Privy Council Appeal No. 37 *of* 1931.

The Attorney-General of Saskatchewan and another - - *Appellants*

v.

The Attorney-General of Canada - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD HANWORTH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD ATKIN.]

This appeal from the Supreme Court of Canada arises upon an order of reference pursuant to Section 55 of the Supreme Court Act, made by the Governor-General in Council, dated May 3rd, 1930, to determine questions that had arisen between the Dominion and the Province of Saskatchewan. The questions to be answered are to be found in the following formal submission agreed between the Dominion and the Province and annexed to the order of reference :—

> Whereas under an agreement made between the Government of the Dominion of Canada, of the one part, and the Government of the Province of Saskatchewan of the other part, provision is made for the submission to the Supreme Court of Canada, for its consideration, of certain questions agreed upon ;
>
> And whereas it is admitted for the purpose of this submission that
>
> (*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 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.

(*c*) Throughout the following questions the term "lands" means and includes "lands, mines, minerals and royalties incident thereto."

The following questions are submitted for the consideration of the Supreme Court pursuant to Section 55 of the Supreme Court Act:—

1. Upon Rupert's Land and the North-Western Territory 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; or

(*b*) In the right of any province or provinces to be established within such area; or

(*c*) To be administered for any province or provinces to be established within such area; or

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

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?

The Supreme Court answered all the questions in favour of the Dominion, and the province of Saskatchewan and the province of Alberta (which is equally concerned with the decision) appeal. To appreciate the practical relevance of the questions it is necessary to go back to Canadian constitutional history at the time of the creation of the Dominion. The original provinces federally united by the British North America Act were Canada, Nova Scotia and New Brunswick. Lying to the West and North of the new Dominion were the vast tracts of country known as Rupert's Land and the North-Western Territory. Over this territory the Hudson's Bay Company exercised control more or less defined. Their charter, granted in 22 Charles II, had granted them large powers and a vast extent of land which was not well defined, but which was assumed to cover the whole of what was later known as Rupert's Land. They had extended their jurisdiction into the North-Western Territory, and were in practice the sole authority responsible for the maintenance of law and order in both districts. The existence of a trading company with vast obligations and necessarily limited resources had been recognised before 1867 by Canadian statesmen as an obstacle to the development of Canada, and communications had later taken place between the Government of the then province of Canada, the British Government and the Company as to the surrender of the Company's charter rights. By Section 146 of the B.N.A. Act provision was made for power to admit *inter alia* Rupert's Land and the North-Western Territory into the Union. Eventually, on the 19th November, 1869, in pursuance of an Imperial Act, 31 & 32 V., c. 105, the Hudson's Bay Company surrendered to the Crown all their rights granted by charter and all their lands within Rupert's Land. A

Dominion Act was passed in the same year providing for the government of the territories after admission to the Union. On June 23rd, 1870, an Order in Council was made admitting Rupert's Land and the North-Western Territory into the Dominion. In 1870, in anticipation of the Order in Council, the Manitoba Act was passed, creating Manitoba a separate province, carving its territory out of the new district so to be admitted. Thereafter, under appropriate legislation, Imperial and Dominion, the Dominion of Canada governed the rest of Rupert's Land and the North-Western Territory as part of the Dominion, dealing with the land in pursuance of the Dominion Land Act of 1872. In 1905 it created out of the district two new Provinces. Saskatchewan and Alberta. Both the Saskatchewan and the Alberta Acts contained provisions by which all Crown lands should continue to be vested in the Crown and administered by the Dominion for the purposes of Canada. In lieu of the land revenue each province received an annual payment from the Dominion, varying with the population. It would appear that both the new provinces found these provisions irksome, and objected to being put in a different position from the original provinces as to land revenue, which under Section 109 of the B.N.A. Act belonged to the province. Questions were raised as to the validity of the legislation, and eventually in 1930 the Dominion entered into agreements with both provinces whereby the interest of the Dominion in the public lands in each province was transferred to the province. The agreements were made on the express footing that the provinces should be placed in a position of equality with the other provinces as to their " natural resources " (which would include the land) as from their entry into confederation in 1905.

