

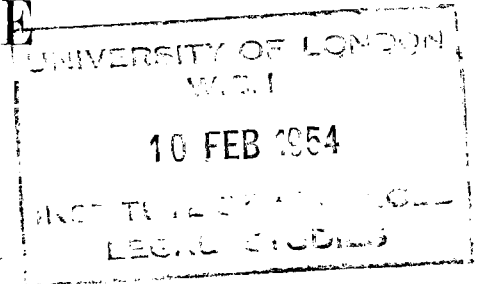
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19, 1953

In the Privy Council.

No. 21 of 1952.

ON APPEAL FROM THE SUPREME
COURT OF CANADA



BETWEEN

THE ATTORNEY GENERAL FOR SASKATCHEWAN
APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY RESPONDENT

AND

THE ATTORNEY GENERAL OF CANADA
AND THE ATTORNIES GENERAL FOR
ALBERTA AND MANITOBA INTERVENERS.

33457

RESPONDENT'S CASE

RECORD

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

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p. 7

The Court of Appeal answered four questions referred to it by an order of the Lieutenant-Governor in Council dated 16th November, 1948, pursuant to the Constitutional Questions Act (Revised Statutes of Saskatchewan, 1940, Chapter 72).

p. 1

10 2.—The questions referred to the Court of Appeal involve consideration of the interpretation of clause 16 of a contract between Her Majesty the Queen acting in respect of the Dominion of Canada and George Stephen and others executed on 21st October, 1880. This contract provided for the construction, operation and maintenance of the Canadian Pacific Railway. Clause 16 of the contract provided for freedom from taxation in the following terms :

p. 174

p. 181, l. 9

“ The Canadian Pacific Railway, and all stations and
“ station grounds, workshops, buildings, yards and other
“ property, rolling stock and appurtenances required and used

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“ 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 twenty years after the grant thereof from the Crown.”

p. 172 The Contract containing this clause was approved and ratified by Statutes of Canada, 1881, 44 Victoria, Chapter 1.

3.—The questions referred to the Court of Appeal also involve 10
 consideration of whether, in view of the freedom from taxation
 granted the Respondent by clause 16, certain provisions of Sas-
 katchewan legislation are operative in respect of property of the
 Respondent. This in turn depends on the validity of section 24 of
 the Saskatchewan Act (Statutes of Canada, 1905, 4-5 Edward VII,
 p. 266, l. 18 Chapter 42) which provides 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 20
 “ Company.”

p. 5, l. 15 4.—By questions 1 and 3 the Court of Appeal was asked in effect whether the freedom from taxation in clause 16 applied to branch lines constructed under the authority of clause 14 of the contract. By questions 2 and 4 the Court of Appeal was asked in effect whether the freedom from taxation in clause 16 applied to so-called business taxes provided for in certain statutes of the Province of Saskatchewan.

5.—The Appellant by its petition sought leave to appeal from the answers given by the Supreme Court of Canada to all four 30 questions.

p. 390
 p. 391, l. 41 By order of Her Majesty dated 18th July, 1952, leave to appeal was granted but it was directed that the appeal was “ to be limited to the following questions (a) whether the exemption granted in clause 16 of the contract between the Dominion of Canada and the Respondent Company covers the form of local taxation known as ‘ business taxes ’ and (b) as to the validity of the limitation on the powers of the Province contained in section 24 of the Saskatchewan Act 1905 ”. Thus, in the result leave was refused as to questions 1 and 3, but was granted with respect to questions 2 and 4. 40

6.—The contention of the Appellant that section 24 of the Saskatchewan Act is unconstitutional was not argued before the

Court of Appeal or the Supreme Court of Canada because in the view of the Appellant that question had been decided against it by the decision of the Supreme Court of Canada in *Reference re Constitutional Validity of Section 17 of the Alberta Act* (1927), S.C.R. 364.

