

The Attorney-General of New Brunswick - - - *Appellant*

v.

The Canadian Pacific Railway Company and another (Respondents)
and The Attorney-General of Canada (Intervener) - - - *Respondents*

FROM

THE SUPREME COURT OF NEW BRUNSWICK.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1925.

Present at the Hearing :

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal by special leave from a judgment of the Appeal Division of the Supreme Court of New Brunswick, confirming a judgment of the Chancery Division of that Court, whereby certain points of law were determined adversely to the appellant and his action was dismissed. The principal question involved in the proceedings is whether the right to regulate navigation on the St. John River where both banks of the river are within New Brunswick rests with His Majesty in right of the Dominion, or with His Majesty in right of the Province of New Brunswick.

The St. John River takes its rise partly in the State of Maine and partly in the Province of Quebec. For a portion of its course it forms the boundary between Maine and New Brunswick; but its lower course from the Grand Falls to the City of St. John,

where it empties into the Bay of Fundy, is wholly in New Brunswick. It is tidal and navigable from its mouth to the City of Fredericton, a distance of about 80 miles. A few miles above the point where the river enters the harbour of St. John it passes through a narrow gorge, and over this gorge there have been thrown two passenger bridges (of which one has since been removed) and two railway bridges. Of the railway bridges the older was constructed by the respondents, The St. John Bridge and Railway Extension Company, under the authority of an Act of the Legislative Assembly of the Province of New Brunswick passed in the year 1881, and was completed in 1886, the height of this bridge above the river being 82 feet. The second railway bridge, which is higher up the gorge, was constructed by the respondents, the Canadian Pacific Railway Company, with the sanction of the Governor-General of Canada in Council under the Navigable Waters Protection Act of Canada 1906, and of the Board of Railway Commissioners under the Railway Act of Canada 1919, and was completed (or nearly completed) in November 1921. The height of this bridge above the river is said to be 84½ feet at the centre line of navigation, but to diminish towards the western bank.

On the 7th December 1921 the appellant, the Attorney-General of the Province of New Brunswick, commenced these proceedings against the two Companies, in which he alleged that the two railway bridges were an obstruction to the navigation of the river, and claimed to have them removed. The Companies by their defence (as amended) pleaded that the plaintiff had been guilty of laches, and also alleged that the claim was bad in law in so far as it alleged (among other things):—

(1) That the right to regulate the navigation of the Saint John River where the same flows within the Province of New Brunswick is vested in His Majesty as represented by the Government of the Province of New Brunswick and not in His Majesty in the right of the Dominion of Canada.

(2) That neither the Department of Public Works of Canada nor the Government of Canada had power or authority under the Navigable Waters Protection Act or otherwise to approve of the plans under which the new railway bridge was constructed and that any such approval thereof was of no force or effect.

(3) That the rights (if any) vested in the Province of New Brunswick by the Ashburton Treaty cannot or could not be altered, varied or withdrawn in whole or in part or given or delegated to the Government of Canada or any department thereof without the consent of the United States of America, the other contracting party to the said treaty.

At the hearing of the action before Grimmer, J., it was agreed by Counsel for the parties, with the consent of the Court, that the questions of law arising in the case should be considered and determined before any questions of fact were submitted or considered; and Grimmer, J., after argument, decided the points of law against the plaintiff and dismissed the action. Upon

appeal by the plaintiff to the Appeal Division, that Court (consisting of Hazen, C.J., and Barry and White, JJ.) agreed with the decision of Grimmer, J., though on somewhat different grounds, and dismissed the appeal. Special leave was granted to the appellant to appeal to this Board, and the Attorney-General for Canada obtained leave to intervene.

It was hardly disputed by counsel for the appellant that, apart from the argument founded on the Ashburton Treaty (to which reference will be made hereafter), the first and second points of law raised by the defence must have been decided against the appellant. Section 91 (10) of the British North America Act 1867 gives to the Parliament of the Dominion exclusive legislative authority over navigation and shipping; and by a series of Canadian statutes, of which the most recent is the Navigable Waters Protection Act (R.S.C. 1906, c. 115), authority to approve the construction of a bridge over a navigable river has been conferred upon the Governor-General in Council. Further, by section 248 of the Railway Act of 1919 (9 and 10 Geo. V, c. 68) any company desirous of constructing such a bridge is required to obtain the approval of the Railway Board and is authorized to construct the bridge as so approved. It is under these statutes of 1906 and 1919 that the second railway bridge in question in these proceedings was authorized to be made. Further, section 92 (10) of the Act of 1867 excludes from the jurisdiction of the Provincial Legislatures railways and other works extending beyond the limits of the Province and any works which, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada; and both the railway bridges in question in these proceedings fall within this exception. By an Act of the Dominion Parliament passed in the year 1883, it was declared that the older railway bridge and the railway crossing it were works for the general advantage of Canada; and the Canadian Pacific Railway, of which the new bridge forms part, of course extends beyond the limits of the Province. *Prima facie*, therefore, not only are the railway bridges under the care and jurisdiction of the Dominion, but the right and power of safeguarding the navigation of the river passing under the bridges is in the same hands.

