

Privy Council Appeal No. 73 of 1922.

Brooks-Bidlake and Whittall, Limited - - - - *Appellants*

v.

The Attorney-General of British Columbia and another - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1923.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD SHAW.

LORD CARSON.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal by the plaintiffs in the action from a judgment of the Supreme Court of Canada which reversed a judgment of the Supreme Court of British Columbia and dismissed the plaintiffs' action. The substantial question to be determined is whether the appellants are entitled to a renewal of certain licences to cut and carry away timber from lands belonging to the Province of British Columbia.

The appellants and their predecessors in title were for some time the holders of special timber licences granted by the Minister of Lands of British Columbia under the authority of the Land Act of that Province, and enabling them to cut and carry away timber from certain lands belonging to the Province. Each of these licences was granted for a year only ; but under Section 57, Sub-section 3 (a) of the Land Act a licence was renewable from year to year if the terms and conditions of the licence had been

complied with. Each licence contained a stipulation in the following terms :—

“ N.B.—This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.”

This stipulation was inserted in compliance with Orders of the Lieutenant-Governor in Council dated the 26th May and the 18th June, 1902. The stipulation had not been observed by the appellants, but the licences were nevertheless renewed or treated as renewed on the same terms in every year down to and including the year commencing the 11th February, 1920.

On the 16th November, 1920, the Court of Appeal for British Columbia, on a reference by the Lieutenant-Governor in Council, held the above stipulation to be unauthorised and invalid, partly on the ground that it conflicted with Section 91 (25) of the British North America Act, by which the exclusive right of legislation with reference to naturalisation and aliens was reserved to the Dominion Parliament, and partly on the ground that it was repugnant to a Dominion statute, the Japanese Treaty Act, 1913, by which it was declared that the Treaty signed on the 3rd April, 1911, between His Majesty the King and the Emperor of Japan, under which the subjects of the High Contracting Parties were “ in all that related to the pursuit of their industries, callings, professions and educational studies,” to be placed in all respects on the same footing as the subjects or citizens of the most-favoured nation, should have the force of law in Canada (see *Re The Japanese Treaty Act*, 1913, 3 W.W.R. (1920), 937, 29 B.C.R. 136). Notwithstanding this decision, the licences were renewed to the appellants in February, 1921, for another year on the same terms ; and by the Oriental Orders in Council Validation Act of British Columbia, passed in April, 1921, it was declared that the Orders in Council and the stipulation in question were valid, and had the force of law, and that the violation of any such stipulation in any instrument should be sufficient ground for the cancellation of that instrument. It is not easy to understand why it was considered worth while to pass this enactment, for if (as the Court of Appeal had held) the stipulation was void as conflicting with Imperial or Dominion statutes, no Provincial legislation could give it validity. Fortified by this enactment, however, the Minister of Lands, by a letter dated the 24th August, 1921, called the attention of the appellants to their breach of the stipulation, and threatened to cancel their licences.

On the 3rd September, 1921, the appellants commenced this action in the Supreme Court of British Columbia against the Attorney General for British Columbia and the Minister of Lands, claiming a declaration that, notwithstanding the above stipulation, they were entitled to employ Chinese and Japanese upon the timber lands, and an injunction restraining the defendants from interfering with the enjoyment by the plaintiffs of their licences.

