

22, 1953

UNIVERSITY OF LONDON
W.C.1.

In the Supreme Court of Canada 12 NOV 1956

ON APPEAL FROM THE COURT OF APPEAL INSTITUTE OF ADVANCED
FOR MANITOBA LEGAL STUDIES

33 566

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
(Plaintiff) Appellant,

AND:

THE CITY OF WINNIPEG,
(Defendant) Respondent.

— and —

BETWEEN:

THE CITY OF WINNIPEG,
(Defendant) Appellant,

AND:

CANADIAN PACIFIC RAILWAY COMPANY,
(Plaintiff) Respondent.

**FACTUM OF
CANADIAN PACIFIC RAILWAY COMPANY**

H. A. V. GREEN, Esq.,
Solicitor for Canadian Pacific Railway Company.

EWART, SCOTT, KELLEY & BURKE-ROBERTSON,
Ottawa Agents for Canadian Pacific Railway Company.

G. F. D. BOND, Esq.,
Solicitor for The City of Winnipeg.

GOWLING, MAC TAVISH, WATT, OSBORNE & HENDERSON,
Ottawa Agents for The City of Winnipeg.

FACTUM OF THE RESPONDENT

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
(*Plaintiff*) Appellant,

— and —

THE CITY OF WINNIPEG,
(*Defendant*) Respondent.

10

— AND —

BETWEEN:

THE CITY OF WINNIPEG,
(*Defendant*) Appellant,

— and —

CANADIAN PACIFIC RAILWAY COMPANY,
(*Plaintiff*) Respondent.

FACTUM OF CANADIAN PACIFIC RAILWAY COMPANY

PART I.

1. These are appeals from a judgment of the Court of Appeal for
20 Manitoba pronounced on 17th April, 1950, allowing in part an appeal by the
City from a judgment of Williams C. J. K. B. dated 7th October, 1949, which
had granted in full the relief claimed by the Company. The reasons for judg-
ment of Williams C. J. K. B. will be found commencing at p. 67 of the Case
and those of the Court of Appeal commencing at p. 183.

2. This action arose as a result of an assessment by the City of the
Company for realty and business taxes in respect of certain property of the
Company located in the City of Winnipeg. The Company claims that it is
exempt from such taxes by virtue of an exemption provision in an agreement
between the City and the Company, the terms of which are embodied in City
30 of Winnipeg By-law 148 dated 5th September, 1881, as amended by By-law 195
dated 30th October 1882. The exemption provision is set out in the by-law as
clause 4(8) and reads as follows (p. 293 l. 17):

“4(8) Upon the fulfilment by the said Company of the conditions and stipulations herein
mentioned, by the said Canadian Pacific Railway Company all property now owned, or
that hereafter may be owned by them within the limits of the City of Winnipeg, for
railway purposes, or in connection therewith shall be forever free and exempt from all
municipal taxes, rates, and levies, and assessments of every nature and kind.”

3. The four main questions raised in the action are:

1. Whether the agreement between the City and the Company set forth in By-law 148 as amended by By-law 195 is valid and binding.
2. Whether, if the agreement is valid and binding, the exemption provided by the agreement is operative within the limits of the City of Winnipeg as from time to time constituted.
3. Whether, if the agreement is valid and binding, the exemption is applicable to the hotel and restaurant of the Company.
- 10 4. Whether, if the agreement is valid and binding, the so-called business tax is within the exemption.

4. The trial judge decided all four of these questions in favour of the Company. The Court of Appeal (Dysart J. A. dissenting) upheld the decision of the trial judge on the first question, but (McPherson C. J. M. and Coyne, J. A. dissenting) reversed his decision on the other three questions.

The Company is now appealing from the decision of the majority of the Court of Appeal on the last three questions and seeks to have the judgment of the trial judge restored. The City, on the other hand, is appealing from the decision of the majority of the Court of Appeal on the first of the four questions
20 and seeks to have the action dismissed.

The Appeals of the Company and of the City were consolidated by Order of the Honourable Mr. Justice Kerwin dated 27th June, 1950 (Case p. 251).

5. The facts relevant to the present Appeals will now be outlined briefly.

6. In 1881 the Company and the City entered into an agreement, the terms of which are set out in City of Winnipeg By-law 148 dated 5th September, 1881, as amended and re-enacted by By-law 195, dated 30th October, 1882 (p. 289 l. 26; p. 301 l. 28).

Under the said agreement the Company agreed that it would on or before 1st February, 1883, commencing within the City of Winnipeg, construct and
30 complete and fully equip one hundred miles of railway running southwesterly towards the westerly limits of the Province of Manitoba (p. 291 l. 34 as amended by p. 304 l. 16) and that it would on or before 1st November, 1883, build, construct and complete within the City of Winnipeg a substantial and commodious general passenger railway depot (p. 292 l. 6 as amended by p. 304 l. 33), and that it would, immediately after the ratification of By-law 148 make, execute and deliver to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal that it would with all convenient and reasonable despatch, establish and build within the limits of the City of
40 Winnipeg, its principal workshops for the main line of its railway within the Province of Manitoba and the branches thereof radiating from Winnipeg within the limits of the said Province and forever continue the same within the said City of Winnipeg (p. 292 l. 20), and that it would by such bond and covenant bind itself as soon as it conveniently could, to procure and erect within the City of Winnipeg large and commodious stock or cattle yards, suitable and appropriate for the central business of its main line of railway and the several branches thereof (p. 292 l. 30).

7. The said agreement also provided that the Mayor and Council of the City were authorized and empowered upon the Company making, executing and delivering to the said Mayor and Council the bond and covenant referred to in paragraph 6 hereof, to make, seal and deliver to the Company a deed of the lands upon which the passenger station referred to in paragraph 6 hereof was to be erected (p. 292 l. 41).

The Mayor and Council were further empowered to issue debentures for the sum of \$200,000 payable to the Company or bearer on the 20th day of September, 1901, bearing interest in the meantime at 6% per annum (p. 290 l. 36).

The agreement further provided by clause 4(8) set out in paragraph 2 hereof that upon the fulfilment by the Company of the conditions and stipulations therein mentioned, all property then owned or that might thereafter be owned by the Company "within the limits of the City of Winnipeg, for Railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind" (p. 293 l. 17).

8. As prescribed in By-law 148 as amended, the Company constructed, completed and fully equipped the one hundred miles of railway running southwesterly from Winnipeg, built, constructed and completed a substantial and commodious general passenger depot and executed and delivered to the Mayor and Council of the City of Winnipeg a bond and covenant to establish, build and forever continue its principal workshops for Manitoba in the City of Winnipeg and to procure and erect within the said City large and commodious stock and cattle yards suitable and appropriate for the central business of its main line and branches. These facts were admitted (Ex. 5, p. 257 l. 19).

That the Company had duly executed and delivered the bond required by By-law 148 as amended by By-law 195 was also acknowledged by the City in the Deed, dated 18th April, 1882, coveying the land for the passenger depot (p. 298 l. 10). That the Company had completed and performed all the conditions mentioned in such by-laws and had in all other respects complied with the same was also acknowledged in City of Winnipeg By-law 219, dated 30th March, 1883, which directed the City's Trustee to deliver to the Company the debentures provided for by the said By-law 148 as amended (p. 307 l. 9).

9. From 1882 to 1903 the Company maintained within the corporate limits of the City of Winnipeg as established by its incorporating Statutes, S.M. 37 Vic., (1873) Chap. 7 (Appendix p. 1) and S.M. 38 Vic., (1875) Chap. 50 (Appendix p. 3) its principal workshops for its main line within the Province of Manitoba and the branches thereof radiating from Winnipeg. In 1903 the said workshops, with the exception of an enginehouse, were without objection from the City, re-located in an area which had been added to the City in 1882 by S.M. 45 Vic., Chap. 36 (Appendix p. 38). The shops and enginehouse have remained in the locations established in 1903 until the present time. These facts were admitted (p. 257 l. 39).

10. In 1882 the Company procured and erected in the City of Winnipeg large and commodious stock and cattle yards. This fact has been admitted

(p. 258 l. 14). The Company has continuously maintained and still maintains stock and cattle yards within the City of Winnipeg large enough to handle all the business offering (p. 41 l. 44; p. 42 l. 1-4, l. 39-41).

