

1, 1935

No. 36 of 1934.

In the Privy Council.

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

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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 ATTORNEY-GENERAL OF BRITISH COLUMBIA.

1. This is an appeal, by special leave granted the 21st day of June,
20 1934 from a judgment of the Supreme Court of Canada dated 3rd October,
1933 upon a reference by His Excellency the Governor-General in Council
to the Court pursuant to s. 55 of the Supreme Court Act (R.S.C. 1927,
C. 35).

2. The questions thus referred concerned the interpretation of
several distinct Agreements providing, in the cases of Manitoba, Saskatch-
ewan and Alberta, for the transfer of the " Natural Resources " within the
respective Provinces from the Dominion to the Provinces and in the case
of British Columbia for the re-transfer to the Province by the Dominion

Case for the Appellant, The
Attorney-General of British
Columbia.

of the residue of the Crown Lands known as the " Railway Belt " and the " Peace River Block " which had been ceded by the Province to the Dominion for the purpose of securing the construction of a trans-continental railway.

p. 69, ll. 18-29.

3. The order of reference, having recited that before the making of the several agreements the Dominion had granted licenses to entrants in occupation of homesteads, under the legislation and regulations hereinafter referred to, to cut and sell timber from their homesteads upon payment of dues which the Dominion had agreed to refund if, but only if, the entrant secured his patent for the homestead, proceeded to enunciate the following questions for the decision of the Court :—

p. 5,
ll. 21-27.

(A) Under the terms of the several agreements aforementioned is the obligation to refund dues pursuant to the terms of paragraphs (E) and (F) of Section 47 of the Timber Regulations in the cases aforementioned an obligation of the Dominion or of the respective provinces.

(B) If the obligation is that of the Dominion, is the Dominion entitled to be recouped by the provinces respectively the amount of the dues so refunded ?

p. 42,
ll. 21-31.

4. The Supreme Court, by its Judgment delivered by Duff, C.J., and concurred in by Rinfret, Lamont, Smith, Cannon, Crocket and Hughes, JJ., unanimously answered the first question by declaring that the obligation to refund was an obligation of the Provinces and accordingly gave no answer to the second question, although intimating that, had its answer to the first question been that the Provinces were not under a direct obligation to refund, it would have held the Provinces liable to recoup the Dominion all monies refunded.

5. The Supreme Court by its judgment did not make any distinction between the agreements in the case of the different provinces, although, in the submission of this Appellant, these differ materially. In the case of British Columbia the main provisions of the agreement are as follows :—

p. 70,
ll. 9-14.

1. Subject as hereinafter provided, all and every interest of Canada in the lands granted by the Province to Canada as hereinbefore recited are hereby re-transferred by Canada to the Province and shall, from and after the date of the coming into force of this agreement, be subject to the laws of the Province then in force relating to the administration of Crown Lands therein.

p. 70,
ll. 15-20.

2. Any payment received by Canada before the coming into force of this agreement in respect of any interest in the

said lands shall continue to belong to Canada, whether paid in advance or otherwise, without any obligation on the part of Canada to account to the Province therefor, and the Province shall be entitled to receive and retain any such payment made after the coming into force of this agreement without accounting to Canada therefor.

10 3. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any interest in any of the lands hereby transferred and every other arrangement whereby any person has become entitled to any interest therein as against Canada, and will perform every obligation of Canada arising by virtue of the provisions of any statute or order in council or regulation affecting the said lands hereby transferred to any person entitled to a grant of lands by way of subsidy for the construction of railways or otherwise, or to any railway company for grants of land for right of way, roadbed, stations, station grounds, workshops, buildings, yards, ballast pits or other appurtenances. p. 70, ll. 21-30.

20 5. The application to the lands hereby transferred of the laws of the Province relating to the administration of Crown Lands therein, as hereinbefore provided, shall not be deemed to affect the terms of any alienation by Canada of any interest in the said lands or of any agreement made by Canada for such alienation, or the rights to which any person may have become entitled as aforesaid. p. 70, ll. 40-45.

THE HOMESTEAD SYSTEM.

6. The Homestead System established under the Dominion Land Act (R.S.C. 1927 C. 113) provides for the disposal of crown lands to sellers by homestead grants. Its main provisions may be summarised as follows:—

30 (a) The applicant files his application for lands open to entry, pays a fee of 10 dollars and the receipt for this is his certificate of entry and enables him to “take occupy use and cultivate the land” “to hold possession thereof to the exclusion of any other person and to maintain actions for trespass” but his holding is subject to the provisions of the Act. S. 11 SS. 2.

(b) The entry must be for the sole use and benefit of the entrant and neither directly or indirectly for the benefit of any other person. S. 11 (6).

(c) The entrant must take possession of the land within six months. S. 12.

40 (d) The entry is liable to cancellation if the land is ascertained to be valuable on account of merchantable timber thereon. S. 15 (4).

(e) It is an offence to buy or sell any interest in or control of homestead land before issue of a patent. S. 15 (9).

(f) A patent for the land may be granted if the entrant has held the land for three years performing the residential conditions, has built a house on it and has cultivated to the satisfaction of the minister. SS. 16 and 25.

