Privy Council Appeal No. 15 *of* 1926.

The Attorney-General of Quebec - - - - - *Appellant*

v.

The Nipissing Central Railway Company and another - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MAY, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* THE LORD CHANCELLOR.]

The Nipissing Central Railway Company was incorporated by an Act of the Dominion of Canada (No. 112 of 1907) for the purposes of constructing and operating certain lines of railway, including a line extending from Latchford, in the Province of Ontario, to a point on the line of the Grand Trunk Pacific Railway in the Province of Quebec. The plan and book of reference for this line, as approved by the Board of Railway Commissioners, show a line traversing lands belonging to the Crown in right of the Province of Quebec. The statute governing the construction and operation of inter-provincial railways in Canada (other than Government railways) is the Railway Act of 1919 of Canada, which provides for the compulsory taking of lands required for a railway and for the payment of compensation for lands so taken,

and the section of the Act dealing specially with Crown lands is section 189, which is in the following terms :—

"(1) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.

"(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate for the use of its railway and works so much of the lands of the Crown lying on the route of the railway which have not been granted or sold as is necessary for such railway, and also so much of the public beach or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

"(3) The company may not alienate any such lands so taken, used or occupied.

"(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust."

In pursuance of this section, the Nipissing Company applied for the consent of the Governor-General in Council to the taking, for the purposes of its railway, of the provincial Crown lands lying on the approved route; and the Government of the Province of Quebec having disputed the right of the Governor in Council to give an effective consent, the Governor in Council, under section 60 of the Supreme Court Act, referred the questions so raised to the Supreme Court of Canada for hearing and consideration. The questions referred to the Supreme Court, with the replies given by that Court, are as follows :—

"First question: Is it within the competence of Parliament to enact the provisions of section 189 of the Railway Act, 1919, with regard to provincial Crown lands?

"Answer: Yes.

"Second question: If the answer to question 1 be in the affirmative, is said section 189, as it now stands, applicable to provincial Crown lands?

"Answer: Yes.

"Third question: Is it obligatory upon the Governor in Council to give his consent under the provisions of subsection 2 of said section upon any proper application therefor, or has he discretion to grant or refuse such consent as he may think fit?

"Answer: It is not obligatory upon the Governor in Council to give his consent, and he has in point of law discretion to grant or refuse such consent as he may see fit."

Against this judgment the Attorney-General for Quebec has appealed to His Majesty in Council.

As to the third of the above answers, no question is raised on this appeal; and, as the first question does not arise unless the second is answered in the affirmative, it is convenient to take the latter question first.

Their Lordships do not feel any doubt that section 189 of the Railway Act applies, according to its true construction, to lands belonging to the Crown in right of a Province. The section applies in terms to all "lands of the Crown lying on the route of the railway," no distinction being made between Dominion and provincial

Crown lands. It is true that the only consent required by the section is that of the Governor in Council; but if any executive consent was to be required to the taking of Crown lands for the purposes of a Dominion railway, it was to be expected that the consent required would be that of the Dominion Government, for otherwise the construction of the railway would be dependent upon the consent of the Government of each Province through which it was intended to pass. It is true also that subsection (4) of the section appears to proceed on the assumption that all compensation money for Crown lands taken will be payable to the Governor in Council, and it is suggested that this would not be the natural destination of compensation paid in respect of lands in which the beneficial interest belongs to a Province; but this subsection is machinery only, and there is no reason why the Governor in Council should not direct any compensation monies received in respect of provincial Crown lands to be handed over to the Government of the Province concerned.

