

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 OF SASKATCHEWAN AND
THE ATTORNEY GENERAL OF ALBERTA - *Appellants*

AND

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

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

No.	Description of Document.	Date.	Page.
1	Order of Reference by the Governor General in Council and Submission attached - - -	3rd May 1930 - -	3
IN THE SUPREME COURT OF CANADA.			
2	Order for inscription of Reference and directions -	27th May 1930 - -	5
3	Notice of hearing - - - -	4th June 1930 - -	6
4	Affidavit of service of notice of hearing - - -	7th June 1930 - -	7
5	Agreement between Dominion of Canada and Province of Saskatchewan on the subject of the transfer of the Natural Resources of Saskatchewan - - - -	20th March 1930 -	8

No.	Description of Document.	Date.	Page.
6	Factum of the Attorney General of Saskatchewan-	- - - - -	16
7	Factum of the Attorney General of Alberta - -	- - - - -	40
8	Factum of the Attorney General of Canada - -	- - - - -	40
9	Formal Judgment - - - - -	3rd February 1931	47
10	Reasons for Judgment : (A) Newcombe J. (concurrent in by Duff, Rinfret, Lamont, Smith and Cannon JJ.) - - - - - (B) Anglin C.J.C. - - - - -	- - - - - - - - - - - - - - -	49 58
IN THE PRIVY COUNCIL.			
11	Order in Council granting special leave to appeal to His Majesty in Council - - - - -	20th March 1931	59

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 OF SASKATCHEWAN AND
THE ATTORNEY GENERAL OF ALBERTA - *Appellants*

AND

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

RECORD OF PROCEEDINGS.

No. 1.

Order of Reference by the Governor General in Council and Submission attached.

P.C. 947.

CERTIFIED to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd May, 1930.

The Committee of the Privy Council have had before them a report, dated May 2nd, 1930, from the Minister of Justice, stating that, in connection with negotiations with the Government of the Province of Saskatchewan looking toward the conclusion of an agreement for the transfer to the Province of its natural resources, the said Government has raised the question of the liability of Canada to render to the Province an account of its dealings, prior to September 1, 1905, with lands lying within the provincial boundaries as now defined, and it is desirable, in order to permit

No. 1.
Order of Reference by the Governor General in Council and Submission attached, 3rd May 1930.

No. 1.
Order of
Reference
by the
Governor
General in
Council and
Submission
attached,
3rd May
1930—con-
tinued.

of the execution of such an agreement, that this question should be determined by the reference to the Supreme Court of Canada of questions expressed in a form which the Government of the Province considers appropriate to obtain the judgment of the Court on the contention it has put forward.

The Minister further states that a submission in the form hereto attached has accordingly been prepared on behalf of the Government of the Province, such submission containing certain questions and certain admissions of fact to which it is desirable to agree.

The Minister, therefore, recommends that the said submission be referred to the Supreme Court of Canada pursuant to Section 55 of the Supreme Court Act for hearing and consideration, and in order to obtain answers to the questions in the said submission set forth.

The Committee concur in the foregoing recommendation and submit the same for approval.

(Sgd.) E. J. LEMAIRE,
Clerk of the Privy Council.

SUBMISSION.

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 ?

- 10 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 ?

No. 1.
Order of Reference by the Governor General in Council and Submission attached, 3rd May 1930—*continued.*

No. 2.

Order for Inscription of Reference and Directions.

In the Supreme Court of Canada.

IN THE SUPREME COURT OF CANADA.

Before the Honourable Mr. Justice Lamont, in Chambers.

TUESDAY, the 27th day of May, A.D. 1930.

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

- 20 Upon the application of the Attorney-General of Canada for directions as to the inscription for hearing of the case relating to the above questions referred by His Excellency the Governor General, for hearing and consideration by the Supreme Court of Canada under the provisions of section 55 of the Supreme Court Act, R.S.C. 1927, upon hearing read the Order in Council dated 3rd May, 1930, (P.C. 947), setting forth the said questions, upon reading the affidavit of Charles P. Plaxton filed herein, and upon hearing what was alleged by counsel for the applicant ;

- 30 IT IS ORDERED that the said case be inscribed for hearing at the head of the Saskatchewan list for the October, 1930, Session of the Supreme Court and filed on or before the 1st day of August 1930.

AND IT IS FURTHER ORDERED that the Attorneys-General of the Province of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan be notified of the hearing of the argument of the said case by sending to each of them by registered letter on or before the 5th day of June, 1930, a notice of hearing of the said reference and a copy of the said Order in Council and of this Order.

No. 2.
Order for Inscription of Reference and Directions, 27th May 1930.

*In the
Supreme
Court of
Canada.*

AND IT IS FURTHER ORDERED that the said parties be at liberty to file factums of their respective arguments on or before the 15th day of September, 1930, and that they be at liberty to appear personally or by counsel upon the argument of the said reference.

No. 2.
Order for
Inscription
of Reference
and Direc-
tions,
27th May
1930—con-
tinued.

AND IT IS FURTHER ORDERED that notice of the said reference be given in the CANADA GAZETTE on or before the 5th day of June, 1930.

(Sgd.) J. H. LAMONT,
J.S.C.C.

Approved
L. P. SHERWOOD,
Agent for Saskatchewan.

10

No. 3.
Notice of
Hearing,
4th June
1930.

No. 3.
Notice of Hearing.

IN THE SUPREME COURT OF CANADA.

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

TAKE NOTICE that by Order of His Excellency the Governor General in Council, dated 3rd May, 1930 (P.C. 947), the following questions have been referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, R.S.C. 1927, chap. 35 :—

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming 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 30 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 ?

AND FURTHER TAKE NOTICE that the said reference has been inscribed for hearing at the October, 1930, Session of the Supreme Court of Canada.

Dated this 4th day of June, A.D. 1930.

W. STUART EDWARDS,
Deputy Minister of Justice.

No. 4.

Affidavit of Service of Notice of Hearing.

IN 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.

I, William John Heal, of the City of Ottawa, County of Carleton, Province of Ontario, make oath and say as follows :

1. That I am a clerk in His Majesty's Civil Service of Canada attached to the Department of Justice, in the said City of Ottawa.

10 2. That I did on the 5th day of June, A.D. 1930, send to the Attorney-General of each of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan, a notice dated 4th June, 1930, signed by W. Stuart Edwards, Deputy Minister of Justice (a copy of which is hereunto annexed and marked Exhibit " A " to this my affidavit).

3. That the said letters, mailed as aforesaid, also contained a copy of the Order of the Honourable Mr. Justice Lamont, dated 27th day of May, A.D. 1930, and a copy of Order in Council P.C. 947 of the 3rd May, 1930.

20 4. That I obtained from the Post Office in the City of Ottawa a receipt for the registration of said letters, as appears by stamp in book which is kept in the Department showing all outgoing registered mail.

WM. J. HEAL.

Sworn before me at the City of Ottawa, this 7th day of June, A.D. 1930.

C. P. PLAXTON,

A Commissioner for taking affidavits, etc.

Exhibit " A " to No. 4.

IN 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.

30 Take notice that the reference herein has, by order of the Honourable Mr. Justice Lamont, dated 27th day of May, 1930, been inscribed for hearing at the head of the Saskatchewan list for the October, 1930, Session of the Supreme Court, and you are hereby notified of the hearing of the said reference pursuant to the terms of the said order, copy of which is annexed hereto.

Dated at Ottawa, this 4th day of June, A.D. 1930.

W. STUART EDWARDS,

Solicitor for the Attorney-General of Canada.

40 To the Attorneys-General of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, and Saskatchewan.

*In the
Supreme
Court of
Canada.*

No. 4.
Affidavit of
Service of
Notice of
Hearing,
7th June
1930.

*In the
Supreme
Court of
Canada.*

No. 5.

**Agreement between Dominion of Canada and Province of Saskatchewan on the subject
of the transfer of the Natural Resources of Saskatchewan.**

No. 5.

MEMORANDUM OF AGREEMENT.

Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930.

Made this 20th day of March, 1930.

Between

The GOVERNMENT OF THE DOMINION OF CANADA, represented herein
by the HONOURABLE ERNEST LAPOINTE, Minister of Justice, and the
HONOURABLE CHARLES STEWART, Minister of the Interior,

Of the First Part, 10

and

The GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN, represented
herein by the HONOURABLE JAMES THOMAS MILTON ANDERSON,
Premier and Minister of Education of the Province, and the
HONOURABLE MURDOCH ALEXANDER MACPHERSON, Attorney-General
Of the Second Part.

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 on 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 :

Now therefore this Agreement Witnesseth :

TRANSFER OF PUBLIC LANDS GENERALLY.

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 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, it being 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.

3. Any power or right, which, by any such contract, lease or other arrangement, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred, or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time,

*In the
Supreme
Court of
Canada.*

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—con-
tinued.

and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

4. The Province will perform every obligation of Canada, arising by virtue of the provisions of any statute or Order in Council or regulation in respect of the public lands to be administered by it hereunder, 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 lands for right of way, road bed, stations, station grounds, workshops, buildings, yards, ballast pits or other appurtenances.

5. The Province will further be bound by and will, with respect to any lands or interests in lands to which the Hudson's Bay Company may be entitled, carry out the terms and conditions of the Deed of Surrender from the said Company to the Crown as modified by the Dominion Lands Act and the Agreement dated the 23rd day of December, 1924, between His Majesty and the said Company, which said Agreement was approved by Order in Council dated the 19th day of December, 1924 (P.C. 2158), and in particular the Province will grant to the Company any lands in the Province which the Company may be entitled to select and may select from the lists of lands furnished to the Company by the Minister of the Interior under and pursuant to the said Agreement of the 23rd day of December, 1924, and will release and discharge the reservation in patents referred to in clause three of the said agreement, in case such release and discharge has not been made prior to the coming into force of this agreement. Nothing in this agreement, or in any agreement varying the same as hereinafter provided, shall in any way prejudice or diminish the rights of the Hudson's Bay Company or affect any right to or interest in land acquired or held by the said Company pursuant to the Deed of Surrender from it to the Crown, the Dominion Lands Act or the said Agreement of the 23rd day of December, 1924.

SCHOOL LANDS FUND AND SCHOOL LANDS.

6. Upon the coming into force of this agreement, Canada will transfer to the Province the money or securities constituting that portion of the school lands fund, created under sections twenty-two and twenty-three of the Act to amend and consolidate the several Acts respecting Public Lands of the Dominion, being chapter thirty-one of forty-two Victoria, and subsequent statutes, which is derived from the disposition of any school lands within the Province or within that part of the Northwest Territories now included within the boundaries thereof.

7. The School Lands Fund to be transferred to the Province as aforesaid, and such of the school lands specified in section thirty-seven of the Dominion Lands Act, being chapter one hundred and thirteen of the Revised Statutes of Canada, 1927, as pass to the administration of the Province under the terms hereof, shall be set aside and shall continue to be administered by the Province in accordance, *mutatis mutandis*, with the

provisions of sections thirty-seven to forty of the Dominion Lands Act, for the support of schools organized and carried on therein in accordance with the law of the Province.

*In the
Supreme
Court of
Canada.*

WATER.

8. Canada agrees that the provision contained in section four of the Dominion Water Power Act, being chapter two hundred and ten of the Revised Statutes of Canada, 1927, that every undertaking under the said Act is declared to be a work for the general advantage of Canada, shall stand repealed as from the date of the coming into force of this agreement in so far as the same applies to undertakings within the Province; nothing in this paragraph shall be deemed to affect the legislative competence of the Parliament of Canada to make hereafter any declaration under the tenth head of section ninety-two of the British North America Act, 1867.

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—con-
tinued.

FISHERIES.

9. Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

INDIAN RESERVES.

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

11. The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise

*In the
Supreme
Court of
Canada.*

apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—con-
tinued.

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish 10
for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

SOLDIER SETTLEMENT LANDS.

13. All interests in Crown lands in the Province upon the security of which any advance has been made under the provisions of the Soldier Settlement Act, being chapter 188 of the Revised Statutes of Canada, 1927, and amending Acts, shall continue to be vested in and administered by the Government of Canada for the purposes of Canada.

NATIONAL PARKS.

14. The Prince Albert National Park shall continue as a national park 20
and the lands included therein as the same are described in Orders made by the Governor in Council on the twenty-fourth day of March, 1927, (P.C. 524), the eighteenth day of October, 1928 (P.C. 1846), and the sixth day of February, 1929 (P.C. 162), together with the mines and minerals (precious and base) in the said park and the royalties incident thereto, shall continue to be vested in and administered by the Government of Canada as a national park, but in the event of the Parliament of Canada at any time declaring that the said land or any part thereof is no longer required for park purposes, the lands, mines, minerals (precious and base) 30
and the royalties incident thereto, specified in any such declaration, shall forthwith upon the making thereof belong to the Province, and the provisions of paragraph three of this agreement shall apply thereto as from the date of such declaration.

15. The Parliament of Canada shall have exclusive legislative jurisdic-
tion within the whole area included within the outer boundaries of the said park, notwithstanding that portions of the said area may not form part of the park proper; the laws now in force within the said area shall continue in force only until changed by the Parliament of Canada or under its authority, provided, however, that all laws of the Province now or hereafter in force, which are not repugnant to any law or regulation made applicable 40
within the said area by or under the authority of the Parliament of Canada, shall extend to and be enforceable within the same, and that all general taxing acts passed by the Province shall apply within the same unless

expressly excluded from application therein by or under the authority of the Parliament of Canada.