11. The Company was incorporated by Letters Patent issued by His Excellency the Governor-General of Canada under the Great Seal of Canada dated 16th February, 1881 (Ex. 1, p. 262 l. 1). The Company owns, maintains and operates within the limits of the City of Winnipeg, for railway purposes or in connection therewith, lines of railway, lines of telegraph, passenger stations and depots, offices, an hotel and restaurant, freight sheds, loading and
 10 unloading platforms, large railway workshops, large and commodious stock and cattle yards and other works and facilities.

12. The City was incorporated in 1873 as a municipality by special charter (S.M. 37 Vic. Chap. 7, Appendix p. 1). The Charter was consolidated by S.M. 47 Vic. (1884) Chap. 78, (Appendix p. 49). The City operated under a special charter until 1886 when it became subject to the general Municipal Act of the Province (49 Vic. (1886) Chap. 52, Appendix p. 52). The general municipal Acts of Manitoba were operative as to the City of Winnipeg until 1902 when, by 1-2 Edw. VII, Chap. 77 (Appendix p. 64), the City again secured
 20 a special charter from the Legislature and the City has operated under the said special charter or consolidations thereof since that date.

13. By-law 148 was voted upon and approved of by the ratepayers of the City of Winnipeg as the City was constituted in 1881 (p. 257 l. 13). On 26th October, 1882, By-law 195 was voted upon and approved of by the ratepayers of the City of Winnipeg as constituted on that date (p. 257 l. 16), that is, including ratepayers within the limits of the City as enlarged by S.M. 45 Vic., Chap. 36 (Appendix p. 38), which was assented to on 30th May, 1882. The extended boundaries were again set forth in the consolidated charter of 1884 (Appendix p. 50 l. 45).

14. On the petition of the City in 1883, by S.M. 46-47 Vic., Chap. 64,
 30 the said By-laws 148 and 195 were specifically declared by the Legislature of Manitoba to be legal, binding and valid upon the City (Appendix p. 47, l. 36; p. 48 l. 2). In 1886, by S.M. 49 Vic., Chap. 52, Section 741, all then existing by-laws of the City (which would include By-laws 148 and 195) were declared to be valid and binding and applicable to the whole City within the extended boundaries (Appendix p. 54 l. 4). In 1902, when the City was granted a new charter (S.M. 1-2, Edw. VII., Chap. 77), it was provided by Sec. 3 that the boundaries of the City should be the boundaries as extended in 1882 (Appendix p. 64 l. 31) and by Sec. 6 that the "by-laws . . . of the City when this Act takes effect shall be deemed . . . the . . . by-laws . . . of the City of Winnipeg as
 40 continued under or altered by this Act" (Appendix p. 66 l. 16).

In 1918, when the City's Charter was consolidated by S.M. 8 Geo. V. (1918) Chap. 120, the boundaries were defined by Sec. 3 (Appendix p. 77 l. 4) to include the City as it existed in 1902 and also some further areas which had been included within the City in 1905, 1906, 1907, 1913 and 1918. By Sec. 8 it was again provided that the "by-laws . . . of the City when this Act takes effect shall be deemed . . . the . . . by-laws . . . of the City of Winnipeg as continued under or altered by this Act" (Appendix p. 79 l. 13).

In 1940, when the City's Charter was consolidated again by S.M. 4 Geo. VI Chap. 81, the boundaries were defined by Sec. 4 to include the City as it existed in 1918 and also two further areas which had been included within the City in 1940. By Sec. 754 of the Charter of 1940 (Appendix p. 91 l. 32), it is provided:—

“Notwithstanding the passing of this Act, all by-laws validly passed pursuant to the powers contained in the Winnipeg Charter, 1918, shall, except as they may be amended, remain valid until repealed.”

15. From 1881 until 1948 the City did not demand any taxes on the Company's properties owned for railway purposes or in connection therewith situated anywhere within the area which from time to time comprised the City of Winnipeg, with the exception of an unsuccessful attempt in 1896 to collect school taxes (Case p. 259 l. 32; p. 251 l. 20; p. 252 l. 38).

In each of the years 1890 to 1894, both inclusive, the City purported to assess certain lands of the Company for school taxes. On 16th September, 1896, the City commenced action in the Court of King's Bench for Manitoba to recover the amount of such taxes. The Supreme Court of Canada dismissed the action on the ground that the Company was exempt from such taxes by virtue of By-law 148 as amended. (1900 30 S.C.R. 558). The petition of the City for leave to appeal to the Judicial Committee of the Privy Council was refused (King's Order 24th July, 1901, Appendix p. 121).

The Company has not paid any so-called realty or business taxes to the City on any property within the limits of the City as from time to time constituted, owned for railway purposes or in connection therewith (Case p. 259 l. 32).

16. The Company has owned since 1881 and still owns property for railway purposes or in connection therewith in the area within the limits of the City of Winnipeg as constituted at the date of the said Agreement and in areas added to the City in subsequent years. On the assessment rolls of the City for the years from 1882 to 1900 opposite the entries of the property owned by the Company for railway purposes or in connection therewith situate both within the limits of the original City and in areas added to the City in subsequent years, there are notations that the said properties were exempt from taxation under By-law 148 or under By-law 195 or were exempt from municipal taxes (p. 251 l. 20 to p. 253 l. 14).

17. The City from time to time has requested the Company for payments to assist the City in carrying out its municipal obligations. Arising out of such requests, three agreements were made between the Company and the City. The first of these was made on 4th August, 1906 (Ex. 9, p. 349 l. 1) and was adopted by resolution of the City Council on 6th August, 1906 (Ex. 9A, p. 351 l. 17). The second was made on 29th May, 1914 (Ex. 10, p. 352 l. 1; p. 259 l. 6) and was ratified and confirmed by the City's By-law 8721, dated 15th June, 1914 (Ex. 11, p. 354 l. 1). The third was made on 28th April, 1942 (Ex. 12, p. 361 l. 1) and was authorized by the City's By-law 15455, dated 27th April, 1942 (Ex. 13, p. 356 l. 20).

18. The 1906 Agreement contains a definite statement that the hotel of the Company in Winnipeg was constructed “in connection with its railway and the operation thereof” and also that the hotel property and all other

property of the Company in the City of Winnipeg are exempt from taxation (p. 349 l. 12 and l. 25). The fact that the payments made by the Company under the agreement were concessions given without legal necessity on the part of the Company is acknowledged (p. 349 l. 12-16, l. 25-29; p. 350 l. 35-38).

The 1914 Agreement provided for an increase in the payment to be made by the Company to the City, but except as to the amount payable the terms of the 1906 Agreement were not amended (p. 259 l. 15).

10 The 1942 Agreement provided for a payment to be made by the Company to the City in each of the years 1943 to 1952 inclusive in addition to that payable under the two earlier Agreements (p. 361 l. 29). The 1942 Agreement also stated that it was understood and agreed that these payments were concessions made by the Company without legal necessity (p. 364 l. 5).

19. In spite of the agreement set forth in By-laws 148 and 195 which had been confirmed and validated by the legislature, the City, on 23rd February, 1948, passed By-law 16306 which purported to repeal the said By-laws (p. 368). By-law 16306 was not authorized or confirmed by the legislature.

20. By Notices dated 29th March, 1948, the City notified the Company that it had assessed all lands and buildings owned by the Company in the City of Winnipeg for railway purposes or in connection therewith for realty tax and
20 had assessed the Company therefor (p. 372).

By Notices dated 11th June, 1948, the City notified the Company that it had assessed all lands and buildings owned by the Company in the City of Winnipeg for railway purposes or in connection therewith for business tax and had assessed the Company therefor (p. 373).

21. The Company then brought this action to restrain the City from assessing and imposing realty and business taxes on property owned by it for railway purposes or in connection therewith, on the ground that by virtue of the said Agreement set forth in By-law 148 as amended, the Company has been since 1881 and is forever exempt from such taxation.

30 22. The judgment of the learned trial judge, the Chief Justice of the King's Bench, may be summarized as follows:

Dealing with the question as to the validity of the agreement, he found that the Company and the City entered into an Agreement, the terms of which were set out in By-laws 148 and 195; that the conditions which the Company was required to fulfil were carried out in accordance with the Agreement; that the City then authorized the Trustee to deliver the debentures, conveyed the land for the passenger depot and did not attempt until 1948, except unsuccessfully in 1896, to tax the Company (p. 84 l. 9-40; p. 85 l. 1-7).

