for upon the extension of the boundaries of Ontario and Quebec in 1912 by adding to such Provinces large portions from Rupert's Land, the land was treated, without question, as belonging to the Provinces and not to the Dominion. 30
- Appx. pp. 165-168.

9. In the Appellants' respectful submission effect can only be given to the words "subject to the provisions of this Act" in section 146 of the British North America Act, 1867, by restricting the beneficial interest of the Dominion of Canada in public lands within Rupert's Land and the North Western Territory to the like beneficial interest as was given to the Dominion in the public lands in the original Provinces and that in so far as the Dominion has in fact taken a greater beneficial interest the Dominion has done so without authority. RECORD.

10. The matters affecting Rupert's Land and the North Western Territory, so far as they may have a bearing on this appeal, are:—

- (1) By letters patent Charles the Second granted to the Hudson's Bay Company, with wide rights of government, lands and territories the extent of which has from time to time been in dispute but which were surrendered to the Crown by a deed of the 19th November, 1869, in return for certain rights and £300,000 payable by the Dominion of Canada. The surrender was made and accepted pursuant to the Rupert's Land Act, 1868, which also empowered Her Majesty to admit Rupert's Land (defined as including all land held or claimed to be held by the Company) into the Dominion of Canada and gave the Parliament of Canada from the date of admission power to make ordain and establish therein such laws institutions and ordinances and to constitute such Courts and officers as might be necessary for the peace order and good government of Her Majesty's subjects and others therein. Appx.
p. 44, l. 8.
p. 68.
p. 44.
p. 44, l. 34.
p. 45, l. 25.
- (2) By the Manitoba Act, 1870, (33 Victoria, chapter 3) the Parliament of Canada provided for the creation of the Province of Manitoba in which, subject to the conditions of an agreement with the Hudson's Bay Company, all ungranted or waste lands should be vested in the Crown and administered by the Government of Canada for the purposes of the Dominion. p. 48.
p. 53, l. 19.
- (3) By Order in Council of the 23rd June, 1870, which recited section 146 of the British North America Act, 1867, Her Majesty united Rupert's Land and the North Western Territory with the Dominion of Canada from the 15th July, 1870, with full power and authority to the Parliament of Canada to legislate for the future welfare and good government of the said Territory. The Order in Council set out in a schedule an address from the Parliament of Canada representing (inter alia) that it would promote the prosperity of the Canadian people and conduce to the advantage of the whole Empire if the Dominion of Canada were extended westward to the shores of the Pacific Ocean, that the welfare of the population would be materially enhanced by the formation of political institutions bearing analogy, as far as circumstances would admit, to those which exist in the several Provinces and that the Parliament of Canada was willing to assume the duties and obligations of government and legislation. p. 55.
p. 57, l. 25.
p. 59, l. 36.
p. 60, l. 7.
p. 60, l. 21.

Appx.
p. 76.

(4) The Imperial Parliament by the British North America Act, 1871, authorised the Parliament of Canada to establish new Provinces in any part of Canada not within any Province and in doing so to provide for the constitution and administration of any such Province, for the passing of laws for the peace order and good government thereof and for its representation in Parliament (Section 2); with the consent of the provincial legislature to alter the boundaries of any Province and to make provision respecting the effect of such alteration (Section 3); and to make provision for the administration, peace order and good government of territory not within any Province (Section 4). The Act also made valid the Manitoba Act. The Parliament of Canada (except when acting under Section 3) was expressly prohibited, once it had passed an Act establishing a new Province, from altering any of the provisions of such Act (Section 6). 10

p. 76, l. 21.

p. 76, l. 27.

p. 76, l. 30.

p. 77, l. 3.

p. 81.

(5) In 1872 the Parliament of Canada passed the Dominion Lands Act which, as amended and revised, is still in force and by which the Dominion purported to have the beneficial interest in as well as the administration of the land now in question.

p. 119.

(6) From 1875 extensive and gradually increasing powers of self government were granted to a local government and from 1880 to a local legislature. The principal Statutes of Canada conferring such power are printed in a Joint Appendix at pages 119 to 147, 147c and 148A to 148E. 20

p. 148.

