

31, 1937

In the Privy Council

No.....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

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*

RECORD OF PROCEEDINGS

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RECORD OF PROCEEDINGS.

In the Privy Council

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BETWEEN

THE JUDGES - - - - - *Appellants*

AND

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

RECORD OF PROCEEDINGS

No. 1.

Order of Reference by the Lieutenant Governor in Council.

CERTIFIED copy of a Minute of The Executive Council of Saskatchewan, dated at Regina on Wednesday, the twenty-second day of January, 1936, and approved by His Honour The Lieutenant Governor.

*In the
Court of
Appeal for
Saskatchewan*

No. 1.
Certified copy
of a Minute,
etc., as above.

The Executive Council has had under consideration a report from the Attorney General, dated January 21, 1936, stating that certain Judges of the Courts of Saskatchewan appointed by the Governor General pursuant to the provisions of section 96 of the British North
10 America Act, 1867, have failed to comply with the provisions of The Income Tax Act, 1932, being chapter 9 of the Statutes of Saskatche-

*In the
Court of
Appeal for
Saskatchewan*

No. 1.
Certified copy
of a Minute,
etc., as above
—continued.

wan, 1932, and amendments thereto, and have raised the question whether Judges appointed as aforesaid are subject to taxation authorized by The Income Tax Act, 1932.

The Minister further states that it is deemed expedient that such question should be referred to the Court of Appeal for Saskatchewan for judicial determination.

Upon consideration of the foregoing report and on the recommendation of the Attorney General, the Executive Council advises that the following questions be referred to the Court of Appeal for Saskatchewan for hearing and consideration pursuant to the provisions of The Constitutional Questions Act, being chapter 60 of the Revised Statutes of Saskatchewan, 1930: 10

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 Saskatchewan, appointed by His Excellency, the Governor General, pursuant to section 96 of the British North America Act, 1867, subject to the taxation authorized by The Income Tax Act, 1932, of Saskatchewan, being otherwise persons subject to the provisions of the said Act?
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? 20

J. W. McLEOD,
Clerk of the Executive Council.

Executive Council Office,
Jan. 25, 1936,
Regina,
Saskatchewan.

No. 2.

Order of Reference and Direction.

In the Court of Appeal for Saskatchewan

IN THE COURT OF APPEAL FOR SASKATCHEWAN

No. 2. Order for Reference and Direction.

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

BEFORE: THE HONOURABLE THE CHIEF JUSTICE OF SASKATCHEWAN, THE HONOURABLE MR. JUSTICE MACKENZIE, THE HONOURABLE MR. JUSTICE GORDON. } MONDAY, the 3rd day of February, A.D. 1936.

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ORDER

UPON THE APPLICATION of counsel on behalf of the Government of the Province of Saskatchewan, Mr. J. L. McDougall, K.C., appearing on behalf of the Government, and upon reading a certified copy of a Minute of the Executive Council of Saskatchewan, dated at Regina on Wednesday, the twenty-second day of January, 1936, and approved by His Honour the Lieutenant Governor whereby the Lieutenant Governor in Council referred to the Court of Appeal for Saskatchewan for hearing and consideration pursuant to the provisions of The Constitutional Questions Act the following questions:

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

*In the
Court of
Appeal for
Saskatchewan*

No. 2.
Order for
Reference and
Direction—
continued.

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?

IT IS HEREBY ORDERED that the matter so referred as aforesaid be heard by the court at the next sittings of the court at Regina, commencing on Monday, the 6th day of April, A.D. 1936;

IT IS HEREBY DIRECTED that the judges of the Court of King's Bench 10 and the judge of each of the District Courts be notified of the hearing by serving personally a copy of this order upon The Honourable The Chief Justice of the Court of King's Bench and His Honour Judge Ross of the District Court of the Judicial District of Yorkton and by mailing a copy of this order to each of the other judges aforesaid;

AND IT IS FURTHER ORDERED AND DIRECTED that at the said hearing one counsel only shall be heard on behalf of the Judges of the Court of King's Bench and one counsel only shall be heard on behalf of the Judges of the District Courts.

R. CHARLTON, 20
Registrar.

[COURT SEAL]

No. 3.

Formal Judgment.

IN 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 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 30 thereto.