40 He also found that Canadian Pacific Railway Company was duly incorporated by Letters Patent under the Great Seal of Canada and as such has all the powers of a corporation created by the King's Charter at common law and a general capacity analogous to that of a natural person (p. 97 l. 13-20). On this finding he held that the Company had the power to enter into the Agreement embodied in By-law 148 as amended and to give the bond and covenant required by the Agreement (p. 97 l. 21-25). He also examined the

City's argument that the form of incorporation of the Company places restrictions upon its powers and held that there were no restrictions on the expressly enumerated powers of the Company which precluded it from entering into the said Agreement and moreover that the powers of the Company would embrace the making of contracts of the type set forth in the said Agreement (p. 102 l. 33-39; p. 103 l. 26-32; p. 104 l. 3-12).

23. Turning to the position of the City, His Lordship said that the Legislature by 46-47 Vic. (1883), Chap. 64, declared the said By-laws 148 and 195 to be legal, binding and valid upon the City. He held that in view of
 10 this, it was not open to the City to say that By-laws 148 and 195 are not binding upon it. (p. 105 l. 29-32; p. 109 l. 12-19).

The learned trial judge also held that by reason of the decision of the Supreme Court of Canada in the School Tax Case (1900, 30 S.C.R. 558) the principle of *res judicata* applied to the following facts: that there was an Agreement between the parties the terms of which were set out in By-law 148 as amended; that the said By-law as amended, the said Agreement and the Bond and Covenant were *intra vires*; that the Company fulfilled all the conditions to make the exemption clause effective; that the exemption clause
 20 in the Agreement and By-laws is an exemption forever; and that it applies to all municipal taxes which the City might otherwise be entitled to impose upon the property of the Company (p. 116 l. 39-43; p. 117 l. 1-9; p. 123 l. 37-44).

24. The learned trial judge held that the exemption applied to the enlarged area of Winnipeg, that is, the phrase "within the limits of the City of Winnipeg" in the tax exemption clause meant the City of Winnipeg as from time to time constituted (p. 130 l. 42-44; p. 131 l. 1-13; p. 132 l. 3-5). His finding was based upon the construction of the Agreement, the validating statute and the bond and covenant, and also on the ground of the subsequent conduct of the parties.

25. Dealing with the hotel and restaurant property, the learned trial
 30 judge held that on the evidence it was abundantly clear that the hotel and restaurant "are properties owned in connection with the railway and for railway purposes" (p. 133 l. 36-44; p. 134 l. 1-3). In his view, the decision in *Canadian Pacific Railway Company v. Attorney-General of British Columbia (Empress Hotel Reference)* (1948) S.C.R. 373 was not relevant to the interpretation of the exemption clause in question (p. 133 l. 31-35).

26. As to business tax, the learned trial judge was of the view that business tax as imposed by the present Winnipeg Charter is a municipal "levy" on property and came within the exemption in the said Agreement (p. 145 l. 40-44). While preferring to base his judgment on this ground, His
 40 Lordship was also of the view that the business tax in question is a municipal "tax" on property within the meaning of the term as used in the exemption clause of the Agreement (p. 146 l. 7-11).

27. The learned trial judge found no substance in the arguments of the City that the said Agreement was too vague, indefinite and uncertain, was unfair, was subject to an implied term, that it could be terminated at any time

and that there was no consideration received by the City (p. 135 l. 10-28; l. 44-45; p. 136 l. 1-4; p. 137 l. 9-22).

28. The trial judge granted the claim of the Company for a declaration that its property in the City owned for railway purposes or in connection therewith is exempt from realty or business taxes, and that the City committed a breach of the Agreement and By-laws by serving the notices referred to in paragraph 14 hereof (p. 174 l. 10-30). He granted an injunction perpetually restraining the City from making any assessment for and levying and collecting any realty or business taxes (p. 174 l. 31-42; p. 175 l. 1-5).

10 29. On the appeal by the City to the Court of Appeal for Manitoba the Court by a majority reversed in part the findings of the learned trial judge. All members of the Court held that there was an agreement between the Company and the City, the terms of which are embodied in By-law 148 as amended and re-enacted by By-law 195 (p. 183 l. 36-41; p. 193 l. 14-16; p. 194 l. 14-15; p. 202 l. 33-34; p. 204 l. 14-17; p. 206 l. 14-17; p. 229 l. 4-6). All members of the Court with the exception of Dysart J. A. held that the Agreement was legal, valid and binding on both the City and the Company (p. 184 l. 13-16; p. 194 l. 10; p. 202 l. 33-35; p. 231 l. 8-11).

20 McPherson C. J. M., Coyne J. A. and Adamson J. A. held the Company had the status of a common law corporation with powers analogous to those of a natural person and as such had the necessary powers to enter into and carry out the said Agreement (p. 184 l. 11; p. 202 l. 33; p. 229 l. 12). Adamson J. A., as did the trial judge, also held that the expressly enumerated powers of the Company gave it authority to make the Agreement and execute the bond and on this additional ground held the Agreement *intra vires* (p. 230 l. 23).

30 Richards J. A. and Dysart J. A. held that the Company's powers are limited to those set forth in the Act authorizing its Charter (p. 193 l. 12-14; p. 210 l. 26-29; p. 218 l. 3-6). Richards J. A., however, went on to hold that the Agreement was within such powers and *intra vires* the Company (p. 193 l. 14-16). Dysart J. A. was the only member of the Court dissenting on the question as to the Company's power to enter into the agreement. He held that the Company's powers did not, either expressly or on the ground of being reasonably incidental, permit the Company to enter into the agreement (p. 223 l. 15-20). He did not question the learned trial judge's finding that the Agreement was legal, binding and valid on the City.

40 30. Turning to the point as to whether the agreement exempted property within the limits of the City of Winnipeg as constituted from time to time or only within the limits of the City of Winnipeg at the date of the agreement, Richards J. A., Dysart J. A. and Adamson J. A. reversed the finding of the trial judge and held that the exemption from taxation was only effective within the limits of the City of Winnipeg as it existed in 1881 (p. 194 l. 20-21; p. 228 l. 1-6; p. 240 l. 9-20; p. 245 l. 32-36). McPherson C. J. M. and Coyne J. A. agreed with the trial judge on this issue (p. 185 l. 12-18; p. 202 l. 33-35; p. 203 l. 40-45).

31. Dysart J. A. and Adamson J. A. were of the opinion that, in view of the decision in *Canadian Pacific Railway Company v. Attorney-General of British Columbia (Empress Hotel Reference)* (1948) S.C.R. 373; (1950) A.C. 122, they were bound to find that the hotel and restaurant of the Company in

the City of Winnipeg were not property "owned for railway purposes or in connection therewith" (p. 228 l. 10-14; p. 239 l. 32-39). Richards J. A. held that the hotel and restaurant were not owned by the Company for railway purposes or in connection therewith. He referred to the *Empress Hotel Reference* (p. 197 l. 3 to 34; p. 198 l. 26-28). Coyne J. A. agreed with the learned trial judge that the hotel and restaurant are exempt and that the decision in the *Empress Hotel Reference* was not relevant in deciding the issues in this case (p. 202 l. 33; p. 204 l. 3). That case turned on the language of the B.N.A. Act and federal legislation and raised different issues to those in the present
10 case (p. 204 l. 7).

McPherson C. J. M. considered the hotel and restaurant were operated for railroad purposes within the meaning of clause 4(8) of By-law 148 and certainly "in connection therewith" (p. 192 l. 33-36). He said that if the judgment in the *Empress Hotel Reference* covers all hotels of the Company he was bound by that judgment but if he were wrong in so interpreting the decision he would hold the hotel exempt from taxation. In the result he would have dismissed the Appeal (p. 192 l. 42-45; p. 193 l. 1-4).

32. McPherson C. J. M. and Coyne J. A. upheld the finding of the learned trial judge that the Company is exempt from business tax (p. 191 l. 39-42; 20 p. 192 l. 1-8; p. 202 l. 33). The majority of the Court, however, held that under the terms of the City of Winnipeg Charter there was no assessment of property, that the said tax was a tax on the person and not a tax on property, and that the exemption section of the By-law did not apply (p. 201 l. 17; p. 228 l. 6-10; p. 234 l. 11).

