In the Privy Council.

No. 101 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact the Employment and Social Insurance Act, being Chapter 38 of the Statutes of Canada, 1935.

BETWEEN

THE ATTORNEY GENERAL OF CANADA - - - *Appellant*

AND

THE ATTORNEYS GENERAL OF THE PROVINCES OF ONTARIO, QUEBEC, NEW BRUNSWICK, MANITOBA, BRITISH COLUMBIA, ALBERTA AND SASKATCHEWAN - - - - - - - *Respondents.*

CASE OF THE APPELLANT THE ATTORNEY GENERAL OF CANADA.

RECORD.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 17th day of June, 1936, answering a question referred to the said Court for hearing and consideration by Order of His Excellency the Governor General in Council, dated the 5th day of November, 1935 (P.C. 3453), pursuant to the provisions of Section 55 of the Supreme Court Act, touching the constitutional validity of The Employment and Social Insurance Act, Chapter 38 of the Statutes of Canada, 1935. pp. 76–77. pp. 52–53. pp. 3–4.

2. The question so referred to the said Court was as follows :—

"Is the Employment and Social Insurance Act, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada ?" p. 4, ll. 5–7.

3. The full text of the said Act is contained in an official print thereof which is a separate document on this appeal and is attached hereto. p. 78, ll. 37–39.

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4. The said Act was passed, as appears from the recitals set out in the preamble thereof, for the purpose of providing for the establishment of a National Employment Service and of a National Insurance Fund against unemployment, as well as other forms of Social Insurance, not only as being essential for the peace, order and good government of Canada and for maintaining on equitable terms interprovincial and international trade, but also for giving practical effect on the part of Canada, as a signatory of the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles, on the 28th June, 1919, to the principles and methods of social justice affecting labour and conditions of labour affirmed and outlined by the said Treaty (Article 23, preamble of Part XIII and Article 427), as being of supreme international importance, in that they are principles and methods which all industrial communities should endeavour to apply, so far as their special circumstances will permit, as an indispensable means of securing the permanent peace of the world.

5. After making provision for the short title and interpretation clauses, the Act provides for its division into five parts. Part I relates to the Employment and Social Insurance Commission which is thereby brought into existence. Part II provides for the constitution and management of an Employment Service for the Dominion of Canada.

Part III, which constitutes the main feature of the Act, provides for the establishment of an Unemployment Insurance Fund out of which unemployment insurance benefits will be payable to all persons of the age of sixteen years and upwards who are engaged in any of the specified insurable employments. The said Fund is to be derived partly from moneys provided by Parliament and partly from compulsory contributions by employers and workers. Weekly rates of contribution by employers, in respect of male and female workers of various ages, are prescribed. Such contributions are made payable by means of revenue stamps, which may be authorized by regulation of the Governor in Council, to be affixed to unemployment books or cards, or otherwise as may be prescribed by the Commission. The employer is liable in the first instance to pay the contributions payable by himself and the worker but is authorised to deduct the worker's contribution from wages. The Dominion Government's contribution is fixed at one-fifth of the aggregate amount contributed by employers and workers. The contributions payable by employers and workers are made recoverable as civil debts. The Commission is empowered to make regulations providing for any matters relating to the payment and collection of contributions payable under the Act and for various other specified matters.

Part IV under the heading " National Health " charges the Commission with the duty of collecting information concerning any scheme, actual or proposed, for providing medical, dental, surgical and hospital cases, and compensation for loss of earnings due to ill-health or accident, making such information available to persons interested, and examining and reporting on schemes on request of any province, municipality or group of persons.

Part V contains general provisions concerning regulations; the annual report to be submitted by the Commission; all other reports, recommendations and submissions required to be made to the Governor in Council; the disposition of fines; the repeal of certain existing legislation; audit of the Commission's accounts and the coming into force of the Act. It is followed by three Schedules, the first of which defines employment within the meaning of Part III of the Act and enumerates the " excepted employments ". The second schedule fixes the weekly rates of contributions and establishes the rules as to payment and recovery of compulsory payments by employers on behalf of unemployed persons. The third schedule fixes the rates of unemployment benefits. RECORD.

A summary of the provisions contained in the several parts of the said Act will be found in paragraphs 4 to 8 inclusive, of the Factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada. pp. 7–9.

