1, 1935

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 ATTORNEY GENERAL OF CANADA.

Case for the Respondent The Attorney-General of Canada.

RECORD.

1. This is an appeal by special leave from the Judgment of the Supreme Court of Canada, delivered on 3rd October, 1933, on a reference by His Excellency the Governor General in Council to the Supreme Court of Canada, for hearing and consideration pursuant to Sec. 55 of the Supreme Court Act, of questions involving determination of the issue whether or not the Provinces of Manitoba, Saskatchewan, Alberta and British Columbia, under the terms of certain agreements for the transfer of the administration of natural resources to these Provinces, severally assumed an obligation to repay moneys received by the Dominion, as dues in respect of timber permits granted to entrants in occupation of homesteads, under regulations made under the authority of the Dominion Lands Act R.S.C., 1927, Chap. 113.

p. 51, l. 30.
p. 41, l. 14.
p. 3, l. 2.
pp. 3–5.

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RECORD.

2. When the Province of Manitoba was established in 1870 and the Provinces of Alberta and Saskatchewan in 1905, provision was made in each of the constituent Acts, the Manitoba Act, 1870, 33 Vic. (Can.) C. 3, confirmed by the British North America Act, 1871, and the Alberta and Saskatchewan Acts, 4–5 Edw. VII (Can.) Chaps. 3 and 42, passed in pursuance of the powers conferred by the British North America Act, 1871, for the continued administration of the Crown lands, mines, minerals and royalties within each Province by the Government of Canada for the purposes of Canada.

p. 53, l. 25–30.
p. 61, l. 28–38.
p. 76, l. 18–28.

3. The several Agreements hereinbefore referred to, made between the Government of Canada and the Governments of the several Provinces respectively, in 1929 and 1930, were, by the British North America Act, 1930, thereby confirmed and declared to have " the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of Parliament of Canada, or in any Order in Council, or terms or conditions of union made or approved under any such Act as aforesaid."

pp. 53–83.
pp. 84–85.
p. 84, l. 39–42.

These Agreements came into force respectively as follows: in the case of Manitoba, on July 15th, 1930; in the case of British Columbia, on August 1st, 1930, and in the case of Saskatchewan and Alberta, on October 1st, 1930.

p. 60, l. 33–39.
p. 74, l. 24–29.
p. 86, l. 28–32.
p. 88, l. 16–20.

4. In pursuance of the declared object of placing the Provinces " in a position of equality with the other Provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation," each of the Agreements made with the Provinces of Manitoba, Alberta and Saskatchewan provided,

(1) For the transfer to the Province, except as therein otherwise expressly provided, of the interest of the Crown in all Crown lands, mines, minerals and royalties derived therefrom within the Province;

p. 54, l. 5–20, 34–36.
p. 76, l. 28–31.
p. 62, l. 1–4, l. 9–29.
p. 77, l. 10–30.
p. 55, l. 1–7

(2) In the case of Manitoba (pursuant to the report of the Royal Commission after conducting an elaborate inquiry in which all payments received by the Dominion in respect of disposition of Crown Lands etc., between July 15, 1870, and July 15, 1930, were necessarily brought into account) for the payment to the Province forthwith after the coming into force of the Agreement, in addition to an increased annual subsidy to be paid in perpetuity as provided in cl. 20 of the Agreement of that Province, of a lump sum of $4,584,212·49, with interest thereon, by way of a balance of compensation in respect of interests in Crown Lands, etc., disposed of by the Dominion during the period aforementioned, and the said sum was so paid; and

p. 59, l. 28–42.
p. 60, l. 7–17

(3) In the case of Alberta and Saskatchewan, for the appointment of a Royal Commission to inquire and report what financial adjustments, if any, (in addition to the annual subsidy to be paid

p. 67, l. 21–40.
p. 82, l. 22–39.

in perpetuity by the Dominion to the Province under Clauses 20 and 21 of the Agreements with these Provinces respectively) ought to be made in favour of the Province in respect of interests in Crown lands etc., disposed of by the Dominion during the interval between September 1, 1905 (when the said Provinces were established) and October 1, 1930; it having been decided that in respect of all dispositions of such lands, etc., made prior to September 1st, 1905, the Dominion was under no liability to account to the Province: In re Transfer of Natural Resources to the Province of Saskatchewan (1932) A.C. 28. RECORD.

