58, 1949

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

THE ATTORNEY-GENERAL OF NOVA SCOTIA

THE ATTORNEY-GENERAL OF ALBERTA

Intervenants.

FACTUM OF THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA

J. A. WRIGHT, ESQ.,
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H. ALAN MACLEAN, ESQ.,
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Factum of the Attorney General of the Province of Nova Scotia

PART I—FACTS

This is an appeal from the decision of the Court of Appeal of British Columbia, upon a Reference to that Court of the question whether the Hours of Work Act, being Chapter 122 of the Revised Statutes of British Columbia, 1936, and amendments thereto, was applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, in the City of Victoria, and if so, to what extent. The Court of Appeal decided that the whole Act was so applicable and binding. The decision is reported *sub nom. Reference re Application of "Hours of Work Act" to C. P. R. Hotel Employees*, 1947, 2 *D. L. R.* 723. The Order of Reference was dated 21st September, 1946, and the decision of the Court was delivered on 27th March, 1947. The facts upon which the Court of Appeal reached its decision are set out in the Order of Reference which appears at Pages 1 to 3, inclusive, of the Case.

It is here noted for the record, and in case it is referred to in the course of the Argument, that Section 27A of The Canadian National—Canadian Pacific Act, 1933, was enacted by Chapter 28 of the Statutes of Canada for 1947, which was assented to the 27th June, 1947. This Section provides, in effect, that 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, and their employees, whether entered into before or after the commencement of the Act, if such agreements are filed in the office of the Minister of Transport.

PART II—SUBMISSIONS

It is submitted on behalf of the Attorney General for Nova Scotia that the question asked on the Reference was properly answered in the affirmative by the Court of Appeal of British Columbia. The reasons upon which it is submitted that the correct answer to such question is an answer in the affirmative, appear from the following Argument.

PART III—ARGUMENT

Reason 1. Conditions of labour, including the fixing of maximum hours, are *prima facie* a matter for Provincial legislation under Section 92 (13) of the British North America Act, 1867.

In the Matter of Legislative Jurisdiction over Hours of Labour, 1925 S. C. R. 505.

Attorney General for Canada vs. Attorney General for Ontario et al., (Labour Legislation Reference) 1937 A. C. 326.

Reason 2. The Hours of Work Act of British Columbia is in pith and substance legislation in relation to conditions of labour.

This is immediately apparent from an examination of the Act. It provides, in effect, for a maximum eight-hour day and forty-four hour week with generous provisions for making exceptions in the cases of extraordinary circumstances and in the cases of undertakings to which the principal provisions of the Act cannot feasibly be applied. The object of the Act is obviously the physical and mental well-being of employees, with which it is concerned as a part of minimum decent standards of living.

Reason 3. The fixing of maximum hours of labour, in the manner of the Hours of Work Act, in respect of employees of Canadian Pacific Railway Company employed at the Empress Hotel, is not competent to Parliament on account of being an integral part of the subject matter of Section 91 (29) of the British North America Act, because it is not such an integral part. The Empress Hotel is not, itself, a part of any work or undertaking mentioned in sub-paragraph (a), (b) or (c) of Section 92 (10), to which Section 91 (29) refers. Even if the Empress Hotel were such a part, the fixing of maximum hours of labour, in the manner of the Hours of Work Act, in respect of the Empress Hotel employees is not an integral part of the subject matter of said sub-paragraph (a), (b) or (c). (Sections 91 (29) and 92 (10) are printed on page 9 *infra*.)

In the Matter of Legislative Jurisdiction over Hours of Labour, 1925 S. C. R. 505 (*supra*).

There is no division of labour relations which follows the division of classes of subjects in Sections 91 and 92 of the British North America Act:

Re Lunenburg Sea Products, Limited, 1947, 3 D. L. R. 195 at 208.

The distinction between a subject that is an integral part of a subject matter contained in Section 91 and a subject that is only necessarily incidental to such a subject matter is illustrated by:

Reference re Waters and Water-Powers, 1929 S. C. R. 200 at 213.

Clement's Canadian Constitution, 3rd Edition, p. 494.