33. Richards J. A., Dysart J. A. and Adamson J. A. held that, on the issues on which they had decided against the Company's contentions, *res judicata* was not applicable (p. 196 l. 25-27; p. 227 l. 23-28; p. 245 l. 14-15). McPherson C. J. M. expressed no opinion on this point and Coyne J. A. held that it was not necessary to deal with the doctrine of *res judicata* in this case
30 but held that *Canadian Pacific Railway Company v. City of Winnipeg (School Tax Case)* (1900) 30 S.C.R. 558 was a binding precedent (p. 205 l. 27-30).

The majority of the Court also held that waiver, acquiescence and the other grounds of estoppel, did not support the finding of the trial judge (p. 195 l. 21-22; p. 227 l. 34; p. 245 l. 16). Coyne J. A. supported in general the findings of the trial judge (p. 202 l. 33; p. 204 l. 1-2). McPherson C. J. M. did not discuss these points.

34. On 6th May, 1950, the Company served notice that this Honourable Court would be moved to restore the judgment of the Court of King's Bench for Manitoba (p. 247 l. 1).

40 On 19th May, 1950, the City served notice that this Honourable Court would be moved to reverse the decision of the Court of Appeal for Manitoba in so far as it affirmed the judgment of the learned trial judge (p. 248 l. 18).

PART II.

35. The Company submits that the judgment of the Court of Appeal is erroneous and the judgment of the learned trial judge should be restored.

The company submits on its appeal that:

- 10 (a) Richards J. A., Dysart J. A. and Adamson J. A. erred in holding that the Company's exemption from all municipal taxes, rates and levies and assessments of every nature and kind on all property of the Company owned by it within the limits of the City of Winnipeg for railway purposes or in connection therewith does not apply to such property of the Company situate outside the area of the City as it existed at the date of By-law 148. The majority of the Court of Appeal should have held, as did the learned trial judge and McPherson, C. J. M. and Coyne J. A., that the exemption provided by the agreement is operative within the limits of the City of Winnipeg as from time to time constituted.
- 20 (b) The majority of the Court erred in holding that the hotel and restaurant property of the Company within the limits of the City of Winnipeg was not property owned for railway purposes or in connection therewith. They should have held, as did Williams C. J. K. B. and Coyne J. A., that such property was included within the exemption and, instead of holding that they were bound by the decision in the *Empress Hotel Reference* (1950) A.C. 122, they should have held such decision was not binding and was not relevant to the question raised in the present case.
- 30 (c) Richards J. A., Dysart J. A. and Adamson J. A. erred in holding that all property of the Company owned by it for railway purposes or in connection therewith is not exempt under the terms of the Agreement from the business tax imposed under the Charter of the City. The majority of the Court of Appeal should have held, as did the learned trial judge, McPherson C. J. M. and Coyne J. A., that because of the exemption none of said property of the Company could be assessed or taxed for business tax under the Charter of the City.

36. On the City's appeal, the issue is whether the agreement between the City and the Company set forth in By-law 148 as amended by By-law 195 is valid and binding.

On this issue the Company submits that such agreement is, as was held by all the learned judges below except Dysart J. A., valid and binding.

 PART III.

THE COMPANY'S APPEAL

- 40 37. In dealing with the three questions raised by the Company's appeal, it will be assumed, as will be submitted later and as was held by the learned trial judge and by the majority of the Court of Appeal, that the agreement set

out in By-law 148 as amended by By-law 195, and in particular the exemption provision in clause 4(8), is valid and binding on both the City and the Company.

Whether the exemption provided by the agreement is operative within the limits of the City of Winnipeg as from time to time constituted.

38. According to the exemption provision of the agreement as set out in clause 4(8) of By-law 148, the exemption applies to property "within the limits of the City of Winnipeg" (p. 293 l. 17).

39. The City's contention is that the phrase "the City of Winnipeg", even though used without qualification, should be construed as meaning the City of Winnipeg as it existed at the time By-law 148 was passed. In the absence of such a qualification and in the absence of clear evidence to be derived from the facts and circumstances existing at the time or from the subsequent conduct of the parties that such a qualification was intended, the phrase should be given its natural meaning, that is, the City as from time to time constituted.

40. It is submitted that there is no evidence, let alone clear evidence, of that character. Indeed the facts and circumstances existing at the time of the by-law and the subsequent conduct of the parties over a long period of years, clearly indicate that it was not intended to give the phrase the restricted meaning contended for by the City but it was intended that the phrase should have its natural meaning.

41. In construing the phrase, the natural meaning of the words themselves should first be considered. Where the meaning of the words is not clear a consideration of the circumstances with reference to which the words were used is a proper aid to interpretation.

Charrington & Company Limited v. Wooder (1914) A.C. 71

River Wear Commissioners v. Adamson (1877) 2 A.C. 743 at 763

42. In September 1881 Winnipeg was a small city anxious to become a central point on the main line of the Canadian Pacific Railway which was then in the course of construction. The citizens of Winnipeg realized that the location of the principal workshops of the railway in Manitoba would assure the city of expansion. Accordingly, negotiations between the City and the Company were commenced looking towards making Winnipeg the railway centre of Manitoba. This was to be accomplished by the building of a branch line to tap an area of Southern Manitoba, to provide for the building of a large and commodious passenger station, to provide for the building of stock and cattle yards and to provide for the perpetual location of the principal workshops for Manitoba in the City. Obviously, both parties to the contract contemplated an increase in the population and activities of Winnipeg. Obviously, both parties knew that the restricted limits of the City of Winnipeg as they existed in 1881 (Ex. 7, p. 261) could not accommodate the expansion of the City that would follow the opening of Western Canada to settlement by the Canadian Pacific Railway and the expansion made certain by making the City of Winnipeg the main railroad centre in Manitoba. When By-law 148 was passed in July 1881 much land outside the then limits had already been sub-

divided into building lots and the further extension of boundaries had already been planned. At the next session of the Legislature, the boundaries were in fact extended as of May 30th, 1882 (p. 203 l. 20; p. 289 l. 32; Appendix p. 38 l. 32).

In the light of these facts and circumstances it is abundantly clear why the City and the Company used the words "the limits of the City of Winnipeg" without restricting them in any way. The Company had tremendous advantages to offer the City and the City in turn was naturally anxious to obtain such advantages. The natural meaning of the words "the limits of the City of
10 Winnipeg" is the limits of the City as from time to time constituted. To restrict the words to the limits of the City as they existed in September 1881 would be to give a narrow and unwarranted interpretation to the plain and unqualified words of the agreement.

43. Further evidence that the phrase "within the limits of the City of Winnipeg" was not intended to be used in a restricted sense appears from the following facts.

On 24th August, 1881, By-law 148 was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted (p. 257 l. 13). Less than a year later, as already pointed out, a considerable area was added to the
20 City on 30th May, 1882, by S.M. 45 Vic. (1882) chap. 36 (App. p. 38). On 20th September, 1882, less than four months after the limits of the City had been extended, By-law 195, the sole purpose of which was to amend By-law 148, was referred to the ratepayers of the City as extended. Had it been intended that the "City of Winnipeg" in By-law 148 was to mean the City as it existed a few months prior to the date on which the amending by-law was referred to the ratepayers of the whole City, it might fairly be expected that this would have been indicated in the amending By-law. No such indication was given.

44. The City operated under a special charter until 1886 in which year it became subject to the general Municipal Act of the Province (S.M. 49 Vic.
30 (1886) chap. 52; Appendix p. 52). By section 741 of that Act "all existing By-laws heretofore passed by the mayor and council of the City of Winnipeg prior to the 29th of June, 1884" (which would of course include By-laws 148 and 195) "shall in all courts of law . . . be held to apply to the said City including the limits thereof extended by the said charter of 1884" (Appendix p. 54 l. 4). The extension of 1882 had been confirmed by the charter of 1884 (Appendix p. 51 l. 1 and p. 39 l. 37).

If the agreement set forth in By-law 148 meant or was understood by the City to mean that the exemption was to be limited to the City as it existed prior to the 1882 extension, it might fairly be expected that the City would
40 have required some qualification to be inserted in section 741 of the 1886 Act to make clear that the exemption provision applied only to the City as it existed in 1881.

