Privy Council Appeal No. 41 *of* 1913.

The Attorney-General for the Province of British Columbia - - - - *Appellant.*

v.

The Attorney-General for the Dominion of Canada - - - - - *Respondent.*

AND

The Attorney-General for the Province of Ontario and others - - - - *Intervenants.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER 1913.

Present at the Hearing:

THE LORD CHANCELLOR. LORD MOULTON.
LORD ATKINSON.

[*Delivered by* THE LORD CHANCELLOR.]

This is the Appeal of the Government of British Columbia from answers given by the Supreme Court of Canada to certain questions submitted to it by the Canadian Government, under the authority of a statute of the Dominion Parliament. The questions did not arise in any litigation, but were questions of a general and abstract character relating to the fishery rights of the Province.

It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the

[63.] J. 273. 125.—12/1913. E. & S.

Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case of *The Attorney-General of Ontario* v. *the Attorney-General of the Dominion* (1912 A.C., 571). It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of Review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the position of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that, in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present Appeal.

The questions submitted to the Supreme Court of Canada were as follows :—

1. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt—

A. As to such waters as are tidal; and

B. As to such waters as, although not tidal, are in fact navigable?

2. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low-water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia, and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the Province or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorise the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right or any right to fish below low-water mark in the said waters or any of them?

Before dealing with these questions it is necessary to refer to the nature and origin of the Constitution of the Province of British Columbia. The Province was established by an Imperial Statute passed in 1858, and by various Orders in Council made under its provisions a Government was set up consisting of a Governor and a local legislature. By certain of these Orders, and by a local Ordinance of 1867, the Civil and Criminal Law of England, as it existed in 1858, was made the law of the Colony so far as it was not from local circumstances inapplicable. By an Imperial

Statute of 1866 the Colony of Vancouver Island was united with, and thenceforth became part of the Colony of British Columbia.

In 1871 British Columbia was admitted, under Section 146 of the British North America Act, into the Union of Provinces which that Act constituted. The instrument by which the Union was actually effected was an Order in Council, but it was necessarily based on addresses from both Houses of the Canadian Parliament, and from the Legislative Council of British Columbia. These addresses contained the terms and conditions upon which these two quasi independent communities proposed, through their respective Legislatures, that the Union should be effected and these terms and conditions so far as approved of by their then Sovereign, were intended to be embodied in the Order in Council effecting the Union, which was to have the same effect as if it had been enacted by the Parliament of the United Kingdom.

The Order in Council dated 16th May 1871 recites, that each of the several things had been done, which were required by Section 146 of the British North America Act, and the terms and conditions proposed in the addresses and approved of by the Crown are annexed to this Order. By paragraph 5, sub-head E., of these latter, Canada, *i.e.*, the Dominion of Canada undertook to assume the protection and encouragement of fisheries and defray the expenses of the same, and thereby became bound so to do. By the first clause of paragraph 11, the Dominion also undertook amongst other things to secure the commencement within two years from the date of the Union of, and to complete within 10 years, a railway from the Pacific Coast to such a point east of the Rocky Mountains, to be selected, as would secure that the seaboard of British Columbia should be connected with the railway

system of Canada. By the second clause of paragraph 11 the Government of British Columbia became bound to convey to the Dominion Government, or rather to the Crown in right of the Dominion, in trust to be appropriated in such manner as the Dominion Government should deem advisable in furtherance of the construction of this railway, a certain extent of public lands, therein described, lying along the railway line throughout its entire length, not to exceed 20 miles in extent on each side of the line, and in consideration of this the Dominion Government undertook to pay to the Government of British Columbia 100,000 dollars per annum. Neither the Legislature of the province of British Columbia nor that of the Dominion, has power by legislation to alter the terms of this Order in Council (which is in effect an Imperial Statute), or to relieve themselves from the obligations it imposes upon them.