BEFORE THE HONOURABLE CHIEF JUSTICE HAULTAIN
THE HONOURABLE MR. JUSTICE MARTIN
THE HONOURABLE MR. JUSTICE MACKENZIE
THE HONOURABLE MR. JUSTICE GORDON

SATURDAY,
*the 6th day of
June, 1936*

WHEREAS by Minute of the Executive Council of Saskatchewan, bearing date the twenty-second day of February, in the year of our Lord one thousand nine hundred and thirty-six, and approved by His Honour the Lieutenant Governor of Saskatchewan, the questions here-

*In the
Court of
Appeal for
Saskatchewan*

No. 3.
Formal
Judgment.

inafter set out were referred to the Court of Appeal of Saskatchewan for hearing and consideration pursuant to the provisions of The Constitutional Questions Act, being chapter 60 of The Revised Statutes of Saskatchewan, 1930, namely:—

*In the
Court of
Appeal for
Saskatchewan*

No. 3.

Formal
Judgment—
continued.

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

AND WHEREAS by order of the said Court of Appeal under date of the third day of February in the year of our Lord one thousand nine hundred and thirty-six, the matters so referred were ordered to be heard at the next sittings of the said Court of Appeal commencing on the sixth day of April, in the year of our Lord one thousand nine hundred and thirty-six;

AND WHEREAS the said questions came before this Court for hearing on the seventh day of May, in the year of our Lord one thousand nine hundred and thirty-six, in the presence of counsel for the Attorney General of the Province of Saskatchewan, and for the Judges;

WHEREUPON and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said reference should stand over for consideration, and the same having come on this day for determination, the following judgment was pronounced:—

The first question is answered in the affirmative.

The second question is answered in the affirmative.

R. CHARLTON,
Registrar.

No. 4.

In the
Court of
Appeal for
Saskatchewan

Reasons for Judgment.

No. 4.
Reasons for
Judgment.

JUDGMENT OF THE COURT

[Delivered by MARTIN, J.A.]

This is a reference by the Lieutenant Governor in Council under the provisions of the Constitutional Questions Act, chapter 60, R.S.S. 1930. By section 2 of the Act it is provided that the Lieutenant Governor in Council may refer to the Court of Appeal for hearing and consideration any matter which he thinks fit, "And the Court shall thereupon hear and consider the same." In section 3 it is provided that the Court shall certify to the Lieutenant Governor in Council its opinion on the matter referred. "With the reasons therefor, which shall be given in like manner as in the case of a judgment in an ordinary action."

The matter involved in the present reference is whether or not the salaries of the Judges of the Court of Appeal, the Court of King's Bench, and the District Court are subject to taxation under the provisions of The Income Tax Act, chapter 9, of the Statutes of Saskatchewan, 1932. The questions submitted are as follows:

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 Saskatchewan, appointed by His Excellency, the Governor General, pursuant to section 96 of the British North America Act, 1867, subject to the taxation authorized by The Income Tax Act, 1932, of Saskatchewan, being otherwise persons subject to the provisions of the said Act? 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? 30

It is a fundamental rule in the administration of justice that where a Judge is interested in the result of litigation he cannot sit in judgment upon it. *Nemo debet esse iudex in propria sua causa*. Proceedings have been frequently set aside because a Judge who had an interest in the cause took part in the decision. According to the rule, therefore, the Members of the Court should not participate in the reference, because each of us has a pecuniary interest in the result. The rule, however, does not apply where the Courts acts *ex necessitate*, e.g., where an action is brought against all the Judges of the Court in a matter over which the Court has exclusive jurisdiction. *Dimes vs. Grand Junction Canal Co.*, 3 H.L.C. 787. *Ranger vs. Great Western Railway* 40

Co., 5 H.L.C., p. 88, per Lord Cranworth. Boulton vs. the Church Society, 15 Grant, 450. City of Toronto vs. Morson, 37 O.L.R., p. 369. The present reference has been made to the Court of Appeal under the provisions of The Constitutional Questions Act, and the Court is required not only to hear and consider the subject referred, but also to certify its opinion to the Lieutenant Governor in Council, and to give reasons therefor. Moreover, all Judges of the Province have the same interest in the result of the reference, as have the members of this Court. The Court, therefore, acts *ex necessitate*.

*In the
Court of
Appeal for
Saskatchewan*

No. 4.
Reasons for
Judgment—
continued.

10 Section 3 of The Income Tax Act defines "income" for the purposes of the Act as follows:

"For the purposes of this Act, 'income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments, or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, 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:

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(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 in Canada, or of any province thereof, or by any person, except as herein otherwise provided."

