

The Luscar Collieries, Limited                   -           -           -           -           *Appellants*

*v.*

N. S. McDonald and others                   -           -           -           -           -           *Respondents*

AND

The Attorney-General of Canada and another                   -           -           -           -           *Interveners*

FROM

THE SUPREME COURT OF CANADA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1927.

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*Present at the Hearing :*

VISCOUNT HALDANE.

VISCOUNT SUMNER.

LORD WRENBURY.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

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The appellants, the Luscar Collieries, Limited, are the owners of a short branch line of railway in the Province of Alberta, constructed by them but operated by the Canadian National Railway Company under certain agreements to be mentioned presently. The question in this appeal is whether the appellants' railway is a railway "within the legislative authority of the Parliament of Canada," and therefore a railway to which the Railway Act, 1919, of Canada applies (Railway Act, 1919, Section 5).

The facts giving rise to these questions are as follows :—

In the year 1911 the Grand Trunk Pacific Branch Lines Company, under the authority of an Act of 1909 of the Parliament of Canada, constructed a Coal Branch in the Province from a station on the main line of the Grand Trunk Railway to a point at or near Coalspur. This branch line is now part of the Canadian National Railway.

In the year 1911, by an Act of that year, the Branch Lines Company were authorised by the Parliament of Canada to construct another branch from the branch last mentioned to the Mountain Park Coal Company's collieries.

In the year 1912 the Mountain Park Coal Company, Limited, obtained authority from the Parliament of Alberta to construct, maintain and operate a railway which is either identical with or takes the place of the branch described in the Canadian Act of 1911, and by the same Act of the Parliament of Alberta an agreement set forth in the Schedule to the Act between the Branch Lines Company, the Grand Trunk Company, and the Coal Company was ratified and confirmed, and it was provided that the railway thereby authorised should be operated pursuant to the agreement.

By the said agreement, which is dated the 23rd January, 1912, it was provided in effect that the last-mentioned railway should be constructed by and at the expense of the Coal Company, who were to be reimbursed by certain rebates on freight, and that so soon as they had been so reimbursed, the Branch Lines Company were to be the absolute owners of the railway. Provision was also made for the operation of the railway by the Grand Trunk Company.

In the year 1921 the appellant company, by an Act of the Parliament of Alberta, were authorised to construct the railway in question to connect with the Mountain Park Company's railway and to enter into an agreement for the operation of the railway by the Canadian National Railways which then comprised both the Branch Lines Company and the Grand Trunk Company, and for the ultimate transfer to or acquisition by the Canadian National Railways of the railway.

By an agreement dated the 10th May, 1921, made between the Branch Lines Company and the Grand Trunk Company, and the Mountain Park Coal Company, supplemental to the agreement of the 23rd January, 1912, provision was made for the application of the agreement to the railway in question, therein referred to as the Luscar Branch Line, with certain modifications as to the terms of reimbursement, and it was thereby provided that on failure of the Coal Company to ship over the Luscar Branch Line when constructed the annual quantity of coal therein mentioned, neither the Branch Lines Company nor the Grand Trunk Company should be under any obligation to the Coal Company to continue the operation of such branch line.

Ultimately, by an agreement dated the 2nd April, 1923, and made between the Mountain Park Company of the first part, the appellant company of the second part, the Branch Lines Company of the third part, and the Grand Trunk Company of the fourth part, the appellant company agreed to submit the Luscar Branch to the operation of the agreements of the 23rd January, 1912, and the 10th May, 1921, and agreed that the Branch Lines Company and the Grand Trunk Company should have as regards the Luscar Branch all the rights given to them by the Mountain Park Company

under the said agreements with regard to the Mountain Park Branch.

Since the construction of the Luscar Branch Line it has been operated under the agreements aforesaid by the Canadian National Railways, and traffic over it can pass without interruption to such parts of the Dominion as are served by the Canadian National Railways.

Under these circumstances the respondent, N. S. McDonald, the owner of a coal lease in the vicinity of the appellants' colliery, made an application to the Board of Railway Commissioners constituted under the Railway Act of 1919, for an order granting him running rights over the Luscar Branch and for an order requiring the Canadian National Railway Company to grant him permission to construct a short track to serve his coal lease.