In this respect the agreement with Saskatchewan appears to put the Saskatchewan claim higher than that of Alberta ; but as by the Acts adopting the agreements Alberta is to have no less rights against the Dominion than Saskatchewan, it is unnecessary to go beyond the agreement with the latter. The agreement is made the 20th March, 1930. The recitals are as follows :—

> Whereas by section twenty-one of the Saskatchewan Act, being chapter forty-two of the four and five Edward the Seventh, it was provided that " All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories " :
>
> And whereas the Government of Canada desires that the Province should be placed 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 in 1905 :

And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada :

And whereas it has been agreed between Canada and the said Province that the said section of the Saskatchewan Act should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Province as herein set out :

After providing for the transfer of the land from the Dominion to the Province and setting out other terms, the agreement contains two clauses which give rise to this reference, viz. :—

23. Provision will be made pursuant to section fifty-five of the Supreme Court Act, being chapter thirty-five of the Revised Statutes of Canada, 1927, to submit for the consideration of the Supreme Court of Canada questions agreed upon between the parties hereto as being appropriate to obtain the judgment of the said Court, subject to appeal to His Majesty in Council in accordance with the usual practice, 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.

24. As soon as the final answers to the questions submitted under the last preceding paragraph have been given, the Government of Canada will appoint three persons to be agreed upon to be Commissioners under Part I of the Inquiries Act, to inquire and report whether any and, if any, what consideration, in addition to the sums provided in paragraph twenty-one hereof, shall be paid to the Province in order that the Province may be placed in a position of equality with the other provinces of Confederation 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 as aforesaid ; such commissioners to be empowered to decide what financial or other considerations are relevant to the inquiry and the report to be submitted to the Parliament of Canada and to the Legislature of Saskatchewan ; if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments of Canada and of the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such agreement.

It will be seen that it is only in order that Saskatchewan may support a claim under Section 24 of the agreement to be placed in a position of equality with other provinces with respect to the administration of its natural resources as from an earlier date than September, 1905 (the date of its creation as a province), that the questions arise at all. The position after 1905 is

admittedly to be adjusted. Their Lordships feel bound to remark that it is difficult to see how Saskatchewan passes over the threshold of this claim. It had no separate existence at all before 1905, except as part of the North-Western Territories. Its predecessor, if a unit newly created and defined can have a predecessor, was the Dominion or, on the extreme view, the North-Western Territories, which also included the present Province of Alberta and other territory as well. It would appear to be difficult to correlate such a position to that of the other provinces of the Union or to speak of "its" natural resources before it took any shape. However, the questions have been formulated and should be answered. The argument of the Attorney-General for the Province may be summarised as follows. There was a well-established Imperial policy as to colonies that they should enjoy, for the benefit of the inhabitants, the revenues of lands in the colony vested in the Crown. This did not depend upon the colony being self-governing. This area was a colony before 1867, and though as to a large part of it the land was vested in the Hudson's Bay Company, yet on the surrender by that Company of its charter the colony was restored to its appropriate position of enjoying proprietary rights in the land. It therefore was in the same position as the original colonies, whose rights to the land were maintained as a fundamental principle of the B.N.A. Act. On the true construction of the Order in Council and the legislation giving effect to the admission of the area into the Confederacy, the Dominion Government and Dominion Legislature were intended to administer the land revenues for the beneficial use of the inhabitants only of the area in question. Upon the establishment of the Province it must be taken to have attained its majority, and was entitled to go back to 1870 and have an account of the use of its resources during that time.

