

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 FOR THE ATTORNEY-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 17th June, 1936, answering a question referred to the Court for hearing and consideration by order of His Excellency the Governor-General in Council, dated the 5th November, 1935, pursuant to the provisions of Section 55 of the Supreme Court Act, concerning the constitutional validity of the Employment and Social Insurance Act, being Chapter 38 of the Statutes of Canada 1935. Record.
p. 52.
p. 3.

2. The question so referred was :—

p. 4, l. 5.

“ Is the Employment and Social Insurance Act, or any of the

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“ provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada ? ”

p. 53,
li. 24-28.

3. The Right Honourable the Chief Justice of Canada (Sir Lyman P. Duff) and the Honourable Mr. Justice Davis were of opinion that the Act was *intra vires* of the Parliament of Canada. The Honourable Justices Rinfret, Cannon, Crocket and Kerwin were of opinion that the Act was *ultra vires* of the Parliament of Canada.

4. The British North America Act, 1867, provides in Sections 91, 92, 102, 106, 125, 126 and 132 as follows :—

“ 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 :—

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“ (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.

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“ (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

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“ 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.

“ 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 :—

* * * * *

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“ (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.

* * * * *

10 “ 102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

* * * * *

“ 106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

* * * * *

20 “ 125. No lands or Property belonging to Canada or any Province shall be liable to Taxation.

“ 126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

* * * * *

30 “ 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries.”

40 5. The Employment and Social Insurance Act recites in the preamble that the Dominion of Canada was a signatory, as part of the British Empire, to the Treaty of Versailles ; that the treaty was confirmed by statute ; that by Article 23 of the treaty the signatories agreed to endeavour to secure and maintain fair and humane conditions of labour in their own countries and all countries to which their commercial and industrial relations extend ; that by Article 427 of the treaty the well-being of industrial wage-earners was declared to be of supreme importance, and that it was desirable to discharge the obligations to Canadian Labour assumed under the treaty. The preamble also recited that it was essential for the peace, order and

- Record. good government of Canada to provide for unemployment and other social insurance and for maintaining on equitable terms inter-provincial and international trade, and to authorise a contributory national fund for unemployed persons throughout Canada.
- p. 78. 6. The Treaty of Versailles was confirmed by the Treaties of Peace Act, 1919, which is printed in the Record. The Act empowered the Governor-in-Council to make such appointments, establish such offices, make such orders and do such things as appear to him necessary for carrying out the treaty and giving effect to its provisions.
- pp. 6-34. 7. Notwithstanding the preamble the Attorney-General of Canada in 10
p. 69, l. 42. his factum did not rely on the Treaty of Versailles, the Treaties of Peace Act or Section 132 of the British North America Act, and by Counsel at the hearing stated that he was not relying on any treaty or on Section 132. This Respondent respectfully submits that, if otherwise invalid, the Act cannot be justified under Section 132 or by reason of the treaty, and that the Attorney-General of Canada was right in conceding that it cannot be so justified.
- p. 66, l. 21-
p. 68, l. 31. 8. A summary of the Act is contained in the reasons for the judgment of Mr. Justice Rinfret.
- p. 53, l. 1. 9. The Supreme Court heard argument on the question referred to it 20
pp. 52-53. on the 31st January, and the 1st and 3rd February, 1936, and delivered judgment on the 17th June, 1936.
- pp. 53-65. 10. In his reasons for judgment, in which Mr. Justice Davis concurred,
p. 53, l. 37-
p. 54, l. 18. the Chief Justice set out the preamble to the Act, which stated aims for the attainment of which the Parliament of Canada might legitimately use its powers. The exclusive legislative power of Parliament extends to the public property in its broadest sense of including every asset, subject to the qualification that Parliament cannot acquire jurisdiction over matters exclusively provincial under pretence of exercising a power which does not embrace the real subject of the legislation. Sections 102 and 106 of the 30
p. 54,
ll. 29-42. British North America Act do not qualify Section 91 or restrict Parliament's discretion to determine what is "for the public service of Canada." Parliament has unfettered discretion to make grants out of public monies to individual inhabitants of any Province, and, therefore, can constitute an unemployment relief fund, and determine the manner in which public assets, such as the proceeds of a particular tax, may be appropriated, even antecedently, for such a fund. The possibility of a future Parliament abrogating such a scheme does not affect its validity. Section 35 (2) of the Act made such a provision, none the less validly because its effective working depends on Parliament providing monies in the future. The Chief Justice then 40
p. 54, l. 43-
p. 55, l. 2. dealt with the argument that the Act was not within the enumerated heads of Section 91 but dealt with property and civil rights, because the Act creates a compulsory contract between the persons liable to contribute and the Crown or Minister of Finance, and because the pith and substance of
- p. 55,
ll. 32-37.
p. 55, l. 38-
p. 56, l. 7.
p. 56,
ll. 8-19.

