56, 944

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
Appellant

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,
Respondent,

AND

THE ATTORNEY-GENERAL OF CANADA,
Intervenant.

FACTUM OF A.-G. CANADA

FACTUM

OF THE ATTORNEY-GENERAL OF CANADA

PART I

1. This is an appeal from a judgment delivered on March 27, 1947 by the Court of Appeal for British Columbia, the Honourable Mr. Justice O'Halloran dissenting, answering in the affirmative a question referred to that Court by the Lieutenant-Governor of British Columbia in Council pursuant to the Constitutional Questions Determination Act, chapter 50 of the Revised Statutes of British Columbia, 1936. The question reads as follows:

> "Are the provisions of the 'Hours of Work Act' being Chapter 122 of the 'Revised Statutes of British Columbia, 1936' and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent?"

The majority of the Court expressed the opinion "that the whole Act applies".

2. The Order of Reference was made on September 20, 1946 and contains the following recitals:

"THAT Canadian Pacific Railway Company, a Corporation incorporated by the Statutes of the Dominion of Canada, has constructed, owns and operates lines of railway extending continuously from Saint John, New Brunswick, to Vancouver, British Columbia, and also numerous branch lines extending into and connecting with railway lines in the United States of America. The Company owns and operates lines of steamships plying between Vancouver and Victoria and Seattle, in the State of Washington. The said Company also leases and operates the lines of the Esquimalt and Nanaimo Railway Company, running from Courtenay to Victoria.

"The lines of railway and branch lines of the said Company were by 46 Victoria, Chapter 24, Section 6 of the Statutes of the Dominion of Canada, declared to be works for the general advantage of Canada.

"The said Company has further, for the purpose of its lines of railway and steamships and in connection with its said business, built the Empress Hotel at Victoria, which it operates for the comfort and convenience of the travelling public. The hotel is available for the accommodation of all members of the public, as a public hotel. The said hotel caters to public banquets and permits the use of its hotel ballroom for local functions, for reward.

"The property upon which the said hotel is built is not contiguous to property used by the Company for its line of railway, and is not a terminus for its railway line or steamships.

"The Company has owned and operated the said hotel for a period of thirty-eight years, and the same provides accommodation for large numbers of travellers and tourists from Canada, the United States of America and elsewhere, having five hundred and seventy-three rooms. The operation of the hotel is a means of increasing passenger and freight traffic upon the Company's lines of railway and steamships.

"The Company owns and operates other hotels elsewhere in Canada for like purposes.

"There is a catering department in the hotel wherein the Company employs persons to prepare and serve meals.

"The Company also employs hotel clerks, book-keepers and other persons to do clerical work at the hotel.

"Pursuant to Section 6 of the Wartime Labour Relations Regulations being P.C. 1003 passed by Governor-General in Council by Order dated March 16, 1945, the War Labour

Relations Board (National) certified to all parties concerned that the Canadian Brotherhood of Railway Employees and Other Transport Workers, Empress division No. 276 and the bargaining representatives named in the order are the properly chosen bargaining representatives for the employees of the Empress Hotel, except employees specifically named in said order.

"Following certification of the bargaining representatives and pursuant to the said Order in Council P.C. 1003 a collective agreement was negotiated by the said representatives and the Company and was duly executed by the parties thereto. The said agreement became effective September 1, 1945, for a period of one year and thereafter subject to termination on thirty days' notice in writing from either party. By the said agreement, rates of pay, hours of work, and other terms and conditions of employment of the employees affected by the said agreement, are fixed for the period of the said agreement. No notice of termination has been given by either party to said agreement. A copy of said agreement is annexed hereto as Schedule A."

3. The Hours of Work Act, chapter 122 of the Revised Statutes of British Columbia 1936, as amended by chapter 30 of the Statutes of 1937 and chapter 34 of the Statutes of 1946, fixed the maximum hours of work of all employees in industrial undertakings to which the statute is applicable. The schedule of industrial undertakings to which the Statute is expressed to be applicable is wide enough to include some, if not all, of the employees employed at the Empress Hotel.

4. The Honourable Mr. Justice Robertson, with whom the Honourable the Chief Justice, the Honourable Mr. Justice Smith and the Honourable Mr. Justice Bird concurred, held that the Empress Hotel is not part of the Appellant's line of railway and is not, therefore, within the exclusive legislative jurisdiction of the Dominion, although he expressed the opinion that whatever is absolutely necessary for the physical use of the railway is to be treated as part of the railway and that this would include such things as "round houses, stations, rolling-stock, equipment and all other things necessary for the operation of a railway" (Case p. 22 ll. 1 to 6, incl. and ll. 32 to 34, incl.).