The Saskatchewan Natural Resources Commission, appointed pursuant to the Agreement with that Province, has completed its inquiry and is now engaged in considering its report. The Alberta Natural Resources Commission, appointed pursuant to the Agreement with that Province, is now engaged in conducting a similar inquiry.

5. The Agreement with the Province of British Columbia provided, in accordance with the recommendations of a Royal Commission, for the re-transfer to the Provincial of all and every interest of Canada in the lands, within the tracts known as the Railway Belt and Peace River Block, and for the continued payment by the Dominion to the Province (notwithstanding such re-transfer) of the annual sum of $100,000 which, under the terms of paragraph 11 of the Terms of Union between Canada and that Province, Canada had undertaken to pay to the Province in consideration of the lands to be conveyed by the Province to the Dominion in aid of the construction of the Canadian Pacific Railway. The Royal Commissioner reported that, when this re-conveyance had been made, British Columbia would be placed in a position of equality with the other Provinces in respect of the cost of the construction of the said railway. pp. 69–75.

6. The provisions of the said Agreements of direct bearing upon the determination of the present issue are clauses 1 and 2 of the Agreement with Manitoba and the corresponding clauses of the other Agreements which are framed substantially in identic terms. p. 54, l. 34–46. p. 55, l. 1–16. p. 62, l. 9–39. p. 70, l. 9–20. p. 77, l. 10–40.

Said clauses 1 and 2 read as follows :—

" 1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of Section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province

RECORD.

otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

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 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 in so far 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. Prior to the coming into force of the several Agreements aforementioned, provision was made for the disposition of interests of the Crown (Dom.) in the lands, mines and minerals, lying within the Provinces of Manitoba, Saskatchewan and Alberta and the Railway Belt and Peace River Block in British Columbia, by the Dominion Lands Act (last consolidated as c. 113 of the Revised Statutes of Canada, 1927) and by Regulations made thereunder. The methods of alienation of such interests, authorized by the said Act and Regulations, included, with a view to the settlement of such areas, that of homestead entry. The system of homestead entry was one by which any person possessing certain qualifications (s. 9) was entitled, on application therefor and payment of a small fee, to obtain entry for a homestead consisting of an area of available agricultural land, not exceeding one quarter-section (160 acres) (secs. 9 and 11) and thereby acquire a right, upon fulfilling certain requirements involving residence on the homestead for a period of at least six months in each of three successive years, the erection thereon of a habitable house and the cultivation in each year of his occupation of an area of land satisfactory to the Minister of the Interior (s. 16) to obtain a Crown grant of that parcel (s. 25). A homestead entry gave the entrant the right " to take, occupy, use and cultivate the land entered for and to hold possession thereof to the exclusion of any other person and to bring and maintain actions for trespass committed on the said land " subject, however, to the proviso that " occupation, use and possession of land entered for as a homestead shall be subject to the

provisions of this Act or of any other Act affecting it, or of any regulations made thereunder" (s. 11 (2)). RECORD.

8. By certain "Regulations governing the granting of yearly licenses and permits to cut timber on Dominion lands" made under the authority of the Dominion Lands Act, and duly published in the Canada Gazette, it was provided as part of sec. 47 as follows:—

"(*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. p. 4, l. 11–27.

(*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."

9. Prior to the coming into force of the several agreements aforementioned, permits to cut timber were (as is stated in the narrative of the reference) granted to entrants to homesteads within the Provinces of Manitoba, Alberta and Saskatchewan and within the Railway Belt and Peace River Block in British Columbia and dues were paid to the Dominion Government in respect of the timber to be cut under such permits, pursuant to the terms of par. (*f*) of sec. 47 of the Regulations aforementioned, upon the stipulation and assurance to the permittee in terms expressed by the said Regulation that "the amounts so paid shall be refunded when he secures his patent." Many of the permits so granted were outstanding and in force when the said Agreements came into force. A large number of the holders of the said permits, having subsequently secured patents for their homestead lands and thus become entitled to a refund of the dues which they had paid, as aforementioned, made application for such refund of dues to either the Provincial Government concerned or to the Dominion Government. Thereupon a question arose between the Dominion Government and the Government of each of the Provinces aforementioned whether the obligation to make such refunds of dues was, under the terms of the said Agreements, an obligation of the Provincial Governments respectively, or of the Dominion Government. The object of the reference to the Supreme Court of Canada was to obtain a judicial determination of this question. p. 4, l. 28–46. p. 5, l. 1–15.