The test as to whether legislation is in relation to an integral part of a subject matter of Section 91, is whether the provisions "are provisions which fall strictly within a federal class and therefore in no aspect could be enacted by a provincial legislature." (Clement, *supra*). Obviously, the provisions of the Hours of Work Act do not meet this test. When legislation does meet this test, the result is not to limit its application, but to declare it wholly *ultra vires.*

Moreover, the Empress Hotel itself is not a part of any work or undertaking mentioned in said sub-paragraph (a), (b) or (c). Section 91 (29) reserves to Parliament such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Provincial Legislatures. Section 92 (10) makes such an exception of certain "works and undertakings." If the Empress Hotel is a part of such a work or undertaking, it must come under sub-paragraph (a) within the meaning of the single word "Railways." Upon no reasonable construction can the word "railway" be held to include the word "hotel." In this and in no wider sense must be read Section 6 of Chapter 24 of the Statutes of Canada for 1883, the relevant part of which provides that "it is hereby declared, that. . (reference to several other Railways). . .and the Canadian Pacific Railway, are works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any one of them , is a work for the general advantage of Canada."

Reference re Application of "Hours of Work Act" to C. P. R. Hotel Employees, 1947, 2 D. L. R. 723, the reasoning wherein of the Chief Justice of British Columbia and Robertson, Smith and Bird, J J. A. is respectfully adopted.

Reason 4. The fixing of maximum hours of labour, in the manner of the Hours of Work Act, in respect of employees of Canadian Pacific Railway Company employed at the Empress Hotel, is not competent to Parliament on account of being necessarily incidental to the subject matter of Section 91 (29) of the British North America Act because it is not necessarily incidental to such subject matter.

A high standard of necessity, much higher than mere convenience, must be demonstrated before a subject will pass to Dominion jurisdiction under the doctrine of incidental or ancillary necessity. This appears from an examination of the following cases in which the expression "necessarily incidental" and synonymous expressions are used and explained:

Attorney General of Ontario vs. Attorney General for the Dominion of Canada, 1894 A. C. 189 at 200, 201.

Attorney General for Ontario vs. Attorney General for the Dominion et al., 1896 A. C. 348 at 359, 360.

In re Railway Act, 36 S. C. R. 136 at 142.

Grand Trunk Railway Company of Canada vs. Attorney General of Canada, 1907 A. C. 65 at 68.

Corporation of the City of Toronto vs. Canadian Pacific Railway Company, 1908 A. C. 54 at 58.

City of Montreal vs. Montreal Street Railway, 191 2 A. C. 333 at 345.

The British Columbia Electric Railway Company vs. the Vancouver, Victoria and Eastern Railway and Navigation Company, et al., 48 S. C. R. 98 at 120.

Reference re Waters and Water-Powers, 1929 S. C. R. 200 (*supra*) at 213.

Attorney General for Canada vs. Attorney General for British Columbia et al. (Fisheries Reference), 1930 A. C. 111 at 118.

In re the Regulation and Control of Aeronautics in Canada, 1932 A. C. 54 at 72.

Rex vs. Morley, 1932 4 D. L. R. 483 at 492.

Assuming that the case of *In the Matter of Legislative Jurisdiction over Hours of Labour*, 1925 *S.C.R.* 505 (*supra*) is authority for the proposition that legislation of the nature of the Hours of Work Act is necessarily incidental to true railway legislation, it does not follow from this that the Dominion Parliament has jurisdiction to enact legislation of the nature of the said Act in respect of the Empress Hotel. The Empress Hotel, for the reasons already submitted, is not a part of the Canadian Pacific "Railway" nor is it necessarily incidental thereto.

Even if the Empress Hotel were held to be a part of Canadian Pacific "Railway," it by no means follows that the remarks of Duff (then) J. at page 511 of the case *In the Matter of Legislative Jurisdiction over Hours of Labour*, 1925, *S. C. R.* 505 (*supra*), would extend to the Empress Hotel. Duff (then) J. was obviously considering only "railways" proper.

Section 27A of the Canadian National—Canadian Pacific Act (if it is to be considered) can only displace provincial legislation in respect of the same subject matter, to the extent that the Section is necessarily incidental to the sub-

ject matter of Section 91 (29). Neither upon the view that the Empress Hotel is or is not a part of Canadian Pacific Railway can the Section be said to be necessarily incidental, in so far as its application to the Empress Hotel is concerned.

The concept of "ancillary necessity" or "incidental necessity" is a relative one. In any particular case the question as to whether powers are necessarily incidental to a subject matter contained in Section 91, must depend upon considerations, not only of the importance of such powers to the subject matter in Section 91, but also of their importance to the subject matter, to which they would otherwise belong, in Section 92.

