Privy Council Appeal No. 91 *of* 1917.

The Attorney-General for the Dominion of Canada - - *Appellant*

v.

The Attorney-General for the Province of Quebec and others - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT HALDANE.]

The controversy in this case arises over the answers to certain questions relating to the right of fishing in the tidal waters of the Province of Quebec. These questions were submitted to the Court of King's Bench of the Province by the Lieutenant-Governor in Council, who so submitted them under authority conferred on him by a statute of Quebec.

The questions were these :—

1. Has the Government of the Province of Quebec, or a member of the Executive Council of the Province, power to grant the exclusive right of fishing, either by means of engines fixed to the soil, or in any other manner, in the tidal waters of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province, and of the high seas washing its coasts, to a distance of 3 marine miles from the shore—

(*a*) between high-water mark and low-water mark ;

(*b*) beyond low-water mark, and if in the affirmative, to what extent ?

2. Can the Legislature of the Province authorise the Government of the Province, or a member of the Executive Council of the Province or any other person, to grant the exclusive rights of fishing set forth in the preceding question.

3. If there existed heretofore, or if there still exist, restrictions upon the granting of exclusive rights of fishing in the tidal waters as aforesaid, and if such restrictions have been or are abolished, are the fisheries in such waters, after such abolition, the property of the Province, and has the Legislature or the Government of the Province, or a Minister of the Government, or any other person the powers mentioned in the preceding question with regard to these fisheries ?

The learned Judges of the Court of King's Bench of Quebec, by a majority consisting of the Chief Justice, Sir Horace Archambeault, Mr. Justice Trenholme, Mr. Justice Lavergne and Mr. Justice Carroll, answered all these questions in the affirmative. The Chief Justice, however, so answered the first question subject to a reservation as regards waters beyond low-water mark out to the 3-mile limit, regarding which he was of opinion, following an expression of view by their Lordships in a previous case, that no deliverance on a subject which was one of international law, ought under the circumstances to be made. He inserted a similar qualification into his answer to the third question. Mr. Justice Cross, who also heard the case, dissented as to the general principle laid down by his colleagues, expressing an opinion in the negative on the two first questions, and treating the third question as consequently not arising.

The questions thus raised relate to the Province of Quebec, where the Common law is based on that of France, and it is the circumstance that the Common law of the Province is different from that which obtains in the rest of Canada that gives rise to a distinction which has to be kept in mind. If the Common law of Great Britain had obtained, the points that have arisen would have been covered in some measure by their Lordships' decision in the *British Columbia Appeal* (1914, A.C. 153), which applied principles previously laid down by the Board in *A.G. for the Dominion* v. *A.Gs. for the Provinces* (1898, A.C. 700). It is accordingly desirable before proceeding further to refer to the principles which were laid down in the appeals in these two cases.

The decision of 1898 was concerned with a number of questions between the Dominion and the Provinces relating to rights of property and to legislative jurisdiction. It was pointed out that the proprietary right in the *solum* of Canada was vested in the Crown, whether the legislative and executive control is with the Dominion or with the Province, and that there is no presumption because legislative jurisdiction has been conferred on the Dominion, that therefore a proprietary title has been conferred on it. What the Board on that occasion had to determine was, among other things, whether the beds of rivers and other waters situate within the territorial limits of a Province and not granted before Confederation, belonged to the

Crown in right of the Dominion or of the Province. The answer was that, generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial. It followed that the fishing rights, so far as they depended on property, were likewise provincial. But to the Dominion had been given by Section 91 of the British North America Act exclusive legislative jurisdiction over sea coast and inland fisheries. This power to legislate was so sweeping in its terms that it could extend to what practically might be a modification of the character of the proprietary title of a Province, and it was not possible to lay down in abstract terms *a priori* a limit to this power of legislation. All that Lord Herschell could say in delivering their Lordships' opinion was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by Section 91 extended to regulation only, however far regulation might proceed. It included the capacity to impose taxes for licences to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant. It was added that the enactment of fishery regulations and restrictions was within the exclusive competence of the Dominion Parliament, and was therefore not within the legislative power of any Province, although that Province might well have power, under the capacity that belonged to it under Section 92, to deal with property and civil rights within the Province, to pass statutes relating to modes of conveyance, or prescribing the terms and conditions upon which the fisheries that were the property of the Province might be granted, leased, or otherwise disposed of, or relating to succession to a provincial fishing right; for such legislation would be concerned only with the proprietary title.