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p. 5, l. 16–27. 10. The questions referred for the opinion of the Court were as follows :—

(*a*) Under the terms of the several Agreements aforementioned, is the obligation to refund dues, pursuant to the terms of paragraph (*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 be that of the Dominion, is the Dominion entitled to be recouped by the Provinces respectively the amount of the dues so refunded?

p. 41, l. 14–36. p. 42. 11. The Supreme Court of Canada, composed of Sir Lyman Duff, C.J.C., and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes, JJ., having heard argument on behalf of the appellants and the respondent, pronounced judgment on the 3rd October, 1933, unanimously answering the said questions as follows :—

To the Interrogatory (*a*) : The said obligation is an obligation of the respective Provinces.

To the Interrogatory (*b*) : In view of the answer to Interrogatory (*a*), this question does not arise; but, if our view had been that the provinces were not under a direct obligation to refund, we should have considered that the Dominion, on refunding such dues, would be entitled to recoupment from the province concerned.

pp. 43–51. 12. In reasons for judgment, delivered by Sir L. P. Duff, C.J.C. and concurred in by the other members of the Court, the Court, upon a close consideration of the provisions of the Dominion Lands Act and of the regulations made thereunder, concluded—

First, that the right given to a homestead entrant, by a permit issued under said regulation (*f*), to cut timber on his homestead for sale to actual settlers for their own use or to others than actual settlers, was a right arising under an " arrangement " vesting in the holder of the permit " an interest in land " within the meaning of clause 2 of the said Agreements, whether this right be regarded as either

(1) an item in the sum of rights of the entrant as the holder of a homestead, which they considered the better view, or as

(2) a separate right; and

Secondly, that the right of the entrant, on obtaining a Crown grant to his homestead, to be repaid the dues paid by him under such permit was plainly one of the " terms " of " the arrangement " under which he acquired, first, the rights enjoyed during his occupancy and afterwards his right to a patent.

In support of these conclusions, the Court stated :

(1) That the interest of a homestead entrant in his homestead was most conveniently envisaged as a statutory interest *sui generis*,

the character of which, as well as the rights annexed or incidental to it, must be ascertained from the Dominion Lands Act, and other statutes, as well as from any statutory regulations, affecting it;

(2) That the statutory requirements, as well as the regulations, seemed clearly to imply, having regard to the well known conditions under which homestead duties are usually performed, a right on the part of an entrant, in addition to the right of protection against trespass, to cut timber, not only for the purposes of cultivation, but also for fencing, for building, for fuel and for all other purposes involved in the maintenance of his occupation and in the working of his homestead, in the manner contemplated by the statute; but that this right seemed to be all that could reasonably be implied, as necessary or incidental to the exercise of rights expressly conferred, or necessary to enable him to perform his duties;

(3) That they thought protection was intended to be and was provided for the rights of holders of permits to cut timber, in force when the agreements became effective, by the words of clause 1,

> " subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same,"

when read and construed, as they must be, together with the correlated words of clause 2,

> " every other arrangement whereby any person has become entitled to any interest therein as against the Crown."

" Interest," in their opinion, included every interest which it was the duty of the Crown to recognize, as " trust " embraced every obligation savouring of the nature of trust or equitable obligation affecting the lands, mines and minerals transferred, to which the Crown was under duty to give effect. From this point of view, the right of repayment of dues was one of the terms upon which the holder of a permit acquired it.

(4) That they thought the language of clause 2 altogether too explicit to justify such a restriction of its scope as was involved in the contention that the words " every other arrangement whereby " etc. must be construed in compliance with the rule *noscitur a sociis* as extending only to arrangements of a " contractual nature." It seemed to them that the character of the arrangements contemplated was clearly defined by the adjectival phrase " whereby any person has become entitled to any interest therein as against the Crown "; and that these words should be construed in their ordinary sense. The term " arrangement " clearly extended to the transaction or series of transactions by which the entrant became entitled, first, to his homestead, and afterwards to his Crown grant, as well as to the transaction by which he acquired his rights under a permit.

