

19, 1953

# In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

33854

UNIVERSITY OF LONDON  
W.C.I.  
10 FEB 1954  
RECORDED  
IS

BETWEEN  
THE ATTORNEY-GENERAL FOR SASKATCHEWAN . . . . . *Appellant*  
AND  
CANADIAN PACIFIC RAILWAY COMPANY . . . . . *Respondent*  
AND  
THE ATTORNEY-GENERAL FOR MANITOBA,  
THE ATTORNEY-GENERAL FOR ALBERTA  
and  
THE ATTORNEY-GENERAL OF CANADA . . . . . *Interveners.*

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## Case

FOR THE ATTORNEY-GENERAL OF CANADA.

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, answering questions referred to the Court of Appeal of Saskatchewan concerning the liability of the Respondent to pay certain taxes under legislation of the Province of Saskatchewan. p. 345.  
p. 7.
2. By an order of Her Majesty in Council made on the 25th day of November, 1952, leave was granted to the Attorney-General of Canada to intervene in the appeal to lodge a Printed Case and to be heard by Counsel. p. 393.
3. By the order granting special leave to appeal, the appeal is limited to two questions. The Attorney-General of Canada seeks to be heard on only one of those questions, namely, the question as to the validity of the limitation on the powers of the Province contained in section 24 of the Saskatchewan Act of 1905. p. 390.

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4. The relevant provisions of the British North America Act of 1867 read 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 10  
 “ 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 20  
 “ 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,—

\* \* \* \* \*

“ 2. Direct Taxation within the Province in order to the  
 “ Raising of a Revenue for Provincial Purposes.

\* \* \* \* \*

“ 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 con- 30  
 “ necting the Province with any other or others of the  
 “ Provinces, or extending beyond the Limits of the  
 “ Province . . .”

p. 96. 5. Doubt having arisen as to the power of the Parliament of Canada to establish provinces in the Territories, the British North America Act, 1871, 34–35 Victoria, chapter 28 (Imperial), was enacted in 1871 providing in part as follows :—

p. 96, l. 21. “ 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 40  
 “ 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 Province, and for its representation  
 “ in the said Parliament.”

6. By chapter 1 of the Statutes of Canada of 1881, provision was made for the incorporation of the Canadian Pacific Railway Company (section 2) and a contract between Her Majesty in right of Canada and certain individuals for the construction and operation of a railway joining Eastern Canada with the Pacific Ocean was "approved and ratified" (section 1). Paragraph 16 of the contract, a copy of which was appended to the Statute, read as follows :

10 " 16. The Canadian Pacific Railway, and all stations and  
 " station grounds, work shops, buildings, yards and other property, p. 181, l. 9.  
 " 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."

20 7. By the British North America Act, 1886, chapter 35 of the Statutes  
 of 1886 (Imperial), which was enacted to make provision for representation  
 in the Parliament of Canada of Territories which for the time being form  
 part of Canada but are not included in any province, it was also declared  
 " that any Act passed by the Parliament of Canada, whether before or  
 " after the passing of this Act, for the purpose mentioned . . . in the  
 " British North America Act, 1871, has effect, notwithstanding anything  
 " in the British North America Act, 1867 . . . "

8. By the Saskatchewan Act, chapter 42 of the Statutes of Canada, 1905, a portion of the North-West Territories was established as a Province of Canada to be called the Province of Saskatchewan (section 2). This Statute contains, amongst others, the following provisions :—

30 " 3. The provisions of the British North America Acts, 1867 p. 266, l. 10.  
 " to 1886, shall apply to the Province of Saskatchewan in the same  
 " way and to the like extent as they apply to the provinces hereto-  
 " fore comprised in the Dominion, as if the said Province of  
 " Saskatchewan had been one of the provinces originally united,  
 " except in so far as varied by this Act and except such provisions  
 " as are in terms made, or by reasonable intendment may be held  
 " to be, specially applicable to or only to affect one or more and not  
 " the whole of the said provinces."

40 " 24. The powers hereby granted to the said province shall p. 266, l. 18.  
 " 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."

