

The Attorney-General for Saskatchewan - - - - *Appellant*
v.
Canadian Pacific Railway Company - - - - *Respondent*
and
The Attorney-General for Manitoba, and others - - - *Intervenors*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 6TH JULY, 1953

Present at the Hearing:

VISCOUNT SIMON
LORD OAKSEY
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* VISCOUNT SIMON]

This is an Appeal by special leave from a judgment of the Supreme Court of Canada, dated November 20th, 1950, allowing in part an Appeal by the respondent from a judgment of the Court of Appeal for Saskatchewan dated January 29th, 1949.

The Court of Appeal had before it four questions referred to it by an Order of the Lieutenant-Governor in Council, dated November 16th, 1948, pursuant to the Constitutional Questions Act (Chapter 72 of the Revised Statutes of Saskatchewan 1940). These questions involved consideration of the interpretation of Clause 16 of a contract executed on October 21st, 1880 between the Canadian Government and contractors who were to constitute the Canadian Pacific Railway Company. The contract provided for the construction, operation and maintenance of the Canadian Pacific Railway.

The respondent Company was created under the authority of a Statute of Canada enacted in 1881 (44 Victoria, Ch. 1), to which the contract was scheduled, and Clause 1 of the Statute approved and ratified the contract.

Clause 16 of the contract is as follows:

“The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.”

The Province of Saskatchewan was established in 1905 by the Saskatchewan Act of the Dominion Parliament (4 and 5, Ed. VII, Ch. 42) and Section 24 of that Act reads as follows:

“The powers hereby granted to the said Province shall be exercised subject to the provisions of Section 16 of the contract set forth in the Schedule to chapter 1 of the Statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.”

The Order in Council granting special leave to appeal limited the appeal to the following questions:

(a) As to the validity of the limitation on the powers of the Province contained in Section 24 of the Saskatchewan Act, 1905; and

(b) whether the exemption granted in Clause 16 of the contract covers the form of local taxation known as "business tax".

As to (a), the appellant contends that the Parliament of Canada in passing the Saskatchewan Act, 1905 and thereby creating the new Province of Saskatchewan and including it in the Union had no power to provide that the provincial legislature, when making laws in relation to direct taxation within the Province in order to the raising of revenue for provincial purposes, or in relation to municipal institutions in the Province, should exercise those powers "subject to the provisions of Section 16 of the contract", but that the effective taxing powers of the legislature of the new Province remain as extensive as the powers conferred by Section 92 (2) of the British North America Act, 1867 upon the legislature of each of the Provinces originally included in the Federation. This amounts to saying that Section 24 of the Saskatchewan Act should be disregarded as being *ultra vires* of the Parliament of Canada.

As to (b), the appellant contends that if effect is to be given to Section 24 and to the provisions of Section 16 of the said contract, which thus provide a certain exemption from taxation by the new Province, or by any municipal corporation therein, the result is nevertheless to leave the respondent Company liable to "business tax" under the City Act, 1947 of the Province.

Their Lordships will first deal with the former of the two questions above formulated. It is obvious that, if this first question is answered in favour of the appellant, the second question becomes immaterial, for if the provincial powers of taxation possessed by the Province of Saskatchewan are as wide as those contained in Section 92 without the fetter imposed by Section 16 of the contract and Section 24 of the Saskatchewan Act, it is immaterial how Section 16 is construed and applied, and the business tax which has been enacted by the Saskatchewan legislature will be imposed on the respondent Company in common with all other persons and enterprises carrying on business within the Province.

This first question could only be raised on appeal to the Privy Council inasmuch as it had already been in effect decided in a sense adverse to the appellant's contention in the judgment of the Supreme Court of Canada, delivered by Newcombe J. on behalf of the Court, in the *Reference re Section 17 of the Alberta Act* [1927] S.C.R. 364. The appellant contended before the Board that Mr. Justice Newcombe's judgment leading to this conclusion in the Alberta reference was wrong, and their Lordships were therefore invited to dissent from the view of Newcombe J. and to hold that Section 24 of the Saskatchewan Act has no effect.

