CHAPTER VI

OTHER NEW BRUNSWICK CLAIMS

Two further claims were presented to us in our New Brunswick hearings, both requesting compensation from the Dominion.

THE HALIFAX AWARD

The Government of the Province of New Brunswick in the brief presented at the Commission’s hearings in Fredericton and again in its supplementary submission in Ottawa advanced a claim for a share of the Halifax Award made in 1877 under the provisions of the Treaty of Washington, 1871. These dates indicate that the claim arises from events which occurred many years ago and, as it was suggested that the claim for approximately $1,000,000 in 1877 should bear interest, the amount involved in this claim, as estimated by New Brunswick, is nearly $15,000,000.

The basis of the claim may be stated briefly. The Treaty of Washington, 1871, between Great Britain and the United States of America contained several provisions relating to fishing privileges on the Atlantic Coast. By Article XVIII Great Britain agreed to give to fishermen of the United States, in addition to the privileges accorded to them by the Convention of 1818, the additional liberty to—

"take fish of every kind, except shell-fish, on the seacoasts and shores and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia and New Brunswick, and the Colony of Prince Edward Island, and of the several islands thereunto adjacent without being restricted to any distance from the shore, with permission to land upon the said coasts, and shores, and islands, and also upon the Magdalen Islands, for the purpose of drying their nets, and curing their fish; provided that, in so doing, they do not interfere with rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose."

The right of British fishermen to the salmon and shell fisheries, and to all other fisheries in the rivers and mouths of rivers, was expressly reserved. Similar rights were given by Article XIX to British subjects in American waters, and provision was made by Article XXXII for the extension of the Treaty to Newfoundland. In Article XXII provision was made for the determination by arbitration of the “amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII,” having regard to the privileges accorded to British subjects by Articles XIX and XXI. Necessary legislation to implement the Treaty was passed not only by the British Parliament and the American Congress, but also by the Parliament of Canada and by the Legislatures of Prince Edward Island and Newfoundland. The provisions of the Treaty dealing with fisheries became effective on 1st July, 1873 (except as applicable to Newfoundland where they became effective on 1st June, 1874).

The three commissioners appointed pursuant to the Treaty met in Halifax in the summer of 1877 for the purpose of determining the compensation payable to Great Britain in accordance with the provisions of Article XXII. By a majority they awarded to Great Britain the sum of $5,500,000. After deducting costs and expenses Great Britain paid $1,000,000 to Newfoundland and the balance of $4,490,882.64 including interest, to Canada, and this sum was by Canada paid into the Consolidated Revenue Fund.

Shortly after receipt by Canada of this amount representations were made by the Maritime Members of Parliament and the Governments of the three Maritime Provinces that Canada’s share in the award moneys should be paid to the fishermen or to the governments of the respective provinces, but the Dominion took the position that the moneys belonged to Canada to be disposed of as Parliament might determine. Pressure from the Maritime Provinces continued from 1879 to 1882 and late in the parliamentary session of the latter year provision was made by Parliament for payment of bonuses amounting to $150,000 a year to fishermen and owners of fishing vessels. In 1891 the amount

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1 Brief of N.B., pp. 66-69. See also Ev. pp. 8740-79.
2 Ex. 413.
3 Ev. pp. 8753-54.

4 Statutes of Canada (1882), 45 Vict. c. 18.
appropriated for bonuses was increased to $160,000 and that sum has been paid yearly since that date. The payments of bonuses up to and including the year 1936 totalled $8,708,283, of which New Brunswick fishermen have received $935,145.6

Prince Edward Island, which was a separate colony when the Treaty of Washington was signed, had become a province of Canada when the fisheries articles came into operation on July 1, 1873. When the award was made Prince Edward Island claimed treatment similar to that accorded to Newfoundland. This was refused because during the period covered by the award Prince Edward Island was a province of Canada.