9. By order of the Lieutenant-Governor of Saskatchewan in Council pp. 1 to 6.  
 made on the 16th of November, 1948, under The Constitutional Questions  
 Act, chapter 72 of the Revised Statutes of Saskatchewan, 1940, certain  
 questions as to the effect of clause 16 of the contract which was ratified  
 by chapter 1 of the Statutes of Canada of 1881 were referred to the Court  
 of Appeal for Saskatchewan for hearing and consideration. The answers p. 7.

pp. 67, 68.  
p. 345.

of the Judges of the Court of Appeal of Saskatchewan were certified to the Lieutenant-Governor in Council on 29th January, 1949. An appeal was taken by the present Respondent from the answers so certified to the Supreme Court of Canada and on the 20th day of November, 1950, the Supreme Court of Canada rendered judgment allowing the appeal in part.

p. 390.

10. By order of Her Majesty in Council made on the 18th day of July 1952 leave was granted to the Attorney-General for Saskatchewan to appeal against the judgment of the Supreme Court of Canada aforesaid but such leave was limited to the following questions :—

p. 391, l. 41.

- “ (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.”

Saskatchewan's  
Factum.  
p. 25, l. 15.

11. The question as to the validity of the limitation on the powers of the Province contained in section 24 of the Saskatchewan Act of 1905 was first raised in this case on the application for leave to appeal. It was not argued in the Court of Appeal for Saskatchewan or in the Supreme Court of Canada as the Appellant apparently conceded that this question had been determined against him by the judgment of the Supreme Court of Canada in the *Reference as to the Validity of Section 17 of the Alberta Act* (1927), S.C.R. 364. 20

12. The decision of the Supreme Court of Canada in the *Reference as to the Validity of Section 17 of the Alberta Act* was on a reference by the Governor-General of Canada in Council, under the authority of section 60 of the Supreme Court Act, chapter 139 of the Revised Statutes of Canada, 1906, for hearing and consideration of the following question :—

- “ Is section 17 of the Alberta Act, in all or in part, *ultra vires*  
“ of the Parliament of Canada, and, if so, in what particular or  
“ particulars ? ”

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The answer given by the Supreme Court of Canada to this question was that section 17 of the Alberta Act is not, in whole or in part, *ultra vires* of the Parliament of Canada (1927 S.C.R. 364, at p. 374). The Reasons for Judgment of the Supreme Court of Canada (1927 S.C.R. 365 *et seq.*) were delivered by Newcombe, J. After reviewing the steps leading up to the admission of the Territories into Canada and to the enactment of the Alberta Act, the learned Judge (p. 369) reviewed the argument which had been put against the validity of section 17 of the Alberta Act. He said that the authority of the Parliament of Canada to make laws for the peace, order and good government of the territory which became the Province of Alberta, so long as it remained a part of the Territories, and to provide that it should be constituted into a Province was incontestable, and had not been contested. It had, however, he said, been argued that  
“ the Parliament could not vary, for the new Province of Alberta, s. 93  
“ of the British North America Act, 1867, which defines the provincial  
“ legislative powers relating to education in each of the original provinces.”  
It had been sought to introduce “ a limitation into the ample and comprehensive powers declared by the British North America Act, 1871,” 40

