1967

*May 9
July 11

NICKEL RIM MINES LIMITED (*Appellant*) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL FOR ONTARIO (*Respondent*) ..... APPELLANT.

ON APPEAL FROM THE REGISTRAR

Practice and procedure—Costs—Taxation—Provincial Attorney General awarded costs of appeal—Attorney General represented on appeal by salaried solicitor—Whether entitled to allowance for counsel fee and preparation of factum—Supreme Court Act, R.S.C. 1952, c. 259, ss. 104, 105—Interpretation Act, R.S.C. 1952, c. 158, s. 15.

*PRESENT: Spence J. in Chambers.

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The change from the Common Law rule that it was improper to allow counsel fees in respect of services rendered by salaried officers representing the Crown on the taxation of costs awarded in favour of the Crown, brought about by s. 105 of the *Supreme Court Act*, R.S.C. 1952, c. 259, applies as much to the Crown in the right of a Province as to the Crown in the right of Canada. Consequently, the Registrar of this Court, in taxing the costs of a provincial Attorney General to whom costs of an appeal have been awarded by this Court, should allow proper counsel fee and proper fee for the preparation of factum, although the Attorney General was represented on the appeal by lawyers on salary in the Department of the Attorney General.

APPEAL by the Attorney General for Ontario from a decision of the Registrar of this Court on the taxation of the costs of the appeal[1] in this case. Appeal allowed.

A. E. Charlton, for the Attorney General for Ontario.

Brian Crane, for Nickel Rim Mines Ltd.

The following judgment was delivered by

SPENCE J. (*in Chambers*):—This is an application by way of appeal from the decision of the Registrar who, by his Allocatur dated May 3, 1967, taxed the costs of the respondent, the Attorney General for Ontario, at the sum of $442.50. The Registrar, in his written reasons, disallowed items claimed by the respondent, the Attorney General for Ontario, of $650 for counsel fee and $150 for costs of preparation of factum. The Registrar expressed the view that the Attorney General for Ontario could not claim profit costs for services performed by lawyers on salary in the Department of the Attorney General for Ontario.

The common law rule as to costs payable to the Crown under the Order of this Court was settled in *Hamburg-American Packet Co. v. The King*[2], where Maclennan J., in Chambers, disallowed such a claim relying on *Jarvis v. The Great Western Railway Co.*[3] and *The Charlevoix Election case: Valin v. Langlois,* Cassels Digest (2nd ed.), 677.

The problem is whether the provisions of s. 105 of the *Supreme Court Act* have wrought an alteration in the law as set out in the said decision. Section 105 of the *Supreme Court Act* reads as follows:

105. In any proceeding to which Her Majesty is a party, either as represented by the Attorney General of Canada or otherwise, costs

[1] [1967] S.C.R. 270, 60 D.L.R. (2d) 576.
[2] (1907), 39 S.C.R. 621.
[3] (1859), 8 U.C.C.P. 280.

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adjudged to Her Majesty shall not be disallowed or reduced upon taxation merely because the solicitor or the counsel who earned such costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered, and the costs recovered by or on behalf of Her Majesty in any such case shall be paid into the Consolidated Revenue Fund.

This section was enacted in 1917. The provisions which now appear as ss. 104 and 106 had been enacted in the year 1887.

The learned Registrar in his reasons relied on the wording of s. 104 of the statute to indicate that the provisions of s. 105 of the statute were restricted to the cases of the Crown in the right of Canada and particularly the reference to the Minister of Finance and to the Consolidated Revenue Fund of Canada in s. 104 and in s. 106(2). It must be observed, however, that the words which appear in s. 105 are not "The Consolidated Revenue Fund of Canada" but merely "The Consolidated Revenue Fund". Neither the *Supreme Court Act* nor the *Interpretation Act* bear any definition of the words "The Consolidated Revenue Fund" but the *Financial Administration Act,* R.S.C. 1952, c. 116, in s. 2(*e*) provides:

> 2. In this Act,
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> * * *
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> (*e*) "Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

Therefore, plainly, of course, in that statute but not elsewhere the words "The Consolidated Revenue Fund" even without the addition of the words "of Canada" refer to the federal Crown. As I shall indicate hereafter, I am of the opinion that the point is not material.

There is only one Crown although there are two separate statutory purses: *In re Silver Brothers*[1]. In determining whether s. 105 applies in favour of the Crown in the right of the province as well as the Crown in the right of Canada, one should have in mind the provisions of s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, which are as follows:

> 15. Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of

[1] [1932] A.C. 514, 2 D.L.R. 673, 1 W.W.R. 764, 53 Que. K.B. 418, 13 C.B.R. 223.

any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

In *A.G. for Quebec v. Nipissing Central Railway Co. & A. G. of Canada*[1], the Judicial Committee considered section 189 of the *Railway Act* of 1919 which, in subs. (1) provided:

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

and, in subs. (2), provided that any railway company might, with such consent, take for the use of its railway so much of the lands of the Crown lying in a certain area.

The Judicial Committee held that the section of the said federal statute authorized the railway company to take with the consent of the Governor in Council lands held by the Crown in the right of the Province of Quebec. Viscount Cave, L.C., said at pp. 720-721:

Their Lordships do not feel any doubt that s. 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 subs. 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 sub-section is machinery only, and there is no reason why the Governor in Council should not direct any compensation moneys received in respect of Provincial Crown lands to be handed over to the Government of the Province concerned.

The construction so put upon s. 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) authorized 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

[1] [1926] A.C. 715, 3 D.L.R. 545, 2 W.W.R. 552, 32 C.R.C. 96.

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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.

Again, in *A.G. of Alberta v. The Royal Trust Co.*[1], this Court dealt with the then s. 70 of the *Supreme Court Act* which now appears as s. 69 of the Act, R.S.C. 1952, c. 259. This Court held that the section which exempted the Crown from the provisions of the Act requiring the deposit of security for costs applied as well to the Crown in the right of Canada. The Court therefore refused to quash the appeal on the ground, inter alia, that it had not been properly instituted when no proper security had been given under the said s. 70.

I am of the opinion that the situation to which s. 105 was addressed is one equally applicable to the Provincial Crown as to the federal Crown. As directed by s. 15 of the *Interpretation Act*, I consider the provisions of s. 105 of the *Supreme Court Act* as being remedial in the case of the provincial Crown as well as the Dominion Crown. I adopt here the words of Tweedie J. in *Re Cardston U.F.A. Co-Op. Association Ltd., ex parte The King*[2]:

> It is quite true that the section is not in express words made applicable to the Crown in the right of the Province, but, if the intention of the Act as a whole is to place the Crown in regard to priorities in the same position as private creditors, then the expression "Crown" must be construed so as to include both the right of the Dominion and that of the Province.

For these reasons, I am of the opinion that the proper interpretation to be given to s. 105 of the *Supreme Court Act* is to apply it in favour of the Crown in the right of the Province of Ontario as well as the Crown in right of Canada and that the Registrar, therefore, should have allowed proper counsel fee and proper fee for preparation of factum.

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[1] [1944] S.C.R. 243, 3 D.L.R. 145.

[2] [1925] 4 D.L.R. 897 at 899, 3 W.W.R. 651, 7 C.B.R. 413.

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The appeal is therefore allowed with costs which by agreement of the parties are allowed at the sum of $100 and the Allocatur is referred back to the learned Registrar for amendment in accordance with these reasons. I express no view as to the quantum of the costs to be allowed for either item.

Appeal allowed with costs.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

Solicitors for Nickel Rim Mines Ltd: Day, Wilson, Campbell & Martin, Toronto.