

Privy Council Appeal No. 22 of 1952

The City of Winnipeg - - - - - Appellant

v.

Canadian Pacific Railway Company - - - - - Respondent

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1953

Present at the Hearing:

VISCOUNT SIMON

LORD OAKSEY

LORD TUCKER

LORD ASQUITH OF BISHOPSTONE

LORD COHEN

[*Delivered by* LORD COHEN]

By notices given respectively in the months of March and June, 1948, the appellant notified the respondent company that the appellant had assessed the lands and buildings owned by the respondent company in the City of Winnipeg for railway purposes or in connection therewith for realty tax and business tax respectively. Immediately after the service of the first of such notices the respondent company commenced proceedings against the appellant and after receipt of the second notice amended its statement of claim. By the amended document the respondent company claimed that all its property then owned or thereafter to be owned by it in the City of Winnipeg was forever exempt from all municipal taxes, rates and levies and assessments of every nature and kind, and in particular from any real property tax or business tax in respect of such property. It based its claim on an alleged agreement the terms of which were set out in City of Winnipeg by-law No. 148 dated the 5th September, 1881, as amended by City of Winnipeg by-law No. 195 dated the 30th October, 1882.

A number of issues were raised in the action and were decided in favour of the respondent company by the trial judge Williams, C.J., on the 7th October, 1949. The appellant appealed to the Court of Appeal for Manitoba and on the 17th April, 1950, that Court varied the judgment of the trial judge by holding amongst other things that the respondent company was liable for business tax.

Both parties then gave notice of appeal to the Supreme Court of Canada, the respondent company seeking a restoration of the judgment of the trial judge and the appellant seeking a reversal of that part of the order of the trial judge which had been affirmed by the Court of Appeal. On the 22nd October, 1951, the Supreme Court restored the order of the trial judge.

The appellant then applied to this Board for leave to appeal and on the 18th July, 1952, leave was granted but the appeal was limited to two questions :

- (1) Whether a deed of covenant dated the 10th October, 1881, and executed by the respondent company in pursuance of the agreement

mentioned in by-law 148 was *ultra vires* the respondent company with the result that the exemption from taxation conferred on the respondent company by by-law 148 never became effective; and

(2) Whether, if perpetual exemption from taxation is conferred by the said by-law, such exemption does or does not extend to the business tax.

To determine these issues it is necessary to have in mind the circumstances in which the respondent company was incorporated and to refer briefly to certain incidents in its history. On or about the 21st October, 1880, a syndicate entered into a contract with the then Minister of Railways and Canals in Canada for the construction of the Canadian Pacific Railway and the incorporation of a company to be called the Canadian Pacific Railway Company. The said agreement provided among other things:

(1) (by clause 7) that the said company should forever maintain, work and run the Canadian Pacific Railway:

(2) (by clause 21) that the said company should be incorporated with sufficient powers to enable them to carry out the contract and that the contract should only be binding in the event of an Act of incorporation being granted to the said company in the form thereto appended as Schedule A:

(3) (by clause 22) that the Railway Act of 1879, in so far as the same might be applicable to the undertaking referred to in the contract and in so far as not inconsistent therewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the said company, should apply to the Canadian Pacific Railway.

No statute was passed incorporating the company, but the Parliament of Canada passed an Act 44 Vict. c. 1 approving and ratifying the above-mentioned contract. Clause 2 of this Act provided as follows:

"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."

Pursuant to this Act Letters Patent incorporating the respondent company were sealed on the 16th February, 1881. Clause 4 of this charter was in the following terms:

"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."

It is unnecessary to refer in detail to the special provisions therein referred to but it should be mentioned that they contain a provision in the terms *mutatis mutandis* of clause 22 of the agreement thus making applicable the Consolidated Railway Act, 1879.

The appellant was anxious to secure that the principal workshops and stockyards of the respondent company for the province of Manitoba should be situated in the City of Winnipeg and entered into an agreement with

the respondent company to this end. The agreement is evidenced by by-law No. 148 of the appellant which was passed on the 5th September, 1881. The by-law recited amongst other things that it was desirable that the principal workshops and stockyards should be situated as aforesaid and that in consideration of the premises it was expedient for the appellant to lend its aid to the respondent company by granting the respondent company by way of bonus debentures of the City as therein mentioned and by exempting the property then owned or thereafter to be owned by the respondent company for railway purposes within the City from taxation for ever.

The operative part of the by-law authorised the issue of the debentures to the respondent company when the respondent company should have performed certain conditions two of which were in the following terms:

"3. The said Canadian Pacific Railway Company, shall immediately after the ratification of this By-Law as aforesaid, make, execute and deliver to the Mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said Company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the Mainline of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said Province, and for ever continue the same within the said City of Winnipeg.