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7.—By the British North America Act, 1867 (30–31 Victoria, Chapter 3) the present provinces of Ontario, Quebec, Nova Scotia and New Brunswick were united to form Canada. By section 146 of that Act, authority was given for the admission to Canada by Imperial Order in Council of the provinces of Newfoundland, Prince Edward Island and British Columbia and of the territories of Rupert's Land and the Northwestern Territory. p. 81, l. 26

8.—Rupert's Land and the Northwestern Territory were admitted into the Union as of 15th July, 1870, by Imperial Order in Council dated 23rd June, 1870, and the Parliament of Canada was given full power and authority to legislate for the future welfare and good government thereof. The territory which constitutes the present Province of Saskatchewan was part of the territory admitted into the Union by that Order in Council. p. 89, l. 1

9.—The Province of British Columbia was admitted into the Union as of 20th July, 1871, by Imperial Order in Council dated 16th May, 1871. By the terms of its admission into the Union the Government of the Dominion undertook "to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, from such point as may be selected east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union". p. 92, l. 31
p. 94, l. 8

10.—It was the intention of the Parliament of Canada in 1871 that the railway to connect British Columbia with the railway system of Canada should be constructed and worked by private enterprise and not by the Government, but that the Government should give assistance in the form of land and money. Accordingly, a general statute regarding the Canadian Pacific Railway was enacted in 1872. p. 91, l. 27
p. 97

Pursuant to this Act, the Inter-Oceanic Railway Company of Canada and the Canadian Pacific Railway Company were incorporated the same year. The Government attempted to induce these Companies to unite but they refused to do so, and the contract for the construction of the railway was not entered into with either of them. Instead, in 1873, a charter was granted to another company p. 100
p. 102
p. 103, l. 30
pp. 289–291

- RECORD
p. 103
pp. 291-294
- called "The Canadian Pacific Railway Company". This Company however, failed to raise the necessary capital and its charter was surrendered.
- p. 104
p. 105, l. 20
- 11.—In 1874 a second general statute regarding the Canadian Pacific Railway was enacted. It recited the failure of the 1872 Act to induce private interests to undertake the construction of the railway and went on to provide for the construction of the railway either by private enterprise or as a public work of the Dominion. Under the terms of this Act in 1875 yet another company was incorporated, but once again the attempt to get the railway constructed 10 came to nothing.
- p. 114
- 12.—British Columbia complained to the British Government of the Dominion Government's delay in commencing the construction of a railway to the seaboard of British Columbia as provided by the Terms of Union. Lord Carnarvon, the Colonial Secretary, who was appointed to settle the dispute recommended, among other things, that the date for the completion of that railway should be extended from 1881 to the end of 1890.
- p. 110, l. 38
p. 131, l. 24
- 13.—Unable to interest capitalists in either the United States or England, the Government of Canada commenced the construction 20 of certain sections of the railway as government works.
- . 294-296
- 14.—Negotiations with private interests continued, however, and in September, 1880, after several months of negotiations, the Government on its second attempt was finally successful in reaching an agreement with Duncan McIntyre and associates as to terms upon which they were prepared to construct a railway to the Pacific. These terms were outlined in a memorandum of "Heads of Arrangement" in which the Government undertook to procure the passage of an Act of incorporation "which shall be on as favourable terms as have been granted by the Dominion Parliament to any Railway 30 Company and to embrace all the necessary clauses to carry out this arrangement".
- pp. 151-155
- p. 156
- p. 156, l. 26
- 15.—In addition to substantial grants of land and money, broad exemption from taxation had been a prominent consideration in the attempts made in 1872 to induce private interests to undertake the construction of the railway.
- pp. 101-103
- p. 174
- 16.—A contract with George Stephen, Duncan McIntyre and their associates was executed on 21st October, 1880. Clauses 1 to 8 of this contract provided for the completion of the main line of the railway in part by the Government and in part by the Respondent 40 Company for the conveyance to the Company of the sections of

the railway constructed by the Government, and for the equipment, maintenance and efficient running of the whole railway by the Company. Clause 9 provided for the grant by the Government to the Company of \$25,000,000 and 25,000,000 acres of land in consideration for its undertaking. Clause 10 provided for the grant of lands required for the road bed, stations and other appurtenances and for the admission into Canada free of duty of construction materials for part of the main line. Clause 14 gave the Company the right to construct branch lines and provided for the grant of
 10 lands required for the road bed, stations and other appurtenances of the branch lines. Clause 16 provided for freedom from taxation.