the Act is to attach statutory terms to contracts of employment Parliament can raise money, for the exclusive disposition of Parliament, by any mode or system of taxation and, whatever the meaning of the taxing provisions in Sections 91 and 92, the Dominion can raise money, by taxing inhabitants of the Provinces, for the relief of individual distress. After referring to the Statute of Westminster to show the plenary legislative authority of Parliament, the Chief Justice held that Parliament has an unlimited discretion under head 3 of Section 91 so long as the essentials of taxation are present. By Section 17 of the Employment and Social Insurance Act employed persons and employers are liable to pay contributions by means of revenue stamps, in accordance with regulations to be made, under penalties imposed by Section 31, and the revenue received is to be deposited by the Minister of Finance in the Bank of Canada. A court, in the Chief Justice's opinion, ought to be very cautious in pronouncing an Act compelling individuals to pay money to the Dominion treasury to be not in truth a taxing statute. There is no attempt under the guise of exercising a taxing power to do what Parliament has no power to do. Parliament is competent to provide an unemployment fund by taxation. The essentials of taxation as laid down in the authorities, are present. Subsection 3 of Section 17 (which, subject to regulations being made which provide otherwise, makes the employer liable in the first instance for his own and the employed person's contributions with a right to recover from the employed person contributions paid on his behalf) is within the taxing power, in the Chief Justice's opinion, as also is Section 33 (which gives an employed person who loses benefit by his employer's non-compliance with the Act a right to recover from his employer as a civil debt the amount of benefit so lost). Section 33, if *ultra vires*, is, however, in the Chief Justice's opinion severable, and is not sufficiently strong evidence of an intention in Parliament to legislate to regulate relations between employer and employee to deprive the Act of its *prima facie* taxing character. On the broad contention that the Act as a whole discloses a scheme to impose a statutory contract to contribute to an insurance fund with contractual rights to receive benefit from the fund, the Chief Justice reviewed the authorities and reached the conclusion that the Act dealt with taxation and not with property and civil rights in the Provinces. The provisions for unemployment benefit might be regarded as annexing a statutory term to contracts of employment, but the legislation was not within provincial powers as it provides for the application of a fund constituted by contributions out of Dominion public funds. The Chief Justice and Mr. Justice Davis therefore concluded that in its main provisions the Act was justified under heads 1 and 3 of Section 91 and that many of its provisions, being outside provincial authority, were within the general words of Section 91. They rejected the argument that the Act was within the regulation of trade and commerce or in its entirety within the residuary clause of Section 91. The Chief Justice then summarised his reasons.

11. Mr. Justice Rinfret in his reasons for judgment summarised the Act, and stated the Appellant's submissions. The Act 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

p. 56, l. 20-
p. 57, l. 34.

p. 57, l. 35-
p. 58, l. 25.

p. 58,
ll. 26-28.

p. 58, l. 29-
p. 59, l. 23.

p. 59,
ll. 24-39.

p. 59, l. 40-
p. 60, l. 4.

p. 60,
ll. 9-43.

p. 60, l. 44-
p. 61, l. 6.

p. 61,
ll. 7-10.

p. 61,
ll. 10-11.

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ll. 11-17.

p. 61, l. 18-
p. 64, l. 11.

p. 69,
ll. 12-23.

p. 64,
ll. 24-31.

p. 64,
ll. 32-36.

p. 64, l. 38-
p. 65, l. 47.

pp. 66-72.
p. 66, l. 6-

p. 68, l. 31.

p. 68,
ll. 35-44.

p. 68, l. 45,
p. 69, l. 6.