The construction so put upon section 189 of the Act of 1919 is strongly supported by a reference to the history of the Railway Acts, which were carefully analysed in the judgment delivered by Newcombe J. on behalf of the Supreme Court in this case. The pre-Union Railway Act of the Province of Canada (22 Vict., c. 66) authorised the taking of any "wild lands of the Crown" situate on the route of the railway; and this expression was repeated in the Railway Act passed immediately after Confederation (the Railway Act, 1868) at a time when all such "wild lands" were necessarily provincial Crown lands. It reappeared in the Railway Acts of 1879 and 1886, the word "wild" being omitted in the Act of 1888 and in all subsequent consolidating Acts down to and including the Act of 1919; and it is hardly conceivable that an expression which in the earlier of these statutes plainly included provincial Crown lands was intended to have a less extended meaning in the later statutes. It is noteworthy too that the Act of 1919 was passed after it had been decided in the British Columbia case (to be hereafter referred to) that the section extended to provincial Crown property, and without any alteration of language.

Assuming then that the section, on its true construction, extends to the compulsory taking of provincial Crown lands, was it within the competence of the Dominion Parliament to enact it? In other words, does the exclusive power to legislate in respect of inter-provincial railways reserved to the Dominion Parliament by section 91 (29) and section 92 (10) of the British North America Act, 1867, empower that Parliament to authorise the compulsory taking of lands on the route of a Dominion railway which belong to the Crown in right of a Province? This question has already been considered by this Board in connection with the corresponding section of the Railway Act, 1888, and has been answered in the affirmative (*Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, L.R. 1906, A.C. 204).

Sir Arthur Wilson, in announcing the decision of the Board in that case, used the following language :—

> " It was argued for the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Railway Company* v. *Corporation of the Parish of Notre Dame de Bonsecours* (L.R. 1899, A.C. 637), a case relating to the same company as the present, the right to legislate for the railway in all the provinces through which it passes was fully recognised. In *Toronto Corporation* v. *Bell Telephone Company of Canada* (L.R. 1905, A.C. 57), which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto, which are vested in the City Corporation. To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think therefore, that the Dominion Parliament had full power, if it thought fit, to authorise the use of provincial Crown lands by the company for the purposes of this railway."

This judgment appears to their Lordships to be conclusive of the question now under discussion. It is true that in the British Columbia case the Board found additional support for their conclusion in the circumstance that the land there in question (which was provincial foreshore) had been used before the Union for harbour purposes. But a substantial, if not the principal, ground for the decision is to be found in the reasoning above cited from the judgment of Sir Arthur Wilson ; and their Lordships would hesitate long before departing from an opinion so clearly and emphatically expressed by this Board even if they were not wholly in agreement with it. But, in fact, no argument has been adduced in the present case which would lead their Lordships to doubt in any way the correctness of the decision reached in the year 1906. It was suggested that the effect of section 65 of the British North America Act was to vest in the Lieutenant-Governor of Quebec, and not in the Governor-General, the power to consent under section 9 (3) of the Canada Railway Act (22 Vict., c. 66) to the appropriation of Crown lands in the Province of Quebec for railway purposes ; but the last-mentioned Act, although it does not appear to have been formally repealed, has been superseded by later Railway Acts, and no sound argument can now be founded upon it. It was further argued that the effect of sections 109 and 117 of the British North America Act was to vest in each of the Provinces the beneficial interest in the Crown lands situate in the Province, subject only to the right of Canada under the reservation contained in section 117 to assume lands required for purposes of defence. But the reservation in question appears to refer to executive, and not to legislative, action ; and while the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the

Parliament of Canada within the limits of the authority conferred on that Parliament. Reference was made to certain passages in judgments pronounced on behalf of the Board in earlier cases, in which emphasis was laid on the view that the regulative powers conferred upon the Dominion Parliament by section 91 of the British North America Act did not authorise that Parliament to transfer to itself or others the proprietary rights of a Province. But those expressions must, of course, be taken subject to the observation of Lord Herschell in the first Fisheries case (*Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia*, L.R. 1898, A.C. 700, at page 712) that the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power.

Upon the whole matter their Lordships find themselves completely in agreement with the judgment of the Supreme Court, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The costs of the respondent, the Nipissing Central Railway Company, should be paid by the appellant, the Attorney-General for Canada bearing his own costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF QUEBEC

v.

THE NIPISSING CENTRAL RAILWAY COMPANY AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR.

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