17.—The contract was approved and ratified by a Dominion Act assented to on 15th February, 1881, to which it was annexed as a schedule and letters patent under the Great Seal of Canada were issued on 16th February, 1881, incorporating the Respondent.
 p. 172
 p. 174
 p. 198

The main line of the railway was completed by the Respondent in 1885.

18.—By the Saskatchewan Act of 1905, passed pursuant to the British North America Act, 1871 (34–35 Victoria, Chapter 28), the Dominion established the province of Saskatchewan out of part of the territory through which the main line of the railway ran. By section 24 of the Saskatchewan Act, which is set out in paragraph 3 hereof, the Dominion provided that the powers of the province it had established should be exercised subject to clause 16 of the contract.
 p. 265
 p. 96
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19.—Questions 2 and 4 referred to the Court of Appeal and the answers of the Supreme Court of Canada to those questions are as follows :

30 *Question 2* : Does clause 16 of the contract aforesaid exempt and free the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of the business carried on as a railway

(a) based on the area of the land or the floor space of the buildings used for the purpose of such business,

(b) based on the rental value of the land and buildings used for the purposes of such business,

(c) based on the assessed value of the land and buildings used for the purposes of such business,

but not made a charge upon such land or buildings ?

40 *Answer* : Yes as to the business carried on as a railway upon or in connection with the railway as described in Sections 1, 2 and 3 of the Act 37 Victoria c. 14, and upon such other
 p. 346, l. 3

RECORD

properties, if any, real or personal of the Company situate upon its branch lines in Saskatchewan as are entitled to the benefit of exemption from taxation under clause 16 as being required and used for the construction and working of that portion of the line referred to in the said sections of the Statute.

p. 5, l. 39

Question 4 : Are the provisions of the said The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947, and The Town Act, 1947, all as amended, relating to the assessment and taxation of railway companies in respect of the business carried on as a railway, operative with respect to Canadian Pacific Railway Company in respect of the stations, workshops, and other buildings, used for the working of 10

- (a) the main line of its railway in Saskatchewan, and
- (b) its branch lines in Saskatchewan ?

p. 346, l. 15

Answer :

4 (a) No.

4 (b) Yes, subject to the limitation stated in the answer to Question 2.

20.—As a result of the answers of the Supreme Court of Canada to questions 1 and 3, the freedom from taxation granted by clause 16 of the contract applies in Saskatchewan to the property of the Respondent which is situated on the main line of the railway and to such property on branch lines as is required and used for the construction and working of the main line. 20

21.—The tax for which provision is made by the legislation referred to in question 4 is similar to the tax described in question 2 (a). The principles involved in answering question 2 (a) are applicable in answering questions 2 (b) and 2 (c). The taxes described in the three parts of question 2 and in question 4 can therefore be conveniently dealt with together. 30

22.—Assuming that section 24 of the Saskatchewan Act is valid, there is no question but that clause 16 exempts the Respondent from one common form of municipal tax in Canada, that is a tax on a person in respect of his ownership of real property.

The problem raised by questions 2 and 4 is whether clause 16 also exempts the Respondent from an equally common form of municipal tax in Canada, namely, a tax on a person in respect of his use or occupation of real property for business purposes.

23.—This latter tax is of a nature that, in the Respondent's submission, would clearly come within the exemption provision of clause 16. 40

24.—The Court of Appeal for Saskatchewan considered that it was bound to follow its own earlier decision in *City of Moose Jaw v. British American Oil Company Limited* (1937) 2 W.W.R. 309 and held that the exemption provided by clause 16 did not apply to the taxes described in questions 2 and 4 on the ground that those taxes were personal taxes and not property taxes.

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p. 27, l. 11

p. 35, l. 15

p. 42, l. 42

Every tax is, of course, a personal tax in that a person and not a thing is required to pay the tax. In this sense, the taxes in question here are personal taxes. In exactly the same sense, however, taxes imposed on persons in respect of their ownership of real property are personal taxes.