In the appeal decided in 1914 (*A.G. for British Columbia* v. *A.G. for the Dominion*, 1914, A.C. 153) the principles laid down in the judgment of 1898 were further developed in their application. It was held that it was not competent for the Legislature of British Columbia to authorise the Government of the Province to grant exclusive rights of fishing in tidal rivers or in the sea, including arms of the sea and estuaries of rivers. It was laid down that in the sea, wherever the Common law of England applies, the right of fishing is a public right, not dependent on a proprietary title, and that consequently the regulation of the right must rest exclusively with the Dominion Parliament. In the case of an inland lake or river, or other non-tidal water, where the *solum* is vested in a private owner or the Crown, the public in British Columbia have no such right. The fisheries are mere profits of the soil over which the water flows, and the title to fish follows the title to the *solum*, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit *a prendre in alieno solo*. With such inland fisheries it is of

course only by way of regulation that the Dominion Parliament can interfere. Their Lordships were chiefly concerned in the decision under discussion with the right of fishing in tidal waters and in the sea. So far as these waters were concerned, the right of fishing in them was by English law a public and not a proprietary right, and was accordingly held to be subject to regulation by the Dominion Parliament only. So far as concerned waters which were navigable but non-tidal no question arose; for, as English law governed, the fishing in navigable non-tidal waters was the subject of property, and there was no right in the public generally to fish in them. As to the sea between low-water mark and the 3-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed out that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only.

Whatever the origin and character of the title of the public to fish in tidal waters, that title had, as their Lordships observed, been made unalterable, except by a legislature possessing competent authority, since Magna Charta. And as Magna Charta had come to form part of the Common law of England, it was part of the law of British Columbia. In speaking of the public right of fishing in tidal waters, their Lordships were careful to point out that they did not refer to fishing by way of kiddles, weirs, or other engines fixed to the soil. For such methods of fishing involved a use of the *solum* which, according to English law, cannot be vested in the public, but must belong to the Crown or to a private owner. They added that the question whether non-tidal waters were navigable or not did not bear on the question they had to decide; for the fishing in non-tidal navigable waters was the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally. They held that, because the right of fishing in the sea is a right of the public generally which does not depend on any proprietary title, the Dominion must have the exclusive right of legislation with regard to it as such, and that accordingly the Province of British Columbia could not confer any exclusive or preferential right of fishing on individuals or classes of individuals.

The questions which their Lordships were called on to decide in 1914 were in certain important respects different from those now before them. In the first place, the questions then raised related to rights of fishing in British Columbia, where, as has been remarked, the Common law applicable was that of England, whereas the Common law applicable in Quebec is, generally speaking, the old French law, as it was introduced into the territory of the Province when it was subject to the rule of the

King of France. The provisions of Magna Charta, now the foundation of the public right wherever the Common law of England prevails, could in that case have no application to Quebec. In the second place, under that old French law, it may be that the distinction was not between tidal and non-tidal waters, but between those waters that were navigable and those that were not.