6. The relevant provisions of the British North America Act, 1867, contained in Sections 91 and 92 thereof are the following :—

" 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say :—

1. The public debt and property.

2. The Regulation of Trade and Commerce.

3. The raising of money by any Mode or System of Taxation.

. . . . .

6. The Census and Statistics.

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal Matters.

. . . . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

. . . . .

2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private nature in the Province.

p. 53, ll. 1–17. 7. On the hearing of argument on the 31st day of January and the 1st and 3rd days of February, 1936, before Duff, C.J., Rinfret, Cannon, Crocket, Davis and Kerwin, JJ. counsel for the Attorney General of Canada, as well as counsel for the Attorneys General of the Provinces of Ontario, Quebec, New Brunswick, Manitoba, British Columbia, Alberta and Saskatchewan, respectively, were heard.

pp. 52–53. 8. On the 17th day of June, as aforementioned, the Court delivered judgment, answering the question referred to the Court as follows:

p. 53, ll. 24–27. "Mr. Justice Rinfret, Mr. Justice Cannon, Mr. Justice Crocket and Mr. Justice Kerwin are of the opinion that the statute is *ultra vires;* The Chief Justice and Mr. Justice Davis are of the opinion that the statute is *intra vires.*"

p. 53, ll. 37–44; pp. 54–65. 9. The reasons given by the learned Chief Justice for holding the statute to be *intra vires* and for, accordingly, answering the question referred to the Court in the negative, were concurred in by Davis, J.

pp. 66–76. Separate reasons for holding the statue to be *ultra vires* and, accordingly, answering the said question in the affirmative were delivered by Rinfret, J. (Cannon, Crocket and Kerwin, JJ. concurring); and by Kerwin, J. (Rinfret, Cannon and Crocket, JJ. concurring). The reasons for judgment of the several members of the Court are reported in (1936) S.C.R. pp. 427–460.

p. 64, ll. 38–46; p. 65. 10. In summarizing the reasons of himself and Mr. Justice Davis for their answer to the question referred to the Court, the Chief Justice said the aims stated in the preamble were legitimate, provided, of course, that the enactments themselves were within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 together, the proper conclusion was that Parliament had exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it was competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endowed the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court was vested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity,

subject only to the rule that the courts were always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority was not really an enactment of that character; but one relating to a subject over which Parliament had no jurisdiction.

It could not, they thought, be disputed, even with plausibility, that, in point of strict law, Parliament had authority to make grants out of the public moneys to individual inhabitants of any of the provinces, for example, for relief of distress, for reward of merit, or for any other object which Parliament in its wisdom deemed to be a desirable one. The propriety of such grants, the wisdom of such grants, the convenience or inconvenience of the practice of making such grants, were consideration for parliament alone, and had no relevancy in any discussion before any other Court concerning the competence of Parliament to authorize them.

The provisions requiring compulsory contributions by employers and employed possessed the essential elements of legislation respecting taxation. The contributions were levied by Parliament directly. That the contributions were to be paid by revenue stamps was prescribed by Parliament; but the Governor in Council was to regulate payment and collection. Payment was compulsory. Contributions were recoverable by process of law and failure to pay was an offence punishable by fine and imprisonment. The contributions were payable into the public treasury of the Dominion, and were to be paid by the Minister of Finance into a fund which was to be applied as directed by Parliament. On their true construction the said provisions had the character of legislation respecting taxation, because, first, it would not be competent to a provincial legislature to enact them in the context in which they stood, which demonstrated that the contributions were exacted for the purpose of raising moneys for exclusive disposition by Parliament; and, second, there was no adequate ground for holding that they were, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion Treasury. They were not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by any or all of the provincial legislatures, and there was no adequate ground for affirming that these enactments were not legislation in relation to the subjects within the scope of sub-division 1.

It was hardly susceptible of dispute that Parliament could, in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of Section 91, levy taxes for the purpose of raising money to constitute a fund to be expended, in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion Treasury, or to maintain that, in executing these exclusive powers, Parliament was subject to any control by the Courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits. It was, perhaps, not too much to

RECORD. say that complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, were essential to enable Parliament to discharge the responsibilities entrusted to it.