16. The Province will not, by works outside the boundaries of the said park, reduce the flow of water in any of the rivers or streams within the same to less than that which the Minister of the Interior may deem necessary adequately to preserve the scenic beauties of the said park.

17. In the event of its being hereafter agreed by Canada and the Province that any area or areas of land in the Province, in addition to that hereinbefore specified, should be set aside as national parks and be administered by Canada, the foregoing provisions of this agreement on the subject of parks may be applied to such area or areas with such modification as may be agreed upon.

SEED GRAIN, ETC., LIENS.

18. Every lien upon any interest in any unpatented land passing to the Province under this agreement, which is now held by Canada as security for an advance made by Canada for seed grain, fodder or other relief, shall continue to be vested in Canada, but the Province will, on behalf of Canada, collect the sums due in respect of such advances, except so far as the same are agreed to be uncollectible, and upon payment of any such advance, any document required to be executed to discharge the lien may be executed by such officer of the Province as may be authorized by any provincial law in that behalf; the Province will account for and pay to Canada all sums belonging to Canada collected hereunder, subject to such deduction to meet the expenses of collection as may be agreed upon between the Minister of the Interior and the Provincial Secretary or such other Minister of the Province as may be designated in that behalf under the laws thereof.

GENERAL RESERVATION TO CANADA.

19. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (a) any lands for which Crown grants have been made and registered under the Land Titles Act of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become, the registered owner at the date upon which this agreement comes into force, or (b) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

HISTORIC SITES, BIRD SANCTUARIES, ETC.

20. The Province will not dispose of any historic site which is notified to it by Canada as such and which Canada undertakes to maintain as an

*In the
Supreme
Court of
Canada.*

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskat-
chewan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan,
20th March
1930—*con-
tinued.*

historic site. The Province will further continue and preserve as such the bird sanctuaries and public shooting grounds which have been already established and will set aside such additional bird sanctuaries and public shooting grounds as may hereafter be established by agreement between the Minister of the Interior and the Provincial Secretary or such other Minister of the Province as may be specified under the laws thereof.

FINANCIAL TERMS.

21. In lieu of the provision made by subsection one of section twenty of the Saskatchewan Act, Canada will, from and after the date of the coming into force of this agreement, pay to the Province by half-yearly payments in advance, on the first days of January and July in each year, an annual sum based upon the population of the Province as from time to time ascertained by the quinquennial census thereof, as follows:— 10

The sum payable until such population reaches one million two hundred thousand shall be seven hundred and fifty thousand dollars;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

22. If at the date of the coming into force of this agreement any payment has been made under subsection one of section twenty of the Saskatchewan Act in respect of any half-year commencing before but terminating after the said date, a proportionate part of the payment so made shall be taken as having been made under the provisions hereof. 20

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. 30

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 40

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.

*In the
Supreme
Court of
Canada.*

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan.
20th March
1930—*con-
tinued.*

RECORDS.

10 25. Canada will, after the coming into force of this agreement, deliver to the Province from time to time at the request of the Province the originals or complete copies of all records in any department of the Government of Canada relating exclusively to dealings with Crown lands, mines and minerals, and royalties derived therefrom within the Province, and will give to the Province access to all other records, documents or entries relating to any such dealings and permit to be copied by the Province any of the documents required by it for the effective administration of the Crown lands, mines, minerals and royalties.

AMENDMENT OF AGREEMENT.

20 26. The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province.

RESERVATION OF RIGHTS.

27. This agreement is signed on behalf of the Province with the reservation on its part that neither the execution thereof nor any statute confirming the same shall affect or prejudice any right the Province may now have to call into question the legislative competence of the Parliament of Canada to enact certain sections of the Saskatchewan Act and the Dominion Lands Acts.

30 WHEN AGREEMENT COMES INTO FORCE.

28. This agreement is made subject to its being approved by the Parliament of Canada and by the Legislature of the Province of Saskatchewan, and shall take effect on the first day of the calendar month beginning next after the day upon which His Majesty gives His Assent to an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland confirming the same.

In witness whereof the Honourable Ernest Lapointe, Minister of Justice, and the Honourable Charles Stewart, Minister of the Interior, have hereunto set their hands on behalf of the Dominion of Canada, and

*In the
Supreme
Court of
Canada.*

the Honourable James Thomas Milton Anderson, Premier and Minister of Education of the Province, and the Honourable Murdoch Alexander MacPherson, Attorney-General thereof, have hereunto set their hands on behalf of the Province of Saskatchewan.

No. 5.
Agreement
between
Dominion of
Canada and
Province of
Saskatche-
wan on the
subject of
the transfer
of the
Natural
Resources
of Saskat-
chewan.
20th March
1930—con-
tinued.

Signed on behalf of the GOVERNMENT OF CANADA
by the HONOURABLE ERNEST LAPOINTE,
Minister of Justice, and the HONOURABLE
CHARLES STEWART, Minister of the Interior,
in the presence of
O. M. BIGGAR.

ERNEST LAPOINTE.
CHAS. STEWART.

10

Signed on behalf of the PROVINCE OF SASKATCHE-
WAN by the HONOURABLE JAMES THOMAS
MILTON ANDERSON, Premier and Minister of
Education, and the HONOURABLE MURDOCH
ALEXANDER MACPHERSON, Attorney-General,
in the presence of
JAS. F. BRYANT.
R. STIPE.

J. T. M. ANDERSON.
M. A. MACPHERSON.

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan.

No. 6.

Factum of the Attorney General of Saskatchewan.

20

STATEMENT OF THE CASE.

By an agreement entered into between the Dominion of Canada and the Province of Saskatchewan touching the transfer of the Natural Resources from the Government of the Dominion of Canada to the Government of the Province of Saskatchewan, it was agreed *inter alia* by Section 23 of the said agreement that provision would be made pursuant to Section 55 of the Supreme Court Act to submit for consideration to this Court questions agreed upon between the said parties as being appropriate to obtain the judgment of this 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 of Saskatchewan and as to any alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto. 30

Questions were agreed upon by counsel on behalf of the Dominion of Canada and the province of Saskatchewan, which said questions are stated in the submission set forth below.

Section 1 of the said agreement provided in part as follows :

“ In order that the province (Saskatchewan) 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. shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the province.”

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

10 Section 24 of the said agreement provided as follows :

“ As soon as 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. . . . to enquire and report whether any, and if any, what consideration. . . . 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.”

20

SUBMISSION.

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 :

30 (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.”

40 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

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

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 ?

10

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 ?

2 (A).—HISTORICAL REVIEW.

The area now comprising the Province of Saskatchewan by the above admission was prior to its establishment as a province a part of Rupert's Land and the North-Western Territory. It was established as a province in 1905 under the Saskatchewan Act pursuant to the powers contained in the British North America Act, 1871. By Section 21 of the said Saskatchewan Act, 4-5 Edward VII, cap. 42, it was declared 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, should continue to be vested in the Crown and administered by the Government of Canada for the purpose of Canada subject to the provisions of any Act of the Parliament of Canada with respect to road allowances, etc. Otherwise, except for certain further exceptions, the province was created upon the same basis and with the same powers as the original provinces. 20

Rupert's Land was that area claimed by the Governor and Company of Adventurers of England trading into Hudson's Bay, hereinafter referred to as the Hudson's Bay Company, as its property by virtue of a charter granted by Charles II. in 1670. This area consisted of all the land between Hudson's Bay and the height of land from which water flowed into the Bay, but exclusive of any land then actually possessed by any British subjects or by the subjects of any other Christian Prince or State. This area included tracts of land subsequently added to Quebec and Ontario, all Manitoba and part of Saskatchewan and Alberta. 30

It would follow from the above that the major portion of the Province of Saskatchewan was situated in Rupert's Land unless it came within the exception of land actually possessed by the subjects of any other Christian Prince or State. This question is of no particular interest except insofar as it affects any contention that may be put forward that the area of the province was purchased from the Hudson's Bay Company. 40

According to Mr. Justice Monk in *Conolly vs. Woolrich*, 11, L.C.J. 197, the Great Plain as far as the Athabaska territory was in the actual occupation of the French and belonged to the Crown of France at the time the grant of the charter was made.

*In the
Supreme
Court of
Canada.*

According to a letter written by the Governor of the Hudson's Bay Company on December 12th, 1876, the Hudson's Bay Company had not extended their posts and operations far from Hudson's Bay, and that some time prior to 1773 there was apparently a "Franceway" settlement on the Saskatchewan. Article by C. C. McCaul, 4, C.L.T. p. 1, at p. 10.

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

10 At page 12 Mr. McCaul states as follows :

" Giving all attention to the arguments urged on behalf of the Hudson's Bay Company, it seems absurd to say that they acquired by occupancy a country already occupied simply by taking possession of the mouths of the rivers draining that country."

The authorities appear to indicate that the area of Saskatchewan was acquired from France by cession either by the Treaty of Utrecht or the Treaty of Paris, or partly by one and partly by the other.

20 The North-Western Territory appears to have been all that part of the present Dominion lying east of the present Province of British Columbia and north of the international boundary which lies in the basins of those rivers flowing into the Arctic ocean, and would include the area in the basins of rivers flowing into Hudson's Bay which at the grant of the Hudson's Bay charter was possessed by the King of France. It would, therefore, include the greater part, if not all, of the Saskatchewan fertile belt.

The Treaty of Utrecht, 1713, by its tenth article required King Louis XIV. of France to

30 " restore to the Kingdom and Queen of Great Britain the Bay and Streights of Hudson together with all the lands, seas, sea-coasts, rivers and places situate in the said Bay and Streights . . . All which . . . shall, within six months from the ratification of the present treaty, or sooner, if possible, be well and truly delivered to the British subjects having commission from the Queen of Great Britain to demand and receive the same."

40 In the nineteenth century came the clash between the Hudson's Bay Company and the North-West Company. This dispute was set at rest by the union of the two companies in 1821. Partly as a consequence of the strife between these two companies, an Act described as " An Act for Regulating the Fur Trade and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America", 1-2 Geo. IV., cap. 66, was passed. This Act recited as follows :

" After the passing of this Act, it shall be lawful for His Majesty, his heirs and successors, to make Grants or give His Royal License, under hand and seal of one of His Majesty's Principal Secretaries of State, to any body corporate, or company, or person,

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

or persons, of or for the exclusive privilege of trading with the Indians in all such parts of North America, as shall be specified in any such Grants or Licenses respectively, not being part of the lands or territories heretofore granted to the said Governor and Company of Adventurers of England trading into Hudson's Bay, and not being part of any of His Majesty's Provinces in North America, or of any lands or territories belonging to the United States of America."

Section 146 of the British North America Act, 1867, which is intituled "Admission of Other Colonies" provided on address from the Houses of Parliament of Canada for the admission of "Rupert's Land and the North-Western Territory or either of them into the Union on such terms and conditions as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act." (Appendix page 35.) 10

Prior to the Union, which was effected by order-in-council dated June 23rd, 1870, (Appendix page 55), Rupert's Land was a colony. The patent of Charles II. recited in part as follows :

"That the said land be from henceforth reckoned and reputed as one of our plantations or colonies in America called Rupert's Land."

The patent creating the See of Rupert's Land, May 21st, 1849, recited in part as follows : 20

"Did, moreover, ordain and direct that the land within the said limits . . . should thenceforth be reckoned and reputed as one of his plantations and colonies in America, called Rupert's Land . . . for the remedy of the aforesaid inconveniences we have determined to erect the said colony into a bishop's see . . . We do erect . . . and constitute the said colony of Rupert's Land into a bishop's see or diocese." Copy of Public Documents, Various, Public Archives of Canada.

The government of Rupert's Land was carried on by the Hudson's Bay Company under its charter and the constitution thereby granted was similar to the primitive constitutions of the other colonies of that day, such as Virginia, Massachusetts and Pennsylvania. The pertinent part of the charter on this point runs as follows : 30

"We do grant . . . that it shall be lawful for the said Governor and Company . . . and . . . being so assembled . . . to make, ordain and constitute such and so many reasonable laws, constitutions and orders and ordinances as to them . . . shall seem necessary and convenient for the good government of the said Company."

And further provided :

"The said Governor and Company shall have liberty, full power and authority to appoint and establish Governors and all other officers to govern them and that the Governor and his Council of the several respective places where the Company shall have plantations, forts, factories, colonies or places of trade therein may 40

have power to judge all persons belonging to the said Governor and Company or that shall live under them, in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute justice accordingly."

*In the
Supreme
Court of
Canada.*

Further progress was made in the form of Government under Lord Selkirk who brought out settlers to the Red River. After the settlement of the dispute between the Hudson's Bay Company and the North-West Company a general Court of the Hudson's Bay Company passed a series of resolutions giving the country a primitive constitution. This scheme
10 was submitted to Lord Bathurst who expressed his formal approval as follows :

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

"Until His Majesty shall constitute Courts and justices under the said Act (i.e., 1-2 Geo. IV. cap. 66, entitled 'An Act for Regulating the Fur Trade and Establishing Criminal and Civil Jurisdiction within Certain Parts of North America'), the resolutions of the 29th appear well calculated to preserve the peace and good government of that part of North America under the jurisdiction of the Hudson's Bay Company."