The appellant company objected to this application on the ground that the Board of Railway Commissioners for Canada had no jurisdiction, asserting that their line was a provincial railway, to which the Dominion Railway Acts had no application.

The Board of Railway Commissioners over-ruled the appellants' objection, and on the 14th August, 1924, made a formal order declaring that in pursuance of the powers conferred by Section 6 (c) of the Railway Act, 1919, the Board had power to make the order applied for.

In view of the then pending appeal to the Supreme Court of Canada, the Board made no operative order, leaving this to be dealt with after the question of jurisdiction should have been settled.

The Attorney-General of Canada intervened in the appeal to support the jurisdiction of the Board, and by an order dated the 18th May, 1925, the Supreme Court affirmed the order of the Board and dismissed the appeal.

The appellant company thereupon obtained special leave to appeal to His Majesty in Council. The Attorney-General for Canada and the Attorney-General for Alberta intervened to oppose and support the appeal respectively. The respondent McDonald does not appear.

The material statutory provisions are the following :—

By Section 91 of the British North America Act, 1867, it was provided that the exclusive legislative authority of the Parliament of Canada extends to (amongst other subjects thereby enumerated) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

Section 92, so far as it is material, is as follows :—

“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 :—

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"(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."

"(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."

The Railway Act, 1919 (Canada), contains the following material provisions:—

"Section 2 (4). 'Company' . . . where not otherwise stated or implied means 'railway company' unless immediately preceded by 'any' 'every' or 'all' in which case it means every kind of company which the context will permit of."

"Section 5. This Act shall, subject as herein provided, apply to all . . . railways . . . within the legislative authority of the Parliament of Canada. . . ."

"Section 6. The provisions of this Act shall without limiting the effect of the last preceding section extend and apply to:—

"(c) Every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned controlled leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada . . . whether such ownership control or . . . operation is acquired or exercised by lease agreement or other means whatsoever and whether acquired or exercised under authority of the Parliament of Canada or of the Legislature of any Province or otherwise howsoever; and every railway or portion thereof now or hereafter so owned controlled leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

On this section it is clear that having regard to the definition in Section 2 (4), the word "company" means railway company, and does not include a bank or financial company controlling a railway.

The Attorney-General for Canada, in support of the jurisdiction of the Board of Railway Commissioners, relies on two alternative grounds:—

- (1) That the appellants' railway is, under the circumstances, a railway connecting the Province of Alberta with other Provinces (Section 92 (10) (a)).
- (2) That, if this ground fails, then it is a 'work' within Section 92 (10) (c) by virtue of Section 6 (c) of the Railway Act, 1919, and the declaration therein contained.

Of the Judges of the Supreme Court of Canada three, viz., the Chief Justice and Duff and Rinfret, JJ., decided in favour of the jurisdiction on the first ground, but in reference to the second were of opinion that such a general declaration as that contained in Section 6 (c) was not a declaration within Section 92 (10) (c) of the British North America Act, 1867; two, viz., Mignault and Newcombe, JJ., accepted the second ground and expressed no opinion on the first. Idington, J., was for allowing the appeal.

Their Lordships agree with the opinion of Duff, J., that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within Section 92 (10) (a) of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within Section 92 (10) (a) may have to be determined, but that question does not now arise.

Their Lordships having thus come to a conclusion against the appeal on the first of the two grounds mentioned above, it is unnecessary for them to express any opinion on the second, and in accordance with their usual practice they think it not desirable to do so. But they 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 Act of 1919 is to be treated as absolutely open.

Counsel for the appellant company raised a question as to the power of the Board of Railway Commissioners to grant the application in the form in which it was framed. This is not a matter going to the jurisdiction of the Board—a Dominion authority as distinct from a Provincial one—and is one which can and ought to be considered by the Board when—its general jurisdiction having been established—it is asked to exercise it in the particular case.

Their Lordships are of opinion that the appeal fails and must be dismissed, but without costs. The respondent McDonald does not appear to ask for costs, and the interveners are not entitled to them. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY LORD WARRINGTON OF CLYFFE.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.  
1927.