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 ON BEHALF OF THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA

PART I

STATEMENT OF THE FACTS

By Order of the Lieutenant-Governor in Council of the Province of British Columbia, dated the 21st day of September, A.D. 1946, (Order of Reference No. 2189), the following question was referred to the Court of Appeal of British Columbia pursuant to the provisions of The Constitutional Questions Determination Act:

> "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?"

A majority of the Court answered the question submitted, in the affirmative and stated that the whole Act applied to the employees employed at the Empress Hotel. Mr. Justice Robert-

son delivered the judgment of the Court, concurred in by Chief Justice Sloan, Mr. Justice Sidney Smith and Mr. Justice Bird. Mr. Justice O'Halloran delivered a dissenting judgment and would answer the question submitted, in the negative.

PART II

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR ALBERTA

The Attorney-General for Alberta submits that the opinion expressed by the majority of the Appeal Court of British Columbia was correct in holding that the Hours of Work Act, being chapter 122 of the Revised Statutes of British Columbia, 1936, and amendments thereto, is applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees, employed at the Empress Hotel.

PART III

ARGUMENT

1. The Attorney-General for Alberta adopts the factum of the Attorney-General for British Columbia.

2. It has been authoritatively settled that a provincial government has complete legislative authority over hours of work under sub-head 13 of section 92 of the British North America Act.

Attorney-General for Canada v. Attorney-General for Ontario and others (Labour Conventions Case) 1937 A.C. 326; Plaxton 278.

In re Legislative Jurisdiction over Hours of Labour 1925 S.C.R. 505. In this Reference dealing with the draft convention limiting the hours of work in industrial undertakings, Duff J. as he then was, said at page 510:

> "Under the scheme of distribution of legislative authority in the British North America Act, legislative jurisdiction touching the subject matter of this convention is . . . primarily vested in the Provinces."

See also **Reference re Natural Products Act 1934 (1936) S.C.R. 398,** Duff C.J. at pages 414 *et seq.*

3. The Hours of Work Act of British Columbia being in pith and substance legislation respecting "property and civil rights" under sub-head 13 of section 92 of the British North America Act, and being of general application, is not invalid because it affects Dominion companies or companies operating railways declared to be for the general advantage of Canada, providing it does not conflict with valid Dominion legislation on the subject.

Canadian Pacific Railway Coy. v. Bonsecours 1899 A.C. 367; 1 Cameron 558.

Lymburn v. Mayland 1932 A.C. 318; Plaxton 149.

Shannon v. Lower Mainland 1938 A.C. 708; Plaxton 379.

Workmen's Compensation Board v. C.P.R. 1920 A.C. 184; 2 Cameron 151 at 156 and 157.

Ladore v. Bennett 1939 A.C. 468.

4. Under the provisions of the British North America Act, the provincial legislature has jurisdiction over all local works and undertakings other than those excepted under sub-head 10 of section 92 of the British North America Act as follows:

"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;"

By section 6 of the Railway Act, every railway or portion thereof . . . now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada . . . shall be deemed and is hereby declared to be a work for the general advantage of Canada. There has never been any specific declaration that the Canadian Pacific Railway or its works or undertakings are for

the general advantage of Canada under sub-head 10(c) of section 92 of the British North America Act.

By section 8 of The Canadian Pacific Railway Act 1902, being chapter 52 of the Statutes of Canada 1902, the Canadian Pacific Railway Company may "for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith . . . "

It is to be noted that the Canadian Pacific Railway Company was incorporated to construct and operate "lines of railway" and the Dominion's power to legislate under the exception contained in sub-head 10(a) of section 92 of the British North America Act is restricted to lines of railways and other works and undertakings connecting the Province with any other or others of the Provinces. It is submitted that the words "works and undertakings" mentioned therein, must necessarily be works and undertakings which are an integral part of such railways or are works and undertakings connecting one Province with another.

5. It is submitted that the Empress Hotel cannot be said to have been declared by the Parliament of Canada to be a work for the general advantage of Canada or for the advantage of two or more of the Provinces within the meaning of clause (*c*) of sub-head 10 of section 92 of the British North America Act.