In a word, legislation for raising money for disposition by Parliament under subdivision 3 of Section 91, and directing the disposition of it under subdivision 1, was necessarily excluded from the jurisdiction of the provinces by the concluding words of Section 91; and there was not sufficient ground for affirming that, in the enactments of this statute, Parliament was not exercising its powers under these subdivisions. " Let it not be overlooked that we are not here dealing with an attempt on the part of Parliament to do something it has no power to do. We have not before us an attempt under the guise of taxation to regulate insurance contracts, or an attempt under the guise of criminal legislation to regulate insurance contracts, or an attempt under the guise of legislation for the regulation of mines to regulate in relation to aliens. The statute before us has nothing of that character. If we are right in what we have already said, it is entirely competent to Parliament to resort, as sources for the provision of the unemployment fund, to taxes levied on employers and employees and to taxes levied by any mode or system which Parliament in its discretion may adopt."

pp. 66–72. 11. In his reasons, Rinfret, J. after reviewing the provisions of the Act, referred to the reasons of the learned Chief Justice in the references concerning the Natural Products Marketing Act and the Dominion Trade and Industry Commission Act as indicating the reasons why he thought the validity of this legislation could not be supported as an exercise of the residuary power to make laws for the peace, order and good government of Canada or of the power to regulate trade and commerce. Insurance of all sorts, including insurance against unemployment and health insurances, had been recognized as being exclusively provincial matters under the head of " Property and Civil Rights " or under the head " Matters of a merely local or private nature in the province."

The exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in Section 91 was, by more than one pronouncement of the Judicial Committee of the Privy Council, declared to be " strictly confined to such matters as are unquestionably of Canadian interest and importance " (*Attorney General for Ontario* v. *Attorney General for Canada*) (1896) A.C. 348; it would be recognized by the Courts " only after scrutiny sufficient to render it clear that circumstances are abnormal . . . such as cases of war or famine " (1922) 1 A.C. 200; and " instances of these cases . . . are highly exceptional " (1923) A.C. 695; (1925) A.C. 396. In this particular matter, there was no evidence of an emergency amounting to national peril; but, moreover and still more important, the statute was not meant to provide for an emergency. It was not, on its face, intended to cope with a temporary national peril; it was a permanent statute dealing with normal conditions

of employment. There was, accordingly, here no occasion, nor foundation, for the exercise of the residuary power.

Nor was this legislation for the regulation of trade and commerce. It was not trade and commerce as defined by the Privy Council in its numerous decisions upon the subject. It dealt with a great many matters which were trade and commerce in no sense of the word, such as the contract of employment, employment service, unemployment insurance and benefit, and health. Further, the proposition that the Act could be supported in virtue of the powers of the Dominion Parliament derived from Head 6 (Statistics) or Head 27 (Criminal Law) of Section 91 need not detain their attention and the legislation was not based upon the Treaty of Peace, although it was referred to in the Preamble.

There remained, therefore, in the submission made on behalf of the Dominion Government, only two heads that had to be considered in support of the legislation; and they were " the power to raise money by any mode or system of taxation " (91—(3)) and " the power to appropriate public moneys for any public purpose."

The learned Judge said the recitals contained in the preamble of the Act clearly indicated that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance, and to health matters; that it was not concerned with the public debt and property or with the raising of money by taxation; and that the provisions for levying contributions for the creation of the national fund were nothing more than provisions to enable the carrying out of the true and only purposes of the legislation. The Act was one dealing with and regulating employment service and unemployment insurance. The contributions (or the taxes, if they were to call them so) were mere incidents of the regulation. As these were subject matters falling within the legislative authority of the provinces, the Dominion Government might not, under pretext of the exercise of the power to deal with its property, or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. If it were otherwise, the Dominion Parliament, under colour of the taxing power, would be permitted to invade almost any of the fields exclusively reserved to the legislatures in each province.

One of the effects of the Act under submission was, in the language of Lord Haldane, in *Workmen's Compensation Board* v. *C.P.R.* (1920) A.C. 184, " to attach statutory terms to contracts of employment " and to impose contractual duties as between employers and employees. In its immediate result, the Act created civil rights as between the former and the latter.