For the purposes of this case it is not necessary to discuss the accuracy of the earlier propositions in this argument. It may well be doubted whether there has ever been an invariable rule that a colony enjoyed its own land revenue. It would appear to be a question of fact in each case whether the Crown had placed its beneficial interest in land at the disposal of the particular colony. In the present case it is known that the Crown had parted with all its interest in the land to the Hudson's Bay Company so far as Rupert's Land is concerned. As to the North-Western Territory, it is at least doubtful whether before 1867 the beneficial interest in the land had been entrusted by the Crown to any authority, or whether there was in respect of that part of the area any colony at all within the meaning of the Attorney-General's argument. But even assuming that the propositions in question were established, their Lordships have no doubt whatever that the effect of the surrender of the charter rights and the relevant legislation was on the admission of the area in question into the Dominion to give to the Dominion full control of the land to be administered for the purposes of the Dominion

as a whole, and not merely for the inhabitants of the area. It is only necessary to read the addresses of the Dominion Parliament dealing with the admission of the new areas to be satisfied that the control of the whole area by the Dominion was treated as an important factor in Canadian policy, and was advocated in the words of the first address " to promote the prosperity of the Canadian people and conduce to the advantage of the whole Empire." It is not merely improbable, but it is incredible, that at that stage of the development of Canada the resources of the immense area added to the Dominion were to be administered solely for the advantage of the sparse population scattered over its thousands of square miles. Even contemporaneously when Manitoba was created a Province it was not given control of its lands: and it would certainly be remarkable if after 1870 the Dominion administered Manitoba's land for the purposes of the Dominion, but administered the larger areas of Rupert's Land and North-Western Territory for the purposes only of their few inhabitants. The provisions of the Order in Council and of Section 5 of the Imperial Act of 1868, Rupert's Land Act, make it clear that the Dominion was to govern the new area when admitted as part of the Dominion for the purposes of the Dominion. An argument was based on the terms of Section 146 of the B.N.A. Act, which provides the power to admit Rupert's Land, etc., into the Union " on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve subject to the provisions of this Act." It was said that the reference to the provisions of this Act incorporated the proviso made in Section 109 that all the lands belonging to the several provinces of Canada, Nova Scotia and New Brunswick should continue to belong to the provinces, and that no powers could be given to the Dominion inconsistent with this. The answer is that Section 109 dealt only with the provinces thus admitted, and the provisions of the Act referred to in Section 146 are plainly the general provisions covering the structure of the Union into which new provinces were to be admitted, as, for instance, the section distributing legislative and other functions between the Dominions and the constituent provinces. It is to be noted that the argument for the Province necessarily disputed the validity not only of Section 21 of the Alberta and Saskatchewan Acts of 1905, but also of the Dominion Land Act of 1872. As to the Act of 1905, the validity of Section 21 appears to their Lordships to have been specifically upheld in the judgment of this Board in *The Attorney-General for Alberta* v. *The Attorney-General for Canada*, 1928, A.C. 475, where it was decided that lands in Alberta granted by the Crown before or after September, 1905, in the absence of heirs, escheat to the Crown in right of the Dominion. There was adduced before their Lordships no ground for attacking the Dominion Land Act of 1872, other than the general considerations mentioned above, which, as stated, have not the effect claimed. It follows that the answers to the

respective sub-heads of Question 1 must be in favour of the Dominion.

Their Lordships entirely agree with the reasoning of the judgment of Newcombe J. in the Supreme Court. It does not seem necessary to determine the slight difference of opinion between the Chief Justice and the other members of the Court as to the exact answer to Question 1 (*d*). Treating the question as the Chief Justice seems to have done, as meaning "to be administered exclusively for the benefit of the inhabitants from time to time of the area," the answer admits of a simple negative; but the qualified answer given by the majority of the Court cannot in any way be said to be wrong. The second question seems to be intended to ask as to the existence of a legal obligation to account to the Province of Saskatchewan for something done before the Province came into existence, without any statutory provision for the Province inheriting, or in some way having transferred to it, the rights, whatever they were, which before 1905 were invaded. As no rights were invaded, it is obvious that the question is correctly answered, No; and it becomes unnecessary to consider how, on a different hypothesis, an obligation to account could have been enforced by the Province.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and in accordance with the usual practice in such cases without costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF SASKATCHEWAN
AND ANOTHER

v.

THE ATTORNEY-GENERAL OF CANADA.

DELIVERED BY LORD ATKIN.

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