It will thus be seen from the above that Rupert's Land and the
20 North-Western Territory were recognized as colonies, and that the said areas were so treated as colonies when the British North America Act 1867 was passed.

Reference to and a comparison with the area now called British Columbia at the time of the surrender of the Hudson's Bay Company afford some ground of support of the case for the province.

After the loss of Oregon when Great Britain in 1846 conceded to the United States the forty-ninth parallel of latitude as the boundary west of the Rocky Mountains, it was felt necessary to create a colony which would stay the further progress of the Americans. This colony was to be
30 Vancouver Island and the duty of establishing it was conferred on the Hudson's Bay Company by charter dated January 30th, 1849. The charter bears a close resemblance to the charter of 1670. The Company was given the title and control of the land in Vancouver Island in order to establish a colony. There were, however, two safeguards—one, that if the colony was not established within five years the grant might be revoked, and the other that the land was to be used for actual colonization. By 1853 the population of the island had grown to four hundred and fifty souls—yet this primitive colony enjoyed its own Natural Resources. It was not until
40 1856 that an assembly was elected. In 1858 the colony of British Columbia was created and though governed by no more than a Governor, Sir James Douglas, who was also Governor of Vancouver Island, the colony of British Columbia was given its Natural Resources so that the colony might thereby be built up. Parliamentary Blue Book, 1849, No. 103, page 13. British Columbia Volume.

These precedents on the Pacific Coast show that no matter who might control the Natural Resources they were earmarked for the colony in the

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

area concerned and the colony even if it were in an inchoate state, and the enjoyment of responsible Government was not deemed a condition precedent to the control or benefit of those resources.

The Dominion of Canada desired the entry of British Columbia into the Union and as a condition to that entry the building of a railway across Canada was stipulated. It therefore became necessary to bring into the Union the great plain of Rupert's Land and the North-Western Territory.

As already stated, Rupert's Land and the North-Western Territory were admitted into the Union and became a part of the Dominion of Canada by order-in-council of June 23rd, 1870. By an address from the Canadian Parliament dated December 17th, 1867, Her Majesty the Queen was petitioned to unite Rupert's Land and the North-Western Territory with the Dominion. The address sets out the reasons, namely if the Dominion of Canada as constituted under the powers of the British North America Act, 1867, were extended westward to the shores of the Pacific Ocean it would

- (a) promote the prosperity of the Canadian people,
- (b) conduce to the advantage of the whole Empire.

The address then went on to recite that colonization, development of mineral wealth and extension of commercial intercourse from the Atlantic to the Pacific were dependent on stable Government and that the welfare of the British subjects of European origin in that region would be enhanced by the formation therein of political institutions bearing an analogy as far as circumstances would admit to those which existed in the several provinces of the Dominion.

Reference is made to the one hundred and forty-sixth section of the Act of 1867 which provided for the admission of the said territories. By that section the two areas might be admitted under the stipulations provided by that section, namely "on the terms and conditions expressed in the addresses and as the Queen thinks fit to approve subject to the provisions of the B.N.A. Act 1867." The terms and conditions of this first address are

- (a) to grant to the Parliament of Canada authority to legislate for the future welfare and good government of the area;
- (b) willingness on the part of Canada to assume the duties of government and legislation;
- (c) consent by Canada to protect the rights of any corporation, company or individual;
- (d) to deal equitably with Indian claims.

The only reference in the address that could even remotely refer to a beneficial ownership of the public domain is the phrase "transference of the territories in question to the Canadian Government." That phrase, however, is defined by the first use of the word "transfer" in the preceding paragraph, and is clearly referable only to turning over to Canada the jurisdiction and control over the region.

The word "transfer" is used in an Act for temporary government of Rupert's Land and the North-Western Territory when united with Canada, 32-33 Vic. c. 3, and it is obvious from the context that the word means a transfer of the jurisdiction.

*In the
Supreme
Court of
Canada.*

The Imperial Government before consenting to the Union required that the claims of the Hudson's Bay Company be disposed of. This was done by a Deed of Surrender dated November 19th, 1869, and accepted by the Queen June 22nd, 1870, under the powers contained in Rupert's Land Act, 1868. (Appendix page 44.)

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

10 This Act was intituled "an Act for enabling Her Majesty to accept a transfer upon terms of the lands, tributaries and rights of the Governor and Company of Adventurers of England trading into Hudson's Bay and for admitting the same into the Dominion of Canada."

This Act recites the grant of lands and territories to the company and recites that part of the British North America Act 1867 providing for the admission of Rupert's Land and the North-Western Territory subject to the provisions of the British North America Act 1867.

20 It was therein provided, for the purposes of the Act, that Rupert's Land should include all the lands and territories held or claimed by the Company to be held and made provision for surrender to the Queen of the said lands and territories and for the absolute extinguishment of all rights of Government and proprietary rights.

It further provided for an order-in-council declaring Rupert's Land to be admitted into the Dominion and for the Parliament of the Dominion to establish Courts and make laws for peace, order and good government of Her Majesty's subjects and others therein.

The Deed of Surrender provided for payment of £300,000 by Canada to the Hudson's Bay Company and for retention by the Company of a portion of the lands.

30 The first suggestion of payment of any money by Canada arose upon amendment of the Rupert's Land Act by the House of Commons. The bill had been introduced in the House of Lords. When it reached the Commons, Section 3 was amended by addition of the last paragraph thereof, namely :

" Provided further that no charge shall be imposed by such terms upon the consolidated fund of the United Kingdom."

40 It consequently followed that if any money was to be paid as a condition of the Surrender, Canada would have to make arrangements for it, and the sum eventually agreed upon was £300,000 or \$1,460,000. The Canadian delegates Cartier and McDougall regarded this payment as a species of settlement out of Court.

" Cost of legal proceedings necessary, if any be necessary to recover possession. . . . Compromises of this kind are not unknown in private life and the motives and calculations which govern them may be applicable to the present case." See Report

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

of Delegates appointed to negotiate the acquisition of Rupert's Land and the North-Western Territory, Ottawa, 1869. Imperial Blue Book, Hudson's Bay Volume, page 59.

This sum was, in the first instance, paid by British bankers out of money borrowed by Canada under guarantee of the British Treasury Warrant of 1870, pursuant to Rupert's Land Loan Act, 32-33 Vic. 101. The principal was to be repaid on April 1st, 1904. The Attorney General of Saskatchewan contends that while nominally paid by the Dominion as a whole, it was in effect paid in full from monies derived from the proceeds of lands within the area itself, inasmuch as such proceeds, after deducting all expenditures and administration, exceeded the sum so paid. 10

Further, insofar as the Province of Saskatchewan is concerned, a large portion of this area of great potential mineral wealth was added to and became a part of the Provinces of Ontario and Quebec respectively. No suggestion has apparently ever been made that these provinces were not entitled to such lands and minerals originally forming part of Rupert's Land, merely because the £300,000 (Sterling) was paid by the Dominion in extinguishment of the Hudson's Bay Company's rights to the area in question. Boundaries Extension Act, 1912, caps. 40 and 45.

In May, 1869, a second address from the Parliament of Canada was submitted to the Queen. (Appendix page 65). This address referred to the first address of December 17th, 1867, and to the necessity of disposing of the Hudson's Bay charter. Reference is made in the address to the "acquisition by Canada" of Rupert's Land (Appendix page 66) and for payment of the £300,000 by Canada on transfer of the company's rights, and also the fact that the Imperial Government would guarantee a loan to enable Canada to pay the Hudson's Bay Company. The address ended with a prayer that Her Majesty might under the one hundred and forty-sixth section of the British North America Act unite Rupert's Land and the North-Western Territory with the Dominion of Canada. The union was consummated by the said order-in-council of June 23rd, 1870. 30

The first part of the preamble of this order is important because it repeats the phrase that the union is to be subject to the provisions of the British North America Act, 1867; in fact, all the Imperial Acts and documents relating to the union invariably contained the phrase "subject to the provisions of the said Act."

For the government of Rupert's Land and the North-Western Territory, the Parliament of Canada in 1869 passed an act entitled the "Rupert's Land and North-Western Territory Act 1869", 32-33 Vic. c. 3, being an Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada. 40

Following that was passed the Manitoba Act, 1870, 33 Vic. c. 3. This was an act to amend or continue the Act just mentioned and to establish and provide for the government of the Province of Manitoba.

It was and is generally conceded that the Manitoba Act was *ultra vires* of the Parliament of Canada. In order to settle doubts upon this point

the Imperial Act of 1871, known as the British North America, 1871, ratified the two said Acts. That is to say, the creation out of a portion of the area into the Province of Manitoba was ratified by the British North America Act, 1871. A further pertinent point ratified was Section 30 of the Manitoba Act which provided that all ungranted or waste lands in the province should from and after the date of the transfer (that is the transfer of the territories to the Government of Canada) be vested in the Crown and administered by the Government of Canada for the purposes of the Dominion, subject to the conditions and stipulations contained in
 10 the agreement for the surrender, etc.

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

As stated, the validity of those provisions was confirmed by the British North America Act, 1871, but there has never been any Imperial legislation granting to the Dominion title to the remaining portion of Rupert's Land and the North-Western Territory. Any such legislation is confined to that portion lying within the boundaries of Manitoba.

The preamble to the British North America Act, 1871, states :

“Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces in territories admitted or which may hereafter be admitted into the Dominion
 20 of Canada and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts and to vest such powers in the said Parliament.”

Further, the Act is intituled “an Act respecting the establishment of provinces in the Dominion of Canada.” Section 2 of the said Act provided that the Parliament of Canada may from time to time establish a province in any territories forming for the time being part of Canada but not included in any province thereof, and may at the time of such establishment make provision for the constitution and administration of any such province and for the passing of laws for peace, order and good government of such
 30 province and for its representation in the said Parliament.

Section 4 provided that the Parliament of Canada might make provision for the administration, peace, order and good government of any territory not for the time being included in any province.

Section 5 confirmed the two aforementioned Acts.

It is to be noted that nothing is said in the British North America Act, 1871, respecting the right to retain the Crown lands for the purposes of Canada in the territories outside the area of Manitoba, and in construing the said Act reference can be made to the title and to the preamble. Maxwell on Interpretation of Statutes 7th Ed. page 36.

40 The North-West Territories Act, 1871, 34 Vic. c. 16, was an Act to make further provision for the government of the North-West Territories.

The next Act was one amending the North-West Territories Act, 1871, 36 Vic. c. 5, 1873, intituled “an Act to make further provision for the government of the North-Western Territory.”

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

The next Act was the North-West Territories Act, 1875, 38 Vic. c. 49, being an Act to amend and consolidate the laws respecting the North-Western Territory.

Then followed the North-West Territories Act, 1877, 40 Vic. c. 7, an Act to amend the North-West Territories Act, 1875. The Act of 1875 provided for a partly elective council.

In 1880 extended powers of self-government were given to the North-Western Territory by the North-West Territories Act, R.S. of C. 1886, cap. 50.

The next Act was the British North America Act, 1886, 49-50 Vic. c. 35, Imperial, being an Act respecting the representation in the Parliament of Canada of the territories which at the time being formed part of the Dominion of Canada but were not included in any province. 10

Then followed the Act of 1891, 54-55 Vic. c. 22.

Next was the North-West Territories Act, 1898, 61 Vic. c. 5.

Then followed the Act of 1900, 63-64 Vic. c. 44.

The final step was the erection of the territory into a province by the Act of 1905.

The government of the area now known as Saskatchewan was for the first years after Confederation somewhat primitive. It first consisted of a Lieutenant-Governor with a nominated council appointed by the Governor-General of Canada. Under the Act of 1880, R.S. of C., 1886, c. 50, government was carried on by a Lieutenant-Governor appointed by the Dominion Government. The Lieutenant-Governor had power to appoint a council of not more than six to aid him in the administration. By Section fifteen of the Act the council had power to make ordinances in relation to administration of justice in as full and as ample a manner as the Legislature of any province of Canada could under paragraph fourteen of Section ninety-two of the British North America Act, 1867, and had power to constitute, maintain and organize a provincial Court, both of civil and criminal jurisdiction. Section eighteen provided for the erection of electoral districts and by Section twenty-three the elected members had the same powers as appointed members. By Section twenty-four when the number of elected members amounted to twenty-one the appointed members of the council ceased to function and the elected members would then constitute the Legislative Assembly. 20 30

These powers of government were extended until by the Acts of 1888 and 1891 there was very little difference between the powers of government exercised in the North-Western Territory and those exercised by the Legislatures of the various provinces. 40

See remarks of Mr. Justice Newcombe *in re Alberta Act* 1927 S.C.R. 364 :

“ The Territories had, from the time of their admission into the Union, exercised, under legislative grant from the Dominion, powers of self-government which had gradually been expanded, until, when the Ordinances of 1901 were passed, they had for many years enjoyed a representative assembly, with powers of legislation not far inferior to those of the provincial Legislatures.”

2 (B).—ARGUMENT.