25.—If taxes imposed on a person in respect of his ownership of property are to be regarded as being property taxes, there can, in the Respondent's submission, be no justification for regarding taxes imposed on a person in respect of his use or occupation of property as being personal taxes. Both types of taxes being levied on a person are in a sense personal taxes. Both types of taxes are, however, taxes on property and, the Respondent contends, come within the exemption.

26.—The Court of Appeal attached some importance to the fact that taxes imposed in respect of the ownership of land and buildings are commonly made a charge on the land or buildings in respect of which they are payable whereas the taxes in question are not made a charge on the land or buildings. The effect of making a tax a charge on the land or buildings is merely to give the tax collector an additional means of collecting the tax. It does not alter the true nature of the tax. The fact that the taxes in question are not made a charge against real property is not, therefore, a valid basis for holding that those taxes do not come within the clause 16 exemption.

27.—The taxes described in questions 2 and 4 are in no true sense taxes on businesses. Not all businesses are taxed but only businesses in which land or buildings are used for the purposes of the business. Moreover, the amount of the taxes are not based on the volume of business carried on or on the earnings of the business, but on the amount or value of the real property used for the purposes of the business.

28.—It is apparent that the taxes in question, although labelled "business taxes", are in their true nature taxes in respect of the use or occupation of property. Taxes of that character are just as much taxes on the property of the Respondent "required and used" for the business of the railway within the meaning of clause 16 as would be taxes in respect of the ownership of that property.

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29.—A substantially similar tax to the taxes in question here was held by the Judicial Committee in *Halifax v. Fairbanks' Estates* (1928) A.C. 117, to be a property tax and accordingly a valid direct tax.

30.—To hold the Respondent liable to taxes levied in respect of the use or occupation of the property which was declared to be exempt from taxation would, it is submitted, be clearly contrary to the intention of the Dominion Government and the Respondent, who were the parties to the contract. The benefits which the Dominion Government intended to confer by clause 16 would be illusory if, although free from taxation in respect of its ownership of the property, the Respondent was not free from taxation in respect of its use or occupation of that property. 10

31.—The purpose of the first part of clause 16 was to assure the Respondent freedom from the burden of taxation on the property “required and used for the construction and working” of the part of the railway referred to. Thus the nature of the Respondent’s use and occupation of the property was the reason for the exemption. It is therefore obvious that if taxes such as those described in questions 2 and 4 were to be imposed on the Respondent, the freedom from taxation granted the Respondent would be as effectively nullified and the purpose of clause 16 as effectively defeated as they would be by the imposition of taxes on the Respondent in respect of its ownership of its property. 20

32.—Six of the seven judges in the Supreme Court of Canada held that the so-called business taxes referred to in questions 2 and 4 come within the clause 16 exemption.

p. 386, l. 36

Mr. Justice Locke, whose judgment was concurred in by Mr. Justice Kerwin and Mr. Justice Cartwright, held that since it was the property of the Respondent when used for railway purposes which was declared to be free from taxation, it could not be said that a tax on an owner in respect of his use of the property for the purpose of working the railway was not squarely within the exemption. 30

p. 377, l. 44

p. 365, l. 10

Mr. Justice Kellock was of the view that the “business” assessment provided for by the taxing provisions was an “assessment (and taxation) of a person in respect of land or buildings occupied by him for the purposes of a business” and that there was no essential difference in nature between such taxation and taxation of a person in respect of ownership of land and buildings. 40

p. 355, l. 36

The Chief Justice, who delivered the judgment of himself and of Mr. Justice Taschereau, was of the opinion that clause 16 exempted the Respondent from the taxation in question.

Mr. Justice Estey, who dissented, was of the opinion that the tax was not a tax on the occupation of the property but was a tax on the business and not within the exemption.

33.—The second issue raised on this appeal is as to the validity of section 24 of the Saskatchewan Act of 1905, which is set out in paragraph 3 hereof.

If the section is valid it would follow that it is beyond the power of Saskatchewan to impose taxation in contravention of clause 16.

