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In the Privy Council.

No. 36 of 1934.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference concerning refunds of dues paid under the terms of Section 47 (*f*) of the Timber Regulations in Manitoba, British Columbia, Saskatchewan and Alberta.

BETWEEN

THE ATTORNEY-GENERAL OF MANITOBA, THE ATTORNEY-GENERAL OF SASKATCHEWAN, THE ATTORNEY-GENERAL OF ALBERTA and THE ATTORNEY-GENERAL OF BRITISH COLUMBIA - - - - - - - - - *Appellants*

AND

THE ATTORNEY-GENERAL OF CANADA - *Respondent.*

CASE FOR THE APPELLANTS.

THE ATTORNEYS-GENERAL OF THE PROVINCES OF MANITOBA, SASKATCHEWAN AND ALBERTA.

Record.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada dated on the 3rd of October, 1933, on a reference by His Excellency the Governor in Council under Section 55 of the *Supreme Court Act* asking the Court's opinion as to the effect of certain agreements between the Dominion of Canada and the appellant Provinces, which provided for the transfer from Canada to the several Provinces of the administration of the undisposed of Crown lands within their respective boundaries. The agreements in question were confirmed by the *British North America Act*, 1930. p. 41, l. 15. p. 3. 20-21 Geo.V, c. 26 (Imp.).

2. The questions referred for the opinion of the Court were, put briefly, (*a*) whether Canada or one of the Provinces was under obligation to refund to certain homesteaders money paid by the latter to Canada on p. 5, l. 21 et seq.

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Record. terms that it would be refunded on the fulfilment of certain conditions, and (*b*) whether, if Canada made the repayment, it was entitled to be recouped by the appropriate province.

p. 42, l. 25. The Supreme Court's answer to the first question was that the obligation was upon the Provinces, and the Court stated that if this question had
p. 42, l. 27. been answered in the opposite sense, its answer to the second would have been that Canada was entitled to recoupment.

3. The Provinces of Manitoba, Alberta and Saskatchewan were constituted in 1870 and 1905 by statutes passed by the Parliament of
34-35 V, c. 28 (Imp.). Canada pursuant to section 2 of the *British North America Act*, 1871, and 10
33 V, c. 3, s. 30 (Ca.). 4-5 Ed. VII, c. 3, s. 21 (Ca.). having by virtue of section 6 of that Act the same effect as if they had been passed by the Imperial Parliament. Each of them included a provision whereby the administration of the Crown lands within the newly constituted provinces was retained by Canada, and the Parliament of Canada subsequently provided for their administration by the enactment of the
See R.S.C. (1927), c. 113 (Ca.). *Dominion Lands Act* in its successive forms.

p. 53, l. 10. p. 61, l. 16. p. 76, l. 1. **4.** In 1929 and 1930 separate agreements in, for the present purpose, identical terms were made between Canada and these Provinces respectively defining the terms upon which the administration of such of the Crown lands as then remained in the Crown should be transferred to the province in 20 which they lay. Since the effect of the agreements was to amend the statutes constituting the Provinces, they included provisions postponing their coming into operation until after they had been approved by the Legislature of the Province concerned and by the Parliament of Canada
20-21 Geo. V, c. 26 (Imp.). and had been confirmed by the Imperial Parliament. Each was duly approved and all of them were confirmed accordingly.

5. The first operative clause of each of the agreements provided that, from the date of the agreement's coming into force, the interest of the Crown in lands within the Province should belong to the Province, by which the lands should thereafter be administered, and that there should be no 30 accounting between the parties but that Canada should retain any payments received by it in respect of lands before the coming into force of the agreement, and that any sums due, or becoming due, and paid thereafter be receivable by and belong to the Province.

6. The next following provision of each agreement is that on which the present controversy chiefly turns and is expressed as follows :—

> " 2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and 40

further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or insofar as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto."

7. The controversy relates to the obligation to refund to certain homesteaders the amounts of deposits made by them under regulations adopted by the Governor-General in Council in the supposed exercise of regulatory powers conferred by the *Dominion Lands Act*. The regulations so adopted purport to require a homesteader to make a deposit of money as a condition precedent to the issue of a permit to him to cut timber on his homestead and contain a provision for the return of the amount paid upon the permittee's becoming entitled to receive a Crown grant of the homestead land. The deposits in question are those made, before the agreements came into force, by homesteaders to whom Crown grants did not become issuable until after they had done so.

R.S.C., c. 113.

The Supreme Court has held that, notwithstanding that the Provinces never received and have no claim to these deposits, they are nevertheless liable under paragraph 2 of the agreements to find the money for and make the refunds.