The legislation just reviewed establishes that, in the result, from the 22nd of June, 1870, until the 15th day of July, 1870, Rupert's Land and the North-Western Territory were British colonies in North America, the Crown lands of which were vested in the Queen, and wherever the beneficial interest in and the proprietary rights to those lands may have been, it was not in the Dominion of Canada.

When the Union did take place it was subject to the express terms of Section one hundred and forty-six of the British North America Act, 1867. See section one hundred and forty-six of the Act. Under this section this new unit became a part of Canada subject to the provisions of the Act itself.

Section one hundred and nine of that Act specifically provided that each of the original provinces should own their own lands, mines, minerals and royalties. Section ninety-two, sub-sec. five, provided that each province should have the exclusive power to manage and sell its public lands.

After the Union the Parliament of Canada proceeded to deal with the waste or Crown lands as if they were vested in the Crown in the right of the Dominion, and to use the language of the British North America Act, 1867, as if they belonged to the Dominion, or to use the term employed in the Manitoba Act, 1870, the British North America Act, 1871, and the Saskatchewan and Alberta Acts, "for the purposes of the Dominion."

To effect that end and to provide machinery for the disposal of the Crown lands, the Dominion Lands Act, 1872, was passed. That Act assumed that the Crown lands in Rupert's Land and the North-Western Territory at the time of the surrender and the admission of the Territories into the Union, belonged to or were vested in the Crown for the purposes of the Dominion; or, in other words, assumed that the said waste or Crown lands were the property of the Dominion. Such an assumption affords no proof of the right so claimed.

"Declarations of the Dominion Parliament upon the interpretation of the British North America Act are not conclusive but if the language is doubtful the interpretation may be considered." Lefroy. Constitutional Law of Canada page 99.

At page 195 of Lefroy's Constitutional Law of Canada the argument in *Attorney-General of British Columbia vs. Attorney-General of Canada*, [1914] A.C. 153, Lord Haldane said:

"It shows the view the Dominion took but it does not cast much light on the question."

Further, "continued exercise of a legislative power does not make it constitutional." *Valin vs. Langlois*, 1879, 3 S.C.R. 1, 26. Lefroy Notes page 195.

The Attorney-General of Saskatchewan contends that no authority can be found for such an assumption of ownership. Nowhere can there be found any act or document conveying the beneficial or any ownership to the Dominion. The surrender by the Hudson's Bay Company was to the

*In the
Supreme
Court of
Canada.*

No. 6.

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 6.

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

Queen from whose predecessor, Charles II, it had been received. There is some reference to a transference of the area to the Dominion, but it is submitted that in view of what took place the only meaning to be attached to that phraseology is the meaning applied to it in the address of December 17th, 1867, namely, transference of the "jurisdiction and control of the region" and nothing more. Interpretation Act R.S. of C. 1927, Vol. 1, c. 1, s. 16. *In re Cuno* 43 Ch. D. page 12 at page 17. Craies on Statute Law page 109. *Hough vs. Windus* 12 Q.B.D. 237.

Crown prerogatives cannot be transferred by implication. *Attorney-General of Canada vs. Attorney-General of Alberta*, 1927 S.C.R. page 136 16
at page 139.

It is true the sum of £300,000 was paid by the Canadian Government, but for what? Not a conveyance of the region, for there was no conveyance. This sum was paid, as stated, to avoid delay and expense of litigation. The Union with the prairie provinces was necessary and necessary at once in order to carry out the scheme of Confederation. Remarks of Mr. Justice Duff in *Dominion of Canada vs. Ontario*, 42 S.C.R. 1, at p. 123. That scheme embraced entrance into the Union of British Columbia and the building of a transcontinental railway was a condition of the entrance by British Columbia. It also included the grand scheme of Confederation of 20
the British colonies from ocean to ocean.

The Province of Saskatchewan contends that the Dominion neither obtained a conveyance nor did Canada as then composed pay the so-called purchase price. The money was borrowed. The interest, in part at least, was charged up to and paid out of the homestead fees and proceeds of the sale of western lands and the principal was paid by the whole of Canada in 1904. Part of the area of the Hudson's Bay Company so surrendered was subsequently transferred to the Provinces of Ontario and Quebec and those two provinces immediately assumed and exercised control of the Crown lands from the date the area was added. 30

If the statements in part 2 (A) of this factum respecting the area of Saskatchewan having been obtained by cession instead of by charter through the Hudson's Bay Company are correct, then the contention of purchase has no bearing as the area would be in the North-Western Territory and not in Rupert's Land. In any event the purchase aspect of the case applies only to the proprietary rights of the Hudson's Bay Company over land owned by it—not over land alleged to have been owned by it.

There was no deed of conveyance from the Hudson's Bay Company—there could not be, for the only deed was a deed of extinguishment of all proprietary rights. The deed was a deed of surrender to Her Majesty. 40
There was therefore nothing to assign or convey. There the transaction terminated except that the Dominion was given full power to legislate for the future welfare and good government of the territory (North-Western Territory).

The Imperial Government paid the Hudson's Bay Company £57,500 for the surrender of Vancouver Island. It has never been contended that

by such purchase Vancouver Island passed to the Imperial Government for the purposes of the Imperial Government, but the Crown lands have always been administered for the benefit of the inhabitants of that colony.

It has already been stated that the British North America Act 1871 gave authority to the Dominion to create provinces in the territories admitted. It also validated the Manitoba Act. By the latter Act the Parliament of Canada had erected Manitoba into a province and had given a constitution to it and had declared the Crown lands of that area to be vested in the Crown and to be administered by the Government of Canada
10 for the purposes of the Dominion.

As already stated, that Act was *ultra vires* of the Parliament of Canada and the Imperial Act just referred to, namely the British North America Act 1871, was required to validate its provisions. There is, however, no Imperial Statute confirming the Saskatchewan and Alberta Acts. No confirmation of the power to create these provinces was needed—that power flowed from the British North America Act 1871, but there is nothing in that Act authorizing the Dominion to hold the public domain for the purposes of Canada.

Lord Buckmaster in *Attorney-General of Alberta vs. Attorney-General of*
20 *Canada* 97 L.J.P.C., page 106, [1928] A.C., page 475 stated that

“In respect to Crown lands the province could never, apart from statute, be in a position of owning lands, etc.”

This decision is referred to later. The point now taken is that there is no statute that enabled or authorized the Dominion to own, that is in the beneficial aspect, or to administer for its own purposes the Crown lands of the prairie area. There was a transference of the control but that is an entirely different thing from the proprietary rights assumed under the Dominion Lands Act 1872.

Lord Herschell in *Attorney-General for Canada vs. Attorneys-General*
30 *for Ontario, Quebec and Nova Scotia*, (67 L.J.P.C. 90 at 91, [1899] A.C. 700), stated:

“It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion Legislature for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament, proprietary rights were transferred to it.”

40 The only statutes to which one can look for such powers are the Acts of 1867, 1868 and 1871. There the only pertinent reference to lands, in the British North America Act 1867, is Section 91, subsection 1, which gives jurisdiction to the Parliament of Canada over the “public debt and property.” Any property the Dominion got was acquired upon its incorporation under the British North America Act, it having had no existence

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

prior to the passing of that Act. Reference to that Act and schedules shows what is the nature of the property that was to become the public property of Canada. By Section one hundred and seventeen the several provinces retained their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications and defence. By Section one hundred and eight the public works and property of each province enumerated in the third schedule were to become the property of Canada.

The first eight items in the third schedule have no bearing on this question. The Crown lands of the prairies could not come under Section 10 nine because that refers to property transferred by the Imperial Government and known as "ordnance property." Nor could it come under the last Section, namely Section ten unless it comes under the phrase of "lands set apart for general public purposes."

To interpret Section ten of the third schedule as giving the power and authority which the Parliament of Canada assumed under the Dominion Lands Act, namely the beneficial ownership in the Crown lands, would be contrary to the whole spirit of the Act of Confederation.

The scheme and purpose of the British North America Act 1867 was that the separate units or provinces were to own the Crown lands. See 20 sections ninety-two, one hundred and nine, and one hundred and seventeen. the whole of the third schedule is governed by Section one hundred and eight and it has never been successfully contended that under that Section or any other Section of the Act the Dominion could make claim to the whole or any part of the Crown lands except those required for a specific public purpose. *Water and Water Powers Reference*, 1929 S.C.R. page 200 at 210 and 212.

The Dominion was not intended to be a land-owning entity. Its revenue was to be derived from a different source—one national in scope, namely excise and customs duties. The power to exact import duties 30 was taken from the provinces, but the source to which the several communities or colonies looked for their revenue, namely the land, was left to them. The words of Mr. Fortescue on behalf of the Duke of Newcastle in 1864 express the correct constitutional viewpoint :

"The colonists of the Anglo-Saxon race look upon the land revenues as legitimately belonging to the community."

Public Archives, United Kingdom papers, Volume 2 of Hudson's Bay Company, being a return to an address of the House of Commons dated August 5th, 1869, for correspondence relating to the surrender of Rupert's Land, No. 440, page 70.

40 Lord Durham in his report took the view that the land in the Dominion colonies should be administered by the officers of the Imperial Government, but that view was not adopted. Lucas page 187. The Act of Union 1847 on the contrary adhered to the policy that control of the Crown lands should be given to the colonies when they assumed the responsibility for an adequate civil list. See Lord Russell to Paulett

Thompson September 7th, 1839, in Egerton & Grant's Selected Speeches and Dispatches relating to the Constitution and Development of Canada, page 264. See offer made by Lord Glenelg, Lucas' Lord Durham's Report 186. In fact, the Imperial Government did not make the grant of the public domain contingent even upon responsible government. The Imperial Government was ready to concede as early as 1835, long before responsible government was in sight, the grant of the Crown domain.

*In the
Supreme
Court of
Canada.*

The legal steps leading to and consummating the admission of the Territories into the Dominion all expressly provided that the area when admitted became subject to the provisions of the British North America Act 1867. See Section one hundred and forty-six thereof, Rupert's Land Act, order-in-council June 23rd, 1870.

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

Some definite purpose must be attributed to the repeated use of that phrase. It is submitted that it had the meaning that was expressed in the phrase used in the first address to the throne for the admission of the area, namely that when admitted it was to have

“political institutions bearing analogy as far as circumstances will admit to those which exist in the several provinces of this Dominion.”

Appendix page 60. The North-Western Territory was admitted into the Union upon the terms and conditions set forth in the first address from which the above phrase is taken. British Columbia was admitted into the Union and it was decided in *Attorney-General of British Columbia vs. Attorney General of Canada*, (58 L.J.P.C., 88, 14 A.C. 295), known as the “Precious Metals Case” that

“Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that Section one hundred and nine of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated.” Lord Watson at page 92 of the report.

And consequently, British Columbia is to be put on the same basis as the old provinces.

Section ten of the terms of the entry into Union of British Columbia in the schedule appended to the order-in-council May 16th, 1871, provided as follows :

“The provisions of ‘The British North America Act, 1867,’ shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia, in the same way and to the like extent as they would apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.”

If the last two lines were left out, the preceding words are only another way of expressing the phrase “subject to the provisions of this Act”

*In the
Supreme
Court of
Canada.*

No. 6.

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

with a limitation that does not affect the point involved; the last two lines do not detract from or add to the contention of Saskatchewan that Rupert's Land and the North-Western Territory were intended to be and were, by that phrase, admitted into the Union under the same scheme of Confederation as that of the other provinces.

That Rupert's Land and the North-Western Territory were regarded by the framers of the Act of 1867 as being competent to enter the Dominion as a unit or units in their existing condition on a parity with the other provinces or colonies, is apparent from the language of Section one hundred and forty-six itself inasmuch as the conditions governing this section of territory are exactly the same as those governing the other provinces and colonies and there is no suggestion that there should be any limit placed upon this portion of Canada as to its Crown lands merely because at that time it had not attained to full provincial status. Such an important departure from the underlying principles of the Act would, it is submitted, require the most express language to make it effective.

“The true nature and character of the legislation must always be determined.”

Russell vs. The Queen, 1882 (7 A.C. 829, 841-2, 51 L.J.P.C. 77 at 82.)

That phrase is referred to in the case of *Liquidator of Maritime Bank of Canada vs. Receiver-General for New Brunswick*, and in the same case Lord Watson at page 77 said:

“The object of the Act was neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.”

Lord Watson further went on to refer to Lord Fitzgerald in *Hodge vs. The Queen* in the phrase which reads as follows:

“When the British North America Act enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in Section ninety-two, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section ninety-two as the Imperial Parliament in the plenitude of its power possessed and could bestow.”

By Section ninety-two, subsection thirteen, the provinces were given control of property and civil rights in the provinces.

In *Attorney-General for Ontario vs. Attorney-General for Canada et al* 65 L.J.P.C. page 26, [1896] A.C. 348, Lord Watson in dealing with the exception from Section ninety-two enacted by Section ninety-one, namely

the power to make laws for peace, order and good government of Canada, page 32, stated as follows :

“In legislating in regard to such matters the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by Section ninety-two. . . . To attach any other construction to the general power which is conferred in supplement of its enumerated powers . . . would not only be contrary to the intendment of the Act but would practically destroy the autonomy of the provinces.”