The learned judge doubted whether the contribution received from the employee could properly be described as a tax. It seemed to partake more of the nature of an insurance premium or of a payment for services and individual benefits which were to be returned to the employee in proportion to his payments. The benefits conferred on the employees by the Act were not gifts with conditions attached which the employees were free to accept or not; the conditions attached to the benefits were made compulsory terms of all contracts in the specified employments, and he

RECORD. deprecated the idea that the Dominion Parliament might use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees.

It might be that some of the provisions of the Act were not open to objection but he failed to see how they could be severed from the general scheme organized under the Act or from the powers conferred on the Commission; and the legislation as it stood must undoubtedly fall as a whole. In its pith and substance, it was a direct and unwarranted appropriation of the powers attributed to the legislatures by force of Section 92 of the Constitution.

pp. 72–76. 12. In his reasons, Kerwin, J., after a brief résumé of the main provisions of the Act, said he was unable to ascertain in what manner the provisions of Part III might be termed an exercise of the power conferred upon Parliament to tax. If it were otherwise, the Parliament of Canada might in connection with any matter whatsoever, by the mere imposition of a tax, confer upon itself authority to legislate upon matters over which the legislature of each province would ordinarily have jurisdiction. This must be understood, of course, as not referring to any power in the legislatures of the various provinces to originate or assist its local scheme by indirect taxation.

That with this qualification, the subject matter of Part III would ordinarily fall within the ambit of the powers of the provinces within their respective boundaries was not, he thought, seriously disputed. It dealt with contracts of employment and attached thereto a statutory condition. It interfered with property and civil rights. A reference particularly to section 15 and to the recitals in the Act indicated that the very pith and substance of this part of the Act dealt with unemployment insurance.

The learned judge proceeded to refer to the judgment of the Judicial Committee in the *Quebec Insurance Reference* (1932) A.C. 41, where, applying the principle laid down in the *Reciprocal Insurers* case (1924) A.C. 328, the Board had held that a tax imposed under the Special War Revenue Act was a colourable use of the Dominion's taxing power, because it was linked up with an object which was illegal, namely, regulation of the insurance business. The learned Judge considered that the same reasoning applied more cogently to the legislation in question which did not even purport to be a taxing Act. It followed in his view that Part III of the Act might not be justified under either of the heads "The public debt and property" or "The raising of money by any mode or system of taxation." The remainder of the Act was in the same position. Even if the object aimed at by Part III of the Act might be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter was not translated from the jurisdiction of the provincial legislature to that of Parliament. In the same way he was unable to see how, in view of the summary of the powers of the Dominion with reference to trade and commerce given elsewhere by the learned Chief Justice, the matter could be considered as falling within that head of Section 91.

13. The Attorney General of Canada submits that the answer to the question referred to the Court given by Rinfret, Cannon, Crocket and Kerwin, JJ. is wrong; and that the answer to the said question given by the Chief Justice and concurred in by Davis, J. is right; and that the said question should be answered, without qualification, in the negative, for the reasons set out in the judgment of the learned Chief Justice, and also for the reasons set out in the Factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada and for the following among other

RECORD.

REASONS.

1. Because the main provisions of the legislation are a valid exercise of the powers of the Parliament of Canada under heads 1 and 3 of Section 91 of the British North America Act to raise moneys by a system of taxation and to appropriate the same for the public purposes touching the peace, order and good government of Canada indicated by the legislation.
2. Because unemployment has attained such proportions as to render it unquestionably a matter of national interest and importance and as to affect the body politic of the Dominion.
3. Because unemployment through the growing mechanization of industry and other economic causes has ceased to be merely a local or provincial problem and has become one of national proportions, interest and importance.
4. Because as the Provinces have no power to control the migration of labour from one province into another, and provincial boundaries do not affect the movement of labour, legislation to deal effectively with the unemployment problem must be national in its scope.
5. Because the legislation in question provides a national plan for dealing with vital aspects of the unemployment problem.
6. Because the legislation is not in pith and substance legislation to regulate property and civil rights in the province, but is an effort by the Dominion to provide a remedy for a social and economic condition of national concern relating to the peace, order and good government of Canada and its trade and commerce.
7. Because the subject matter of the legislation transcends the scope of provincial legislative authority under Section 92 of the British North America Act, 1867.

N. W. ROWELL.
L. S. ST. LAURENT.
C. P. PLAXTON.

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CASE OF THE APPELLANT
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