Although the British North America Act, 1867, provided for a federation of four Provinces only viz. Quebec, Ontario, Nova Scotia and New Brunswick, the statesmen who were responsible for framing the Act contemplated from the beginning the enlargement of the federal area so as to include the whole of what is now Canada. To the west of the area included in the original Federation lay an immense territory stretching to the Rocky Mountains and beyond to the Pacific. The area immediately to the west (which had originally been granted to the Hudson's Bay Company by the Charter of 1670) was known as Rupert's Land and the North-West Territories, and between the Rocky Mountains and the Pacific Ocean lay the Colony of British Columbia, which already had a separate legislature. Consequently, Section 146 of the Act made provision for the admission into the Union of territories not at first included within the boundaries of Canada. The Section provided as follows:

"It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the

respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

British Columbia entered the Union in 1871 on the Terms and Conditions scheduled to the Order in Council of May 16th, 1871, for British Columbia was a "settled" Colony and thus required no statutory provision to create it an additional Province of Canada. Rupert's Land and the North-West Territories had become part of Canada pursuant to the Rupert's Land Act, 1868, which authorised the surrender of the land of the Hudson's Bay Company to the Crown and which further gave power by Order in Council on Address from the Houses of the Parliament of Canada to admit the surrendered territory into the Dominion of Canada.

The project of a trans-continental railway which would connect the Pacific coast with the railways in the east of Canada had long been in the minds of Canadian statesmen, and more than one effort had been made to realise the project and attract finance for such a railway. If it could be created, it would not only contribute to the development of trade, but would bind all parts of the Canadian continent together. But in order that the project should be achieved by creating a Company, it was necessary to offer investors terms which would attract their support for a railway which would have to traverse immense areas of wild and thinly populated country and would involve the carrying of its track by steep gradients over the Rocky Mountains. It was among the Terms and Conditions insisted upon by British Columbia for its admission into the Union that the Government of the Dominion should assume "the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the railway system of Canada". (See first recital in the preamble of the Canadian Pacific Railway Act, 1881.) Clause 16 of the contract, which was ratified by that Act, was one of the inducements, and other clauses of the contract provided that the Government of the Dominion should make a grant to the Company of the lands required for the road-bed and the other sites necessary for the convenient and effective construction and working of the railway, that materials of construction should be admitted free of duty, and that there should be granted to the Company blocks of land on each side of the railway, which would, of course, increase in value when the railway was made and worked.

It is to be observed that Section 146 of the British North America Act, which authorised the inclusion of Rupert's Land and the North-Western Territories into the Union, did not in terms authorise the creation of new provinces out of these areas when admitted. Notwithstanding this, the Manitoba Act, 1870 of the Canadian Parliament (33 Victoria, Ch. 3) provided for the creation and constitution of the Province of Manitoba, which was carved out of these territories as soon as they were admitted into the Union. Doubts appear to have been entertained respecting the powers of the Parliament of Canada to establish such provinces, and consequently the United Kingdom Parliament enacted the British North America Act 1871 (34 and 35 Victoria, Ch. 28), which, by Section 5, confirmed the Manitoba Act and by Section 2 provided as follows:—

"The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Provinces, and for its representation in the said Parliament."

It is to be noted that the Province of Manitoba thus created was not an exact replica of the provinces created in 1867, but the provisions of the British North America Act, 1867, so far as generally applicable to the Provinces previously composing the Dominion were to apply to the Province of Manitoba "except so far as the same may be varied by this Act" (Section 2). Examples of such variation may be found in Section 22, Section 23 and Section 27 of the Manitoba Act.

It was under these powers conferred by the Act of 1871 that the Parliament of Canada enacted the Saskatchewan Act in 1905 and included in it Section 24, which has already been set out. It will be observed that Clause 16 of the contract of 1880 did not promise any exemption from taxation by the original Provinces, for they had taxing powers under Section 92, which could not be cut down by the Dominion. The exemption provided for was "from taxation by the Dominion, or by any Province hereafter to be established", and hence when the Province of Saskatchewan was carved out of Rupert's Land and the North-West Territories, Section 24 was inserted by the Parliament of Canada in an effort to keep faith with the Canadian Pacific Railway Company.

The question, therefore, which Their Lordships have first to decide is whether Section 24 is validly enacted.