depending, as he understood the argument, upon a general exception to be found in the words of section 146 of the British North America Act, 1867, "subject to the provisions of this Act," which, it had been argued, must, by implication, be read into section 2 of the Act of 1871. It had been argued, he said, that these words must be impliedly incorporated "because s. 146 provides for the admission into the Union, not only "of the colonies of Newfoundland, Prince Edward Island and British "Columbia, but also of Rupert's Land and the Northwestern Territory, "or either of them, 'on such terms and conditions in each case as are in  
10 " 'the addresses expressed and as the Queen thinks fit to approve, subject " 'to the provisions of this Act.' " It had been urged, he said, that the provisions referred to were all those which were, in the British North America Act, 1867, common to the original provinces and that the Territories thus became constitutionally incapable of incorporation into the Union as provinces upon terms and conditions in anywise different from those which applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. The learned Judge expressed the opinion that this contention, if maintainable, might have constituted a very serious  
20 impediment, if not an insurmountable obstacle, to the framing of satisfactory constitutions, but, he said, the argument did not rest upon any sound foundation. After referring to the provisions of section 93 of the British North America Act, 1867, and section 17 of the Alberta Act, he referred to section 3 of the Alberta Act and pointed out (p. 371) that there is a provision corresponding to it in the Manitoba Act, 1870, and in the terms of Union with British Columbia and in the terms of Union with Prince Edward Island and that, in each case, the provisions of the British North America Act, 1867, were to apply except so far as varied by the terms of Union and that it was thus, in these particular cases, found not incompatible with admission into the Union with provincial status that  
30 the terms of Union should have the right of way. He pointed out further that, as far as the Territories are concerned, the powers conferred by section 146 were exhausted or spent by their admission into the Union under the Order in Council of 23rd July, 1870. He said that he could not discover that any terms were introduced which conflict with the provisions of the British North America Act, 1867, and that it was not denied that the Territories were lawfully admitted. Consequently, he said, it was not necessary for his then purposes to interpret the general meaning or effect of the words "subject to the provisions of this Act" as found in section 146. The Territories were admitted in the execution of competent  
40 powers under the provisions of the Act of 1867 and the Rupert's Land Act, 1868, and the legislative powers of the Parliament of Canada with regard to them were declared in the most comprehensive terms by the Act of 1871 which declared that Parliament might make laws for the peace, order and good government of the Territories (*Riel v. The Queen*, 10 App. Cas. 675, per Lord Halsbury at pp. 678-9). Section 17 of the Alberta Act was, he said (p. 373), designed to perpetuate under the Union the rights and privileges with respect to separate schools, or with respect to religious instruction in the public or separate schools, and to avoid discrimination in the appropriation and distribution of the legislative  
50 grants for education, as provided for in legislation adopted in the Territories prior to 1905 and he said that "it would be strange indeed if, when the "new provinces emerged, constitutional guarantees could not be afforded

“ by a law-making body which had the powers of the Imperial Parliament  
“ to legislate for their constitution and administration, and to define  
“ their powers to pass laws for their peace, order and good government.”  
He said that “. . . it seems to be as plain as words can tell that, at the  
“ time of the establishment of the province of Alberta, the Parliament  
“ of Canada had the power to define and to regulate the legislative powers  
“ which were to be possessed by the new province.” He thought that it  
was as impossible as it was inexpedient to cast any doubt upon the generality  
and comprehensive nature of constitutional powers conferred for peace,  
order and good government and he did not find, either in the British 10  
North America Act of 1867 or of 1871, anything expressed or implied  
which limited the powers of the Parliament of Canada in 1905 to define  
the constitution and powers of the provinces which were at that time  
established and constituted within the Territories. He referred also to  
the British North America Act of 1886, and said that, in the view which  
he took, it was not necessary to consider its application to the question.

13. The Attorney-General of Canada respectfully submits that  
section 24 of the Saskatchewan Act of 1925 is valid and operates to limit  
the legislative powers of the Province of Saskatchewan for the following  
amongst other 20

### REASONS

- (1) 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.
- (2) 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 30  
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.
- (3) BECAUSE the reasons of the unanimous judgment of  
the Supreme Court of Canada in the *Reference as to the  
Validity of Section 17 of the Alberta Act (1927)*, S.C.R.  
364, are right and are applicable to section 24 of the  
Saskatchewan Act.
- (4) BECAUSE section 24 of the Saskatchewan Act, being an 40  
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.

F. P. VARCOE.

W. R. JACKETT.

**In the Privy Council.**

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**ON APPEAL**  
*from the Supreme Court of Canada.*

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**BETWEEN**  
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**FOR SASKATCHEWAN .** *Appellant*  
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**CANADIAN PACIFIC RAILWAY**  
**COMPANY . . . .** *Respondent*  
**AND**  
**THE ATTORNEY-GENERAL FOR**  
**MANITOBA, THE ATTORNEY-**  
**GENERAL FOR ALBERTA and**  
**THE ATTORNEY-GENERAL OF**  
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**Case**  
**FOR THE ATTORNEY-GENERAL OF CANADA.**

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