Both the Dominion Government and the Government of British Columbia have performed the obligations thus imposed upon them. The Canadian Pacific Railway has been constructed which connects the eastern seaboard of Canada with the western seaboard of British Columbia. On the other hand the legislature of British Columbia have passed two Statutes, namely, 43 Vict. c. 11 and 47 Vict. c. 14 in order to discharge the obligation to grant what is now known as the Railway Belt (so far as it lies within the Colony) to the Government of the Dominion of Canada. By the combined effect of these Statutes there was granted to the Dominion Government in trust to be appropriated as to the Government might seem advisable the public lands along the line of the Canadian Pacific Railway wherever it might finally be located to a width of 20 miles on each side of the said line as provided in Section 11 of the

Order in Council admitting the Province of British Columbia into confederation with the other Colonies of the Dominion.

The construction of the language of the grant of the railway belt has already come before this Board on more than one occasion. In *Attorney-General of British Columbia* v. *Attorney-General of the Dominion* (14 A.C., 295), it was decided that the grant was in substance an assignment of the rights of the Province to appropriate the territorial revenues arising from the land granted. Nevertheless, it was held that it did not include precious metals which belonged to the Crown in right of the Province, because, as was said by Lord Watson, such precious metals are not *partes soli* or incidents of the land in which they are found, but belong to the Crown as of prerogative right, and there are no words in the conveyance purporting to transfer royal or prerogative as distinguished from ordinary rights. It was pointed out in the judgment in this case that the word "grant" as used in the statute under construction, was not, strictly speaking, suitable to describe a mere transfer of the Provincial right to manage and settle the land, and appropriate its revenues. The title remained in the Crown, whether the right to administer was that of the Province or that of the Dominion. It is true that in the course of the judgment Lord Watson also expressed the view that when the Dominion had disposed of the land to settlers it would again cease to be public land under Dominion control and revert to the same position as if it had been settled by the Province without ever having passed out of its control. Their Lordships, however, have not on the present occasion to consider questions which might arise if this had taken place, inasmuch as the belt, so far as is material for the purposes of this Appeal, is still unsettled and remains under the control of the Dominion.

Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the Province to the Dominion. There is no reservation of anything to the Grantors. The whole *solum* of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the *solum* would also pass to the Grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the *solum*. This view is in harmony with what has been decided by this Board in another case in which the effect of the grant of the railway belt came into question, *Burrard Power Company* v. *The King* (1911 A. C. 87), where it was held that a grant of water rights on a lake and river within the belt made by the Government of the Province was void. The grounds of the decision of the Board in that case were, that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of Section 91 of the British North America Act, and were, therefore, under the exclusive legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the Provincial Government.

During the course of the argument, some reliance was placed by Counsel for the Province of British Columbia, on the fact that by the supplemental agreement recited in the preamble to the British Columbian Act of 1883, the

Dominion is with all convenient speed to offer for sale the lands within the railway belt to settlers. But their Lordships are unable to see how this can affect the question of what passed to the Dominion under the so-called grant. They are unable to see any ground for construing the grant of the railway belt as excluding such lands situated within it as are covered with water. The *solum* of a river bed is a property differing in no essential characteristic from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value. The minerals under it can be worked and in addition there are special rights which flow from its ownership which are of themselves valuable and may be made the subject of sale. And even in view of the construction of the railway itself the possession of the *solum* of the rivers or lakes might become most essential in connection with the building of bridges, &c. Moreover, in districts situated at a distance from the actual railway track the power of using the *solum* of the rivers for the purpose of the construction of bridges might be essential to the settling and disposal of adjacent lands. The plain language of the grant leaves it in their Lordships' opinion impossible to imply any limitations of the generality of that language or to make its operation dependent on whether land situated in the belt was or was not covered with water, or if so covered, whether the rivers or lakes that cover it were of small or large dimensions. The whole *solum* within the belt with all the rights appertaining thereto passed to the Dominion.

In the present case, therefore, their Lordships entertain no doubt that the title to the *solum* and the water rights in the Fraser and other rivers and the lakes, so far as within the

belt are at present held by the Crown in right of the Dominion, and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues. It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the *solum*. A fishery may of course be severed from the *solum*, and it then becomes a *profit á prendre in alieno solo* and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the *solum*.