RECORD.

(5) With regard to the argument that the moneys received by the Dominion as timber dues under the regulation were not " payments " within the contemplation of clause 1 of the agreements, but were moneys held by the Dominion only in trust or *in medio*, for disposition, according to the event, on the issue of letters patent or the abandonment or cancellation of a homestead, as the case might be, they saw nothing to justify the conclusion that the Dominion did not receive these moneys as owner. There was nothing to indicate that they were to pass to a separate fund, or that they were to be dealt with in any other way than moneys received from any other source of revenue. It was impossible to doubt that, in considering the facts bearing upon the financial readjustments provided for, or contemplated by the agreements, moneys received from this source would be taken into account as against the Dominion. In their view, the contemplated character of the transactions in respect of these moneys was precisely what they appeared to be on their face : first, a receipt of timber dues as revenue, dealt with in the same way as all such revenues were dealt with ; secondly, a payment back to the patentee of the moneys so paid under a statutory right which came into existence on the issue of the patent.

(6) With regard to the question whether regulation 47 (*f*) was promulgated under statutory authority, they thought this question must be answered in the affirmative on two grounds. First, the authority given by s. 57 (2b) of the Dominion Lands Act seemed to be adequate to support the regulation ; and, secondly, they were satisfied that the regulation fell within the ambit of the powers conferred on the Governor in Council by s. 57 (1) of the said Act. Furthermore, the regulation could be sustained as falling within the ambit of the authority conferred by s. 74 (k) of the said Act.

(7) With regard to the further question whether or not the patentee had by the force of the statute, a direct recourse against the Province, they considered it to be clear that the B.N.A. Act, 1930, by s. 1, gave statutory force to the obligations of the Provinces under articles 1 and 2 of the agreements.

13. On behalf of the Attorney General of Canada, it is submitted that the anwers given by the Supreme Court of Canada to the questions referred for its opinion are right and ought to be affirmed for the reasons stated in the reasons for judgment delivered by the learned Chief Justice of Canada on behalf of the Court ; for the reasons set out in the factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada ; and for the following among other

REASONS.

(1) Because said regulation 47 (*f*) was validly made under authority conferred by the Dominion Lands Act and the right conferred by a permit issued thereunder to a homestead entrant was

a right arising under, or as part of, an " arrangement " entitling the entrant to " an interest in Crown lands " within the meaning of the several Natural Resources Transfer Agreements.

(2) Because the right of the holder of such a permit, on obtaining a patent to his homestead, to repayment of the dues paid under such permit was, in virtue of said regulation 47 (*f*) one of the " terms " of such " arrangement."

(3) Because the alleged validity of said regulations 47 (*e*) and (*f*) cannot properly be raised in these proceedings and is, in any case, irrelevant to the determination of the matters now in issue.

(4) Because the said agreements are constitutional compacts having the force of law and devolve upon the Provinces respectively the obligation to refund dues so paid to Canada.

(5) Because the dues so paid constituted, as items of revenue, " payments " which Canada is entitled, under the terms of the said agreements, to retain without liability to account therefor to the several Provinces otherwise (in the case of Manitoba, Alberta and Saskatchewan) than in the determination of financial adjustments in favour of each of the said Provinces as provided or contemplated by the said agreements respectively.

(6) Because the object and scheme of the agreements with Manitoba, Alberta and Saskatchewan respectively are such as to justify the inference that the dues so paid to Canada were (in the case of Manitoba) and will be (in the case of Alberta and Saskatchewan), brought into account, as items of revenue, in the determination of such financial adjustments in favour of each of the said Provinces.

(7) Because Canada should not be required, by being held liable to refund such dues, to account, in effect, twice for the moneys so received.

WILLIAM A. JOWITT.

W. STUART EDWARDS.

C. P. PLAXTON.

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

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AND

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CASE FOR THE ATTORNEY GENERAL OF CANADA.

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