4. And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg, large and commodious stock or Cattle Yards, suitable and appropriate for the central business of their Main line of railway and the several branches thereof."

The by-law went on to provide in clause 8 that upon the fulfilment by the respondent company of the conditions aforesaid all property then owned or thereafter to be owned by the respondent company within the limits of the City of Winnipeg for railway purposes or in connection therewith should be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.

On the 10th October, 1881, the respondent executed a bond and covenant which, if *intra vires*, is admitted to be a fulfilment of the conditions of the by-law.

On the 30th October, 1882, the appellant passed by-law No. 195 amending by-law No. 148, but the alterations thus effected are not material to the issues now before the Board.

Doubts appear to have arisen as to whether by-laws 148 and 195 were *intra vires* the appellant and therefore in 1883 on the petition of the appellant an act of the Legislature of Manitoba was enacted expressly declaring these by-laws valid. Their Lordships pause here to observe that this Act merely precludes any suggestion that the by-laws in question were invalid and does not affect the construction of the agreement referred to therein. Cf. *Ontario Power Company v. Stamford Corporation* (1916) 1 A.C. 529, at 534.

The workshops and stockyards were erected and it was not suggested before this Board that they had not been duly erected and maintained in accordance with the provisions of the deed of covenant.

From 1881 until 1900, when the Railway Taxation Act of Manitoba came into force (Statutes of Manitoba, 63-64 Vic., Chap. 57), the appellant, were it not for the exemption provision contained in the said by-law, would have been free to tax the respondent company's property in the City of Winnipeg owned for railway purposes or in connection therewith. The appellant did not, during that period, demand any taxes in respect of such property except that it made an unsuccessful attempt in 1894 to collect school taxes.

In each of the years 1890 to 1894 both inclusive the appellant purported to assess certain lands of the respondent company for school taxes. In 1894, the appellant commenced action in the Court of King's Bench for Manitoba to recover the amount of such taxes. The litigation went to the Supreme Court of Canada which held that the 1883 Act validating by-law 148 made valid the exemption clause, and that the school taxes in question came within the exemption (1900 30 S.C.R. 558). A petition of the City for leave to appeal to the Judicial Committee was refused (King's Order, 24th July, 1901).

By the Railway Taxation Act mentioned above, a provincial tax was imposed on the gross earnings of railway companies operating any line within the Province. The railroad companies paying such taxes were to be exempt from all municipal taxation within the Province. This exemption was suspended in 1947.

On the 23rd February, 1948, the appellant purported to repeal by-laws 148 and 195 and in March and June issued the notices to which their Lordships have already referred.

With this short statement of the history of the matter in mind their Lordships turn to the issues now before the Board. The respondent company alleges that it was within its power to enter into the deed of covenant dated the 10th October, 1881 either (a) because being incorporated by Royal charter it had, to use the language of the trial judge, "all the powers possessed by a corporation at Common Law" or (b) because it had power to execute the said deed of covenant under the very wide powers conferred by clause 4 of its charter of incorporation.

The appellant argued that the respondent company had not the powers of a corporation at Common Law since the power of the Governor-in-Council to constitute a railway company by letters patent under the great seal had been abrogated by section 3 of the Canada Joint Stock Companies Act, 1877, and the respondent company therefore owed its incorporation to the express power conferred on the Governor by the Canadian Statute 44 Vic. c. 1.

The trial judge rejected this argument and in the Court of Appeal McPherson, C.J., Coyne, J., and Adamson, J., agreed with him but Richards, J., and Dysart, J., took the opposite view. In the Supreme Court Estey, J. (with whom Cartwright, J., concurred) agreed with the trial judge but Kellock, J., took the opposite view. Locke, J., and Kerwin, J. (with whom Rinfret, C.J., Taschereau, J., and Fauteux, J., concurred) did not find it necessary to determine the point since they were satisfied that the enumerated powers to be found in the charter were sufficient to authorize the respondent company to enter into the deed of covenant.

There is thus a considerable divergence of opinion in the Courts of Canada on the first ground on which the respondent company sought to justify its entry into the deed of covenant. Their Lordships do not find it necessary to resolve this divergence since they are satisfied that the trial judge, the majority in the Court of Appeal for Manitoba and the majority of the Supreme Court of Canada were right in holding that the enumerated powers in the charter of incorporation justified the respondent company in entering into the deed of covenant dated the 10th October, 1881.

The correctness of this finding depends on the proper construction of the charter and in particular of clause 4 thereof which confers on the respondent company :

" 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 ".