(7) By the British North America Act, 1886, the Parliament of Canada was empowered to provide for representation in the Senate and House of Commons of Canada of territory not within any Province.

p. 149.

p. 154, l. 22.

p. 153, l. 23.

p. 154, l. 4.

(8) In exercise of powers conferred by the British North America Act, 1871, the Parliament of Canada with effect from the 1st September, 1905, created the Provinces of Alberta and Saskatchewan under Acts identical in all points material to this appeal. Section 21 purported to provide that all Crown lands, mines and minerals and royalties incident thereto should be administered by the Government of Canada for the purposes of Canada. Sections 18, 19 and 20 provided for payments by the Dominion of Canada, the payments in Section 20 being provided in lieu of public lands. In the Appellants' submission these latter payments are clearly provided because the provincial governments were not in future to have the public lands as a source of revenue, and were not intended as compensation for the use made by the Dominion of the public lands for Dominion purposes prior to the 1st September, 1905. 30 40

11. This appeal is not concerned with rights after the 31st August, 1905, nor is it concerned with the amount of compensation, if any, to be paid to the Provinces. From the 15th July, 1870, the Dominion of Canada has been put to expense for the government of Rupert's Land and the

North Western Territory and has expended money for the benefit of the inhabitants and to the advantage of the Provinces which have since been established therein. All proper adjustments are to be made by the Commissioners to be appointed. The Appellants are concerned in this appeal only to challenge the contention that under the British North America Acts the Dominion of Canada had an unfettered right to use the public lands of Rupert's Land and the North Western Territory for any purpose which might seem fit to the Parliament of Canada. RECORD. p. 14, l. 35.

10 **12.** The argument was heard on the 14th October, 1930. Counsel were heard on behalf of each of the Appellants. Counsel for the Attorney-General of Manitoba appeared but did not argue. The Attorneys General of the other Provinces, who had been notified of the hearing and to whom leave to appear had been given by Order of the Honourable Mr. Justice Lamont dated the 27th May, 1930, did not appear. p. 48, l. 18. p. 5, l. 20.

20 **13.** The reasons for the judgment of the Court were given by the Honourable Mr. Justice Newcombe with whom the Chief Justice and Justices Duff, Rinfret, Lamont, Smith and Cannon concurred although the Chief Justice answered Question 1 (*d*) in an unqualified negative. The learned Judge set out the contentions on behalf of the Attorney-General of Saskatchewan and pointed out that they were inconsistent with the Saskatchewan Act, 1905, especially sections 3, 17, 20, 21 and 24. Compensation had been provided and presumably paid in lieu of the lands and by the Order in Council of the 23rd June, 1870, and by Rupert's Land Act, the Parliament of Canada had full legislative authority. The nature and amplitude of the legislative powers conferred made it difficult to discover any maintainable ground in the pretention that the Province of Saskatchewan has rights not bestowed by the Queen and which the Parliament of Canada declared that the Province should not possess. The British North America Act, 1871, gave the Parliament of Canada unqualified legislative authority. The restricted property rights of Alberta and by analogy Saskatchewan had been recognised by the Judicial Committee (*Attorney General for Alberta against Attorney General for Canada* reported in [1928] Appeal Cases at page 475) where it was also held that section 109 of the British North America Act, 1867, did not apply to Alberta. No transfer of the lands from the Imperial Crown to the Dominion of Canada had been made because no transfer was necessary, there being only one Crown in whom the lands are vested notwithstanding changes in the administration and beneficial use. pp. 49-58. p. 58, l. 41. Appx. p. 150, l. 4.

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40 **14.** In the Appellants' respectful submission Mr. Justice Newcombe was wrong in holding that the decision of the Judicial Committee in *Attorney General for Alberta against Attorney General for Canada* in any way decides the questions raised in this appeal. The dispute in that case concerned the interpretation and not the constitutional validity of section 21 of the Alberta Act and other Dominion legislation, and the effect and validity of the Alberta Ultimate Heir Act. The judgment of the Judicial Committee proceeded on the view that there was no real

RECORD. dispute between the parties as to the title of the Crown in the right of the Dominion, before the constitution of Alberta and apart from the effect of the Dominion Land Titles Act of 1894, to escheated properties and *bona vacantia* in the territories that now form part of Alberta. The Appellants submit that inferences adverse to their contentions should not be drawn from the fact that the Judicial Committee based its decision on matters not then in dispute before the Judicial Committee but which are in dispute in the present appeal.