Montreal vs. Montreal Street Railway, 81 L.J.P.C. 145 at 149.

It has been repeatedly laid down that the provinces are to be on an equal footing. The ownership and development of Crown lands and the revenue therefrom are to be left to the province in which they are situate. See *the Fisheries Case—Attorney-General for Canada vs. Attorneys-General for Quebec, Ontario and Nova Scotia* (67 L.J.P.C. 90, [1899] A.C. 700). The provinces cannot abolish the sources from which the revenue is to be received. *Attorney-General of Ontario vs. Attorney-General of Dominion, and Distillers and Brewers Association* [1896] A.C. 348 at 364. Reference to this independence was made by Duff, J. in *Ontario vs. Canada*, 12 S.C.R. 4, p. 128 as follows :

“The independence of the provinces as regards control of property and revenues appropriated to them by the Act has been emphasized in a series of decisions.”

Affirmed *Dominion of Canada vs. Province of Ontario*, 80 L.J.P.C., page 32.

That this equality did not only pertain to the original provinces is made clear in the case dealing with British Columbia. See Precious Metals case supra, *The King vs. Attorney-General of British Columbia* [1924] A.C. 213, Reference re *Water and Waterpowers* 1929 S.C.R. 210, and Lefroy page 269.

To hold otherwise, namely to decide that the revenue of the province is dependent on the bounty of the Government at Ottawa is subversive and against the intendment and spirit of the Act of Confederation.

“The spirit in which these enactments should be construed cannot be insisted upon with too much emphasis.” *Attorney-General of Canada vs. Attorney-General of Alberta* 1927 S.C.R. page 147.

In the case of Manitoba there was, of course, distinct authority from the Imperial Government enabling the Parliament of Canada to assume the beneficial ownership of the lands in that province, but that was a special enactment and dealt with by a special provision of the Act, and if any inference is to be drawn from the British North America Act 1871 validating such an arrangement it is, it is submitted, an inference in favour of the contention of the province. If the contention of the Dominion is that it has a right to administer the lands in the area of Saskatchewan for its own purposes, it was unnecessary to have that particular power in respect

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 6.

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

to the lands in the area of Manitoba disposed of by special legislation. Consequently, if any inference at all is to be drawn from the British North America Act 1871 it would be that without the authority of the Imperial Parliament the Dominion had no power to administer the lands in the area of Saskatchewan without something further than the powers under which it has assumed to act. The case of Manitoba was a departure from the British North America Act 1867 and there was a reason for that departure, namely the critical condition of the area of Manitoba at that time. The Red River settlement was in rebellion and legislation was necessary to settle the trouble that arose in that region. It has been pointed out in *Russell vs. Regem* supra that the guiding rule under ordinary circumstances does not apply in exceptional cases. 10

If, however, the contention of the Dominion Government is correct then it means that the remaining part of Canada has the power to dictate whether or not it shall be possible for the area of Saskatchewan to have the power to carry on self-government. Government cannot be conducted without revenue and it is urged that not only is there nothing that gave the Dominion the beneficial ownership of the domain of Saskatchewan but also that the position forced on the area by the powers assumed under the Dominion Lands Act, 1872, of making the inhabitants of the area suppliants for funds to carry on government is not an admission into the Union subject to the provisions of the British North America Act 1867. The division of assets was a fundamental provision of the Act of Confederation and any interference with such a provision is incompatible with the spirit of that Act. Certain changes in form of government, not going to the root of self-government, might be compatible but the retention of the lands is contrary to all idea of self-government. 20

Keith on Responsible Government in the Dominion, Vol. 2, page 1052, says :

“ In fact the lands were the only source from which revenues for the development of the colony could obviously be obtained and if a colony had not been then granted the lands it would have required, as the Canadian provinces which had no lands required, grants from the Central Exchequer to keep them going, but such grants were obviously as has been time after time asserted in the most emphatic terms by the Imperial Government, entirely opposed to the principle of existence of self-government, and therefore self-government could not have been accorded without giving the control of the land revenue which the Crown possessed.” 30

As stated, there is nothing conveying or granting the lands to the Dominion. On the contrary there is the precedent of other provinces, the principle of equal status, the scheme of a division between the Dominion and the provinces of the sources of revenue. If there be any doubt, the more consistent and probable construction is to be preferred. *Attorney-General of Ontario vs. Mercer*, (52 L.J.P.C. 84, 1883, 8 A.C. 767 at 778 and 779). 40

The Attorney-General of Saskatchewan therefore contends that upon admission in 1870 the public domain belonged to the area so admitted. It

either did that or it remained vested in the Queen in the right of the Imperial Government. Rupert's Land Act 1868 authorized the Parliament of Canada "to make, ordain and establish within the land and territory so admitted all such laws, institutions and ordinances and to constitute such Courts and officers as may be necessary for peace, order and good government of Her Majesty's subjects and others therein." The order of 1870 gave the Parliament of Canada such power and authority to legislate for the future welfare and good government of the North-Western Territory. The British North America Act 1871 gave the Parliament of Canada power and authority to make provision for the constitution and administration of any such province, and for the passing of laws for peace, order and good government of such province. If the Dominion Government had the right to deal with the public domain for its own purposes that right insofar as the area of Saskatchewan is concerned must be found in the phrases just quoted.

The legislative power of the Parliament of Canada derived from the right to make laws for peace, order and good government of the Territories, has received judicial interpretation. *Re Alberta Act 1927, Riel vs. Regem* (55 L.J.P.C. 28 at p. 30, 10 A.C. 675 at pp. 678 and 679), Lord Halsbury stated :

"These words are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."

It is submitted, however, that such a definition lends no support to the construction placed upon it by the Dominion and that it furnishes no support for the assumption of beneficial ownership of the public domain. The same words are commented on by Lord Loreburn in the argument in the *Supreme Court Reference* (81 L.J.P.C. 237, 1912 A.C. 571) :

"It is not I suppose contended that the said words involve the faculty of re-writing the whole constitution."

The meaning and effect of the provision to make laws for peace, order and good government has also been dealt with in *Russell vs. The Queen*, L.J.P.C. Vol. 51, p. 77 at p. 81.

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights but to public order and safety."

Further authority in support of the contention of the province is found in *Attorney-General of Canada vs. Attorneys-General of Ontario, Quebec and Nova Scotia*, (67 L.J.P.C. 90, [1899] A.C. 700).

If the power to make laws carries with it control both administrative and beneficial of the Natural Resources then the various statutes passed by the Parliament of Canada creating an elective assembly in the Territories with a council chosen from that elected assembly with power to make laws in the Territory, passed that administrative control and beneficial right in the resources to the present area of Saskatchewan and Alberta.

If the case for Canada rests upon the power to make laws, Canada dispossessed itself of any legal rights to deal with the land for the purposes

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 6.

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

of Canada upon the passing of those statutes. Canada claims that by Imperial Statute it was given power to make laws, etc. and to give a constitution and because of that power it claims the Crown lands became vested in the Crown in the right of Canada. Such a claim is inconsistent with its present denial of the title to Saskatchewan if prior to the creation of the province it, Canada, by the same means by which it acquired title, passed the title to the Territorial Government.

It is therefore contended, first, that the power to make laws conveyed no proprietary interest in the public domain of the area of Saskatchewan, and secondly, if it did, then those rights were surrendered by the legislation referred to. 10

In granting control of the Crown land the Imperial Government was very careful to stipulate for a satisfactory judicial system and for adequate remuneration for the judges. It also of course required suitable provision for the Governor's salary. These matters are, however, under the scheme of Confederation, not factors. The older provinces who control their Crown lands do not provide these salaries nor do they control the criminal law. So that if it be held that Canada's right is derived from the authority to provide a constitution then the lands did not continue to be vested in the Crown in the right of the Dominion upon the admission of the Territory into the Union. At the most, if they so vested at all, they only vested until the passing of the North-West Territories legislation referred to. From thence forward the lands were vested in the Crown in the right of the inhabitants of the area until the province was created in 1905. 20

If the claim of Canada is based upon the power to make provision for the constitution and administration of the province contained in the Act of 1871, then question 1 (a) should be answered in the negative because the admission of the area took place a year before that date. On the assumption that the contention is correct that there was until the Act of 1871 no legal right to the assumption of ownership by the Dominion, there only remains that Act, namely the Act of 1871, to consider. If there be any words in that Act capable of such effect it can only be by the phrase giving the right to make provision for the constitution and administration of such province. The Attorney-General of Saskatchewan submits that such phraseology falls far short of the power either to divest the area of its lands or to convey them to the Dominion. See *Colonial and Sugar Refining Company vs. Melbourne Harbour Trust Commission*, 96 L.J.P.C. 74. 30

In re Cuno 43 Ch. Div. p. 12 at p. 17, Bowen, L.J. said :

“ In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have some plain words which indicate that such was the intention of the Legislature ” 40

Craies on Statute Law, p. 109, says :

“ Therefore rights, whether public or private, are not to be taken away or even hampered by mere implication from the language used in the statute unless as Fry, J. said in *Mayor, etc. of Yarmouth*

vs. Simmons, 10 Ch. Div. 518 at 527, 'The Legislature clearly and distinctly authorize the doing of something which is physically inconsistent with the continuance of an existing right' "

*In the
Supreme
Court of
Canada.*

Craies also says, quoting Bowen, L. J. in *Hough vs. Windus*, 12, Q.B.D. 237 :

No. 6.

" It is a well recognized rule that statutes should be interpreted if possible so as to respect vested rights."

Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

10 With respect to the decision *Attorney-General of Alberta vs. Attorney-General of Canada*, 97 L.J.P.C. 106, known as the "*Ultimate Heir Case*," previously referred to, the Attorney-General of Saskatchewan contends that at the time of the admission of the colonies of Rupert's Land and the North-Western Territory the Crown lands were in the right of those colonies. This contention is based on the Imperial policy with respect to Crown lands in colonies, and particularly as exemplified in the case of Vancouver Island and the mainland of British Columbia.

That the right was not dependent on responsible government in the colony is clearly shown by the terms appended to the order-in-council respecting the Province of British Columbia, May 10th, 1871, and particularly No. 14 thereof which reads as follows :

20 " The constitution of the Executive authority and of the Legislature of British Columbia shall, subject to the provisions of 'The British North America Act, 1867,' continue as existing at the time of the Union until altered under the authority of the said Act,—it being at the same time understood that the Government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of British Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the Colonies, to amend the existing Constitution of the
30 Legislature by providing that a majority of its members shall be elective."

It seems to be apparent from the judgment of the Privy Council in *the Ultimate Heir case* that the point involved in this reference was not argued in that case. Lord Buckmaster at page 108 of the Law Journal Report says :

40 " Before its constitution and apart from the effect of the Land Titles Act of 1894 there is no real dispute on this appeal as to the title of the Crown in right of the Dominion to escheated properties and bona vacantia in the territories that now form part of the province."

Consequently the statement that " the territory out of which the Province of Alberta is constituted was unaffected by this section (section 146) but on the admission of the North-Western Territory into the Dominion of Canada in 1870 and the passing of the British North America Act 1871 became subject to the laws of the Parliament of Canada. It therefore followed that the province could never, apart from statute, be in the position

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

of owning lands, mines, minerals and royalties"—was upon a point not in issue before the Court. It was so far as the proprietary rights in the Crown lands as between the Dominion and the province an unargued case.

As to the effect of such a case, see the comments of Mr. Justice Duff in *In re Board of Commerce* 60 S.C.R. at page 507. Also *Attorney-General of Ontario vs. Attorney-General of Canada*, 42 S.C.R. at 131.

The Ultimate Heir case was decided on the effect of the Land Titles Act 1894 which provided that land should descend to the personal representative of a deceased in the same manner as personal estate.

There is no mention in the judgment of any statute or other authority 10
by which the Dominion obtained the proprietary rights. That was either assumed because not contested or else it was admitted. Such an admission or assumption would not be binding upon the Province of Saskatchewan. Further, there is no reference to the view hereinbefore contended respecting the transfer of jurisdiction and control of the region from the Dominion to the Territorial Government by means of the various North-West Territories Acts cited supra.

If, as stated, proprietary rights depended upon the capacity to make laws for peace, order and good government of the region and if the Dominion Government had at one time proprietary rights and they devolved upon the Dominion of Canada because of that capacity, then those rights passed to the region when the same capacity devolved upon it. In those North-West Territories Acts is to be found the statutory authority. 20

In *Trust and Guarantee Company vs. The King*, the Chief Justice of this Court held at page 122, that it was fully established that the property rights of the Hudson's Bay Company and of the Crown were vested in the Crown in the right of the Dominion of Canada. The judgment recites the various steps by which the land became vested in the Crown and subject to the legislative control of the Parliament of Canada. The Attorney-General of Saskatchewan respectfully submits that for the reasons previously stated legislative control alone does not necessarily convey proprietary rights. 30

The judgment then proceeds with a reference to the Dominion Lands Act 1872. Again the Attorney-General of Saskatchewan desires to point out that an assumption of ownership or rights is not evidence that such ownership or right existed. The judgment further states that the Alberta Act, Section twenty-one, may also, if necessary, be invoked as legislation within the power conferred on the Dominion Parliament by the Rupert's Land Act declaratory of the title and interest of the Crown in right of the Dominion in the public lands. In other words, the proprietary rights were derived from the power to make laws for peace, order and good government. 40

The contention of the Attorney-General of Saskatchewan on that point has already been dealt with.