45. The majority of the Court of Appeal appear to attach some importance to the provision in clause 4(9) of By-law 148 that "this by-law shall take effect from and after" 21st September, 1881 (p. 293 l. 24). According to their view, this provision indicated that the exemption was to be limited to the area

of the City as it existed on the date the by-law came into effect (p. 194 l. 28; p. 228 l. 13; p. 240 l. 21).

It is respectfully submitted that no such interpretation can fairly be put on the by-law or any such inference drawn. There are at least two reasons why the by-law contained an express provision as to when it was to take effect. First — the by-law recited that the debentures to be given by the City to the Company in the amount of \$200,000 were to be payable in “twenty years from the date this by-law takes effect” (p. 290 l. 17). For that reason the by-law had to provide a date when it was to take effect. Secondly — section 931 of the
 10 Winnipeg Charter (S.M. 38 Vic. (1875) Chap. 50) provided that any by-law for contracting debts by borrowing money would only be valid if the by-law “shall name a day in the financial year in which the same is passed, when the by-law shall take effect” (Appendix p. 6 l. 26). For this reason as well, the by-law had to provide a date when it was to take effect.

It is, therefore, respectfully submitted that the majority of the Court of Appeal were in error in the inference they drew from the provision as to when the by-law was to take effect.

46. Further support for the view that “within the limits of the City of
 20 Winnipeg” was intended by the parties to the agreement to refer to the City as from time to time constituted is to be found in events subsequent to the agreement. The subsequent conduct of the parties and the practices they followed under the agreement constitute a useful guide in determining the construction to be placed on phrases in the agreement which are ambiguous. *City of Ottawa v. Canadian National Railways* (1925) S.C.R. 494, Duff J. at 497.

47. If the exemption clause of By-law 148 as amended had not been operative in the added area between September 1881 and July 1900 when The Railway Taxation Act (63-64 Vic., Chap. 57 — Appendix p. 62) came into force, the City would have had the power and the duty to tax the property of the Company in that area. Realizing the exemption applied to the City of
 30 Winnipeg as from time to time constituted the City did not, except for an unsuccessful attempt to levy school taxes, attempt to tax the Company’s property situated either within the limits of the City of Winnipeg as constituted in 1881 or as subsequently enlarged (p. 259 l. 32).

Richards J. A. (p. 196 l. 5-20) and Adamson J. A. (p. 241 l. 36-42; p. 242 l. 3-4) in arriving at a restricted interpretation of the words “within the limits of the City of Winnipeg” stated there was no evidence that the Company owned property beyond the limits of the City of Winnipeg as constituted in 1881, at a time when the City had a legal power and duty to impose taxation. This is conceded to be an error in fact.

40 The Company did own property beyond the limits of the City of Winnipeg as constituted in 1881, during the period 1882 to 1900. It has been admitted by the City that such property was not taxed and that such property was shown on assessment rolls of the City with the notation “exempt by By-law 148” or words to like effect (p. 251 l. 20-39; p. 252; p. 253 l. 1-14).

48. The fact that property of the Company in the area added to the City after 1881 was not taxed during the years from 1882 to 1900 and that this property, like the other property of the Company in the City, was shown on the

assessment rolls with the notation "exempt by By-law 148" or words to like effect, is cogent evidence of the City's own interpretation of the phrase "within the limits of the City of Winnipeg".

49. Pursuant to the bond and covenant given by the Company to the City as one of its obligations under the agreement, the Company duly built its principal workshops for Manitoba in the City of Winnipeg as it existed at the date of By-law 148. Under the bond and covenant the Company was bound to "forever continue the same within the said City of Winnipeg" (p. 292 l. 28). In 1903 the Company moved its workshops from their original site to a location
 10 in the area added to the City in 1882 and has continued them in that location ever since (p. 258 l. 9).

No complaint was made by the City that this move constituted a violation of the terms of the bond and covenant (p. 48 l. 13-25). This clearly indicates that neither the Company nor the City, the two parties to the agreement, regarded the phrase "within the limits of the City of Winnipeg" as used in clause 4(3) to have the restricted meaning now contended for by the City. If it was not used in the restricted sense in clause 4(3) of By-law 148, it can hardly be suggested that the same phrase was used in a restricted sense in the exemption clause 4(8).

- 20 50. It is also of significance that in *City of Winnipeg v. Canadian Pacific Railway Company (School Tax Case)* (1900 30 S.C.R. 558, the City did not contend that the exemption was inapplicable to the part of the City added after 1881 and, therefore, that at the very least the property of the Company in that part of the City was liable for school taxes. As has already been stated, the Company did in fact own property in that part of the City at the time of the *School Tax Case* (pp. 251-253). This again indicates that the City regarded the agreement as meaning that the exemption applied to property within the added areas.

- 30 51. The question of whether or not the City referred to in the agreement was the City as it then existed or the City as from time to time constituted must, of course, be decided by reference to the words used and the particular circumstances of this case. Nevertheless some assistance may be furnished by other cases in which the court has had to deal with a similar problem. *The City of Calgary v. The Canadian Western Natural Gas Company* (1917) 56 S.C.R. 117 is perhaps the closest to the present case. The facts and circumstances which the court had to consider there are similar in many respects to those of the present case. There it was held that the City referred to in a franchise agreement for the supply of gas was not restricted to the limits of the City as it existed when the franchise was granted.

- 40 Other cases in which such a question has been considered are:

Toronto Railway Company v. City of Toronto (1906) 37 S.C.R. 430
Union Natural Gas Company v. Chatham Gas Company (1918) 56 S.C.R. 253
United Gas and Fuel Co. of Hamilton v. Dominion Natural Gas Company (1933) O.R. 369; (1934) A.C. 435.

These cases must, of course, be read in the light of the language of the particular agreements under consideration and in the light of the relevant circumstances.

52. In any event, it is submitted that the question of whether the exemption is restricted in application to the City as it existed in 1881 is now res judicata by virtue of the decision of this Court in the *School Tax Case* ((1900) 30 S.C.R. 558).

In that case the Court had to decide whether the Company was liable for school taxes in respect of its property owned for railway purposes or in connection therewith. The City has admitted that the Company has owned since 1881 and still owns property used for railway purposes or in connection therewith in the area added to the City in 1882 (p. 252 l. 38). When, therefore, the
 10 Court decided that the "property of the Company is exempt from any liability to contribute towards the support of the city schools" (30 S.C.R. at p. 564) it must be taken to have decided that the property of the Company in the area added to the City in 1882 was subject to the exemption.

53. The Company does not suggest that the point as to whether the property in the area added to the City in 1882 was subject to the exemption was expressly decided by the Supreme Court of Canada in the *School Tax Case*.

It was, however, open to the City in that case to take the position that if, contrary to its contention, the exemption included school taxes, nevertheless it did not extend to school taxes on property in areas added to the City after
 20 1881.

Since the City in that case does not appear to have raised any point of distinction between lands within the area of the City in 1881 and lands added to the City subsequently, it must be taken that it was a matter of assumption or admission that the exemption included lands added to the City after 1881. That assumption or admission would be fundamental to the decision of the Supreme Court that the exemption applied to school taxes on property of the Company within the City of Winnipeg. In the taxation years with which the action was concerned (1890 to 1894 inclusive, Case p. 308) the limits of the City included the large area added in 1882 (p. 261). It is to be remembered that
 30 the Company in those years owned property used "for railway purposes or in connection therewith" in that added area (p. 252 l. 38).

54. A statement of the principle of res judicata supporting the above submission will be found in the following passage from the judgment of the Judicial Committee in *Hoystead v. Commissioner of Taxation* (1926) A.C. 155 (Lord Shaw at p. 170).

"But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *HENDERSON v. HENDERSON* ((1843) 3 Hare, 114) by Wigram V. C. as follows: 'I believe I state the rule of the Court correctly when I
 40 say, that where a given matter becomes the subject of litigation in, and of adjudications by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed,
 50 and is settled law."

Whether the exemption is applicable to the hotel and restaurant of the Company.

55. According to the exemption provision of the agreement as set out in clause 4(8) of By-law 148, the exemption applies to "all property now owned, or that hereafter may be owned by" the Company "... for railway purposes or in connection therewith".

The learned trial judge found as a fact on the evidence that the Royal Alexandra Hotel and restaurant were properties owned by the Company "in connection with the railway and for railway purposes" (p. 133 l. 36-39).