8. These Appellants submit that paragraph 2 was clearly not intended to render the provinces liable for a money payment due by Canada to a third party at the date of the coming into force of the agreements merely because the provision for payment formed part of an arrangement of which other terms provided for the third party's acquiring an interest in land. They further submit that the regulation under which the deposits in question were received by Canada was not one which the Governor in Council had power to make, and that, even if it was, it has been misinterpreted by the Supreme Court as having an effect such that the making of the deposit and the issue of the permit formed part of an " arrangement whereby " the homesteader became entitled " to an interest " in lands " as against the Crown ".

9. The homestead system established and maintained by Canada under the *Dominion Lands Act* for the settlement of the area formerly known as Rupert's Land and the Northwestern Territory, of which large parts were, in 1870 and 1905, included within the boundaries of the Provinces of Manitoba, Saskatchewan and Alberta, was one according to which any person having certain qualifications (s. 9) was entitled on application and on payment of a small fee to be recorded as having entered for a

R.S.C., c. 113.

Record. particular parcel of homestead land (s. 11), and thereby acquired a right, upon his fulfilling certain homestead duties during the succeeding years, to obtain a Crown grant of that parcel (s. 25). The homestead duties included generally residence on the land, the erection on it of " a habitable house," and the cultivation in each year of his occupation of " an area satisfactory to the Minister " of the Interior (s. 16). For the purpose of their performance the homesteader had a right to the exclusive possession of the land (s. 11 (2)) and was not subject to any restriction in his mode of using it.

10. In particular the *Dominion Lands Act* contained no provision restricting the right of a homesteader to clear his land of timber, as, indeed, it might be necessary for him to do in order to comply with the homestead condition with regard to cultivation. The only provision included in the Act on the subject of timber on homesteaded lands was Section 103, which was in the following terms :—

> " 103. Any holder of an entry for a homestead who previous to the issue of the letters patent, sells any of the timber on his homestead to owners of saw mills or to any others *than settlers for their own exclusive use*, without having previously obtained permission so to do from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace, and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner hereinbefore provided."

These Appellants submit that the Supreme Court has been led into error by overlooking the appearance in this section of the words printed in italics which, in their submission, are of importance.

11. The *Dominion Lands Act* contemplated the grant not only of homesteads but also of various other interests in lands. As to these the Act conferred express authority on the Governor-in-Council to fix the terms and conditions of their disposition, and it also gave a general regulatory authority on subjects which the statute did not cover. The Governor-in-Council was, for example, authorized to make regulations governing the issue of licenses and permits to cut timber, and in exercise of this authority there were approved certain " *Regulations governing the Granting of Yearly Licenses and Permits to Cut Timber on Dominion Lands.*" Among these, as part of Regulation 47, appeared the following :—

R.S.C., c. 113, s. 74 (*k*).

R.S.C., c. 113, ss. 49-74.

> (*e*) Any holder of an entry for a homestead, *a purchased homestead or a pre-emption*, who, previous to the issue of letters patent, sells any of the timber on his homestead, *purchased homestead or pre-emption*, to owners of sawmills or to any others without having

previously obtained permission to do so from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner provided in the *Dominion Lands Act.*

(*f*) If the holder of an entry as above described desires to cut timber on the land held by him, for sale to either actual settlers for their own use or to other than actual settlers, he shall be required to secure a permit from the Crown timber agent in whose district the land is situated, and shall pay dues on the timber sold to other than actual settlers at the rate set out in section 42 of these regulations, but the amount so paid shall be refunded when he secures his patent.

The deposits now in question were made under Regulation 47 (*f*) to which there is no analogous provision in the statute. Regulation 47 (*e*) is, however, expressed in terms very similar to those used in section 103 of the *Dominion Lands Act.* It differs from that section in the inclusion of the words italicized above (which are of no present significance), and more importantly in the omission of the words " than settlers for their own exclusive use " which appear in italics in section 103 as quoted above in paragraph 10.

12. These differences the Supreme Court has failed to observe. Looking at Regulation 47 (*e*), the Court erroneously describes it as " a textual reproduction " of section 103 of the Act, and in the light of that erroneous impression defines the rights of a homesteader in respect of the cutting of timber as follows :—

" The right to cut, for the purposes of enabling him to enjoy the homestead as exclusive occupant, as cultivator and for his own domestic purposes, seems to be all that can be reasonably implied, as necessary or incidental to the exercise of rights expressly conferred, or necessary to enable him to perform his duties.

" Furthermore, section 103 of the Act, which, as already mentioned, is textually reproduced in 47 (*e*), must be taken into account for the purpose of ascertaining the character of the holder's right in relation to the timber on his land. That section seems to imply that possession of the timber on the land (which includes trees standing, fallen or cut, s. 2 (*j*)) remains in the Crown " . . .

" In effect, the Statute and the regulations together give to the entrant the right to cut timber on his homestead ' without stint,' provided he complies with the conditions of the regulation."

