

# In the Privy Council.

No. 118 of 1936.

## ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

IN THE MATTER of THE CONSTITUTIONAL QUESTIONS ACT,  
being Chapter 60 of The Revised Statutes of Saskatchewan,  
1930,

and

10 IN THE MATTER of a REFERENCE pursuant thereto by THE  
LIEUTENANT-GOVERNOR IN COUNCIL TO THE COURT OF  
APPEAL for the hearing and consideration of certain questions  
arising under The Income Tax Act, 1932, being Chapter 9  
of The Statutes of Saskatchewan, 1932, and amendments  
thereto.

BETWEEN

THE JUDGES - - - - - *Appellants*

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE  
OF SASKATCHEWAN - - - - - *Respondent.*

## CASE FOR THE APPELLANTS.

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1. This is an appeal from a judgment of the Court of Appeal for Saskatchewan dated the 6th day of June, 1936, answering in the affirmative certain questions referred to the Court by the Lieutenant-Governor in Council for hearing and consideration pursuant to The Constitutional Questions Act, being Chapter 60 of the Revised Statutes of Saskatchewan, 1930. Record.  
p. 4.  
p. 1.

2. The questions so referred were :—

(1) Are Judges (A) of the Court of Appeal, (B) of the Court of King's Bench, (C) of the District Courts, of the Province of p. 2, l. 13.

Record.

Saskatchewan, appointed by His Excellency, the Governor-General, pursuant to Section 96 of the British North America Act, 1867, subject to the taxation authorised by The Income Tax Act, 1932, of Saskatchewan, being otherwise persons subject to the provisions of the said Act ?

p. 2, l. 20.

(2) If the said Judges or any of them are subject to the said taxation, then has the Legislature of Saskatchewan legislative authority to include in income for the purposes of The Income Tax Act, the salary and allowances of the said Judges or any of them paid pursuant to the provisions of the Judges Act, being Chapter 105 of the Revised Statutes of Canada, 1927 ? 10

3. The Income Tax Act, 1932, being Chapter 9 of the Statutes of Saskatchewan, 1932, provides as follows :—

2. In this Act, unless the context otherwise requires, the expression :

\* \* \* \* \*

(8) " Person " means an individual, and includes a guardian, trustee, executor, administrator, agent, receiver or any other individual, firm or corporation acting in a fiduciary capacity, and the heirs, executors, administrators, successors and assigns of such person ;

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\* \* \* \* \*

(11) " Taxpayer " means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act ;

(12) " Year " means the calendar year.

3. For the purposes of this Act, " income " means the annual net profit or gain or gratuity . . . directly or indirectly received by a person . . . whether derived from sources within Saskatchewan or elsewhere ; and includes the interest dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including :

\* \* \* \* \*

(c) the salaries, indemnities or other remuneration of all persons whatsoever, whether the said salaries indemnities or remuneration are paid out of the revenue of His Majesty in respect of his Government of Canada, or of any province thereof, or by any person except as herein otherwise provided ; and

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(D) all other gains or profits of any kind derived from any source within or without the province whether received in money or its equivalent.

Record.

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7. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person :

(A) residing or ordinarily resident in Saskatchewan during such year ; or

(B) who remains in Saskatchewan during any year for a period or periods amounting to one hundred and eighty-three days ;

(C) who is employed in Saskatchewan during such year ; or

(D) who, not being resident in Saskatchewan, is carrying on business in Saskatchewan during such year ; or

(E) who, not being resident in Saskatchewan, derives income from services rendered in Saskatchewan during such year, otherwise than in the course of regular or continuous employment for any person resident or carrying on business in Saskatchewan ;

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule to this Act, upon the amount of income in excess of the exemptions granted by this Act ; provided that the said rates shall not apply to corporations and joint stock companies other than personal corporations.

**4.** The Act contains exemptions immaterial to this appeal in favour of consuls, charitable and religious institutions and others. No special provision is made for taxing or for exempting from taxation judges' salaries or allowances or the salary of the Lieutenant-Governor.

**5.** The Act provides for personal allowances and deductions to be made in ascertaining the taxable income. These deductions include

5. (1) (f) travelling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business ;

**6.** The Act also provides machinery for assessment and collection, under which, *inter alia* every person liable to taxation and every employer is required to make a return, the Provincial Treasurer can require information and exercise compulsory powers in investigating a taxpayer's income, and the tax can be collected as a debt due to the Crown, by garnishee or distress and in other ways. By section 53 a right of appeal

Record. to the Provincial Treasurer is given against assessment, and by section 54 (1) an appeal lies from the decision of the Provincial Treasurer to a judge of the Court of King's Bench.

**7.** The Act was amended in 1933, 1934 and 1935 and in 1936 was replaced by a new Income Tax Act, being Chapter 15 of the Statutes of Saskatchewan, 1936, but the changes made are not relevant to this appeal.

**8.** In the early history of Canada there had been a constitutional struggle to secure the independence of the judiciary and before Confederation security of tenure of office by and fixed salaries for judges were established. Following the then law in England these salaries were made "free and clear of all taxes and deductions whatsoever." The British North America Act, 1867, provided for the judicature in Canada by sections 96 to 101 inclusive. Under section 96 the duty of appointing judges is entrusted to the Governor-General, and by section 100 :

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

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**9.** In accordance with the power so conferred the Parliament of Canada fixed the salaries, allowances and pensions of judges by 32 and 33 Vict. cap. 8 which provided that they should be "free and clear of all taxes and deductions whatsoever imposed under any Act of the Parliament of Canada."