10 In the Court of Appeal McPherson C. J. M. would have dismissed the appeal (p. 193 l. 4). Coyne J. A. agreed with the findings of the learned trial judge (p. 202 l. 31-34). Richards J. A. was of the opinion that the hotel and restaurant were not owned for railway purposes or in connection therewith (p. 198 l. 26-32) while Dysart J. A. and Adamson J. A. considered that the decision of this Court in *Canadian Pacific Railway Co. v. Attorney-General B.C. (Empress Hotel Reference)* (1948) S.C.R. 373, affirmed by the Judicial Committee in (1950) A.C. 122 was "conclusive and binding on this point" (p. 228 l. 10-14; p. 239 l. 32-39) and therefore held against the Company.

20 56. With deference it is submitted that Dysart J. A. and Adamson J. A. were in error in holding that "the reasoning and the findings in re the Empress Hotel apply in this case" (p. 228 l. 10-14; p. 239 l. 34-35) and that the decision in that case was conclusive and binding.

57. The question raised in that case with respect to the Empress Hotel was quite different from the question raised here with respect to the Royal Alexandra Hotel and the restaurant.

30 In the *Empress Hotel Case* the Court had to decide whether the hotel employees of the Company were subject to the Hours of Work legislation of British Columbia. The Company contended that the Empress Hotel employees were not subject to the provincial legislation because the Dominion had legislative jurisdiction over the management of the Empress Hotel just as it had jurisdiction over management of other parts of the Company's railway. In order to make good that contention the Company had to establish that the Empress Hotel was *part of* the "railway" within the meaning of section 92(10) (a) of the British North America Act or *part of* the "railway" within the meaning of sections 2(21) and 6(c) of The Railway Act of Canada. As appears from the judgment of the Supreme Court of Canada and of the Privy Council, what was decided in that case with respect to the Empress Hotel was merely that that particular hotel was not *part of* the Company's "railway" as the expression "railway" was used in the sections mentioned above.

40 In the present case, on the other hand, the question to be determined is whether the Royal Alexandra Hotel is owned by the Company "for railway purposes or in connection therewith". In other words the present question is whether that hotel is owned by the Company for purposes of the railway or is owned in connection with purposes of the railway.

This is a very different question from that decided in the *Empress Hotel Reference*. The decision that the Empress Hotel was not a part of the railway

is clearly not conclusive and indeed is hardly relevant to the question before the Court in respect to the Royal Alexandra Hotel.

58. Moreover, even if the question had been the same in both cases, what the Privy Council decided as to the Empress Hotel could certainly not bind this Court in considering the position of the Royal Alexandra Hotel.

The only facts as to the nature and functions of the Empress Hotel which the Court had before it in deciding the question raised in that case were those set out in the Order-in-Council making the Reference. The decision of the Privy Council must, therefore, be considered in the light of those facts.

- 10 59. The position in this case is quite different. Evidence was given as to the nature and functions of the Royal Alexandra Hotel and that evidence establishes clearly that this hotel is owned "for railway purposes and in connection therewith".

20 The hotel is physically attached to the railway station. It is situated on railway property. The hotel restaurant or coffee shop occupies part of the station building (p. 46 l. 1-2; l. 20-29; p. 49 l. 12-23). The functions of the hotel and restaurant are primarily to provide food and lodging for travellers by the railway, and secondly, to draw travellers to the railway (p. 46 l. 3). The Royal Alexandra Hotel is actively used for other railway purposes. It supplies accom-
 20 modation for extra sleeping car conductors and dining-car crews. These men and certain porters are fed there. Railway officers and employees transferred to Winnipeg are temporarily accommodated there. It provides accommodation for meetings of railway employees and officers. The hotel laundry provides service to the Sleeping & Dining Car Department of the railway and also for the handling of soiled linen from railway crews' bunk houses and for cleaning waste from the railway shops (p. 46 l. 3-19; l. 30-35; p. 47 l. 15-35). Merely ancillary to the main purpose of the hotel is the service provided for public functions and for the accommodation of persons not using other railway services (p. 49 l. 24-37).

- 30 60. The recitals to the agreement dated 4th August, 1906, whereby the Company agreed to make certain payments to the City, throw some light on the question as to whether the hotel was owned "for railway purposes or in connection therewith".

40 The City had claimed that the hotel property "was not originally included within the meaning of a railway or railway enterprise" (p. 349 l. 29-32), but the agreement expressly recites that "the Company has built and constructed in the City of Winnipeg (in connection with its railway and the operation thereof) an hotel building . . ." (p. 349 l. 12-14). Thus while the City had claimed that the hotel "was not originally included within the meaning of a
 40 railway or railway enterprise" it recognized by the terms of the recital that the hotel was constructed "in connection with" the railway and its operation. This amounted to a recognition by the City that the hotel was owned "for railway purposes or in connection therewith" within the meaning of the exemption set forth in By-law 148 (p. 293 l. 17).

61. The Railway Taxation Act up to 1909 exempted "the property of every nature and kind" of the Company with certain exceptions which are not

relevant (Appendix p. 63 l. 20) and there could be no doubt that this exemption included the hotel. By the 1909 amending Act, however, an additional exception was made to the property protected by the Act, namely "all lands and property held by the Company not in actual use in the operation of the railway" (Appendix p. 71 l. 7). Had the City been of the view that the Company's hotel was not "in actual use in the operation of the railway" and therefore no longer protected by The Railway Taxation Act it would undoubtedly have raised the question in 1914 and in 1942 when the Company was called on and agreed to make larger payments to the City. There is no suggestion that on either of those
 10 occasions the City based its claim for payments by the Company on the ground that the hotel and restaurant were not "in actual use in the operation of the railway" and that, because of the change in The Railway Taxation Act permitting taxation of property not in such use, the conditions which existed when the Agreement of 1906 was entered into no longer existed (p. 259 l. 9-20; p. 352; p. 361).

62. If after the 1909 amending Act was passed the hotel was not exempt from taxation by The Railway Taxation Act, the reason the City did not tax the hotel must have been because it construed the words "property owned . . . for purposes of the railway or in connection therewith" set out in By-law 148
 20 as including the hotel. As Coyne J. A. expressed it, "The course of conduct of the parties for some forty years shows that the hotel was such property" (p. 204 l. 31).

63. It thus appears that not only on the evidence of fact adduced at the trial but also on the interpretation placed on the terms of the exemption provision by the parties to the agreement, the Royal Alexandra Hotel and restaurant constitute property owned for railway purposes and in connection with railway purposes and are thus within the exemption.

Whether the so-called business tax is within the exemption.

64. According to the exemption provision of the agreement as set out in
 30 clause 4(8) of By-law 148 "property" of the Company referred to therein is exempt from "all municipal taxes, rates and levies, and assessments of every nature and kind" (p. 306 l. 1).

The majority of the Court of Appeal were of the opinion that under the terms of the charter of the City the assessment for business tax was not an assessment of property and the tax itself was a tax on the person and not a tax on property. Since in their view the exemption only extended to taxes, rates, levies and assessments of property, they held that the exemption did not apply to the business tax (p. 228 l. 6-10; p. 234 l. 11-12). The learned trial judge and both McPherson C. J. M. and Coyne J. A. held that the exemption did apply
 40 to the business tax (p. 191 l. 39-42; p. 192 l. 1-8; p. 202 l. 33-34).

65. The decision of the Court of Appeal in this case was, of course, reached before judgment was delivered by the Supreme Court of Canada on 20th November, 1950, in *Canadian Pacific Railway Company v. Attorney-General for Saskatchewan* (not yet reported). It is submitted that for the reasons given by the majority of the Supreme Court in that case, the judgment of the majority of the Court of Appeal in the present case on the question of business tax should be reversed.

66. In the Saskatchewan case the exemption provision in question was that set out in clause 16 of the contract between the Company and the Dominion of Canada (Appendix p. 20 l. 9). There, as here, "property" of the Company was exempt. There the exemption was stated simply to be from "taxation" whereas in this case the exemption is from "all municipal taxes, rates and levies, and assessments of every nature and kind" (p. 293 l. 17).

10 It is submitted that this exemption, so far as it concerns municipal "taxes, rates and levies" is at least as broad as, if not broader than, the exemption in question in the Saskatchewan case and, even more clearly than the exemption in that case, applies to municipal taxes such as the so-called business taxes.

It is also submitted that this exemption is broader than the exemption considered in the Saskatchewan case in that it extends to "assessments of every nature and kind".