Since 1882 no serious attempt has been made by the Maritime Provinces to assert a claim to the award moneys. It was stated by counsel for New Brunswick that such a claim had never before been made to a commission, and in particular that it had not been made to the Duncan and White Commissions,7 although at least the former of these commissions had ample power to deal with such a claim. The Province of New Brunswick alone among the Maritime Provinces advanced before us the claim that “the amount paid to Ottawa as a result of the Halifax Award does not properly belong to New Brunswick”, with accrued interest, should be distributed to the provinces directly concerned” and retained by them “as a trust to promote the interests of the fishermen”.8 It was suggested in evidence that the present value of New Brunswick’s claim was approximately $15,000,000.9 At a subsequent hearing in Ottawa an elaborate argument on a new footing was made in support of this claim.10 It was argued that the provinces alone had legislative power to grant or withhold the liberty of drying nets and curing fish on the shore above high water mark, and, as the Treaty accorded these privileges to fishermen of the United States, New Brunswick should be compensated for this invasion of her rights.

No question can arise as to the power of Great Britain to enter into the Treaty of Washington, or the power of the Imperial Parliament to implement the Treaty. In addition to the Imperial legislation Canada, Prince Edward Island and Newfoundland were requested to pass, and actually enacted, the necessary legislation to implement the provisions of the Treaty within their respective jurisdictions. By the express terms of the Treaty (Article XXII) the amount of the award was to be paid to the “Government of Her Britannic Majesty”. We think it is beyond question that the Imperial Government was free to use the amount of the award in its uncontrolled discretion, and in the exercise of that discretion it saw fit to pay $1,000,000 to Newfoundland and the balance to Canada, in both cases unconditionally, free from any trust or direction as to the uses to be made of the moneys. It was argued by counsel for New Brunswick11 that the moneys thus paid to the Dominion Government constituted a trust fund, but we are unable to find any evidence of the creation of a trust or is it possible to discover who would be the beneficiaries of it. In the New Brunswick submission it is indeed not contended that the Province has a beneficial interest in the amount claimed, and it is difficult to understand upon what basis the Province can establish a right to be constituted the trustee of a fund held by someone else.

It was suggested in argument that the Dominion’s right to retain the share of the award transmitted to it by the British Government could not be based upon any proprietary right of the Dominion in the fisheries as a decision of the Privy Council in 1898 denied the existence of such a proprietary right.12 It was argued further that the Dominion is not entitled to this money because of its responsibility for the regulation of fisheries, as this is a responsibility specifically imposed by the British North America Act for which the Dominion is not entitled to receive financial assistance.13 In view of the fact that the payment by Great Britain to Canada was made without conditions, it appears to us that it is not for the Dominion to establish its right to retain this fund, but rather it is for the Province which asserts a claim to establish its right to receive a portion of it. There has been great delay in asserting the claim by the Province of New Brunswick, but we are unwilling to dispose of it on the ground of lapse of time alone.

In the submission at Fredericton the Province based its claim on the suggestion that its “shore fishing rights were involved in the Treaty of Washington”,14 No precise explanation of this suggestion was given, but if it was intended to imply

5 Statutes of Canada (1891), 54-55 Vict. c. 42.
6 Brief, p. 67.
7 Ev. p. 8765.
8 Brief, pp. 67-68.
9 Ev. pp. 8753-54.
10 Supplementary brief.
11 Ev. p. 8762.
14 Brief, p. 67.
that there was a provincial power to regulate shore fishing rights, there is an obvious error as the regulation of fishing is under exclusive Dominion jurisdiction. It is probable that the suggestion refers to the use of the shore for fishing purposes, such as the right to dry nets and cure fish on the shore; this matter was discussed at great length at the supplementary hearing at Ottawa. It was argued that a portion of the award should be given to the provinces concerned because their jurisdiction to regulate the drying of nets and curing of fish on the shore had been invaded by the provisions of the Treaty. It appears that New Brunswick has never in fact sought to regulate these matters, and the Treaty did not, therefore, interfere with the operation of any existing provincial regulations. Moreover, it is extremely doubtful whether the rights to land on the shore for the purpose of drying nets and curing fish were at the time of the Treaty of any real value. The matter was mentioned in the brief filed by Great Britain before the Halifax Fisheries Commission but little evidence concerning it was given, and the subject was entirely ignored in the concluding argument of counsel for Great Britain. Counsel for the United States argued that the concession was of no value, and that the practice of using the shore for drying nets and curing fish "belonged to the primitive usages of a bygone generation"; these statements went unchallenged by opposing counsel. If these rights were of little value to the fishermen to whom they were granted, it follows that the damages done by the infringement of the provincial right to regulate must have been infinitesimal.