Appx. 15. The Appellants further respectfully submit that Mr. Justice Newcombe failed to give any meaning to the words "subject to the provisions of this Act" in section 146 of the British North America Act, 1867. These words were recited in the Rupert's Land Act, 1868, and in the Order in Council of the 23rd June, 1870, and both the Act and the Order in Council conferred on the Parliament of Canada wide legislative powers. The Supreme Court judgment rests on the suggested inconsistency between such powers in the British North America Act, 1871, and the Appellants' contentions; but the powers in the 1871 Act are as consistent with the contentions as are the like powers in the Rupert's Land Act and in the Order in Council, where the consistency is beyond doubt.

16. Moreover if the right of the Dominion to use the lands in question for Dominion purposes depended on there being no administrative or legislative authority in Rupert's Land and the North Western Territory other than the Government and Parliament of Canada, the right to the beneficial use or proceeds of the lands, in the Appellants' submission, ceased to be vested in the Dominion as soon as a local administration and legislature had been established, because since then, if not before, all difficulties in carrying out the original scheme of the British North America Act, 1867, were removed.

RECORD. 17. The Appellants further contend that under the agreement between the Dominion and the Provinces out of which this issue arises, the intention of the parties is to place the said Provinces as a matter of right on an equal basis with the other Provinces and that a proper interpretation of the agreement, and particularly the accomplishment of the purpose set forth in the provisions for an enquiry by a commission and the basis upon which the commission was to act under section 24 of the agreement would justify the questions being answered in favour of the Provinces.

18. Accordingly the Appellants humbly submit that the judgment of the Supreme Court of Canada is wrong and should be reversed and that question 1 (a) should be answered in the negative and questions 1 (b) (c) and (d) and 2 in the affirmative for the following among other

REASONS

1. Because the British North America Act, 1867, places the Colonies and Territories mentioned in section 146 on admis-

sion into Canada on a basis of equality with the original Provinces and prevents the use of their natural resources by the government or Parliament of Canada for the purposes of the Dominion.

2. Because subsequent legislation cannot properly be construed as repealing or modifying section 146.
3. Because the conferring of administrative and legislative powers on the government or Parliament of Canada could not vest in the Dominion the right to the beneficial interest or proceeds of the lands in question.
4. Because on the establishment of a local government and legislature the purposes for which the Dominion's powers existed were exhausted and any right of the Dominion to the beneficial interest or proceeds of the lands ceased.
5. Because the proper interpretation of the agreement between the Dominion and the Provinces justifies the questions being answered according to the Appellants' contentions.
6. Because legislation applying the beneficial interest and proceeds of the lands in question for Dominion purposes was *ultra vires* the Parliament of Canada.
7. Because in particular section 21 of the Alberta Act, 1905, and section 21 of the Saskatchewan Act, 1905, were *ultra vires* of the Parliament of Canada, and insofar as Canada assumed under the Dominion Lands Act 1872 and amendments thereto to administer the Crown lands in the parts of Rupert's Land and the North Western Territory which now form part of the Provinces of Saskatchewan and Alberta as if Canada had the beneficial interest therein, the said Act and amendments were also *ultra vires* of the Parliament of Canada.

JOHN SIMON.
M. A. MACPHERSON.
A. E. BENICE.
G. H. BARR.
FRANK GAHAN.

In the Privy Council.

No. 37 of 1931.

On Appeal from the Supreme Court of Canada.

IN THE MATTER of a Reference arising out of
the transfer of the Natural Resources to the
Province of Saskatchewan.

BETWEEN

THE ATTORNEY GENERAL FOR THE
PROVINCE OF SASKATCHEWAN AND THE
ATTORNEY GENERAL FOR THE PROVINCE
OF ALBERTA

(Appellants)

AND

THE ATTORNEY GENERAL FOR CANADA
(Respondent).

CASE OF THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.

EYRE AND SPOTTISWOODE, LTD., EAST HARDING STREET, E.C.4.