Mr. Justice O'Halloran in his dissenting judgment (A.C. p. 10, l. 11 to 14, and p. 11, l. 37 to 44) holds that the construction, maintenance and operation of the Empress Hotel forms an integral part of the works and undertaking of the Canadian Pacific Railway within clause (c) of sub-head 10 of section 92, but there has been no specific enactment by the Dominion Parliament whereby works in the nature of the Empress Hotel have, in fact, been declared to be for the general advantage of Canada.

The mere fact that the Canadian Pacific Railway Company was, by an amendment to its Act, given the power to build hotels, cannot in any sense of the word be said to be such a declaration, nor can the provisions of section 6 of the Railway Act being chapter 170 of the Revised Statutes of Canada 1927, be said to be such a declaration in respect of the Empress Hotel. In the

case of **Luscar Collieries Ltd. v. McDonald** *et al* **(1925) 3 D.L.R. 225; 1925 S.C.R. 460,** Duff J. as he then was, states at page 477:

> "There seems to be a preponderance of argument in support of the view that section 6(c) is not an effective declaration under section 92(10) (c) of the British North America Act."

This opinion was supported by Anglin, C.J.C. and Rinfret, J. as he then was, and Mr. Justice Idington dissented on the grounds that parts of section 6(c) of the Railway Act were clearly *ultra vires.* On appeal to the Judicial Committee of the Privy Council **(1927) 4 D.L.R. 85 at page 89; 1927 A.C. 925 at 933,** the judgment of Duff, J. as he then was, was upheld, and their Lordships did not find it necessary to determine the validity of section 6(c). It is significant to note that at page 933, Lord Warrington stated:

> ". . . But they, their Lordships (wish it distinctly to be understood that so far as they are concerned the question as to the validity of section 6(c) of the Railway Act 1919 is to be treated as absolutely open."

In view of these decisions, it is submitted that in order to bring hotels under the provisions of sub-head 10(c) of section 92 of the British North America Act, there must be a specific declaration by the Dominion Parliament with respect thereto, and they cannot be brought in under section 6 of the Railway Act or the other railway legislation referred to in the Appeal Case.

6. The only right which the Dominion Parliament might possess to legislate in respect of the hours of work of employees in Canadian Pacific Railway Company's hotels would be under the third proposition outlined in Lord Tomlin's judgment in **Attorney-General for Canada v. Attorney-General for British Columbia (Regulation of Fish Canneries Case) 1930 A.C. 111; Plaxton 1** where he states at page 8:

> "(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91; see Attorney-General of Ontario v. Attorney-General for the Dominion 1894 A.C. 189; and Attorney-General for Ontario v. Attorney-General for the Dominion 1896 A.C. 348."

At the time when judgment on this Reference was given by the British Columbia Court of Appeal the majority judgment stated that whether or not the Dominion government had the right to regulate the hours of work of the employees of the Empress Hotel, it had not done so, and therefore the field being clear, provincial legislation must prevail (see A.C. p. 22 and 23).

It is submitted that the construction and operation of hotels along the lines of a railway company or at its terminal, is not necessarily incidental to the operation of a railroad. As pointed out in the majority judgment (A.C. p. 21) the generally accepted definition of railroad is "a road or way having parallel lines of steel rails spiked to cross-ties, and at a certain variable distance from each other, called the gauge; designed for the advantageous and economical passage of vehicles used in the transportation of freight, passengers, etc." Mr. Justice Robertson admitted that there might be a wider meaning to this term. At **page 22 of the Appeal Case** he states:

> "I do not suggest this is their entire meaning. I think that whatever is absolutely necessary for the physical use of the railway is to be treated as part of the line of railway. This would include such things as roundhouses, stations, rolling-stock, equipment, and all other things necessary for the operation of a railway. I would not include the Empress Hotel in this category."

It cannot be suggested that an hotel is necessary for the physical operation of a railroad, and it is submitted that Parliament, in order to encroach upon Provincial legislative powers by legislation ancillary to the exercise of an enumerated power, must enact provisions which are necessary to the proper exercise of jurisdiction under one of the sub-heads of section 91, and which are not merely convenient and reasonable.