In the case of a physical thing like a railway, the importance of powers sought to be taken as ancillary may be more apparent, without being more real, than in the case where, not a physical thing like a railway, but a large branch of jurisprudence (Section 92 (13)) is concerned. Actually, the importance of the power to regulate hours of labour, in the manner of the Hours of Work Act in respect of Empress Hotel employees, is much more important to a provincial policy of minimum living standards than it is to the management of a railway, even assuming the Empress Hotel to be part of the Canadian Pacific Railway.

Moreover, there has, in some instances in the past, been indicated a tendency to regard an encroachment upon Section 92 (13), for the purposes of giving ancillary powers to the Dominion Parliament, as less serious and therefore more easily accomplished, than an encroachment upon one of the more limited headings of Section 92. This appears from the case of:

> The British Columbia Electric Railway Company vs. the Vancouver, Victoria and Eastern Railway and Navigation Company, et al., 48 S. C. R. 98. (*supra*).

The reason for this distinction was that Section 92 (13) has, until recent years, represented a conglomeration of property and civil rights, where the taking of one did not affect others or encroach upon any precise field of provincial endeavour. Today, however, conditions of labour, including hours of work, represent a precise field of provincial endeavour concerned with the maintenance of minimum decent living standards. This field is entitled to the same protection as any particular heading of Section 93.

In any case, where there is an overlapping field which Parliament may enter under the doctrine of ancillary necessity, the Provincial legislation is abrogated only when the two enactments meet *in conflict.*

> Rex vs. Morley, 1932 4 D. L. R. 483. (*supra*).
>
> Forbes vs. Attorney General for Manitoba, 1937 A. C. 260 at 274.

Provincial Secretary of Prince Edward Island vs. Egan, 1941 S. C. R. 396.

A conflict between Dominion legislation and the Hours of Work Act is not to be anticipated.

Reason 5. Even if the fixing of maximum hours of work in the manner of the Hours of Work Act in respect of employees of the Canadian Pacific Railway Company employed at the Empress Hotel were competent to Parliament as being necessarily incidental to the subject matter of Section 91 (29), Parliament had not, at any relevant time, entered the field of maximum hours of labour, but had left it in the occupation of the Provincial Legislatures under Section 91 (13).

Attorney General of Ontario vs. Attorney General for the Dominion of Canada, 1894 A. C. 189 at 201. (*supra*).

Reference re Waters and Water-Powers, 1929 S. C. R. 200. (*supra*).

Attorney General for Canada vs. Attorney General for British Columbia et al. (Fisheries Reference), 1930 A. C. 111. (*supra*).

Attorney General for Alberta vs. Attorney General for Canada, 1943 A. C. 356 at 370.

Section 287 (j) of the Railway Act confers authority on the Board of Railway Commissioners to make orders and regulations "limiting or regulating the hours of duty of any employees or class of employees, with a view to the safety of the public and of employees." This authority was unexercised and the primary authority of the Province in relation to the subject matter of such authority remained unimpaired and unrestricted.

In the Matter of Legislative Jurisdiction over Hours of Labour, 1925 S. C. R. 505. (*supra*).

Attorney General for Ontario vs. Attorney General for the Dominion et al., 1896 A. C. 348. (*supra*).

Reason 6. The "Hours of Work Act," being in pith and substance an act relating to property and civil rights, is not invalid or abrogated in respect of a subject matter contained in Section 91 merely because it incidentally *affects* such a subject matter.

Canadian Pacific Railway Company vs. Corporation of The Parish of Notre Dame de Bonescours, 1899 A. C. 367 at 373.

Bank of Toronto vs. Lambe, 12 A. C. 575 at 585.

Workmen's Compensation Board vs. Canadian Pacific Railway Company, 1920 A. C. 184 at 192, 193.

McColl vs. Canadian Pacific Railway Company, 1923 A. C. 126.

Forbes vs. Attorney General for Manitoba, 1937 A.C. 260 (*supra*) at 270.

Shannon vs. Lower Mainland Dairy Products Board, 1938 A. C. 708 at 720.

Ladore vs. Bennett, 1939 A. C. 468 at 483.

Summation. It follows from the foregoing that the fixing of maximum hours, in the manner of the Hours of Work Act in respect of the employees of Canadian Pacific Railway Company employed at the Empress Hotel is within the competence of the Provincial Legislatures and that the Court of Appeal of British Columbia was correct in its conclusion.

All of which is respectfully submitted.

Halifax, Nova Scotia,
16th January, 1948.

THOMAS D. MACDONALD,

of Counsel for the Attorney General of Nova Scotia.

Excerpts from Sections 91 and 92 of the British North America Act, 1867.

POWERS OF THE PARLIAMENT

"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.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

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 Steamships 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....."