30

Section 7 provides that the income of every person "residing, or ordinarily resident in Saskatchewan" shall be assessed and liable to a tax at the rates provided by the Act. A long list of exemptions from taxation are set out in section 4, but none of them have any bearing upon the matter with which we are here concerned.

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Judges of the Court of Appeal, of the Court of King's Bench, and of the District Courts are persons or individuals residing in Saskatchewan, and are in receipt of salaries out of the revenues of His Majesty in respect of His Government in Canada, and are therefore subject to the provisions of the Act, unless, therefore, by virtue of their position as Judges appointed under the provisions of section 96 of the British North America Act, they are exempt from taxation by the provinces in respect of their incomes they are subject to such taxation just as other persons resident in the province.

By section 96 of the British North America Act exclusive power is conferred on the Governor General to appoint the Superior, District, and County Court Judges; by section 100 it is enacted that the salaries of these judges "shall be fixed and provided by the Parliament of Canada" and section 99 provides that the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons. These provisions are similar to those of the Act of Settlement of 1700, which were designed to protect the independence of the Bench. *In Martineau vs. Montreal, 1932, 1 W.W.R., p. 302; 101 L.J.P.C., 49,* 10 Lord Blanesburgh in delivering the judgment of the Privy Council stated that section 96 of the British North America Act, when supplemented by sections 99 and 100 "is shown to lie at the root of the means adopted by the framers of the Statute to secure the impartiality and independence of the Provincial Judiciary. A Court of construction would, accordingly, fail in its duty if it were to permit these provisions, and the principle therein enshrined, to be impinged upon in any way by provincial legislation.

We do not think that the words of Lord Blanesburgh can be construed so as to affect in any way the powers of the provinces to directly tax the income of all persons resident in a province, including Superior, District and County Court Judges. His words must be read as applicable to the facts of the case, and the question was whether the President of the Public Service Commission of the Province of Quebec in assessing compensation for property expropriated by the City of Montreal under authority given him by the City Charter and the Public Service Commission Act of the province was acting as a Judge of a Superior, District or County Court, and whether the province, in appointing him, was trespassing upon the powers conferred upon the Governor General under section 96 to appoint such judges. 20 30

By section 92, clause 2, of the British North America Act, the Legislatures of the provinces are given exclusive powers to make laws on the subject of "direct taxation within the province in order to the raising of a revenue for provincial purposes." Acting under the power thus conferred the Legislature of Saskatchewan has enacted that every person resident, or ordinarily resident in the province, shall pay a tax on his income at the rates prescribed by the Act. A resident of the province is none the less so because he is a Judge appointed by the Governor General. The statute imposes a provincial tax of general application; there is no discrimination, it is aimed at all residents in the province, and there is no ground, in the absence of express provision, for exempting the salaries of Judges from the incidence of the tax. In our opinion there is nothing in sections 96, 99 and 100 of the British North 40

America Act which places limitation upon the powers of the province to tax the salaries and income of Judges to the same extent as the salaries and income of other residents.

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On the argument our attention was called to the words of section 100, "The salaries, allowances, and pensions of Judges . . . shall be fixed and provided by the Government of Canada," and it was contended that the word "fixed" implies stability, security and non-interference, and while it may permit of salaries being increased, it prevents the decrease of a Judge's salary, by means of taxation
10 or otherwise, during his continuance in office. This contention, however, loses much of its significance because of the fact that the word "fixing" is used in *section 91, clause 8, of the British North America Act* in defining the power of the Parliament of Canada with respect to the salaries of civil servants. In *Abbott vs. St. John*, 40 *S.C.R.* 597, the Supreme Court of Canada held that members of the Civil Service of Canada were liable to taxation in the province in which they resided, in respect of their salaries as officials of the Dominion Government. And very recently in two appeals from the Court of Appeal of the Province of Manitoba which were consolidated in the
20 Supreme Court, *Attorney General for Manitoba vs. Worthington*, 1934, *W.W.R.* 658, and *Attorney General for Manitoba vs. Forbes*, 1934, 3 *W.W.R.* 681, it was held by a majority of the Supreme Court (1936, *C.L.R.*, p. 40) that the Province of Manitoba, under the powers conferred upon it with respect to direct taxation within the province, could levy an income tax upon the salaries of officers of the Permanent Force of the Active Militia of Canada, and upon the salaries of members of the Civil Service employed by the Government of the Dominion of Canada.

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Reasons for
Judgment—
continued.