Mr. Justice Robertson states at page 22 of the Appeal Case that an hotel may be an adjunct to a railway company "necessary for convenient business purposes," but it is not necessarily incidental to the operation of the railway lines. In the case of the **City of Montral v. Montreal Street Railway 1912 A.C. 333; 1 Cameron 711,** it was held that a provision of the Railway Act of Canada which subjects a provincial railway (not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is *ultra vires* the Dominion Parliament. At page 720, Lord Atkinson states as follows:

"It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in Attorney-General of Ontario v. Attorney-General of the Dominion (1) that the exception contained in s. 91 near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by the 16th sub-section of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by s. 92; (3) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92 and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in

the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order, and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce."

Duff J. as he then was, in **British Columbia Electric Railway Co. v. Vancouver, Victoria and Eastern Railway 48 S.C.R. 98,** points out that the Dominion Parliament in order to pass overriding legislation as necessarily incidental to one of its specific powers under section 91 cannot be the final judge of the necessity of its own intervention. This is a matter which must necessarily be left to the Courts. At page 120 he states:

"In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. The City of Montreal v. the Montreal Street Railway Co. at pages 342-345."

and at page 129 he states:

"The limit of the overriding jurisdiction of the Dominion in respect of a provincial railway as such cannot finally depend upon the view of a Dominion railway authority as to what in the particular circumstances is reasonable or equitable."

The judgment of Duff, J. was upheld by the Privy Council on appeal, see **1914 A.C. 1067.**

See also **Attorney-General of Ontario v. Attorney-General for Canada 1894 A.C. 189; 1 Cameron 447.**

Attorney-General for Ontario v. Attorney-General for the Dominion 1896 A.C. 348; 1 Cameron 481.

Great West Saddlery v. the King (1921) 2 A.C. 91; 2 Cameron 212.

Attorney-General for Canada v. Attorney-General for British Columbia 1930 A.C. 111; Plaxton 1.

As pointed out in the reasons for judgment of Mr. Justice Robertson at page 22 of the Appeal Case:

> "No one would suggest that an hotel as such is a railway. I fail to see how the fact that it is built for the 'purposes' of a railway makes it part of a railway. In fact, the language of section 8 'for the purposes of its railway and in connection with its business' suggest that it is something apart from the railway itself."

It would be unreasonable to hold that the maintenance and operation of all hotels constructed by a railway company either adjacent to or at some distance from its lines of rails are necessarily incidental to the operation of a railroad. It is well known that certain hotels owned and operated by railway companies are maintained as pleasure resorts and operated only during the tourist season or in the summer months. How could these hotels be said to be necessarily incidental to the operation of the railway?

If this reasoning is sound, then *a fortiori* the regulation by Parliament of the hours of work of employees in hotels cannot be said to be necessarily incidental to the operation of railway lines.

If the Hours of Work Act was held to be inapplicable to these employees, the resulting confusion is at once apparent. The wages and hours of work of employees in railway hotels would be subject to different regulations from those of employees in ordinary hotels in competition with them. Certain railway hotels operate beverage rooms and the hours of work of employees engaged therein are regulated by provincial statute applicable to all beverage rooms under provincial liquor laws. If the Provincial legislature is powerless to control the wages to be paid and hours of work in these establishments, then the local liquor laws might be circumvented by agreements made under Dominion legislation.

7. Since the judgment was delivered in this Reference, the Dominion Parliament has legislated by an amendment to the Canadian National-Canadian Pacific Act 1933, and has enacted the following provision as section 27A of that Act:

> "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."

It is submitted that this amendment is inapplicable to employees of railway hotels and *ultra vires* in so far as it purports to affect these employees because it is in conflict with the Hours of Work Act and entrenches upon the right of the Provinces to legislate on this subject under sub-head 13 of section 92 of the British North America Act.

In re Reference re the Natural Products Act 1936 S.C.R. 398, Duff C. J. at p. 414.

Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions Case) 1937 A.C. 326; Plaxton 278.

Attorney-General for Canada v. Attorney-General for British Columbia (Fish Canneries Case) 1930 A.C. 111; Plaxton 1.

For the above reasons and for such other reasons as may be advanced on the argument at the hearing of this Reference, the Attorney-General for the Province of Alberta submits that the opinion given by the majority of the British Columbia Appeal Court ought to be upheld and that the answer to the question referred to must be in the affirmative.

H. J. WILSON,

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of Alberta