On an interlocutory motion for an injunction in the above terms, Murphy J., holding himself bound by the above-mentioned decision of the Court of Appeal of British Columbia, granted the injunction. The defendants (by consent) appealed against this order directly to the Supreme Court of Canada. While the appeal was pending, the Governor General in Council referred to the Supreme Court of Canada the general question whether the Oriental Orders in Council Validation Act was in excess of the powers of the legislature of British Columbia: and the Supreme Court, having before it both the general reference as to the validity of the Act of 1921 and the appeal of the defendants in this action, heard both matters together, and on the 7th February, 1922, gave successive judgments in both. On the general reference, the Supreme Court, by a majority, answered the question put to them in the affirmative; but the reasons given for this decision varied, and the result was to leave the law in some doubt. The case was heard by a full Court consisting of Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ., and of these three (Davies C.J. and Anglin and Mignault JJ.) held the stipulation void under Section 91 of the British North America Act, and two (Davies C.J. and Duff J.) held it to be invalid as conflicting with the Japanese Treaty Act. Brodeur J., while holding the Provincial statute to be invalid as regards Japanese subjects on account of the Japanese Treaty Act, held it valid as regards Chinese. The remaining Judge (Idington J.) held the stipulation to be wholly valid. The Court then proceeded to give judgment on the appeal in this action, and unanimously allowed the appeal and dismissed the action, mainly on the ground that, even though the condition as to not employing Oriental labour was void, it could not be struck out of the licence, and the right to renewal being founded on an illegal condition, must fail. Thereupon the present appeal was brought.

The points raised for consideration are two, viz.: (1) Was the stipulation against employing Chinese or Japanese in connection with the timber licences valid, or was it wholly or partly void as conflicting with (a) the British North America Act or (b) the Japanese Treaty Act of the Dominion: and (2) If the stipulation was void, were the appellants entitled to a renewal of their licences? The threat to cancel the licences as existing on the 24th August, 1921, is no longer material, as those licences would in any case have expired on the 11th February, 1922. It is the right to renewal which is now the substantial issue.

Their Lordships will deal first with the contention that the stipulation in question is void as conflicting with the British North America Act, 1867. It is said that, as Section 91 (25) of the British North America Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of "naturalisation and aliens," the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the

Province. Their lordships are unable to agree with this contention. Section 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalised persons; but the Dominion is not empowered by that Section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by Section 92 (5) and Section 109 of the Act to the Legislature of the Province; and there is nothing in Section 91 which conflicts with that view. In *Union Colliery Company of British Columbia v. Bryden* (L.R. 1899 A.C. 580), this Board held that a section in a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only—still less to coal mines belonging to the Province—but was in truth devised to prevent Chinamen from earning their living in the Province. On the other hand, in *Cunningham v. Toney Homma* (L.R. 1903, A.C. 151), where another statute of British Columbia had denied the franchise to Japanese, the Board held this to be within the powers of the Provincial Legislature, which had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred. And in *Attorney General for Canada v. Attorney General for Ontario and others* (L.R. 1898, A.C. 700) it was held that the reservation to the Dominion Parliament by Section 91 (12) of the Act of 1867 of the right to legislate as to “sea coast and inland fisheries” did not prevent a Province in which a fishery was vested from settling the conditions upon which fishing rights should be granted. To the same effect is *Attorney General for Canada v. Attorney General for Quebec* (L.R., 1921, 1 A.C. 413). In their Lordships’ opinion, the present case falls within the principle of the authorities last cited and not within *Bryden’s* case, and accordingly the stipulation in dispute is not void as contrary to Section 91 of the British North America Act.

This conclusion is sufficient to dispose of the present appeal. Each licence is issued upon the understanding that no Chinese or Japanese shall be employed in connection therewith; and the appellants’ right to renewal is contingent upon their complying with this stipulation. It appears from the endorsement of the writ in this action, as well as from para. 5 of the affidavit filed by the appellants in support of the motion, that they have employed and claim the right to employ both Chinese and Japanese labour. Now, whatever may be said as to the stipulation against employing Japanese labour, there is nothing (apart from the British North America Act) to show that a stipulation against the employment of Chinese labour is invalid. The stipulation is severable, Chinese and Japanese being separately named; and the condition against

employing Chinese labour having been broken, the appellants have no right to renewal. Upon this point their Lordships agree with Mr. Justice Brodeur.

Having regard to the above considerations, the point raised on the Japanese Treaty Act does not arise, and their Lordships think it unnecessary to deal with it. They will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

In the Privy Council.

BROOKS-BIDLAKE AND WHITTALL, LIMITED,

vs.

THE ATTORNEY-GENERAL OF BRITISH
COLUMBIA AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR,

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