There appears to be no direct authority on the subject which is
30 binding upon this Court. The High Court of Australia, however, held in *Cooper vs. Commissioner of Income Tax (1907) 4, Commonwealth Law Reports, 1304*, that a Judge was not, by virtue of his office, exempt from taxation of a general kind imposed upon all without discrimination. In *Krause vs. Commissioner of Inland Revenue (1929) App. Div., 286*, it was held by the Appellate Division of the Supreme Court of South Africa that, notwithstanding the provisions of section 100 of the South African Act, which enacted that the Judges of the South African Supreme Court should receive such remuneration as Parliament prescribes, and that their remuneration should not be diminished during
40 their term of office, such Judges were not exempted from paying income tax, on the amount of their salaries, under the Income Tax Act (1925) of the Union of South Africa. There is also a decision of the Court of Appeal of the Province of Ontario, *City of Toronto vs. Morson*, 40, *O.L.R.*, 227, in which it was held that a Judge of the County Court was not exempt from municipal taxation under provincial legislation in re-

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No. 4.
Reasons for
Judgment—
continued.

spect to his salary or income. The Ontario Court followed the decision of the Supreme Court of Canada in *Abbott vs. St. John* supra, and apparently made no distinction between the position of Judges appointed under section 96 of the British North America Act and the position of members of the Civil Service of Canada, as no reference is made in the judgment to sections 96, 99 and 100 of the British North America Act.

The subject of the taxation of the salaries of Judges of the Federal Courts has been dealt with by the courts of the United States. Article 3, Section 1, of the American Constitution provides that the compensation of Federal Judges shall not be diminished during their continuance in office. In *McCulloch vs. Maryland*, 4, *Wheat*. 317, it was held that the States could not exercise a power of taxation over Federal agencies, including the Judiciary. In *Evans vs. Gore*, 253, *N.U.S.* 245, it was held (Holmes and Brandies, J.J., dissenting) that Article 3, Section 1 of the Constitution made it unconstitutional for Congress to levy an income tax on the salaries of Judges, because that would amount to a diminution of salary. This decision was relied upon in *Krause vs. Commissioner of Inland Revenue*, supra, but the Appellate Division of the Supreme Court of South Africa followed the dissenting judgment of Holmes, J., who is reported at page 265 of the Reports as saying: 10

“To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a Judge. I can see nothing in the purpose of the clause of the Constitution to indicate that Judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their wellbeing, if not their life, depends.”

We are of the opinion that both questions in the reference should be answered in the affirmative. 30

GIVEN AT REGINA, this 6th day of June, A. D. 1936.

W. M. MARTIN,
J. A.

No. 5.

Leave to Appeal and Order as to Costs.

In the Court of Appeal for Saskatchewan

IN THE COURT OF APPEAL FOR SASKATCHEWAN

No. 5. Leave to Appeal and Order as to Costs.

In the Matter of The Constitutional Questions Act, being chapter 60 of The Revised Statutes of Saskatchewan, 1930, and 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.

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ORDER

BEFORE HONOURABLE CHIEF JUSTICE HAULTAIN
HONOURABLE MR. JUSTICE BIGELOW (ad hoc)
HONOURABLE MR. JUSTICE GORDON } MONDAY, the 15th day of June, A.D. 1936

UPON motion made in this Court this day on behalf of the Judges for leave to appeal to His Majesty in Council from the judgment of this Court dated the 6th day of June, 1936, and upon hearing counsel for the Judges and counsel for the Government of the Province of Saskatchewan, and counsel having stated that by consent of all parties no costs of or incidental to the proposed appeal are to be claimed by or awarded to any party thereto, and upon counsel for the Government of the Province of Saskatchewan consenting hereto;

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THIS COURT DOTH ORDER that the Judges have leave to appeal to His Majesty in Council from the said judgment;

IT IS FURTHER ORDERED that bonds or security for costs of said appeal be dispensed with and that each party thereto pay its own costs thereof.

R. CHARLTON, Registrar.

APPROVED AND CONSENTED TO this 15th day of June, A.D. 1936.

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J. L. McDougall, Counsel for the Government of the Province of Saskatchewan.

W. M. Rose, Of Counsel for the Judges.

BLAKE & REDDEN,
17, Victoria Street,
London, S.W.1,
for the Appellants, the Judges.

J. M. ISAACS,
High Holborn House,
52-54, High Holborn,
London, W.C.1,
*for the Respondent, the Attorney
General of Saskatchewan.*