5. The Honourable Mr. Justice O'Halloran, dissenting, held that the construction, maintenance and operation of the Empress Hotel forms an integral part of the "works and undertaking" of the Appellant within clause (*c*) of head 10 of section 92 of the British North America Act and that the Empress Hotel is an

integral link in the Appellant's world ship and rail transportation system (Case p. 10, ll. 11 to 15, incl. and ll. 25 to 27, incl.). He held that the fixing and determination of the salaries and wages, hours of work, and working conditions throughout a Dominion-wide railway and steamship service and system such as the Appellant's is a matter which relates to the general conduct, management and efficient carrying-on of the Railway Company as a whole and is, in substance, a matter of railway and steamship management and not a matter of civil rights within each of the provinces. He held, therefore, that the relations between employer and employee therein fall necessarily within the realm of railway management, which falls within the exclusive jurisdiction of Parliament. (Case p. 15, l. 32 to p. 16, l. 2, incl.).

6. By chapter 28 of the Statutes of Canada, 1947, which came into force on June 27, 1947, The Canadian National-Canadian Pacific Act, 1933 was amended by the addition thereto of section 27A, which provides that the rates of pay, hours of work and other terms and conditions of employment of the Appellant's employees shall be such as are set out in any agreements in writing respecting such employees made from time to time between the Appellant and representatives of interested employees, whether entered into before or after the commencement of that Act, if such agreements are filed in the office of the Minister of Transport.

7. By a Notice dated August 13, 1947 (not printed in the Case), the solicitor for the respondent notified the Attorney-General of Canada, *inter alia,* that the respondent proposed to bring in question in this appeal the validity of the aforesaid Act to amend the Canadian National-Canadian Pacific Act, 1933 and that he proposed to submit that the Statute is *ultra vires* insofar as it purports to affect the terms of work and other conditions of employment of the employees of the Appellant at the Empress Hotel.

8. The Attorney-General of Canada is informed that the agreement between the Appellant and its employees at the Empress Hotel has been filed in the office of the Minister of Transport.

9. By an Order dated October 3, 1947, the Honourable Mr. Justice Taschereau granted leave to the Attorney-General of Canada to intervene in this appeal upon terms that the Attorney-General may be represented by counsel upon the argument of the appeal and file a factum. (Case p. 28).

PART II

10. The Attorney-General of Canada submits that the Court of Appeal for British Columbia was in error

(*a*) in holding that the Empress Hotel is not a part of a work or undertaking within the exclusive legislative jurisdiction of parliament under section 91(29) and section 92(10) of the British North America Act, and

(*b*) in not holding that the fixing of the hours of work on a work or undertaking within the exclusive legislative jurisdiction of Parliament is outside the legislative jurisdiction of a provincial legislature and that the question put to the Court should, therefore, have been answered in the negative.

11. In the alternative, the Attorney-General of Canada submits that this Court should advise that, even if the decision of the Court of Appeal for British Columbia was right when expressed, the hours of work of employees employed at the Empress Hotel are now governed by section 27A of the Canadian National-Canadian Pacific Act, 1933, as amended by chapter 28 of the Statutes of 1947 and that the question asked should now be answered in the negative.

PART III

12. The relative provisions of the British North America Act are 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,—

* * *

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects

by this Act assigned exclusively to the Legislatures of the Provinces.

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,—

* * *

10. Local Works and Undertakings other than such as are of the following Classes:—

(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

(*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces".

13. The Attorney-General of Canada adopts those portions of the Appellant's Factum by which it is established that the Empress Hotel is a part of a work or undertaking belonging to classes described by paragraphs (*a*) and (*c*) of head 10 of section 92 of the British North America Act.

14. *The exclusive legislative jurisdiction of Parliament extends to the Empress Hotel.* The Empress Hotel is a part of a work or undertaking excepted by paragraphs (*a*) and (*c*) of head 10 of section 92 of the British North America Act from the classes of subjects by that Act assigned exclusively to the legislatures of the provinces. It, therefore, belongs to a class of subjects described by head 29 of section 91 of the British North America Act as one of the classes of subjects to which the exclusive legislative authority of the Parliament of Canada extends.