But it was argued on behalf of the appellant that, having regard to the Ashburton Treaty of 1842, a special construction must be put upon the Act of 1867 and the other statutes above referred to. By that Treaty, which was entered into between Great Britain and the United States of America, the line of boundary between the British Dominions in North America and the United States was ascertained and agreed, a part of such boundary consisting of the middle line of the main channel of the River St. John. By Article III of the Treaty, in order to promote the interests and encourage the industry of the inhabitants of

the countries watered by the River St. John and its tributaries, whether living within the Province of New Brunswick or the State of Maine, it was agreed that, where by the provisions of the Treaty the River St. John was declared to be the line of boundary, the navigation of that river should be free and open to both parties and should in no way be obstructed by either; that all the produce of the forest or of agriculture (not being manufactured) grown on those parts of the State of Maine watered by the River St. John or its tributaries, should have free access into and through the river to and from the seaport at its mouth, and when within the Province of New Brunswick should be dealt with as if it were the produce of that Province; and that in like manner the inhabitants of the territory of the Upper St. John determined by the Treaty to belong to Her Britannic Majesty should have free access to and through the river for their produce in those parts where the river ran wholly through the State of Maine. The Article concluded with a proviso in the following terms:—

Provided always that this agreement shall give no right to either party to interfere with any regulations, not inconsistent with the terms of this Treaty, which the Governments respectively of New Brunswick or of Maine may make respecting the navigation of the said river, where both banks thereof shall belong to the same party.

It is said on behalf of the appellant that the above proviso amounted to a recognition by the British Government, as well as by the Government of the United States, that the power to make regulations respecting the navigation of the River St. John where both banks belonged to New Brunswick rested with the Government of New Brunswick; that this recognition constituted an undertaking or guarantee to the United States that the right to make such regulations should be and remain with the Government of New Brunswick only; that this right had become by virtue of the Treaty part of the municipal law of Canada; and accordingly that section 91 (10) of the British North America Act 1867 must be construed in such a manner as not to violate the guarantee so given to the United States or to interfere with the right of the province as recognised in the Treaty.

In their Lordships' opinion this argument is misconceived. It may be admitted that Article III of the Treaty proceeded upon the assumption that the Government of New Brunswick had at the date of the Treaty power to make regulations as to the navigation of the River St. John; but there was no undertaking or guarantee either to the United States or to New Brunswick that this power should remain unaltered. The effect of the proviso was that, if the Government of New Brunswick, in exercise of its powers, should make regulations not inconsistent with the Treaty, the Government of the United States would not interfere with those regulations; but their Lordships are at a loss to understand how such a provision for the protection of the existing powers of the Provincial Government could have created an

obligation on the part of the British Government to maintain those powers unaltered for all time. The British Government could, consistently with its engagements to the United States, vest the exclusive power to control the navigation of the river and the erection of bridges over it in the Dominion; and there was certainly no engagement to the Province of New Brunswick which would prevent that from being done. Upon the true and natural construction of the Act of 1867 those powers were so vested in the Dominion, and the change so made involved no violation of the Treaty, but was wholly consistent with it. If any question arose as to an obligation to the United States, it might be necessary to consider the effect of section 132 of the Act of 1867; but in fact no such question arises.

For these reasons it appears to their Lordships that the construction of the statutes above referred to was not affected by the Ashburton Treaty, and accordingly that the questions of law were rightly decided in favour of the defendants. In the circumstances the question of laches, which is mainly one of fact, need not be considered. Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. The costs of the respondent companies will be paid by the appellant.

In the Privy Council.

THE ATTORNEY-GENERAL OF NEW
BRUNSWICK

vs.

THE CANADIAN PACIFIC RAILWAY COMPANY
AND ANOTHER (RESPONDENTS) AND THE
ATTORNEY-GENERAL OF CANADA (INTER-
VENER).

DELIVERED BY THE LORD CHANCELLOR.

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