TIMBER LICENSES.

7. The Act also contains regulations for the granting of licenses to cut timber. It is under S. 57 of this part of the Act that the land regulations referred to in the order of reference were made. It runs as follows :— 10

S. 57.

The Governor in Council may make regulations for the issue of permits to cut timber—

- (a) to actual settlers, for use for building purposes on their farms or for fuel for themselves ;
- (b) to persons engaged in explorations, in scientific pursuits or in prospecting ;
- (c) to steamboat owners, for use on their steamboats ;
- (d) for the construction of boats ; 20
- (e) in connection with quarrying or mining, or salt, oil or gas boring operations ;
- (f) for the construction of railways, bridges, churches, schools and public buildings, or any public works ;
- (g) for sale as cordwood ;
- (h) for pulpwood.

2. The Governor in Council may make regulations for the issue of—

- (a) permits to owners of mills who are not the owners of a timber berth under license, to cut timber upon Dominion Lands 30 in the provinces of Manitoba, Saskatchewan and Alberta in the tract of three and one-half million acres described in paragraph (b) of section three of this Act, and in the Northwest Territories, of an area in each case not exceeding one square mile, inclusive of the mill site, upon payment in advance of a fee to be fixed by the regulations ;
- (b) permits to cut timber as cordwood, pulpwood, fence posts, telegraph poles or props for mining purposes or for any other purpose, over tracts of land not exceeding one square mile

in area, except in the case of permits to cut pulpwood which may apply to tracts of such area as may be determined by the Governor in Council :

10 Provided that no person shall be granted more than one permit at a time ; that a permit shall not be transferable, except with the consent of the Minister and subject to such conditions as he may impose ; that it shall not be for a longer period than one year, and shall only be renewable for not more than four consecutive years thereafter, except in the case of a permit to cut pulpwood which shall be renewable from year to year under regulations established by the Governor in Council ; and that for any permit or renewal there shall be payable such fee and annual rental as may be fixed by the Governor in Council.

20 3. Notwithstanding the foregoing subsection, if it is shown to the satisfaction of the Minister that the establishment of a paper or pulp-mill requiring large capital expenditure is dependent upon the acquiring of a right to cut pulpwood in the vicinity of such mill in sufficient quantity to justify such expenditure, the Minister may, with the approval of the Governor in Council and subject to such regulations as the Governor in Council may provide, enter into an agreement granting the exclusive right to cut timber for pulpwood within a specified area until the specified quantity which has been agreed upon as justifying the expenditure shall have been cut :

* * * * *

The only other direct reference in the Act to the cutting of timber by Homestead entrants is in section 103, a purely penal section, which runs :—

S. 103.

30 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. 1908, c. 20, s. 101.

40 The Act further provides that where timber is cut on Dominion Lands without authority, the person cutting it shall not acquire any right or title to it (s. 63) that the timber may be seized wherever found (s. 64) and that if it be mixed with other timber the mass may be seized (s. 65).

8. It is submitted that the position of the homestead entrant under this legislation is that he may

- (1) cut timber for his own use
- (2) clear the land for the purpose of cultivation
- (3) may sell timber to other settlers but
- (4) is not permitted and cannot be permitted to cut and sell timber to others than settlers.

9. Purporting to act under this legislation, the Governor in Council made regulations. These in the main concerned the cutting of timber on large berths and only two Regulations 47 (e) and (f) are expressly applicable to homestead lands: they are:—

S. 47.

(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 saw mills 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. 20

(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 timber 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. 30

10. It is submitted that these regulations are invalid in that they (1) cut down the right of sale given by section 103 above and purport to alter that section and (2) impose a condition, namely payment of dues, upon the statutory right to sell to other settlers. It is further submitted that, even if valid, the regulations only give a power to impose a condition, namely the payment of dues, upon the disposal of a chattel—cut timber; and that a license granted thereunder does not deal with any interest in land. It is further submitted that if made on the authority of section 57, the regulations are invalid in that such section gives no power to make regulations for purposes other than those named therein and in particular in that the section gives no power to allow Homestead entrants to cut and sell timber otherwise than as in the Act provided. 40

11. A typical permit to cut and sell timber on payment of dues is printed in the record herein.

THE AGREEMENT.

12. It is material to state that, whereas the "Natural Resources" transferred to the other provinces had never previously belonged in any sense to these provinces, in the case of British Columbia the lands known as the "Railway Belt" and the "Peace River Block" had been formerly the property of British Columbia. They were Crown Lands and were transferred to the Dominion ^{"in trust"} to secure the construction of a railway to connect the Seaboard of the province with the Railway System of Canada. *Terms of Union R.S.B.C. 1924 Vol. 1. p. XLI. Clause 11.*

13. Parts of the lands had been alienated by Canada by way of grant or otherwise to secure the construction of the railway but after such construction had been secured, a large balance was left in the hands of Canada and the province claimed to be entitled to the re-transfer of this balance. *p. 69, ll. 30-38.*

14. A judicial enquiry was held into this claim by Mr. Justice Martin of the Court of Appeal of Saskatchewan pursuant to an order in Council dated 8th March 1927 and the learned judge found that though the Province had no claim on legal grounds to the re-transfer of the lands, *p. 69, l. 33, p. 70, l. 3.*

20 "its request should be considered from the standpoint of fairness and justice rather than from the strict legal and contractual position" and he recommended that the lands should be "restored."