But the French law applicable to the Province of Quebec, so far as concerns the right of the public to fish in the waters of the Province, has been modified by certain statutes competently passed to which reference will presently be made. Into the precise character of the old French law it will be found that these statutes render it unnecessary to enter for the purposes of the present appeal. Under the French *régime* the Custom of Paris was in force in the Province, and the Government of French Canada was modelled on that of a province of France. If it were necessary to pursue the character of the French law from time to time applicable, it would have to be considered whether any part of the Ordinance, sometimes spoken of as the Code de la Marine of 1681, which declared all the subjects of the King of France to have the right of fishing in the sea and on its banks, was ever so registered as to become law in French Canada, a point which conceivably may still require investigation in view of materials which were brought to their Lordships' notice in the course of the argument. It might also be necessary to determine whether, on the cession of Canada to England in 1763, the French law as to the Royal prerogative was abrogated and the law of England substituted for it. Into this historical question, which is one over which there has been much controversy, it is, however, unnecessary to enter. For assuming that the right of fishing in navigable waters belonged, under French law, to the domain of the Crown, and that the public enjoyed the right of fishing in such waters only subject to the prerogative of the King of France to grant at his pleasure exclusive rights of fishing to individuals, it is plain that this state of the law was altered by local statutes passed after the cession of 1763. In order to find the powers under which these statutes were enacted, reference must be made to the relevant Acts of the Imperial Parliament. The first of these was the Quebec Act of 1774. This Act defined the boundaries of the large Province of Canada which had been called Quebec in the Royal Proclamation that followed on the cession effected by the Treaty of Paris. It then went on to declare that notwithstanding previous Proclamations, Commissions, Ordinances, &c., in all matters of controversy relative to property and civil rights, resort was to be had to the existing laws of Canada as the rule for their decision, unless varied by Ordinances passed by the Governor with the advice and consent of a Legislative Council to be set up by the Crown. The criminal law was to be that of England. The effect of the Act was thus to retain or to reintroduce the old French law wherever applicable as to property and civil rights.

In 1791, under another Act of that year, the Province of Quebec was divided into the separate Provinces of Upper and

Lower Canada, and large powers of legislation were granted. The existing laws were to remain in force until altered, but power was given to the new Governments to make laws for the peace, welfare and good government of their Provinces.

In 1840, by a subsequent Act, the two Provinces were united into the single Province of Canada, which remained as such until confederation in 1867. This united Province possessed representative government from the beginning, and a little later on its government was made responsible also.

Acting under the powers conferred on it, the Province of Quebec from time to time had passed laws regulative of fisheries. In 1788 a statute was enacted which declared that all the King's subjects should have the right to fish and to use the shores for that purpose over a large part of the river St. Lawrence and another river which emptied itself into the Bay of Chaleurs. The right extended to rivers, creeks, harbours and roads. This statute, in conferring the right to fish on the King's subjects generally in the language it adopted, substantially followed the model afforded by the Newfoundland Fisheries Act of 1699, in which the policy of encouraging the people of Great Britain to go to Newfoundland, catch fish, and dry them on the shores and bring them back, was adopted. This policy explains the stress laid in the statute on fishing in the sea and using the banks for drying, &c. It extends, however, to the right to take bait and fish in rivers, lakes, creeks, harbours and roads generally, and rights similar for the purposes of this appeal were conferred by the series of fishery statutes passed in Canada in relation to Canadian waters.

In 1807 a further statute was passed by the Government of the Province of Lower Canada under which the right to fish and land was further extended, with the saving of rivers, creeks, harbours, roads, and land which had been made private property by title derived from the King of England, or by grant prior to 1760, or by location certificate.

In 1824 a similar Act was passed extending the right of the public to fish to the Inferior District of Gaspé and two named counties. Further Acts regulating the rights of fishing in the District of Gaspé were passed in 1829 and 1836, by the Legislature of Lower Canada.

In 1841, after the union of Upper and Lower Canada, the right of all the King's subjects to fish in the waters of Gaspé was reaffirmed, and in 1853 the Legislature of the Province of Canada further declared the right of the King's subjects to fish to extend to the Gulf of the St. Lawrence.

In 1857 an Act of the Province anew declared the right of the King's subjects to fish in all the waters and rivers of the Province, with the exception of rivers lying within the territory known as the King's Posts, as to which it was provided that the Governor in Council might grant permission to fish in these rivers.

In 1858, by another statute of the Province of Canada, the

general right of the King's subjects was reaffirmed; but it was provided that the Governor-General might grant special fishing leases and licences for lands belonging to the Crown, for any term not exceeding nine years, and might make such regulations as should be found necessary or expedient for the better management and regulation of the fisheries of the Province.