We cannot find that, upon any of the grounds argued by the Province, any claim as of right against the Dominion has been established. In so far as the provincial claim is based upon a plea for justice and fair dealing we feel that the Dominion by its bounty system has compensated those who suffered loss by the grant under the Treaty of fishing privileges to the American fishermen, namely, the Canadian fishermen with whom the fishermen of the United States came into competition and, therefore, that the Province of New Brunswick has no claim in equity. Although there is nothing to show any direct connection between the fishing bonuses and the moneys received by the Dominion from the Halifax Award, the amount of the bonuses is approximately equivalent to interest on these moneys at a rate of slightly over 3½ per cent.

We are of the opinion that the Dominion, because of its jurisdiction to regulate fisheries, is in a position to administer these bonuses. Yet they have given rise to some dissatisfaction. A subsidiary argument was advanced by New Brunswick in which it was alleged that the distribution of the fishing bonus (which New Brunswick contends bears no connection with the Halifax Award) was inequitable as New Brunswick fishermen received only 10.7 per cent of the bonus although they produced 26.1 per cent of the fish products of the Maritime Provinces and Quebec. This is a claim that a Dominion statute, clearly within the competence of the Dominion Parliament, dividing a sum of money among fishermen in different provinces, gave New Brunswick fishermen too little and other fishermen too much. It is thus a claim based on the alleged unfairness of Dominion policy as between fishermen of different provinces, and as such is not within our terms of reference.

Compensation for Excess Freight Rates 1912-1927

The Province of New Brunswick addressed to us a claim for compensation for loss caused to the people of the Province by the excessive freight rates on the railways in the Maritime Provinces between 1912 and 1927. It was submitted by counsel on behalf of the Provincial Government that in this instance it was acting in the interests of shippers who had sustained loss, and that any moneys paid under the claim would be held in trust and distributed to the proper parties if they could be found.

The Duncan Commission found that freight rates after 1912, when they had been raised, were excessively high and that such rates placed upon
the traffic a burden which was never intended it should bear. The Duncan Commission found that, owing to excessive mileage on the Intercolonial railway alleged to be due to military and strategic reasons, a 20 per cent differential from rates in Central Canada should be allowed on traffic which originated or terminated at Maritime points. The findings of that Commission as to freight rates were subsequently implemented by the Maritime Freight Rates Act21 (1927) and the recommendation that a 20 per cent differential should be allowed, the cost of which was to be borne by the Dominion, was put into effect. The Province of New Brunswick claimed that the preamble to the Maritime Freight Rates Act amounted to a parliamentary declaration that the rates charged for freight after 1912 were excessive and unwarranted.22

Elsewhere in this Report23 we have discussed at some length the validity of the contention that a claim as of right lies against the federal authority on behalf of a province for compensation for the adverse effects of federal policies upon a province or its people. For the reasons there set forth we have reached the conclusion that such claims are inadmissible. The claim by the New Brunswick Government which we are now examining would seem to come within this category. The action complained of was taken by the Intercolonial Railway, an agent of the Dominion Government.

While it may be argued that the Duncan Commission found that freight rates after 1912 were higher than it was ever intended the traffic should bear, and that the preamble to the Maritime Freight Rates Act admits this finding, it cannot be said that any contractual obligation to maintain rates at the differential applicable before 1912 ever existed. Intentions with respect to freight rates in so far as they had been declared, were declared solely as a matter of public policy, and these declarations never assumed the character of a contract. We are unable to see how this claim of New Brunswick differs in any substantial way from claims for compensation for adverse effects of the customs tariff or of federal monetary policy which we have elsewhere held invalid. We, therefore, conclude that this claim of the Province of New Brunswick should not be allowed.

Although we have denied both claims discussed in this chapter we wish to repeat what we have said previously, that claims of this sort whatever their merits have by and large indicated real fiscal need in the claimant province. This, we think, is particularly apropos of the claims discussed in this chapter. We have noted in our financial section that New Brunswick is in a difficult financial and economic position, and we have recommended changes in financial relations with the Dominion which take account of the Province’s real fiscal need. Thus, while we have disallowed the claims on their merits, we have not been blind to the condition of need under which the Province labours.

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21 Statutes of Canada (1926-27), 17 Geo V. c. 44.
22 Brief, p. 58.
23 See Sect. P, Ch. I.