Mr. Leslie's contention, supported with energy and ingenuity by Lord Hailsham for the Intervener representing Manitoba, was that the Dominion Parliament was given no power by the Imperial Act of 1871 to limit the right of the new Province of Saskatchewan to tax under the terms of Section 92. They contended that the authority which the Act of 1871 gave to the Dominion Parliament to carve out of the added territory "a province" was an authority to create a province with powers identical with those of the provinces already created by the Act of 1867, and that no fetter upon the power of taxation of the new province was permitted. To this Mr. Carson for the respondent Railway Company replied that even in the Act of 1867 the powers of taxation conferred upon the four original provinces was not uniform; for example, although indirect taxation was a dominion subject (Section 91 (3)), yet, by Section 124, the right was conferred on the Province of New Brunswick to levy lumber dues. And other examples could be given. There was thus no set pattern of "a province" in the Act of 1867, which was bound to be followed in creating the new Province of Saskatchewan. The development of the added territories in 1871 had not advanced so far as the development of either the old Provinces or of Manitoba, so that it may very well have been thought necessary to give the Dominion Parliament freedom of action in the creation of new provinces, not only as to the time of their creation but also as to the extent of powers of taxation which should be conferred upon them.

Section 2 of the Act of 1871 empowers the Parliament of Canada, at the time when it establishes new provinces in the added territories, to make provision—

- (a) For the constitution and administration of any such province;
- (b) for the passing of laws for the peace, order and good government of any such province; and
- (d) for its representation in the Dominion Parliament.

The words "peace, order and good government" are words of very wide import and a Legislature empowered to pass laws for such purposes had a very wide discretion. But Mr. Leslie and Lord Hailsham emphasised the distinction between Section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order and good government in territories not included in a province, and Section 2, which only enabled them to provide for the passing of laws for the peace, order and good government of a province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the province. The prescription, they contended, had been done for good and all by Section 92 of the 1867 Act.

But their Lordships would observe that if this argument was well founded the words in Section 2 of the Act of 1871 "for the passing of laws for the peace, order and good government" would be superfluous. The power to make provision for the "constitution" of the new province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which the appellant and Lord Hailsham contend.

The appellant further relied on the phrase "subject to the provisions of this Act" in Section 146 of the 1867 Act and contended that this phrase implied a structure of provinces analogous to the original provinces. But so far as the lands comprising Rupert's Land and the North-West Territories are concerned, Section 146 was exhausted when they were admitted to the Union, as they were by the Rupert's Land Act, 1868. It appears to their Lordships that Section 146 is therefore irrelevant to the issue they have to decide.

The appellant also relied on Section 3 of the British North America Act, 1886, which directed that the 1867 Act and the 1871 Act should be construed together. The expression "province", it was said, must therefore be given throughout the meaning attached to it in the 1867 Act, and this involved that every province must have full Section 92 powers. With great respect, this argument seems to involve a complete *non sequitur*. Every province created or to be created must, of course, be a province in the Dominion of Canada, but the Act of 1867 contained no such definition of province as would involve any conflict between that Act and the 1871 Act. There is no complete equality of powers between the four original provinces. The Manitoba Act, 1870, shows that an Act constituting a province might depart from the strict 1867 pattern. No doubt one reason for the passing of the 1871 Act was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of Section 2 of the Manitoba Act recognising variations has been introduced into all the documents creating a province since that date—see paragraph 10 of the Schedule to the British Columbia Order in Council of May 16th, 1871, the Resolution relating to Prince Edward Island scheduled to the Prince Edward Island Order in Council of June 26th, 1873, Section 3 of the Saskatchewan Act, 1905, Section 3 of the Alberta Act, 1905, and Section 3 of the Terms of the Union between Canada and Newfoundland scheduled to the British North America Act, 1949.

From the time that the North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under Section 5 of the Rupert's Land Act 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new provinces out of the added areas, could not make such deviation from Section 92 as was necessary to make effective acts done under the powers conferred on it by Section 5 of the Rupert's Land Act, 1868, and Section 4 of the 1871 Act. These considerations support the conclusion of the Supreme Court in the *Alberta reference*, and their Lordships are not prepared to differ from it.