**10.** The Parliament of Canada in 1920 by an Act to Amend the Judges Act (10 and 11 Geo. 5 cap. 56), substantially increased the salaries of all judges, and provided that any judge accepting the increase should be taxable under the Dominion Income War Tax Act. By amendment of the Income War Tax Act in 1932 (22 and 23 Geo. 5 cap. 44) a special tax of 10 per cent. was imposed on judges salaries and in 1935 (by 25 and 26 Geo. 5 cap. 22) the special tax was reduced to 5 per cent.

**11.** Superior Courts of Law were first instituted in the North West Territories, which included what is now the Province of Saskatchewan, by legislation of the Parliament of Canada (49 Vict. cap. 25, consolidated in the Revised Statutes of Canada 1886, cap. 50) and the Provincial Courts in Saskatchewan are constituted by chapter 8 of the Statutes of Saskatchewan 1907, chapter 10 of the Statutes of Saskatchewan 1915 and chapter 30 of the Revised Statutes of Saskatchewan, 1930.

**12.** In addition to salary a judge in Saskatchewan also receives or may receive a *per diem* allowance to cover the cost of living when attending in court or in chambers in places other than that where he resides, and to cover actual travelling expenses. Liability to tax in respect of such allowances is also in question in this appeal. A judge's salary and allowances are paid by the Receiver-General of Canada into the branch in Ottawa of any bank in Canada designated by the judge, and the amount so paid can be drawn by the judge at any branch in Canada of such bank.

Record.

**13.** After hearing argument on the 7th May 1936 the Court of Appeal (Haultain, C.J.S., Martin, Mackenzie and Gordon, J.J.A.) took time for consideration and on the 6th June, 1936, pronounced judgment answering in the affirmative both questions submitted. The reasons for the judgment of the Court, delivered by Martin, J.A., held that the salaries and allowances of the judges were income of persons residing in Saskatchewan, and within the meaning of the section defining income as

p. 5, l. 34.

p. 4.

pp. 6-10.

Including . . . the salaries, indemnities or other remuneration of all persons whatsoever, whether the said salaries, indemnities or remuneration are paid out of the revenue of His Majesty in respect of his Government in Canada, or of any Province thereof.

**20** The rule of construction given in the judgment of the Judicial Committee in *Martineau v. Montreal* [1932] Appeal Cases 113 was, in the Court's opinion, to be read as applicable to the facts of that case and could not be construed so as to affect in any way the powers of the provinces to tax directly the income of all persons resident in a province including Superior, District and County Court Judges. There is no discrimination and no ground, in the absence of express provision, for exempting the salaries of judges from the incidence of the tax. Neither, in the Court's opinion, did the provision in the British North America Act in section 100 that "the salaries, allowances, and pensions of the judges . . . shall be fixed and provided by the Parliament of Canada" limit the power of the province to tax the salaries and income of judges to the same extent as the salaries and income of other residents. Apart from decisions in the United States the Court considered that authority supported an affirmative answer to the questions submitted.

p. 8.  
ll. 1-38.p. 8, l. 39,  
p. 9, l. 3.p. 9, l. 4,  
p. 10, l. 30.

**14.** The Appellants respectfully submit that the judgment of the Court of Appeal upon the questions referred is wrong and that the questions should both be answered in the negative, for the following

### REASONS.

- (1) BECAUSE on its proper construction the Income Tax Act does not impose a tax on judges in respect of their judicial salaries and allowances ;

Record.

- (2) BECAUSE the salary of a judge fixed and provided by the Parliament of Canada is for the purpose of enabling him to sustain with decorum and propriety his rank in life, and properly to perform the duties of his judicial office, and is not an annual profit or gain ;
- (3) BECAUSE the allowances made to a judge under the Judges' Act are to reimburse him for disbursements and expenses exclusively and necessarily expended for the purpose of performing his duties ;
- (4) BECAUSE the salaries fixed in 1920 by the Parliament 10 of Canada were fixed on the basis of income taxation only under The Income War Tax Act, and amendments thereto, passed by the Parliament of Canada, and are not subject to other taxation by the province ;
- (5) BECAUSE the duty of maintaining an efficient, independent and impartial judiciary in Canada has by the British North America Act been imperatively placed on the Governor-General and Parliament of Canada, and that duty is inconsistent with the exercise of a power in the province to reduce by taxation the salary and 20 allowances which in the public interest have been fixed for the purpose of maintaining such a judiciary ;
- (6) BECAUSE judges in exercising the functions of their office are commissioners of the Crown administering in the name of His Majesty the King the royal prerogative of justice, and in all matters pertaining thereto are removed from provincial jurisdiction ;
- (7) BECAUSE the Income Tax Act is beyond the legislative power of the Provincial Legislature in that it purports to base the taxation of income on former residence within 30 the province irrespective of the situs of the property taxed ;
- (8) BECAUSE, if the provisions of the Income Tax Act, can be held to apply to judges, then such of those provisions as purport to treat judges as employees in the civil service of the Dominion, are beyond the competence of the Provincial Legislature.

FRANK GAHAN.

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