- Record. commerce for the reasons given by the Chief Justice in the references (now under appeal to His Majesty in Council) concerning the Natural Products Marketing Act and the Dominion Trade and Industry Commission Act. All insurance, including unemployment and health insurance, has been recognised as an exclusively provincial matter. The Act deals, not with a national emergency, but with normal conditions of employment. There was therefore no foundation for the exercise of the residuary power. Nor does the Act deal with trade and commerce, and it cannot be supported by head 6 (statistics) or head 27 (criminal law) of Section 91 or by Section 132. The learned Judge pointed out that the powers to tax and to appropriate 10 public monies for any public purpose were only faintly advanced by the Appellant in favour of the Act, but, as they were accepted in support of its validity by the Chief Justice, the learned Judge examined whether in its substance the Act is an exercise of those powers. The recitals clearly indicate a primary intention to legislate with regard to employment service, unemployment insurance and health matters, and not with regard to the public debt and property or taxation, the provisions for contributions being merely incidental. Scrutinised in its entirety the Act in its pith and substance deals with employment service and social insurance, not public property or taxation. The subject matter is within provincial legislative 20 authority, and the Dominion cannot indirectly accomplish the ends it seeks, under the taxing power. The Act creates civil rights between employer and employee, and the contribution from the employee partakes of the nature not of a tax but of an insurance premium or of a payment for services and benefits proportioned to the employee's payments. The conditions attached to the benefits are made compulsory terms of all contracts in the specified employments, and the Dominion cannot use its taxing power to compel the insertion of such conditions in ordinary contracts between employers and employees. Provisions not open to objection cannot be severed from the general scheme of the Act, which, therefore, is wholly *ultra vires* 30 of the Parliament of Canada. The learned Judge also expressed his entire concurrence with Mr. Justice Kerwin.
- p. 69,
ll. 7-15.
- p. 69,
ll. 16-30.
- p. 69,
ll. 31-36.
- p. 69,
ll. 37-40.
- p. 69,
ll. 41-44.
- p. 70,
ll. 1-14.
- p. 70,
ll. 15-40.
- p. 70, l. 41-
p. 71, l. 15.
- p. 70,
ll. 16-23.
- p. 70,
ll. 24-33.
- p. 71,
ll. 33-39.
- p. 71, l. 40-
p. 72, l. 9.
- p. 72, l. 6.
- p. 66, l. 1 ;
p. 72, l. 20.
p. 72, l. 13.
- p. 76, l. 18.
- pp. 72-76 ;
p. 72, l. 26-
p. 73, l. 7.
p. 73,
ll. 8-13.
- p. 73,
ll. 14-20.
- p. 73,
ll. 20-34.
- p. 73,
ll. 34-36.
- p. 73,
ll. 36-43.
12. Mr. Justice Cannon concurred in the reasons of Mr. Justice Rinfret, and of Mr. Justice Kerwin. Mr. Justice Crocket held the Act to be wholly *ultra vires* for the reasons given by Mr. Justice Rinfret. Mr. Justice Kerwin agreed with the reasons of Mr. Justice Rinfret, but added his own reasons in which, after summarising the Act, he expressed the view that Part II and portions of Parts IV and V were unobjectionable but were so interwoven with the powers of the Commission set up under Part I and with Part III that they must stand or fall with Part III. He could not agree with the 40 Chief Justice that Part III could be justified under the Dominion power over public property and taxation. The Dominion may grant money to individuals or organisations under restrictions and conditions, but the proposed recipient can decline the gift ; the Dominion may also raise money by taxation generally or for the purpose of making grants ; but in Part III Parliament does not purport to do either of these things. Section 15 provides for insurance against unemployment ; Section 17 provides that the benefit fund shall be derived partly from monies provided by Parliament.

partly from contributions of employees and employers payable by revenue stamps or as the Commission otherwise prescribes, and by Subsection 3 the employer is liable in the first instance to pay for the employed person with a right of recovery, subject to regulations, from the employed person. Section 19 gives a right to benefit. The Act is made compulsory by means of a statutory condition attached to contracts of employment. These provisions cannot be termed an exercise of the taxing power, but deal with property and civil rights. The pith and substance of Part III deals with unemployment insurance. The learned Judge then dealt with *In re The*
 10 *Insurance Act of Canada* reported in [1932] Appeal Cases, page 41, where Parliament was held to have colourably invaded provincial jurisdiction under the purported exercise of the taxing power. The reasoning applied more cogently to legislation which did not even purport to be a taxing Act. The argument based on the residuary clause and the power to regulate trade and commerce had been dealt with by the Chief Justice in other references. The praiseworthy object of Part III and the fact that the desired result might better be obtained by the Dominion than the Provinces did not transplant the matter from provincial to Dominion jurisdiction. The learned Judge was therefore of opinion that the Act in toto is *ultra*
 20 *vires* of the Parliament of Canada.

Record.
 p. 73, l. 44-
 p. 74, l. 3.
 p. 74,
 ll. 3-5.
 p. 74,
 ll. 5-9.
 p. 74,
 ll. 10-24.
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 ll. 24-26.
 p. 74, l. 27-
 p. 75, l. 40.
 p. 75,
 ll. 41-44.
 p. 76,
 ll. 3-17.
 p. 76,
 ll. 9-14.
 p. 76, l. 20.

13. This Respondent respectfully submits that the opinion of Mr. Justice Rinfret, Mr. Justice Cannon, Mr. Justice Crocket and Mr. Justice Kerwin is to be preferred to the opinion of the Chief Justice and Mr. Justice Davis, and that the Act in its entirety should be declared to be *ultra vires* of the Parliament of Canada for the following amongst other

REASONS

1. Because the Act is not and does not purport to be an exercise of the taxing power.
2. Because the subject matter of the Act is not within any other enumerated head of Section 91 of the British North America Act.
3. Because the Act cannot be justified under Section 132 of the British North America Act.
4. Because the subject matter of the Act is insurance and contracts of employment which are matters within the class of subject exclusively assigned by Section 92 of the British North America Act to the provincial legislatures.
5. Because, the subject matter being within the exclusive jurisdiction of the provincial legislatures, is removed from the matters in respect of which the Parliament of Canada can make laws for the peace, order and good government of Canada.
6. For the other reasons given by Mr. Justice Rinfret and Mr. Justice Kerwin.

JOHN B. McNAIR.

FRANK GAHAN.

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No. 101 of 1936.

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