The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognise it as giving to the owners of lands on the foreshore or within an estuary or elsewhere where the tide flows and reflows a title to fish in the water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is *primâ facie* in the public. Lord Hale in his "De Jure Maris," in a passage cited with approval by Lord Blackburn in his judgment in *Neill* v. *The Duke of Devonshire* (8 A. C. 177), states the law as follows:— "The right of fishing in this sea" (*i.e.* the

narrow seas adjoining the coasts) "and the "creeks and arms thereof, is originally lodged "in the Crown, as the right of depasturing is "originally lodged in the owner of the waste "whereof he is lord, or as the right of fishing "belongs to him that is the owner of a private "or inland river . . . But though the King "is the owner of this great waste, and as a "consequence of his propriety hath the primary "right of fishing in the sea and the creeks and "arms thereof, yet the common people of "England have regularly a liberty of fishing in "the sea or creeks or arms thereof, as a public "common of piscary, and may not without "injury to their right be restrained of it, unless "in such places, creeks, or navigable rivers "where either the King or some particular "subject hath gained a propriety exclusive of "that common liberty."

Although their Lordships agree with Lord Blackburn in his approval of this citation from "De Jure Maris," their Lordships must not be understood as assenting to all the expressions used by Lord Hale, and more especially to his assumption that the Crown is owner of the *solum* of what he speaks of as the narrow seas. In Lord Hale's time the conception even of the three-mile limit did not exist, and it is clear that Lord Hale meant to include in the dominion of the Crown something much wider even than this. Nor do they think that Lord Blackburn's approval was intended by him to relate to this point, it being quite irrelevant to the case which he had under his consideration at the time. But their Lordships are in entire agreement with him on his main proposition, viz., that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right

enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean if, indeed, it did not in fact first take rise in them. The right into which this practice has crystalised resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as *parens patriæ* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognised as establishing a legal right enforceable in the Courts.

But to the practice and the right there were and indeed still are limits or perhaps one should rather say exceptions. "The King," says Lord Hale in another passage (De Jure Maris, printed at page 373 of Stuart Moores' "*History and Law of the Foreshore and Sea Shore*," Third Edition), used "to put as well fresh as salt rivers *in defenso* "for his recreation, that is, to bar fishing or "fowling in a river till the King had taken his "pleasure or advantage of the writ or precept "*de defensione ripariæ*, which anciently was "directed to the sheriff to prohibit riviation in "any rivers in his bailiwick. But by that "statute it is enacted *quod nullae ripariæ* "*defendantur de cætero, nisi illae quae fuerunt* "*in defenso tempore Henrici regis avi nostri,* "*et per eadem loca et per eosdem terminos,* "*sicut esse consueverunt tempore suo.*" The words of Magna Charta quoted by Lord Hale are of a very general character, and are not

confined to tidal waters. If they had remained unconstrued by the Courts doubts might well have been entertained, as pointed out by Lord Blackburn in *Neill* v. *The Duke of Devonshire* (8 A. C. at p. 177), whether the 16th chapter, which contains the words cited, did more than restrain the writ *de defensione ripariæ*, by which, when the King was about to come into a county, all persons might be forbidden from approaching the banks of the rivers, whether tidal or not, in order that the King might have his pleasure in fowling and fishing. If this were the true interpretation of the words of Magna Charta it would indicate that the general right of the public to fish in the sea and in tidal waters had been established at an earlier date than Magna Charta, so that it was only necessary at that date to guard the subject from the temporary infractions of that right by the Crown in the rivers as well tidal as non-tidal which were covered by the writ *de defensione ripariæ*. But this is a matter of historical and antiquarian interest only. Since the decision of the House of Lords in *Malcolmson* v. *O'Dea* (10 H. of L. Cas. 593), it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.

Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a "liberty of fishing in the sea or creeks or "arms thereof," Lord Hale makes the exception, "unless in such places, creeks, or navigable

" rivers where either the King or some " particular subject hath gained a propriety " exclusive of that common liberty." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognised as the property of the owner of the soil. In all such cases the proof of the existence and enjoyment of the right has of necessity gone further back than the date of Magna Charta. The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself. But it is not necessary to do more than refer to the point in explanation of the words of Lord Hale, because no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta.

It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in rivers and estuaries or on the foreshore) within the railway belt stand *primâ facie* as follows:—In the non-tidal waters they belong to the proprietor of the soil, *i.e.*, the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the *solum* which,

according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner. But we now come to the crux of the present case. The restriction above referred to relates only to Royal Grants, and what their Lordships here have to decide is whether the Provincial Legislature has the power to alter these public rights in the same way as a Sovereign Legislature such as that of the United Kingdom, could alter the law in these respects within its territory.

To answer this question one must examine the limitations to the powers of the Provincial Legislature which are relevant to the question under consideration. They arise partly from the provisions of Sections 91 and 92 of the British North America Act, 1867, and partly from the terms of Union of British Columbia with the Confederation with which we have already dealt. By Section 91 of the British North America Act, 1867, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within (amongst other things) "Sea Coast and Inland Fisheries." The meaning of this provision was considered by this Board in the case of *Attorney-General for the Dominion* v. *The Attorney-General for the Provinces* (1898, A.C. 700), and it was held that it does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on this exclusive right Provincial legislation cannot trench. It recognised that the Province retains a right to dispose of any fisheries to the property in which the Province has a legal title, so far as the mode of such disposal is consistent with the Dominion right of regulation, but it held that even in the case where proprietary rights remain with the Province, the subject

matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly it sustained the right of the Dominion to control the methods and season of fishing and to impose a tax in the nature of license duty as a condition of the right to fish, even in cases in which the property in the fishery originally was or still is in the Provincial Government.

The decision in the case just cited does not in their Lordships' opinion affect the decision in the present case. Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore when by Section 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "Navigation and Shipping" their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the Province no right of property or control in them. It was most natural that this should be done seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the Province.

These considerations enable their Lordships to answer the first question which reads as follows :--

"Is it competent to the Legislature of British "Columbia to authorise the Government of the "Province to grant by way of lease, license or "otherwise the exclusive right to fish in any or "what part or parts of the waters within the "railway belt :—

"(*a*) As to such waters as are tidal;

"(*b*) As to such waters which, though not "tidal are navigable."

The answer to this question must be in the negative. So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament. So far as the waters are not tidal they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and cannot be vested in the public generally.

They now come to the second question, which is :—"Is it competent to the Legislature of British "Columbia to authorise the Government of the "Province to grant by way of lease, licence, or "otherwise the exclusive right, or any right, to "fish below low-water mark in or in any or what "part or parts of the open sea within a marine "league of the coast of the Province?"

Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the Province might, consistently with Section 91, be taxed in respect of its exercise for

the reasons pointed out by Lord Herschell at page 713 of 1898 A. C., but no such taxing could enable the Province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the Provincial Legislature.

In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league. The importance of claims based upon such a proprietary title arises from the fact that they would not be affected by the grant of the lands within the railway belt. But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low-water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

They desire, however, to point out that the three-mile limit is something very different from the "narrow seas" limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on Public International Law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally, but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the powers have adequately discussed and

agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *The Queen* v. *Keyn* (2 Ex. D. 63) is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low-water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, L.C.J., in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

Their Lordships therefore find themselves in agreement with the Supreme Court of Canada in answering the first and second questions in the negative.

The principles above enunciated suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is in their Lordships' opinion, a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the Province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the Province, which is excluded from general legislation with regard to sea coast and inland fisheries.

Their Lordships think that what they have now said affords a sufficient answer to the third

question. It is in the negative. They will humbly advise His Majesty that the three questions should be answered in the fashion they have indicated. In accordance with the usual practice in such cases there will be no costs of this Appeal.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA.

v.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND OTHERS.

DELIVERED BY THE LORD CHANCELLOR.

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