The judgment of the Privy Council in *the Ultimate Heir* case approves of the reasoning of the Chief Justice in *Trust and Guarantee Company vs. The King*, but only upon the point that registration of the title to land did not change the character of the tenure under which it was held. See page 109 of the report.

In *the Alberta Reference* on Section 17, 1927 S.C.R. 364, Mr. Justice Newcombe discusses the phrase "subject to the provisions of this Act" and comes to the conclusion at page 371 that the terms of Union should have the right of way. It is respectfully submitted that nothing can be found in the terms of the addresses authorizing such a departure as that complained of, namely the assumption of ownership of Crown Lands by the Dominion, from the general scheme of Confederation.

Reference is made to British Columbia and its terms. As already pointed out British Columbia has by the decision of the Courts been held entitled to its Crown lands in the same way and to the same extent as the original provinces.

Reference is also made to Manitoba, but there the retention of the lands has the authority of the Imperial Act 1871.

It is submitted that the British North America Act 1886 has no bearing on the question, its effect is limited by the title to the Act. Maxwell Interpretation of Statutes, 7th Ed. page 36, 1930 W.W.R. Vol. 2, page 740, and the cases therein cited.

This limitation is suggested on page 374 of the report in the Reference case. The judgment itself is based upon the power of the Parliament of Canada to make laws for peace, order and good government. The effect of that has already been discussed.

For the reasons herein set forth and upon the authorities referred to, the Attorney-General of the Province of Saskatchewan respectfully submits :

That question 1 (a) should be answered in the negative;

That question 1 (b) should be answered in the affirmative;

and alternatively that question 1 (c) or question 1 (d) should be answered in the affirmative;

Question 2 should be answered in the affirmative.

If it should be held that the answers to the subdivisions of question 1 must be in favour of the Dominion because at the time of Union that region had no capacity for making laws for peace, order and good government, question 2 is still open for a favourable answer to the province. If at any time prior to 1905 the proprietary or beneficial interests passed to the province by reason of the legislation referred to, then the province is entitled to an accounting from that date.

With respect particularly to question 2, the Attorney-General of Saskatchewan draws attention to the meaning to be placed on the word "rights," where it appears in Section 23 of the agreement. In view of what is stated in paragraphs 1 and 24, it is submitted that the proper meaning of that word as used in the agreement requires a positive answer to question 2.

M. A. MACPHERSON,
Attorney-General of Saskatchewan.

A. E. BENCE.

G. H. BARR.

*In the
Supreme
Court of
Canada.*

No. 6.
Factum
of the
Attorney
General of
Saskatche-
wan—con-
tinued.

*In the
Supreme
Court of
Canada.*

No. 7.

Factum of the Attorney General of Alberta.

The province of Alberta adopts and relies upon the arguments set out in the factum filed by the Province of Saskatchewan.

No. 7.
Factum
of the
Attorney
General of
Alberta.

J. F. LYMBURN.
W. S. GRAY.

No. 8.
Factum
of the
Attorney
General of
Canada.

No. 8.

Factum of the Attorney General of Canada.

I.—STATEMENT OF THE CASE.

1. This is a reference by order of His Excellency the Governor General in Council, dated 3rd May, 1930 (P.C. 947) to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, of certain questions which, as appears from the narrative of the said Order in Council, were considered by the Government of the Province of Saskatchewan to be appropriate in form in order to obtain judicial determination of what, prior to the establishment of the Province of Saskatchewan on September 1, 1905, were the constitutional powers and rights of the Dominion of Canada in relation to the beneficial administration of the natural resources lying within the provincial boundaries as then defined. 10

2. Agreed admissions of fact, set out in the submission attached to the said Order in Council (Record, p. 4) are that :— 20

(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 23, 1870.

(b) From the coming into force of the said Order in Council until September 1, 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." 30

(Record, p. 4, lines 25-35.)

3. The questions referred are as follows :—

(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 23, 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 ?

In the Supreme Court of Canada.

—
No. 8.

Factum of the Attorney General of Canada—
continued.

10 (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 1, 1905 ?

(Record, p. 4, l. 38, *et seq.*)

4. When the Dominion of Canada was formed in 1867, Rupert's Land and the North-Western Territory were not brought within it. Their inclusion was envisaged by sec. 146 of the British North America Act, 1867, and was, at all events partially, rendered practicable by subsequent legislation.

20 5. Sec. 146 of the British North America Act, 1867, enacted that it should be lawful for the Sovereign in Council " on address from the Houses of Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act ". That section further enacted that " the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland ".
(Appendix, p. 35, lines 16-26.)

6. The subsequent acts and proceedings, by which that object was realized are embodied in :—

30 (a) The Address of the Senate and House of Commons of Canada to Her Majesty the Queen, dated December 16 and 17, 1867.

(Appendix, p. 59, lines 29-39, and p. 60.)

(b) The Rupert's Land Act, 1868, 31-32 Vict., Chap. 105 (Imp.)
(Appendix, pp. 44, 45.)

(c) The Deed of Surrender of the Hudson's Bay Company to Her Majesty, dated 19th November, 1869. (Appendix, pp. 68-75); and

(d) The Order of Her Majesty in Council of the 23rd June, 1870.
(Appendix, pp. 55-58, p. 59, lines 1-26.)

40 By the effect of these several instruments " the whole of the lands and territories held or claimed to be held " by the Hudson's Bay Company (saving the lands reserved to the Company by its Deed of Surrender; Appendix, p. 70, lines 3-40, p. 71, lines 1-10) became vested in Her Majesty and were, from and after the 15th July, 1870, together with the North-Western Territory, admitted into and became part of the Dominion of

*In the
Supreme
Court of
Canada.*

No. 8.
Factum
of the
Attorney
General of
Canada—
continued.

Canada, and, as such, subject to the legislative authority of the Parliament of Canada and the consequent right of the Dominion to dispose of the Crown lands and to appropriate the revenues arising therefrom.

7. In particular, by the said Order of Her Majesty in Council of the 23rd June, 1870, passed in pursuance of the powers vested in Her Majesty by sec. 146 of the British North America Act, 1867, and the Rupert's Land Act, 1868, it was ordered that, from and after the 15th July, 1870,

(1) "the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address (i.e., the Address of December, 1867), and that the Parliament of Canada, shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory".
(Appendix, p. 57, lines 28-32.)

(2) "that, without prejudice to any obligations arising from the aforesaid approved Report, Rupert's Land shall, from and after the said date, be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second Address of the Parliament of Canada" (i.e., the Address of May, 1869) "and approved by Her Majesty as aforesaid".
(Appendix, p. 57, lines 32-38.)

8. The terms and conditions set out in the Address of the Houses of Parliament of Canada (i.e., the Address of December, 1867: Appendix, p. 59, lines 29-39, p. 60) referred to in the part of the enacting clause of the said Order in Council of the 23rd June, 1870, relating to the North-Western Territory, were :

(a) "That we are willing to assume the duties and obligations of government and legislation as regards these territories."

(b) "That in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction."

(c) "And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

(Appendix, p. 60, lines 21-33.)

9. The more important of the terms and conditions referred in the part of the enacting clause of the said Order in Council, 23rd June, 1870, relating to Rupert's Land, being the terms and conditions still remaining to be

performed of those embodied in the second Address of the Parliament of Canada (i.e., the Address of May, 1869: Appendix, p. 65, lines 25-29, pp. 66, 67) were—

*In the
Supreme
Court of
Canada.*

(a) that Canada should pay £300,000 to the Hudson's Bay Company;

(b) that the Company should receive certain defined areas of land;

(c) that all titles to land conferred by the company up to March 8, 1869, should be confirmed, and

10 (d) that the Company should have the right to continue to carry on its business.

No. 8.
Factum
of the
Attorney
General of
Canada—
continued.

(Appendix, p. 57, lines 39-40, p. 58, p. 59, lines 1-24.)

10. The Rupert's Land Act, 1868, provided, by sec. 5 thereof, that upon the admission of Rupert's Land (as defined by sec. 2 thereof) into the Dominion of Canada "it shall be lawful for the Parliament of Canada. . . . to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers, as may be necessary for the Peace, Order, and good Government of Her Majesty's Subjects and others therein."

(Appendix, p. 45, lines 28-33.)

20 11. Temporary provision for the government of "the North-West Territories," by which name Rupert's Land and the North-Western Territory were designated, was made by Act of the Dominion Parliament, 32-33 Vict. (Canada) chap. 3 (Appendix, pp. 46-47) and the Province of Manitoba was constituted by the Manitoba Act, 1870, 33 Vict., (Canada) chap. 3, (Appendix, pp. 48-54). These Acts were confirmed by secs. 5 and 6 of The British North America Act, 1871, 34-35 Vict., (Imp.) chap. 28, (Appendix, pp. 76-77).

30 12. By the British North America Act, 1871, upon the recital that doubts had been entertained respecting the powers of the Parliament of Canada to establish provinces in territories admitted, or which might thereafter be admitted, into the Dominion, and that it was expedient to remove such doubts, and to vest such powers in the said Parliament, it was enacted, by sec. 2, that the Parliament of Canada might from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada but not included in any province and might "at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament." (Appendix, p. 76, lines 5-20.)

40 It was also enacted, by sec. 4, that "the Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province". (Appendix, p. 76, lines 27-29.)

13. The Parliament of Canada by the North-West Territories Act, 34 Vict., (Canada) chap. 16 (Appendix, pp. 78-79) made fuller provision for the organization of a Government for so much of Rupert's Land and the

*In the
Supreme
Court of
Canada.*

No. 8.
Factum
of the
Attorney
General of
Canada—
continued.

North-Western Territory as had not been included in the Province of Manitoba. The Government so set up, subject to various changes in its form (Appendix, pp. 78, 79, 119-123), continued in existence until the Province of Saskatchewan was constituted. It was nothing more than the agent or organ of the Dominion Parliament and had defined and limited powers which did not extend to the administration of the lands within the Territories. The administration of the ungranted or waste lands in Manitoba had likewise been excluded from the jurisdiction of the Legislature of Manitoba. (Appendix, p. 53, lines 19-24.)

14. For the administration of all Crown lands in the Province of Manitoba and the North-West Territories, the Dominion Parliament enacted, in 1872, the Dominion Lands Act, 35 Vict., (Canada) chap. 23 : (Appendix, pp. 81-117) by which authority was given for disposition by the Crown of interests in Dominion lands throughout these areas on specified terms involving either the payment of a given consideration or the performance of certain residential and like conditions. 10

In pursuance of this statute, interests in considerable portions of the lands subsequently included in the Province of Saskatchewan were from time to time made the subject of Crown grants and leases, etc., any pecuniary consideration received being in general dealt with as part of the Consolidated Revenue Fund of Canada, although the proceeds of sales of certain defined lots in each township, together constituting about one-eighteenth of the total area, were pursuant to the Dominion Lands Act placed in a special trust fund, the income of which was applied to the support of schools for local residents. 20

15. By the British North America Act, 1886, 49-50 Vict., (Imp.) chap. 35 (Appendix, p. 148), entitled "An act respecting the representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province," it is recited that it is expedient to empower the Parliament of Canada to provide for representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any province, and it is provided, by sec. 1, that the Parliament of Canada may from time to time make provision for such representation. It is also provided, by sec. 2, that any Act theretofore passed by the Parliament for the purpose mentioned shall, if not disallowed, be deemed to have been valid and effectual from the date at which it received the assent, and subjoined to this provision is the following declaration : 30

"It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the *British North America Act, 1871*, has effect, notwithstanding anything in the *British North America Act, 1867*, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the 40

case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.” (Appendix, p. 148, lines 18-29.)

The final provision is declaratory of the unity of the several British North America Acts. It provides that :

“ This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together and may be cited together as the British North America Acts, 1867 to 1886.” (Appendix, p. 148, lines 31-33.)

*In the
Supreme
Court of
Canada.*

—
No. 8.

Factum
of the
Attorney
General of
Canada—
continued.

10 16. In 1905, by the Saskatchewan Act, 4-5 Edw. VII, (Canada) chap. 42, the Parliament of Canada, acting in pursuance of the powers conferred upon it by the British North America Act, 1871, established the Province of Saskatchewan. (Appendix, pp. 149-163.) By a similar act, entitled the Alberta Act, 4-5 Edw. VII, chap. 3, provision was also made for the establish-
ment of the Province of Alberta. These Acts came into force on the
1st September, 1905. (See, e.g., sec. 25 of the Saskatchewan Act, Appendix,
p. 155, lines 8-9.) The Dominion continued, however, to retain control
over and to administer the Crown lands within these Provinces, for the
purposes of Canada (see sec. 21 of the Saskatchewan Act: Appendix,
20 p. 154, lines 22-29), in the same manner as it retained control over Crown
lands in Manitoba, until by the British North America Act, 1930, provision
was made for the administration by all three provinces of the respective
natural resources as from the first day of August, 1930. By the same
statute any claim by the Province of Saskatchewan in respect of interests
in lands disposed of during the interval between September 1st, 1905,
and August 1st, 1930, was settled by agreement, and provision was made
thereunder for the determination by this reference of the question whether
the Province had any claim against the Dominion in respect of like
dispositions during the interval between July 15, 1870, and August 31,
30 1905.