Relating this view to the terms of paragraph 2 of the agreements, the Court concludes that :—

> " From this point of view, his right on obtaining his Crown grant to be repaid the dues paid by him under his permit seems to be plainly one of the ' terms ' of ' the arrangement ' under which he acquires, first, the rights enjoyed during his occupancy, and, afterwards, his right to a patent."

13. These appellants submit that, under the terms of section 103 of the statute as they really are, a homesteader's rights with respect to the cutting of timber on his homestead are wider than those which the Supreme Court conceded to him.

The statute, in their submission, imposes no limitation upon the homesteader's rights to cut the timber on his homestead as he sees fit. He may do so freely either for the purpose of using the timber cut, for the purpose of disposing of it to other settlers for their own use, or with no other object in view than the preparation of his land for cultivation.

If after it has been cut neither the homesteader himself nor other settlers have any use for it, it may have to be wasted or even burned, but if there is a sawmill or other like outlet for it, the homesteader may be permitted by the Minister in a proper case to sell it in the open market.

On this interpretation of the statute the effect of the Minister's permission would not be to create any interest in lands in favour of the homesteader, but would merely extend an already existing but limited right to sell chattel property which the homesteader, independently of any permission, was free to destroy.

14. The regulations, on the other hand, purport to restrict the homesteader's right to cut within much narrower limits than the statute.

Regulation 47 (*e*), by reason of the omission of the statutory words " than settlers for their own exclusive use," purports to render the homesteader liable to a penalty if he makes any sale whatever without having obtained the Minister's permission, and Regulation 47 (*f*) goes further in that on a strict construction of its terms it purports to require that, if before cutting timber a homesteader entertains a desire to sell it after cutting, he may not commence to cut until he has first obtained a permit to do so from the Crown timber agent.

These appellants submit that the Governor in Council had no power by regulation so to narrow the rights of the homesteader as the *Dominion*

Lands Act define them, and that in particular there was no power by regulation to make the obtaining of permission a condition precedent to the acquisition of a right to cut standing timber. They submit, in other words, that since the homesteader had already an unrestricted statutory right to cut the timber on his homestead, he could not acquire any added interest in lands as the result of an application for and the issue of a permit under the regulations.

15. These appellants further submit that the same result would follow even if the regulations were held to be a proper exercise of the Governor in Council's regulatory power. In that case Regulation 47 (*f*) should, in their submission, properly be interpreted, not as imposing a restriction additional to that imposed by Regulation 47 (*e*), but as defining the mode in which the permission required by that regulation should be obtained, the permission being thus in strictness not a permission to cut standing timber but a permission to sell severed timber which under Regulation 47 (*e*), was unsaleable without special permission even to settlers for their own exclusive use.

16. These Appellants contend that it would be unreasonable so to construe Regulation 47 (*f*) that the homesteader's right to lay his axe to a tree depended upon the thoughts and desires animating him at the moment he did so, that the regulation may be given its full effect if construed as providing merely for the removal of a limitation or the right to sell a chattel lawfully in the homesteader's possession, and that therefore the application for and the issue of a permit should not be held to be an " arrangement whereby " the homesteader becomes " entitled to any interest " in lands " as against the Crown."

17. These Appellants finally submit that even if the regulations had appeared textually in the statute instead of section 103, the questions submitted should be answered in a sense favourable to the Provinces on the ground that paragraph 2 of the agreements should not properly be interpreted as intended to render, or as having the effect of rendering the Provinces liable for money payments due by Canada to third parties merely because the provision for payment formed part of an arrangement of which other terms provided for the third parties' acquiring an interest in Crown lands in certain eventualities.

That paragraph should, in their submission, be interpreted as being confined to an undertaking by the Provinces to fulfil Canada's previously assumed obligations to third parties to convey lands which Canada could no longer itself convey because they had been transferred to the Provinces by the operation of the agreements.

18. These Appellants therefore submit that the questions submitted should be answered in a sense opposite to that in which they have been answered by the Supreme Court of Canada, for the following among other

REASONS.

(1) BECAUSE, having regard to section 103 of the *Dominion Lands Act*, the regulations in question were invalid insofar as they required a homesteader to obtain a permit as a condition precedent to his acquiring a right to cut timber on his homestead or to sell timber so cut to actual settlers for their own use.

(2) BECAUSE, even if the regulations were valid, they are properly to be interpreted as limiting only the right to sell timber, not the right to cut it.

(3) BECAUSE the application for and the issue of a permit was therefore not an " arrangement whereby " any person became entitled " to any interest " in lands " as against the Crown," and the provision for the repayment of the deposit was not a term of any such arrangement ; and

(4) BECAUSE paragraph 2 of the agreements between Canada and the Provinces is properly to be construed as imposing upon the Provinces an obligation only to make good, out of the Crown lands passing into their control, Canada's previously assumed obligations to make grants of interests in such lands.

O. M. BIGGAR.

Wilfrid Barton

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