Mr. Carson advanced two alternative grounds for upholding Section 24 of the Saskatchewan Act, claiming

(1) that it was validated by the second paragraph of Section 2 of the 1886 Act, and

(2) that Clause 16 of the Agreement when approved by the Dominion Act of 1881 was part of inter-provincial railway legislation, and therefore within Dominion competence under Section 91 (29), and Section 92 (10) of the Act of 1867, and that Section 24, which was only included to make Clause 16 effective, must also be regarded as such railway legislation within the competence of the Dominion Parliament.

Their Lordships, without pronouncing upon the validity of either of these arguments, prefer to rest their conclusion on the other grounds already stated.

There remains the question whether the language of Clause 16 is such as to prohibit the imposition of "business tax" upon the respondent Company. Notwithstanding that the exemption provided by the clause is conferred on the physical property there mentioned, all taxes are exacted from and paid by persons, and the question comes to be whether the respondent Company, as the owner and user of the properties mentioned, is free from taxation in respect of them. Mr. Leslie and Lord Hailsham argue that the business tax imposed by the City Act 1947 of Saskatchewan was imposed on persons and companies carrying on a business and not upon their property or upon their ownership or user of property. On this view, the provision that the liability to business tax of a taxpayer was measured by the floor-space or area which he used while carrying on his business was nothing more than a "yardstick" to ascertain the amount for which the taxpayer was liable under the tax. There are no doubt many instances in which it is important to distinguish between the nature of the tax imposed and the measure of the amount of tax to be paid. For example, British income tax is imposed on the income of the taxpayer in the year of charge, but the amount of tax is measured by reference to income in an earlier year. But where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is "forever free from taxation" the tax so measured cannot be regarded as something lying outside the exemption.

Their Lordships agree with the view of the majority of the Supreme Court that in the present instance the tax in question is imposed upon the owner of things which he is using in his business. As Mr. Justice Kellock observes:—

"It would be an extraordinary result if the proper interpretation of this exemption were to be said to be that while taxes imposed upon the owner in respect of his ownership of these things fall within the exemption, nevertheless taxes imposed upon the owner in respect of his use of the same items do not."

Mr. Justice Locke stated the contention thus:—

"The position adopted on behalf of the Province of Saskatchewan put bluntly is this:—that while neither the physical property defined by Clause 1 nor the Canadian Pacific Railway Company in respect of its ownership of that property is liable to taxation, so-called business taxes may be levied upon the Company in respect of its business of operating it. While the language of Clause 16 is that the property shall be 'forever free from taxation' by any province thereafter to be established, it is said that to tax the Company in respect to the *use* of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited."

That learned Judge goes on to observe:—

"Clause 16 of the contract does not grant an absolute exemption of the stations, station grounds, buildings and other property referred to but only such as are used for the construction and working of the railway and, in my opinion, if buildings which fell within the description ceased to be used by the owner or operator of the property for such purposes the exemption would be lost. Since, therefore, it is the buildings, station grounds, yards and other property when used for these purposes which are declared to be forever free from taxation by the Dominion or by any province thereafter to be established, I think it cannot be said that a tax upon the owner in respect of the use of the property for the purpose of working the railway is not squarely within the exemption. To construe the clause otherwise is to say that the properties mentioned are exempt from all taxation *when* used for the defined purpose, but *if* they are so used that the owner may be taxed in respect of that use. I am unable so to construe the clause."

Their Lordships agree with this construction of the Clause and have reached the conclusion that the exemption operates to relieve the respondent Company from the tax.

In the course of the argument the decision in *City of Halifax v. Fairbanks Estate* (1928 A.C. p. 117) was more than once referred to. That decision contains sentences which, detached from their context, were prayed in aid to reinforce the case for the Respondents. But the point at issue in that case was different, viz., whether the "business tax" there involved was a direct tax, and was moreover so complicated by provisions for treating the owner of property let to the Crown as notionally the occupier, that their Lordships prefer not to rest their conclusions on it. It is unnecessary to say more than that the case does nothing to impair or qualify those conclusions.

Their Lordships will humbly advise Her Majesty that the Appeal should be dismissed. The appellant must pay the costs.

In the Privy Council

THE ATTORNEY-GENERAL FOR
SASKATCHEWAN

v.

CANADIAN PACIFIC RAILWAY COMPANY
AND THE ATTORNEY-GENERAL FOR
MANITOBA, AND OTHERS

DELIVERED BY VISCOUNT SIMON