17. On behalf of the Attorney-General of Canada, it is submitted that the several relevant instruments, referred to above, are open to no other construction than,

(1) That, upon the surrender of the Hudson's Bay Company to Her Majesty of the 19th November, 1869, the title to all the lands thereby surrendered became fully vested in the Crown, subject to the terms and conditions set out in the Company's Deed of Surrender.

40 (2) That, upon Rupert's Land and the North-Western Territory being admitted into and made part of the Dominion of Canada by Her Majesty's Order in Council of the 23rd June, 1870, the Parliament of Canada became vested,—in virtue of the terms of the said Order in Council and of the provisions of sec. 146 of the British North America Act, 1867, the Rupert's Land Act, 1868, and, later, the British North America Act, 1871,—with plenary legislative jurisdiction to provide for the government and administration of those territories.

*In the
Supreme
Court of
Canada.*

No. 8.
Factum
of the
Attorney
General of
Canada—
continued.

(3) That, although the title to all ungranted lands within the territories so embodied in the Dominion of Canada continued to be vested in the Crown, the right to administer and to dispose of these lands, together with all royal and territorial revenues arising therefrom, for the public purposes of Canada, passed to, and was competently exercised by, the Dominion, as a consequence of the said territories becoming part of the Dominion of Canada and of the grant to the Parliament of Canada of plenary legislative power over the said territories, ^{accordance with} settled constitutional principles and practice in regard to the appropriation of the royal and territorial revenues of the Crown arising within the British Colonies and foreign possessions. 10

(4) That the said Crown lands within the territories so made part of the Dominion of Canada were not, by Her Majesty's Order in Council of the 23rd June, 1870, or any other of the relevant instruments impressed with, or affected by, any trust or other obligation on the part of the Dominion to administer the said lands, and appropriate the revenues arising therefrom, for the exclusive benefit of any particular existing or prospective group of citizens residing within the territory or of any politically organized area or province which the Dominion might set up or establish within those territories. 20

(5) That the Province of Saskatchewan has no other rights than those secured to it by the Saskatchewan Act, as modified by the agreement respecting the natural resources lately confirmed and given the force of law by the British North America Act, 1930, and neither of these acts confers upon the province any rights which entitle it to call upon the Dominion to account to the Province for any lands within its boundaries alienated by the Dominion prior to September 1, 1905.

18. For these, among other, reasons, which will be fully urged on the argument of this reference, the Attorney-General submits that question 1 (a), as above set out, should be answered in the affirmative, the remaining portions of question 1 in the negative and question 2 should likewise be answered in the negative. 30

C. J. DOHERTY,
A. E. FRIPP,
C. P. PLAXTON.

No. 9.
Formal Judgment.

*In the
Supreme
Court of
Canada.*

IN THE SUPREME COURT OF CANADA.

Tuesday, the third day of February, A.D. 1931.

No. 9.
Formal
Judgment,
3rd Febru-
ary 1931.

Present :

The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice NEWCOMBE, C.M.G.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.
The Honourable Mr. Justice CANNON.

10

The Chief Justice of Canada being absent, his answers to the questions so referred were read by the Right Honourable Mr. Justice Duff, Acting Chief Justice, copy of which is hereunto annexed; and the Honourable Mr. Justice Smith being absent, his concurrence with the answers to the question by the Honourable Mr. Justice Newcombe was announced by the Right Honourable Mr. Justice Duff, Acting Chief Justice.

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

26 WHEREAS by an Order of Reference by the Governor-General in Council pursuant to 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, whereby a provision is made for the submission to the Supreme Court of Canada, for its consideration, of certain questions agreed upon;

AND WHEREAS it was admitted for the purpose of the said submission, that

30 (a) The area now lying between 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."

AND WHEREAS by an Order of His Excellency the Governor General in Council, dated 3rd May, 1930 (P.C. 947), the following questions were

*In the
Supreme
Court of
Canada.*

No. 9.
Formal
Judgment,
3rd Febru-
ary 1931—
continued.

referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, R.S.C., 1927, chap. 35 :—

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming 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?

10

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 ?

AND WHEREAS the said questions came before this Court for hearing and consideration on the fourteenth day of October in the year of our Lord one thousand nine hundred and thirty, in the presence of Counsel for the Attorney-General of Canada, the Attorney-General for the Province of Alberta, and after due notice to the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia and Prince Edward Island.

20

WHEREUPON and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration, and the same having come on this day for determination, the Court hereby certifies to His Excellency the Governor General in Council for his information, pursuant to sub-section 2 of section 55 of the Supreme Court Act, that the following is its opinion upon each of the questions submitted by this Reference; and that the reasons for such answers are to be found in the reasons for judgment of the Honourable Mr. Justice Newcombe, a copy of which is hereunto annexed :—

30

To Question No. 1 (a) the Court unanimously answers "yes."

To Question No. 1 (b) the Court unanimously answers "no."

To Question No. 1 (c) the Court unanimously answers "no."

To Question No. 1 (d) the answer of the majority of the Court (Duff, Newcombe, Rinfret, Lamont, Smith and Cannon, JJ.) is : "not otherwise than as sharing in any benefit which might accrue to them under the dispositions of the Parliament of Canada"; and the answer of the Chief Justice of Canada is "no."

40

To Question No. 2, the Court unanimously answers "no."

(Sgd.) J. F. SMELLIE,
Registrar.

No. 10.

Reasons for Judgment.

*In the
Supreme
Court of
Canada.*

(A) NEWCOMBE, J.—(Concurred in by DUFF, RINFRET, LAMONT, SMITH, and CANNON, JJ.)

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurred
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.).

The Governor General in Council, by a minute approved on 3rd May, 1930, submits two questions for hearing and consideration, upon the narrative set out in the Order-in-Council that

10 “The Committee of the Privy Council have had before them a report dated May 2nd, 1930, from the Minister of Justice, stating that, in connection with negotiations with the Government of the Province of Saskatchewan looking toward the conclusion of an agreement for the transfer to the Province of its natural resources, the said Government has raised the question of the liability of Canada to render to the Province an account of its dealings, prior to September 1, 1905, with lands lying within the provincial boundaries as now defined, and it is desirable, in order to permit of the execution of such an agreement, that this question should be determined by the reference to the Supreme Court of Canada of questions expressed in a form which the Government of the Province considers appropriate to obtain the judgment of the Court on the contention it has put forward.

20 “The Minister further states that a submission in the form hereto attached has accordingly been prepared on behalf of the Government of the Province, such submission containing certain questions and certain admissions of fact to which it is desirable to agree.

30 “The Minister, therefore, recommends that the said submission be referred to the Supreme Court of Canada pursuant to Section 55 of the Supreme Court Act for hearing and consideration; and in order to obtain answers to the questions in the said submission set forth.”

For the purpose of the submission, the following facts are admitted :

(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.

40 (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.”

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurrent
with Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.)—con-
tinued.

Following and subject to the admissions, the questions are stated as follows :—

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?

It was directed, by order of a Judge, in conformity with the practice, that the Attorneys General of all the provinces should be notified of the hearing, and should be at liberty to file Factums of their respective arguments and to appear personally or by counsel.

At the hearing, counsel on behalf of the Attorney General of Saskatchewan submitted that question 1 (a) should be answered in the negative; that each of the alternatives of question 1 should be answered in the affirmative, and that question 2 should also be answered in the affirmative. The province of Alberta adopted and relied upon the argument submitted on behalf of Saskatchewan. But none of the other provinces appeared.

An Act of the Dominion, entitled *An Act respecting the transfer of the natural resources of Saskatchewan*, cap. 41 of 1930, was assented to on 30th May, 1930, approving an agreement set out in the schedule thereto, dated 20th March, 1930, between the Government of the Dominion and the Government of Saskatchewan; that agreement having previously been approved by the provincial legislature by cap. 87 of 1930, which received the Lieutenant Governor's assent on 10th April. Subsequently, by Imperial Act, c. 26 of 1930, assented to on 10th July, the agreement was confirmed and declared to have the force of law.

The reasons which led the province to advocate the above answers are to be gathered from the argument as set out in the provincial Factum and in the recitals of the agreement of 20th March, 1930, to which Saskatchewan is a party. I shall not attempt to expound the meaning of these recitals otherwise than by quoting the text 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;'

10 "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;

20 "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;

30 "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."

The expression, "natural resources," is not defined, but it is evidently thought to include the public lands within the province; and the controversy is concerned only with the lands, situate within the provincial boundaries, which belonged to the Crown when Rupert's Land and the North-western Territory became part of the Dominion, and their proceeds or revenues.

40 In the case of a reference as to the constitutional validity of sec. 17 of the *Alberta Act*, 1927, S.C.R., 364, I had occasion to outline the legislative steps by which the prairie province of Alberta was constituted and acquired its provincial status under the *Alberta Act*, c. 3, of the Dominion, 1905; and it would be mere repetition, and therefore unnecessary, to reproduce that narrative here, as the facts relating to Saskatchewan are identical. But I shall take the opportunity to rectify a slip which, unfortunately, has found its way into the report of my judgment in the Alberta case, whereby the date of the Order in Council, admitting these territories into the Dominion from and after 15th July, 1870, is printed as 23rd July, 1870, instead of the true date, which is one month earlier.

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurred
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
J.J.)—*con-
tinued.*

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurrent
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.)—*con-
tinued.*

When the case was submitted, it appeared convenient to hear, at the opening, the argument on behalf of the province; and the Court, having taken the matter into consideration, find it unnecessary to hear the learned counsel who appeared for the Attorney-General of Canada. The argument whereby it is sought to maintain the provincial answers is avowedly meant to support the pretensions set up by the Factum of Saskatchewan, and I shall endeavour briefly to summarize it.

First, it is said that, when Rupert's Land and the North-western Territories were admitted into the Union, they became, by express provision of sec. 146 of the *British North America Act*, 1867, "subject to the provisions of this Act;" and it is urged that, since, by sec. 109, the four original provinces retained their Crown Lands at the Union and had, by the fifth enumeration of sec. 92, exclusive legislative power for "The management and sale of the public lands belonging to the province and of the timber and wood thereon," these provisions, upon the introduction of the Territories into the Dominion, had unavoidably the effect to appropriate to the Territories, or to exclusively territorial purposes, the Crown Lands comprised therein; and, consequently, that the Parliament of Canada never had the authority to administer these lands, and certainly not to administer them for Dominion purposes, as subsequently provided by the *Dominion Lands Act*, cap. 23 of 1872, and the succeeding Acts regulating the administration of Dominion lands which, as amended and revised, remain in operation to the present time.

Secondly, it is said that the provisions of the *British North America Act*, 1871, cap. 28 of the United Kingdom, were necessary in order to validate the *Manitoba Act*, cap. 3 of the Dominion, 1870, and equally so for enabling the Parliament of Canada to enact the Saskatchewan and Alberta Acts of 1905; that the authority of the Dominion to constitute the province of Saskatchewan thus depends upon the Act of 1871, and, to quote the submission, that "There is nothing in the Act authorizing the Dominion to hold the public domain for the purposes of Canada." It is recalled that there is a broad distinction between legislative jurisdiction and proprietary rights and that the conferring of the one affords no presumption of the transfer of the other; and it is suggested that the Crown, as represented by the Dominion, has no capacity to enjoy the beneficial interest in any of the public lands of the country, except, under sec. 117, for fortification or defence, and the property appropriated to Canada under the third schedule of the Act of 1867.

Thirdly, even if the Dominion, after the admission of the Territories into the Union, and after the enactment of the *British North America Act*, 1871, had power to legislate for the disposition of the Crown Lands in the Territories, it is argued that upon the passing of *Northwest Territories Acts*, whereby the Parliament of Canada set up an elective assembly and provided for the Government of the Territories, the Parliament, by so doing, became divested of any powers which it previously may have had for the administration of the territorial lands; and that by the operation of these Acts the public lands "were vested in the Crown in the right of the inhabitants of the area, until the province was created in 1905".

These are the points relied upon by the province of Saskatchewan, and they are plainly in conflict with the terms of the *Saskatchewan Act*, c. 42 of 1905, as enacted. The statute proceeds upon two recitals, whereby the *British North America Act*, 1871, is invoked as the authority in the execution of which the Parliament of Canada may establish new provinces in the territories that form part of the Dominion, and "provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament of Canada;" and it is declared expedient to establish, as a province, the territory thereafter described, and to make provision for the government and representation thereof. The territory comprised within the specified boundaries is accordingly constituted as a province of the Dominion, under the name of Saskatchewan; and it is declared, by sec. 3, that

"The provisions of the *British North America Acts*, 1867 and 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces."