15. *The hours of work of employees employed at the Empress Hotel is a matter within the exclusive legislative jurisdiction of parliament.* The exclusive legislative jurisdiction of

Parliament, with reference to a work or undertaking, extends to the management of the work or undertaking. See *Canadian Pacific Railway v. Notre Dame de Bonsecours* 1899 (A.C.) 367 per Lord Watson at 372, *Madden v. Nelson and Fort Sheppard* 1899 (A.C.) 626 per the Lord Chancellor at pp. 629 and 630 and *Grand Trunk Railway of Canada v. Attorney-General of Canada* 1907 (A.C.) 65 per Lord Dunedin at p. 68. Management includes the regulation of the hours of work of the persons employed on the work or undertaking. Legislation regulating the hours of work of employees employed at the Empress Hotel is, therefore, in pith and substance, "works" or "undertakings" legislation. It does not differ in principle from legislation with reference to rates to be charged in connection with the work or undertaking. See *Quebec Railway Light and Power Company v. Town of Beauport,* (1945) S.C.R. 16. Reference should also be made to *Toronto v. Bell Telephone Company* (1905) A.C. 52 per Lord Macnaghten at p. 57.

16. *Legislation with reference to hours of work of employees employed at the Empress Hotel is* ultra vires *a provincial legislature whether or not Parliament has dealt with the subject by legislation.* Parliament has, by section 91 of the British North America Act, been given *exclusive* legislative authority as to "all matters coming within" the classes of subjects defined by head 29 of that section, within which classes the Empress Hotel comes, and section 91 declares that, any matter coming within any such class of subject, "shall not be deemed to come within" the matters assigned to the provincial legislatures. See the *Fisheries Case* (1898) A.C. 700 per Lord Herschell at p. 715, *Union Colliery v. Bryden* (1899) A.C. 580 per Lord Watson at p. 588, *John Deere Plow Company, Limited v. Wharton* (1915) A.C. 330 per Viscount Haldane L.C. at pp. 337-8 and *The Debt Adjustment Act Reference* 1943 A.C. 356 per Viscount Maugham at p. 370. If the provincial legislature cannot, by legislation relating particularly to the employees of the Empress Hotel, regulate their hours of employment, it cannot do so by legislation relating to employees generally. See *Attorney-General for Manitoba v. Attorney-General of Canada* 1929 A.C. 260.

17. *The Hours of Work Act of British Columbia must, therefore, be considered as being inapplicable to employees employed at the Empress Hotel.* It does not, by its terms, specifically refer to such employees. If it did so refer, it would clearly be *ultra vires.* It must be assumed that the provincial legislature did not intend to legislate with reference to a class of subject assigned to the exclusive legislative jurisdiction of Parliament.

18. *The hours of work of the employees employed at the Empress Hotel are now governed by section 27A of the Canadian National-Canadian Pacific Act, 1933 and the Hours of Work Act of British Columbia cannot, therefore, be applicable to such employees.* The relevant portions of the Canadian National-Canadian Pacific Act, 1933, chapter 33 of the Statutes of 1933, as amended by chapter 28 of the Statutes of 1947, read as follows:

"3. In this Act, unless the context otherwise requires,—

* * *

(*g*) 'Pacific Railways' means the Pacific Company as owner, operator, manager and otherwise and all other companies which are elements of the Pacific Company's transportation, communication and hotel system, which system shall be deemed to include railway, express, automobile, aeroplane, inland and coastal steamship, telegraph, cable, radio and hotel companies, and, limited as hereunder and not otherwise than as so limited, the respective undertakings of the Pacific Company and of such other companies, but such undertakings shall be deemed not to include or to relate to manufacturing, mining, dealing in land, operating any ocean marine service or the like or anything ancillary;

* * *

"27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representatives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport.

(2) Nothing in this section shall affect the operation of any other Act of the Parliament of Canada or regulations thereunder."

An agreement in writing respecting the employees employed at the Empress Hotel has been effective since September 1, 1945 (Case p. 2, ll. 29 to 35 incl. and Case pp. 85 *et seq.*). This agreement applies to all employees at the Empress Hotel except certain persons listed in Article 2 of the agreement (Case p. 85 l. 20 to p. 86, l. 10). "Pacific Railways" are defined so as to include the

Empress Hotel and section 27A, therefore, applies to the Empress Hotel. As Parliament has provided that the hours of work of employees engaged in the operation or maintenance of "Pacific Railways" shall be "such as are set out in any agreements in writing respecting such employees made . . . between . . . Pacific Railways . . . on the one hand, and the representatives of interested employees, on the other hand" the British Columbia Hours of Work Act cannot, at the same time, apply in respect of such employees. Even if such legislation is not, strictly speaking, "works" or "undertakings" legislation within section 91 (29) and section 92 (10) of the British North America Act, it is clearly legislation necessarily incidental thereto and "must prevail". See *Attorney-General of Canada v. Attorney-General for British Columbia* 1930 A.C. 111 per Lord Tomlin at p. 118.

F. P. VARCOE

W. R. JACKETT