10 34.—By section 146 of the British North America Act, 1867, authority was given for the admission to Canada by Imperial Order in Council of Rupert's Land and the Northwestern Territory. No express authority was given for the creation of provinces within those territories after their admission to Canada and, accordingly, the British North America Act, 1871 (34–35 Victoria, Chapter 28) was enacted to give such authority. p. 81, l. 26 p. 96

Section 2 of that Act reads as follows :

20 “ 2. 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 estab-
“ lishment, make provision for the constitution and adminis-
“ tration of any such Province, and for the passing of laws for
“ the peace, order, and good government of such Province, and
“ for its representation in the said Parliament.”

35.—Acting on the authority of that section the Parliament of Canada in 1905 enacted the Saskatchewan Act thereby establishing the new province of Saskatchewan out of the territories forming part of Canada. p. 265

30 Section 3 of that Act provides for the application to the new province of the provisions of the British North America Acts, 1867 to 1886 “ except insofar as varied by this Act ”. p. 266, l. 10

Section 17, which deals with education, is identical to section 17 of the Alberta Act, the validity of which was in question in the 1927 Reference of the Supreme Court of Canada referred to in paragraph 6 hereof.

40 Section 23 provides that nothing in the Act shall prejudice or affect the rights or property of the Hudson's Bay Company as contained in the conditions under which that Company surrendered Rupert's Land to the Crown. Section 24 then deals with the exemption provided the Respondent by clause 16 of the contract. p. 266, l. 18

36.—The contention of the Appellant would appear to be that the authority granted to the Parliament of Canada by section 2 p. 96, l. 21

of the Imperial Act of 1871 to “ make provision for the constitution and administration ” of a new province and “ for the passing of laws for the peace, order and good government of such Province ” is limited to the granting to such province of the identical powers conferred on the original four provinces of Canada by the British North America Act, 1867 and accordingly that the limitation imposed on the powers of Saskatchewan by section 24 of the 1905 Act is invalid.

37.—It would seem clear that the Parliament of Canada was granted ample authority by section 2 of the Imperial Act of 1871 10 to limit the power of Saskatchewan to tax the Respondent. The Respondent submits that the reasons on which the Supreme Court of Canada unanimously held section 17 of the Alberta Act to be valid on the Reference in 1927 are sound and support the validity of section 24 of the Saskatchewan Act.

38.—By the British North America Act, 1886 (49–50 Victoria, Chapter 35), it was by section 2 “ declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in 20 the British North America Act, 1867 . . . ”.

The Saskatchewan Act was an Act passed by the Parliament of Canada after the passing of the 1886 Act for the purpose mentioned in the British North America Act, 1871, and accordingly, by virtue of the 1886 Act, is as immune from constitutional invalidity as if it had been directly enacted by the Imperial Parliament.

39.—The Respondent respectfully submits that this appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the taxes described in question 2 and the 30 taxes imposed by the statutory provisions referred to in question 4 are in their true nature taxes on property of the Respondent which is exempt from taxation by clause 16.
2. BECAUSE such taxes are not in their true nature personal taxes.
3. BECAUSE such taxes are not in their true nature taxes on the Respondent’s business.
4. BECAUSE section 24 of the Saskatchewan Act is valid.

5. BECAUSE the Parliament of Canada by virtue of section 2 of the British North America Act, 1871, had power to enact section 24 of the Saskatchewan Act and this power was confirmed by section 2 of the British North America Act, 1886.
- 10 6. BECAUSE section 24 of the Saskatchewan Act was a provision for the continuation in Saskatchewan after the establishment of the Province of a law in force in the Territories before the establishment of the Province and was therefore a valid exercise by the Parliament of Canada of the power conferred by section 2 of the British North America Act, 1871, to establish new provinces in the territories.
7. BECAUSE the reasons of the unanimous judgment of the Supreme Court of Canada in the reference with regard to section 17 of the Alberta Act of 1905 (1927 S.C.R. 364) are right and are applicable to section 24 of the Saskatchewan Act.
- 20 8. BECAUSE section 24 of the Saskatchewan Act, being an enactment in relation to a railway connecting two or more provinces, is within the powers of Parliament by virtue of Head 29 of section 91 of the British North America Act, 1867, read with Head 10 of section 92 thereof, and prevails over an act of the Legislature of Saskatchewan with which it comes in conflict.

C. F. H. CARSON.
FRANK GAHAN.
ALLAN FINDLAY.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT
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RESPONDENT'S CASE

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