Follow provisions for the representation of the new province in the Senate and House of Commons; the constitution of the executive and the provincial legislature; the application of existing laws and official powers and functions; the continuance of the jurisdiction of the Supreme Court of the North-west Territories until superseded by provincial legislation; special provisions with respect to societies, associations and joint stock companies incorporated by the authority of the legislature of the North-west Territories; modifications of sec. 93 of the *British North America Act*, 1867, with respect to education; provincial subsidies; and, by secs. 20 and 21, it is provided as follows:

"20. Inasmuch as the said province will not have the public land as a source of revenue, there shall be paid by Canada to the province by half-yearly payments, in advance, an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—

The population of the said province being assumed to be at present two hundred and fifty thousand, the sum payable until such population reaches four hundred thousand, shall be three hundred and seventy-five thousand dollars;

Thereafter, until such population reaches eight hundred thousand, the sum payable shall be five hundred and sixty-two thousand five hundred dollars;

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurring
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
J.J.)—*con-
tinued.*

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurring
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.)—*con-
tinued.*

Thereafter, until such population reaches one million two hundred thousand, the sum payable shall be seven hundred and fifty thousand dollars ;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

2. As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually by half-yearly payments, in advance, for five years from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of ninety-three thousand seven hundred and fifty dollars. 10

21. 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."

Then there is a clause regulating the division of assets and liabilities 20 as between Saskatchewan and Alberta ; a provision that nothing in the Act shall prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that company surrendered Rupert's Land to the Crown ; and, by sec. 24, it is enacted that

"The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company."

The legislative intent as to the destination of the lands seems thus to be 30 plainly enough expressed ; and compensation has been provided and presumably paid, in lieu of the lands, which it is declared, by the constituting authority, that the province is not to have. It is admitted, and at the foundation of the whole case, that Rupert's Land and the North-Western Territory were, by the Queen's order of 23rd June, 1870, admitted into and became part of the Dominion on 15th July of that year ; by the express terms of the Order in Council, the Parliament of Canada had, from that day, full power and authority to legislate for the future welfare and good govern- 40 ment of the North-Western Territory ; and by the provisions of the *Rupert's Land Act*, cap. 105, of the United Kingdom, 1868, and of the Order in Council, upon the admission of Rupert's Land, which includes by the definition, the whole of the lands and territories held or claimed to be held by the Hudson's Bay Company, it thereupon became lawful for the Parliament of Canada "from the date aforesaid, to make, ordain and establish within the land and territory so admitted as aforesaid, all such laws, institutions and ordinances, and to constitute such courts and officers as may be necessary for the peace,

order and good government of Her Majesty's subjects and others therein". Moreover, by secs. 91 and 146 of the *British North America Act, 1867*, it had been enacted that it "should be lawful for the Queen by and with the advice of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and that it should be lawful for the Queen by and with the advice of her Privy Council,

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurred
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.)—*con-
tinued.*

10 "on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, 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; and the Provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great
20 Britain and Ireland."

As to the nature and amplitude of the legislative powers conferred by the Imperial Parliament in the creation of subordinate governments of the Empire, it was explained in the Privy Council, by Lord Selborne, in the *Queen v. Burah*, 3 A.C., 889, at pp. 904-5, that—

30 "The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category
40 would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further or to enlarge constructively those conditions and restrictions."

To the like effect are the observations of Sir Barnes Peacock, in *Hodge v. the Queen*, 9 A.C., at p. 132, with reference to the Canadian provinces. And these expressions were quoted with approval by Lord Watson in

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurring
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
JJ.)—*con-
tinued.*

Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick [1892], A.C., 441-443.

In *Riel v. Regina*, 10 A.C., 675, the petitioner was tried and convicted of treason under the procedure enacted by the *North-West Territories Act*, 1880, c. 25, s. 76, conferred upon the stipendiary magistrates in the Territories jurisdiction to hear and determine criminal offences, including treason, with the intervention of a jury of six. It was urged before the Board, upon application for special leave to appeal, that the Dominion Parliament had no power to deprive the petitioner of a right which he claimed to have under English law to trial before a judge with a jury of twelve; but Lord 10
Halsbury, L.C., delivering the judgment, pp. 678-9, said—

“ It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order and good government cannot, as matters of law, be provisions for peace, order and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that 20
effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

“ Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, have been authorized in Her Majesty’s Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of 30
powers conveyed by those words would be of widely mischievous consequence.”

Giving due effect to the Dominion powers of legislation, as expounded by or resulting from these authorities, it is very difficult to discover any maintainable ground in the pretention that the province of Saskatchewan, whether on behalf of itself or for the inhabitants of those parts of the North-West Territories which are embraced in the province, has constitutional rights which the Queen did not, either in Council or in Parliament, bestow upon the territories or upon the province, and which the Parliament of Canada, by the *Saskatchewan Act*, which operates irrevocably under the 40
British North America Act, 1871, declared that the province should not possess.

It will be observed that, while, by sec. 146 of the *British North America Act*, 1867, Rupert’s Land and the North-Western Territories, or either of them may be admitted 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 is declared by sec. 4 of the *British North America Act*, 1871, without any qualification, that the Parliament of Canada may, from time to time, make provision for the administration, peace, order and good government of any territory not for the time being included in any province; and, whether you consider one or the other, or both of these provisions as applicable, there are no terms or conditions expressed in the Addresses, or sanctioned by the terms of Union, with which the legislation of the Dominion conflicts, or is alleged to conflict.

As to the effect of sec. 3 of the *Saskatchewan Act*, the corresponding provision of the *Alberta Act* was considered by the Privy Council in *Attorney General for Alberta v. Attorney General for Canada*, [1928] A.C., 475, at pp. 484-6, where Lord Buckmaster, after reviewing the legislation, which differs in no material respect from that affecting Saskatchewan, including the fundamental provisions of sec. 3 of the *Alberta Act*, said that, reading the whole Act together, their Lordships "regard the effect of this section as placing the Province of Alberta in the same position as the other Provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Sec. 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta."

Other passages in Lord Buckmaster's judgment are equally destructive of the argument which seeks to maintain the contention that there is some occult principle of law, not depending upon and indeed proof against legislation, whereby a province or territory of Canada or its inhabitants must have and enjoy, for its or their exclusive benefit, the waste lands of the Crown which lie within its borders. His Lordship said, referring to s. 109 of the *British North America Act*, 1867, a provision upon which the province puts much stress :

"The territory out of which the Province of Alberta is constituted was unaffected by this section, but on the admission of the North-West Territories into the Dominion of Canada in 1870 and the passing of the *British North America Act*, 1871, became subject to the laws of the Parliament of Canada. It therefore followed that the Province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties."

And it follows also that the legislation of the Dominion was paramount and unaffected by any powers granted to the legislature or the local government of the Territories, or any territorial exercise of those powers which might prove to be repugnant.

No doubt there is, as counsel for the province suggests, a distinction recognized between legislative powers and proprietary rights, and the Crown may, for one purpose, be represented by the Dominion, and, for the other purpose, by a province, as in the case of the Inland Fisheries

*In the
Supreme
Court of
Canada.*

No. 10.
Reasons for
Judgment.
(A) New-
combe, J.
(concurrent
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
J.J.)—*con-
tinued.*

*In the
Supreme
Court of
Canada.*

No. 10.

Reasons for
Judgment.
(A) New-
combe, J.
(concurring
in by Duff,
Rinfret,
Lamont,
Smith and
Cannon,
J.J.)—con-
tinued.

or Indian Lands; but it is in perfect conformity with the Canadian system that Dominion rights of property should be subject to the legislative control of the Parliament; and it is expressly so with regard to what is described generally in the first enumeration of sec. 91 of the Act of 1867, as "the public debt and property."

It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown Lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in *Ontario Mining Company v. Seybold*, [1903] A.C., 79, where his Lordship, referring to Lord Watson's judgment in the *St. Catharine's Milling Case*, 14 A.C., 46, said :

"In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.' Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province."

The province has, in my opinion, failed to advance any substantial reason by which to justify the answers which it suggests.

I would, on the contrary, answer to question one, (a) "Yes"; (b) "No"; (c) "No"; (d) "Not otherwise than as sharing in any benefit which might accrue to them under the dispositions of Parliament." I would answer question two in the negative.

(B) Anglin,
C.J.C.

(B) ANGLIN, C.J.C.: For the reasons given by the Honourable Mr. Justice Newcombe, in whose judgment I concur, I would answer the questions proposed as follows :

Question No. 1 (a) : Yes.

Question No. 1 (b), (c) and (d) : No.

Question No. 2 : No.

No. 11.

Order in Council granting special leave to appeal to His Majesty in Council.

*In the
Privy
Council.*

AT THE COURT AT BUCKINGHAM PALACE.

The 20th day of March, 1931.

PRESENT :

THE KING'S MOST EXCELLENT MAJESTY

* * * * *

No. 11.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
20th March
1931.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of March 1931 in the words following, viz. :—

10 “ WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October 1909 there
was referred unto this Committee a humble Petition of Your
Majesty's Attorneys-General of the Provinces of Saskatchewan and
Alberta in the matter of an Appeal from the Supreme Court of
Canada in the matter of a reference by His Excellency the Governor-
General in Council to the Supreme Court of Canada pursuant to
S. 55 of the Supreme Court Act of certain questions for hearing and
consideration as to the rights of the Dominion of Canada and the
20 Provinces of Saskatchewan and Alberta respectively to certain
lands mines and minerals within the boundaries of the said Provinces
and any alienations thereof by Canada prior to 1st September 1905
the date of establishment of the said Provinces between the
Petitioners Appellants and Your Majesty's Attorney-General of
Canada Respondent setting forth (amongst other matters) that the
Dominion of Canada entered into an agreement with the Province
of Alberta dated the 14th December 1929 and an agreement with
the Province of Saskatchewan dated the 20th March 1930 respecting
the transfer of natural resources to these Provinces: that the
30 agreements were approved and confirmed by appropriate Acts of
the Legislatures of the Provinces the Parliament of Canada and the
Parliament of the United Kingdom: that by the said Acts it was
provided that the Province of Alberta should, in addition to the
rights accruing to it under the agreement of 14th December 1929,
be entitled to such further rights if any with respect to the subject
matter of the agreement as were required to be vested in the
Province in order that it might enjoy rights equal to those conferred
upon or reserved to the Province of Saskatchewan under the
agreement relating to that Province: that certain facts were admitted
and certain questions were agreed upon by the Dominion and the

*In the
Privy
Council.*

Province of Saskatchewan for submission to the Supreme Court of Canada as follows :—

SUBMISSION.

No. 11.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
20th March
1931—con-
tinued.

“ “ 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

10

“ “ (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 :

20

“ “ (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 the 23rd June 1870 were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown :

30

“ “ (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 the 1st of September 1905 ? ” :

40

that by an Order of a Judge of the Supreme Court dated the 5th June 1930 it was ordered that the case be inscribed for

10 hearing at the head of the Saskatchewan list for the October 1930 session of the Supreme Court and that notice of the hearing be sent to the Attorneys-General of the Provinces of Ontario Quebec Nova Scotia New Brunswick Manitoba British Columbia Prince Edward Island Alberta and Saskatchewan and that the parties be at liberty to file factums of their respective arguments on or before the 15th September 1930 and be at liberty to appear personally or by Counsel on the argument of the reference: that the Attorneys-General of the Provinces of Saskatchewan and Alberta each filed a factum and appeared in person and by Counsel on the hearing of the reference: that the Attorney-General of the Province of Manitoba appeared by Counsel on the hearing but filed no factum and took no part in the argument: that none of the other Provinces either filed a factum or appeared on the hearing: that the judgment of the Supreme Court was delivered by Newcombe J. on the 3rd February 1931 and was concurred in by the Chief Justice and by Duff Rinfret Lamont Smith and Cannon JJ.: that the questions submitted were answered as follows:—Question No. 1 (a), Yes: Question No. 1 (b) and (c), No: Question No. 1 (d), Not otherwise than as sharing in any benefit which might accrue to them under the dispositions of the Parliament of Canada: Question No. 2, No: that the Chief Justice answered Question No. 1 (d), No: that the Petitioners contended before the Supreme Court and now submit that Question No. 1 (a) should have been answered in the negative and the remaining questions in the affirmative for the reasons set forth in the Petition: that in the Petitioners' submission the land within the boundaries of the Provinces of Alberta and Saskatchewan never belonged to the Dominion and any alienation by the Dominion from the time of the entry of this section of Canada into Confederation on the 15th July 1870 should be accounted for: that the questions raise considerations of great importance to the Provinces of Alberta and Saskatchewan and that it is in the general interest of those Provinces and of the Dominion that the proprietary and other rights of the Dominion and the Provinces should be finally settled: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court of the 3rd February 1931 or for such further or other Order as to Your Majesty in Council may appear fit:

In the Privy Council.

No. 11.
Order in Council granting special leave to appeal to His Majesty in Council, 20th March 1931—continued.

40 “THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and for the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 3rd day of February 1931:

*In the
Privy
Council.*

No. 11.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
20th March
1931—con-
tinued.

“AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

10

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

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 OF SASKATCHE-
WAN AND THE ATTORNEY GENERAL
OF ALBERTA - - - *Appellants*

AND

THE ATTORNEY GENERAL OF CANADA
Respondent.

RECORD OF PROCEEDINGS.

BLAKE & REDDEN,

17, Victoria Street,

S.W.1.

For the Attorneys General of Saskatchewan and Alberta.

CHARLES RUSSELL & Co.,

37, Norfolk Street,

Strand, W.C.2.

For the Attorney General of Canada.