15. It was pursuant to this report that the Dominion agreed to re-transfer the lands and the Appellant Province humbly submits that in the construction of the agreement entered into under such circumstances, these matters are of the greatest weight and negative any intention in the agreement to impose a condition, namely the refunding of dues received by the Dominion, on the restoration on the grounds of equity and justice of these lands to the Province. *p. 70, ll. 4 and 5.*

30 16. The material clauses upon which the Supreme Court founded its judgment have been set out in paragraph (5) hereof. With regard to these this Appellant submits:—

(A) That they do not directly impose a liability on the Province to refund these moneys and that such a liability should not be inferred.

(B) That the payments in question were not legally part of any "Contracts to purchase" or "arrangement to acquire" an interest in land under which the Homestead entrant entered on lands and eventually acquired them.

40 (C) That the payments were in fact either (a) made in pursuant of independent contracts whereby the homestead entrant was

⁶⁰ become entitled to sell a chattel belonging to the Dominion viz., Cut Timber or (b) payments for a license to commit a breach of the contract whereby the entrant contracted to purchase or become entitled to acquire an interest in land.

(D) That the agreement as a whole discloses no intention to make the refunding of moneys paid to Canada by homestead entrants a condition of the restoration.

(E) That the provision of s. 2 of the agreement as to the retention of "payments" by Canada does not apply to these dues because (1) a sum of money handed over subject to repayment in certain events is not a "payment" (2) because moneys paid for a temporary license to do an act not permitted under a contract to acquire an interest in land are not "payments in respect of a contract or arrangement to acquire an interest in land" and (3) because s. 2 deals only with liability to account as between Province and Dominion for moneys actually received by either and does not purport to transfer to the Province any liability of the Dominion. 10

(F) That by s. 3 that which the Province undertakes to carry out and perform is the original contract of the Homestead entrant whereby he became entitled to a part of land eventually on performing certain conditions one of which was that he should *not* cut and sell timber: and that the permit so to cut and sell given for a temporary period—1 year—did not form part of this contract. 20

(G) That the agreement conferred no rights on Homestead entrants as against the Province.

(H) That in as much as by s. 4 of the Dominion Land Act, a section in force at the time of British Columbia's claim in 1927 and the agreement in settlement thereof in 1930, the Homestead Provisions of the Act were expressed not to apply to the "Railway Belt" within British Columbia, a refund of dues paid for licenses to cut timber on their homestead by Homestead entrants could not well have been within the contemplation or intention of the parties and because there could be at law, no homestead no "homestead entrant" and no license to a homestead entrant within such belt. 30

(I) That s. 2 providing as it does for the retention of all moneys received by Canada, including moneys received with an obligation to repay and excluding as it does all questions of account between the parties, negatives any liability upon the Province to refund such moneys. 40

17. The agreement in question was expressly sanctioned by the Parliament of Canada and by the Imperial Parliament 20 and 21 Geo. V.

c. 26 which gave it the force of law. In the following year the Dominion Statute 22 and 23 Geo. V. c. 35 empowered the Governor and Council to refund moneys received prior to the transfer of the natural resources and in connection with their administration, which "His Majesty is under any legal obligation . . . to refund to any person in connection with any transactions relating to the said natural resources." It is submitted that this statute entitled "the Refunds (Natural Resources) Act" constitutes an express recognition by the Dominion of its liability to make the refunds in question. p. 21,
ll. 17-41.

10 This Appellant therefore humbly submits that the judgment of the Supreme Court of Canada should be reversed and that the said questions should be answered by stating that there is no liability upon the Province of British Columbia to refund dues or to recoup the Dominion for dues refunded for the following amongst other

REASONS.

- (1) BECAUSE the agreement neither expressly or impliedly provides for such refunds.
- (2) BECAUSE the agreement, properly construed, negatives any liability on the Province of British Columbia to make such refunds.
- 20 (3) BECAUSE no right to such refund is given to any Homestead entrant against the Province of British Columbia.
- (4) BECAUSE the payment of such dues was not part of any contract to purchase or lease any interest in lands or of any arrangement whereby any person became entitled to any interest in lands.
- (5) BECAUSE the dues were not payments under s. 2 of the said agreement.
- 30 (6) BECAUSE the dues, if payments, were payments made for a license to commit what would have otherwise have been a trespass, an act of waste, or a breach of contract.
- (7) BECAUSE regulations 47 (e) and (f) were invalid and void and the exaction of dues was wrongful.
- (8) BECAUSE there could legally be no homestead entry for lands in the Railway Belt in British Columbia.
- (9) FOR the reasons more fully hereinbefore set out.

WILFRID BARTON.

In the Privy Council.

*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 ATTORNEY-GENERAL OF
BRITISH COLUMBIA.

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