67. In the Saskatchewan case the second and fourth questions submitted to the Court were as follows:

- 20 "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 buildings used for the purposes 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?"
- 30 "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
- (a) the main line of its railway in Saskatchewan, and
 - (b) its branch lines in Saskatchewan?"

The majority of this Court in the *Saskatchewan Reference* answered question 2 in the affirmative, subject to a qualification which is not relevant here. The majority answered question 4(a) in the negative. The answer to question 4(b) relating to branch lines is not relevant here.

- 40 68. The business tax in question in the present case is authorized by the City's charter, S.M. 4 Geo. VI (1940) Chap. 81 (Appendix p. 83 l. 7). That tax is by section 291(1) based on "the annual rental value of the premises which" a person carrying on any business "... occupies in carrying on, or uses for the purpose of, such business" (Appendix p. 85 l. 11). This business tax, therefore, clearly falls within the class of business tax described in part (b) of question 2 in the Saskatchewan case.

69. The business tax imposed under the Saskatchewan Acts referred to in question 4 of the Saskatchewan case was a tax based upon the area of premises used for business purposes rather than, as in this case, on the rental value of the premises used for business purposes. The Saskatchewan tax, therefore, fell within the class of business tax described in part (a) of question 2 in that case rather than the class described in part (b).

In other respects, however, the business tax authorized by the Winnipeg City Charter is substantially similar to the business tax imposed by the Saskatchewan Acts referred to in question 4 of the *Saskatchewan Reference*.
 10 In that case the argument proceeded on the basis that it was sufficient to consider the provisions of The City Act (1947 Statutes of Saskatchewan Chap. 43), that Act being typical of the five Acts in question, and the judgments therefore referred to the provisions of that Act only.

The majority of the Supreme Court in the Saskatchewan case held that the business tax provided for by The City Act constituted taxation of property within the meaning of the exemption clause being considered. In arriving at that decision the Court referred to a number of sections of The City Act. The Winnipeg City Charter (Appendix p. 83 l. 7) contains provisions which have substantially the same effect as the main sections of The City Act to which the
 20 Court referred.

Thus section 290(a) of the Charter corresponds to section 2(4) of The City Act; the first part of section 291(1) of the Charter corresponds to section 441(1)2 of The City Act; the second part of section 291(1) and sections 292, 293 and 297(1) of the Charter together correspond to section 443 of The City Act, but base the assessment on rental value rather than area occupied; the first part of section 295(1) of the Charter corresponds to section 444 of The City Act; section 296 of the Charter corresponds to section 485 of The City Act; section 343 of the Charter corresponds to section 504(2) of The City Act; and section 643(1) of the Charter corresponds to section 495 of The City Act.

30 70. In view of the fact that the exemption provision in the present case in so far as it is directed to municipal taxes and to "assessments of every nature and kind" is more favourable to the Company than the exemption considered in the *Saskatchewan Reference*, the decision of this Court in that case affords the strongest possible support for the contention of the Company that the exemption in this case applies to the business assessment and tax under the charter of the City of Winnipeg.

71. For the reasons that have been given in paragraphs 38 to 70 hereof, it is submitted that the Company's appeal should be allowed and that the judgment of the learned trial judge should be restored.

Whether the agreement between the City and the Company set forth in By-law 148 as amended by By-law 195 is valid and binding.

72. This question is raised by the appeal of the City from the judgment of the Court of Appeal. The learned trial judge and the Court of Appeal

(Dysart J. A. dissenting) rejected the contention of the City that the agreement set forth in By-law 148 as amended by By-law 195 was not valid and binding on both the City and the Company. So far as this question is concerned, therefore, the City is the Appellant and the Company the Respondent.

73. It is clear that all necessary steps were taken to render By-law 148 and amending By-law 195 valid and binding upon the City. If there was any doubt as to the powers of the City when the agreement was made to enter into the Agreement and to enact the two by-laws, such doubt was removed by the Legislature of Manitoba when by statute (46-47 Vic. (1883) chap. 64 sec. 6, 10 Appendix p. 48 l. 22) By-law 148 and By-law 195 were declared to be "legal, binding and valid upon the said Mayor and Council of the City of Winnipeg".

It is to be noted that the Supreme Court of Canada in the *School Tax Case* (1900) 30 S.C.R. 558 held (at p. 561) that "the whole and every part of the by-law was in express words confirmed" by the validating act. The question of whether the agreement as set forth in the by-law is valid and binding upon the City has, therefore, been concluded against the City.

74. Another issue which arises out of the City's appeal is whether the Company had power to enter into the agreement.

The trial judge and McPherson C. J. M., Coyne J. A. and Adamson J. A. 20 held that the Company had such power because it had been incorporated by Letters Patent under the Great Seal of Canada and was thereby given the status of a common law company. The trial judge and Adamson J. A. also held that it had authority by virtue of its expressly enumerated powers. Richards J. A. held that it had authority by virtue of its expressly enumerated powers. Only Dysart J. A. held that it had no power to enter into the agreement.

75. It is submitted in the first place that the Company had the status of a common law company and as such had power to enter into the agreement, secondly, that it also had such power by virtue of its expressly enumerated powers.

30 76. A brief outline of the procedure followed in effecting the incorporation of the Company may be helpful in connection with these submissions.

77. On 21st October, 1880, George Stephen and his associates entered into a contract with the Dominion of Canada whereby on their incorporation by the Dominion they, as the Canadian Pacific Railway Company, would construct and complete a railway to the Pacific Coast (Appendix p. 13 l. 18).

The Contract contemplated that the incorporation of the Company would be carried out by a special Act of Parliament (Appendix p. 22 l. 3) and a schedule setting out the terms of such special Act was appended to the Contract as Schedule A (Appendix p. 22 l. 29).

40 78. On 15th February, 1881, Parliament enacted "An Act Respecting the Canadian Pacific Railway" (Appendix p. 11) whereby it approved and ratified the Contract and authorized the Government to perform and carry out its various obligations thereunder. The Contract (which included the draft special Act as Schedule A) was appended to the 1881 Act as a schedule.

79. Apparently between the date of the execution of the Contract (21st October, 1880) and the enactment of the Act (15th February, 1881) a change of plans took place as to the method of incorporation of the Company. Instead of incorporating the Company by a special Act (as was contemplated by the Contract), it was decided to incorporate it by Letters Patent. Thus section 2 of the 1881 Act provided as follows (Appendix p. 11 l. 38):

10 “2. For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the Canada Gazette, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.”

20 80. As a result, Schedule A to the Contract which was in the form of a special Act was not enacted as a statute. Instead its terms were embodied in Letters Patent which were issued by His Excellency the Governor-General of Canada in the form of a Royal Charter under the Great Seal of Canada on 16th February, 1881, that is on the day following that on which the Act was assented to (Case p. 262).

81. It will be observed that section 2 of the 1881 Act, as set out in paragraph 79 hereof, authorized the Governor to grant the Company a charter. It also, however, provided that the charter granted “shall have the force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said Contract.”

30 82. The necessity for including in the Act that part of section 2 which is quoted, appears from an examination of clauses 21 and 22 of the Contract. Clause 21 of the Contract provided that the Contract “shall only be binding in the event of an act of incorporation being granted to the Company in the form hereto appended as Schedule A” (Appendix p. 22 l. 3). This condition would not have been satisfied and the Contract would not have been binding had it not been for the above words in section 2 of the 1881 Act.

40 Clause 22 of the Contract provided that the provisions of the general Railway Act of 1879 “in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the Company” should apply to the Company’s railway (Appendix p. 22 l. 7). To give effect to this arrangement, the special Act of incorporation then contemplated, contained a provision (section 17) to the same effect as clause 22 of the contract (Appendix p. 27 l. 11). When the plan to incorporate the Company by special Act was abandoned and the Company was incorporated by charter, section 17 of the special Act became paragraph 17 of the charter (Case p. 277 l. 23). But such a provision in the charter could not have the effect of overriding the general Railway Act. And so, to carry out the agreement with reference to the effect of the general Railway Act as expressed in clause 22 of the contract, it was necessary to declare by statute that such charter “shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning
50 of the said contract” (Appendix p. 12 l. 9).

It will be observed that section 2 provides that the charter was to have force and effect “as if it were” an Act and was to be “held to be” an Act “within the meaning of the said Contract”. The use of the words quoted demonstrates that Parliament was merely declaring that the charter should be deemed a compliance with certain requirements of the Contract.