In 1865 the Provincial Government of the united Provinces passed an Act for the amendment of the law and for the better regulation of fishing and protection of fisheries. It applied to the whole of Upper and Lower Canada without distinction between districts. By this statute the Commissioner of Crown Lands might, under Section 3, where the exclusive right of fishing did not already exist by law in favour of private persons, issue fishing leases and licences for fisheries and fishing wheresoever situated or carried on, and grant licences of occupation for public lands in connection with fisheries; but leases or licences for any term exceeding nine years were to be issued only under the authority of an order of the Governor-General in Council.

By Section 4 the Governor in Council might from time to time make regulations for the better management and regulation of fisheries, to prevent the obstruction and pollution of streams, to regulate and prevent fishing, and to prohibit fishing except under leases and licences.

By Section 6, which is headed "Deep Sea Fisheries," it was in the first place declared that every subject of the Sovereign might use vacant public property for the purpose of landing, salting, curing and drying fish, &c., and that—

> "All subjects of Her Majesty may take bait or fish in any of the harbours or roadsteads, creeks or rivers; subject always, and in every case, to the provisions of this Act as affects the leasing or licensing of fisheries and fishing stations, but no property leased or licensed shall be deemed vacant."

Section 17 prohibits fishing in areas described in leases or licences now existing or hereafter to be granted. It, however, adds that the occupation of any fishing station or waters so leased or licensed for the express purpose of net fishing is not to interfere with the taking of bait used for cod fishing, nor prevent angling for other purposes than those of trade or commerce.

In 1867 the British North America Act was passed, and in 1868 the Dominion Parliament repealed the Act of 1865 by Section 20 of its Fisheries Act of 1868. The Act of 1865 was thus in force only for three years. Section 91 of the British North America Act had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast and inland fisheries, and it was under this authority that the repeal was effected. By the Fisheries Act of 1868 that Parliament sought to exercise its powers by enacting a number of provisions in many respects resembling those of the Act of 1865, and by further regulating the exercise of both public and private rights of fishing throughout the Dominion. The substance of this Act was incorporated into the subsequent Consolidated Statutes of Canada on

the subject of fisheries. As to one of the sections, Section 4 of the then Revised Statutes of Canada, c. 95, so far as it purported to empower the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to a Province, it was held by this Board, in the case before them in 1898, that the Dominion had no power to pass it. Their Lordships think that this is now settled law.

But the decision of this point does not conclude the question before them, which is not whether the Dominion has power to grant exclusive rights of fishing in waters the property of a Province, but whether the provincial government has power to grant such an exclusive right of fishing in tidal waters. When the Act of 1865 was passed, the Government of the united Provinces of Upper and Lower Canada could unquestionably confer on itself the capacity to do this. For it had full power to make laws for the peace, order, and good government of the Provinces without any such restrictions as affected the right of a Province under the British North America Act of 1867, and it could consequently abrogate the fishing rights not only of private persons but of the public. After confederation, neither the Dominion nor any Province possessed this power in its integrity. The Dominion Parliament, having exclusive jurisdiction over sea coast and inland fisheries, could regulate the exercise of all fishing rights, private and public alike. As the public right was not proprietary, the Dominion Parliament has in effect exclusive jurisdiction to deal with it. But as to private rights, the provincial legislature has exclusive jurisdiction so long as these present no other aspects than that of property and civil rights in the Province, or of matter of a local or private nature within it, in the meaning of the words of Section 92.

The result of this is that a Province cannot grant exclusive rights to fish in waters where the public has the right to fish. Now this right in the public was created by the series of statutes enacted in the old Province of Upper and Lower Canada prior to confederation, and as it continued to exist at confederation, only the Dominion could deal with it. As this Board said in the British Columbia case in 1914, the object and effect of the provisions of Section 91 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. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province. Even under the guise of their taxing powers the government of the Province could not confer any exclusive or preferential rights of fishing on individuals or classes of individuals, because such exclusion or preference would import regulation and control of the general right of the public to fish.