83. Having been incorporated by Letters Patent issued by the Governor-General under the Great Seal of Canada, the Company has the status of a common law corporation and as such has all the powers of a natural person. The legal result in regard to the powers and capacities of a company so incorporated are succinctly stated in the following passages.

In *Baroness Wenlock v. River Dee Company*, L. R. (1887) 36 Ch. Div. 675n, Lord Justice Bowen stated at p. 685n:

20 “At common law a corporation created by the King’s charter has, prima facie, and has been known to have ever since Sutton’s Hospital Case (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created.”

In *Bonanza Creek Gold Mining Co. Ltd. v. The King* (1916) 1 A.C. 566, Viscount Haldane stated at p. 583:

30 “In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter.”

84. Where a company is not constituted by statute but by the exercise of the royal prerogative pursuant to statute, the doctrine of ultra vires in regard to its acts has no application unless the legislative authority has, by statute, expressly imposed restrictions. (*Bonanza Creek Gold Mining Co. Ltd. v. The King* (1916) 1 A.C. 566 at 581-2 and 583).

85. The prerogative right to incorporate a company with powers analogous to those of a natural person may be subject to express statutory restrictions and a charter cannot validly be granted in contravention of the provisions of the statute dealing with it, but to abridge the exercise of the Royal prerogative requires express and precise language.

40 Section 2 of the 1881 Act (Appendix p. 11 l. 38) which authorized the Governor to grant a charter to the Company did not impose any restrictions upon the powers to be conferred on the Company. On the contrary that section is enabling and, rather than being restrictive, it provides that the Charter shall confer “the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended”. The franchises, privileges and powers referred to are those set forth in section 4 of schedule A to the Contract which

is identical with paragraph 4 of the charter. Paragraph 4 of the charter reads as follows (Case p. 274 l. 3):

“4. All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.”

10 It is difficult to imagine what language could have been used to express more clearly that the widest powers were to be granted to the Company by the Letters Patent.

86. As the Company has powers analogous to those of a natural person, the Agreement entered into between the Company and the City and the Bond and Covenant which the Company, pursuant to the said Agreement, delivered to the City were within the powers and capacities of the Company and were legal, valid and binding upon the Company.

87. The second submission of the Company on the question of its power to enter into and perform the agreement, is that the Company had such power by virtue of the expressly enumerated powers granted to it by the charter.
20 Even if the Company were held to have the status of a statutory company with powers restricted to those expressly enumerated, it is submitted that the Company had power to enter into and perform the obligations contained in the Contract.

88. Very broad powers were conferred on the Company by paragraph 4 of the charter (p. 274 l. 3). The Company was given all powers “necessary or useful” to enable it to carry out the obligations and avail itself of the privileges provided for in the Contract. Under clause 7 of the Contract the Company must “forever efficiently maintain, work and run the Canadian Pacific Railway” (p. 265 l. 14). Under clause 8 of the Contract the Company must “main-
30 tain and efficiently operate” the railway (p. 265 l. 20).

89. The City, in the Courts below, contended that the bond and covenant given by the Company, in that it contained an obligation to maintain workshops in the City of Winnipeg forever and also an obligation to maintain stock and cattle yards in the City, was incompatible with the Company’s powers and the obligation that it must “forever efficiently maintain, work and run the Canadian Pacific Railway”. These obligations of the Company under the bond and covenant are the only ones which the City has contended are ultra vires of the Company. Of the six Judges who have considered this contention of the City, Mr. Justice Dysart is the only one who has found it acceptable (p. 218
40 l. 7 to p. 223 l. 28).

With deference it is submitted that Mr. Justice Dysart is in error. On this point the Company relies on the findings of the learned trial judge and those of McPherson C. J. M., Richards J. A., Coyne J. A. and Adamson J. A. (p. 101 l. 19; p. 184 l. 13; p. 193 l. 14; p. 202 l. 34; p. 230 l. 23).

90. In determining whether a contract entered into by a statutory corporation is intra vires the corporation, the test is an alternative one, that is,

whether there is express authorization for the contract or whether the contract is reasonably incidental to the business authorized by the corporation's special Act (*Attorney-General v. Mersey Railway* (1907) A.C. 415 at 417).

The Company submits that the Agreement with the City was *intra vires* the Company as being expressly authorized by its charter or as being reasonably incidental to the business expressly authorized by its charter.

91. The question whether a given contract is *intra vires* or *ultra vires* a statutory corporation is a question of fact dependent on the particular circumstances of each case. The principle, upon which the enquiry is to be made, has been clearly stated by Lord Selborne in *Attorney-General v. Great Eastern Rly. Co.* (1880) 5 A.C. 473 at 478:

"I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company v. Riche* Law Rep. 7 H.L. 653; It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

- 20 Reference is also made to *Deuchar v. Gas Light & Coke Co.* (1925) A.C. 691 at 695.

92. The Company was granted all powers "necessary or useful" to enable it to work and run the railway efficiently. To work and run the railway efficiently obviously required the establishment of workshops and stock and cattle yards. The Company must certainly, therefore, have had power to establish these.

93. The location of those facilities was a matter for managerial judgment. If these necessary railway facilities could be located in an area where an arrangement could be made for exemption from taxation, unquestionably this would be a circumstance to be considered in determining location. The choice of Winnipeg as a site for the workshops and the stock and cattle yards was a reasonable choice. The workshops and stock and cattle yards located in Winnipeg have operated without interruption since they were first built there in 1882. No evidence was adduced by the City that the obligations assumed by the Company were inconsistent with or incompatible with the due exercise of the powers or duties of the Company. The argument of the City in the courts below was based on the possibilities of difficulty that might arise in the future in the Company being required to maintain its workshops and stock yards in Winnipeg.

- 40 The following passage from the judgment of Lord Sumner in *Birkdale District Electric Supply Co. v. Southport Corporation* (1926) A.C. 355 at p. 375 is appropriate to this point:

"If, again, the agreement is to be *ultra vires* at all, it must be *ultra vires* all through. In cases like the *Ayr Harbour* case (1883 8 App. Cas. 623) the land acquired under statutory powers was fettered in the undertakers' hands from the time the agreement was made. In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been *ultra vires* hitherto?"

It appears to me that no line can be drawn between the agreement now in question and any ordinary trading contract, if the appellants are right in testing the validity of the contract by its ultimate and theoretic possibility of bringing upon them a crippling loss. I do not think that a speculation as to the possible effect of what they have done is a legitimate ground for relieving them from their bargain, and it seems to me that the appeal should be dismissed."

94. The Agreement between the Company and the City does not limit or affect the powers of the Company to carry out its obligations. The Company has not divested itself of its powers to operate the railway or its obligation to
10 operate it efficiently. Mr. Justice Adamson deals with the point in the following passage (p. 233 l. 4-9):

"Should the circumstances arise which require the main line or the shops to be moved away from Winnipeg, the only recourse the City would have would be an action for damages on the bond and covenant. The legal consequences would be that the Company would be liable for what damages the City could prove, but the Company would not have denuded itself of essential powers to operate the railroad."

95. The City in the Courts below pressed strongly the applicability of the decision of the Ontario Court of Appeal in *Whitby v. G.T.R. Co.* (1901) 1 O.L.R. 480. This case turned upon the finding of the Court that the covenant
20 to maintain the principal office of the railway in Whitby was an onerous obligation incompatible with its statutory powers. Whatever may be said concerning the finding that the obligation assumed by the railway company in the Whitby case was onerous, in the present case no evidence was adduced and no arguments were presented, except of a most hypothetical nature, to support the suggestion that the obligations assumed by Canadian Pacific in its Agreement with the City are or will be so onerous as to interfere with the corporate powers of the Company. Mr. Justice Richards (p. 194 l. 10-12) expressed it this way:

30 "In my opinion the covenant was not a peculiarly onerous condition but, on the contrary, it was a very advantageous arrangement for the Railway Company and was not ultra vires."

96. For the reasons that have been given, it is submitted that the agreement set forth in By-law 148 as amended by By-law 195 is valid and binding on the City and on the Company and that the City's appeal should be dismissed.

C. F. H. CARSON,
H. A. V. GREEN,
I. D. SINCLAIR,
of Counsel for
Canadian Pacific Railway Company