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the *solum* kiddles, weirs or other engines of the kind. That is because the *solum* is not vested in

the public, but may be so in either the Crown or private owners. It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself. But it is obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed. The *solum* and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a private individual, and in so far as this is so, it cannot be transferred by regulation. But regulation may proceed very far in limiting the exercise of proprietary rights without ceasing to be regulative.

It thus appears that the question which arises in this appeal in reality bears a considerable analogy to that which arose in the British Columbia case. It is true that here their Lordships have nothing to do with the public title arising out of the English Common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the Common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and Section 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant exclusive leases and licences, to fish in the harbours, roadsteads, creeks or rivers of the old Province of Canada, is the foundation of the public title. This section occurs with the heading "Deep Sea Fisheries," a heading which, in their Lordships' opinion, affects its scope. The language of the section obviously owes its origin to that used in the Newfoundland Fisheries Act of 1699, which, as has been said, was passed for the purpose of encouraging the King's subjects at home to sail to Newfoundland in order to fish. The distinction between coast and inland fisheries could hardly at that time have been an important one, and no distinction was then drawn. There is, however, one significant difference between the enumeration in the Act of 1699 of the waters in which the public may fish and that contained in Section 6 of the Act of 1865. In the former the word "lakes" occurs; in the latter it does not. The introduction into the language of the statute of the heading to Section 6, "Deep Sea Fisheries," when taken in conjunction with the omission of lakes, which are referred to elsewhere in the Act, indicates, in the view their Lordships take of this section, that it was intended to apply only to such fisheries as were either "deep sea," or so accessible from the sea as to make them natural adjuncts to these fisheries. The fisheries to be regarded as so adjoining would not, accordingly, include either the fishing in inland lakes, which are not mentioned, or the right to fish in non-navigable waters. All tidal waters which were navigable would thus be included. Stated generally the test of inclusion appears to be whether the waters in question are such that those who resort to the sea coast to fish there would naturally have access to these waters and would in ordinayr

course conduct their fishing operations in such a fashion as to extend into them.

As to Section 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licences for fisheries and fishing wherever carried on, this was obviously within the competence of the legislature, which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that Section 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament. No question is at present raised as to existing rights created under any of its provisions. Although the power of the Dominion to legislate about the regulation of inland fisheries extends to all fisheries, even where the public has no right, it is obvious that in substance its powers may be more restricted in their operation wherever the only title to fish is a private one arising simply out of the property in the subjacent soil.

In the Court of King's Bench of Quebec, the first of the questions raised in this appeal was answered by the majority of the learned Judges to the effect that the Government of the Province did possess power to grant exclusive rights of fishing in tidal waters. The Chief Justice thought that the effect of the Act of 1865 was that the public right to fish had been abrogated. This seems to import that Section 3 had brought about a transfer of the entire title to fish to the Crown in right of the Province. Their Lordships are unable to concur in this view. They think that Section 3 must be read along with Section 6 which maintains the public right. No doubt that is maintained subject to the powers given in Section 3, and those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under Section 3 of the Act of 1865 no longer exists in its entirety.

Exclusive rights actually granted while the Act of 1865 was in force are another matter. It has not been brought to the notice of their Lordships that any such have been granted. If there are their position will have to be separately considered.

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the 3-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present,

to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

In the result the answer to the questions submitted must be as follows :—

(1) To the first question, neither the Government of Quebec, nor any member of the Executive Council, has power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts. In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the *solum*, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines. The tidal waters may not extend so far as the limits of the navigable waters, but no distinction between the two descriptions is enacted in the statute of 1865, which is the governing authority. There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. This answer applies to waters between low and high mark. As to waters beyond low mark no answer can properly be given.

(2) To the second question, as to the power of the Legislature of the Province, the answer is in the negative.

(3) To the third question, the answer is that restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist, and that therefore the question does not arise.

Their Lordships will humbly advise His Majesty accordingly. There will, following the general practice, be no costs of this appeal.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF CANADA

v.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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