This clause appears to be couched in the widest possible terms and Mr. Fillmore for the appellant does not dispute that it would have justified the respondent company in erecting main workshops and stockyards in Manitoba and in entering into agreements with that end in view. Nor

could he dispute that it was in the interest of the respondent company to secure if it could the immunity from taxation granted by clause 8 of by-law 148; but he pointed out that under the agreement recited in its charter of incorporation the respondent company had contracted "forever efficiently to maintain and use the Canadian Pacific Railway". He argued that it could not be certain in 1881 that at some future period it might not be necessary or at any rate advisable to move the main workshops in Manitoba to some other place than the City of Winnipeg. Therefore, said Mr. Fillmore, it must be *ultra vires* the respondent company to enter into an agreement forever to maintain its main workshops within the City of Winnipeg. He based this argument mainly on the line of authorities which establishes that a company cannot contract not to use or carry out its chartered powers. See *Ayr Harbour Trustees v. Oswald* 8 App. Cas. 623. *Montreal Park and Island Rly. Co. v. Chateauguay and Northern Rly. Co.* 35 S.C.R. 48 per Davies, J., at p. 57.

Their Lordships are unable to see that the deed of covenant of the 10th October, 1881, infringes this principle. They agree with Locke, J., when he says:

"Thus, there was conferred upon the Company by Section 4 of the letters patent all the powers necessary or useful to enable it to discharge its obligations under the contract. It was, in my opinion, for the Railway Company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city or municipality where these were to be located. By the Fall of 1881 the directors of the Company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the Province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and Westerly through the Pembina Mountains areas, should have their Eastern terminus. The Company was not asked by the City in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the province."

Their Lordships also agree with Locke, J., that the observations of Lord Selborne, L.C., in *Attorney-General v. Great Eastern Railway Co.* (1880) 5 App. Cas. 473 at p. 478 are in point. Lord Selborne says:

"I assume that your Lordships will not now recede from anything that was determined in the *Ashbury Railway Company v. Riche* (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*."

In the present case their Lordships are satisfied that the arrangement pursuant to which the deed of covenant of the 10th October, 1881, was executed was so incidental and indeed was "useful" to the respondent company within the meaning of clause 4 of their charter and was within their power.

Mr. Fillmore sought to narrow the effect of clause 4 of the charter by a reference to the Consolidated Railway Act, 1879, which by clause 17 of the charter is made applicable to the undertaking of the respondent company so far as not inconsistent with or contrary to the provisions of the charter. Their Lordships are unable to find anything in the provisions of that Act to which their attention was directed justifying such a restriction. Moreover clause 4 contained an express provision that the powers thereby conferred were not to be impaired by any of the special provisions thereafter contained.

Their Lordships cannot part with this branch of the case without referring to the decision of the Court of Appeal of Ontario in *Corporation of Whitby v. The Grand Trunk Railway Company* (1901) 1 O.L.R. 480 where a contract by a railway company, a predecessor in title in respect of part of the system of the defendant company, to erect and maintain for ever the chief workshops of the company at Whitby was held to be beyond the powers given to that railway company by its statute of incorporation. Their Lordships do not question the correctness of the actual decision that the contract in question did not bind the Grand Trunk Railway Company since as pointed out by Armour, C.J.O., there is great difficulty in holding that the agreement if valid was enforceable against the company, defendant to that action. Apart from that point however their Lordships agree with Kerwin, J., that the decision if correct can only be supported upon the terms of the enactments conferring the particular powers then in question.

The exemption from taxation granted to the respondent company by by-law 148 is therefore binding on the City, but the question remains whether that exemption grants relief from business tax. The trial judge held that it did, but his decision on this point was reversed by the Court of Appeal for Manitoba. Before the matter came to the Supreme Court of Canada that Court had delivered its judgment in *Canadian Pacific Railway Company v. Attorney General for Saskatchewan* (1951) S.C.R. 190 to the effect that the exemption granted by clause 16 of the contract recited in its charter of incorporation relieved the respondent company of liability from the business tax referred to in the Saskatchewan City Act, 1947. That business tax differed from the business tax imposed by the City of Winnipeg in that the yard stick by which the liability was measured was floor space in the case of the Saskatchewan tax whereas in the case of the City of Winnipeg it was rental value. This difference is however immaterial since the Supreme Court decided that the exemption applied whether the yard stick was floor space or rental value and the parties did not argue before this Board that in this respect the Supreme Court were in error.

Mr. Bond who argued this part of the case did not address their Lordships at length since the hearing of this appeal followed immediately on the hearing of the appeal in the Saskatchewan case. He adopted the argument of Mr. Leslie in that case and pointed out that the terms of the exemption in by-law 148 differed from that in clause 16 of the agreement recited in the charter in that the by-law exempted only property then owned or which might thereafter be owned by the respondent company whereas clause 16 exempted property required and used for the construction and working of the railway. He agreed however that there was no suggestion that any of the property in respect of which the respondent company was now seeking exemption from business tax was not owned by the respondent company. Their Lordships are therefore of opinion that the Supreme Court of Canada were right in thinking that on the facts before them there was no material distinction between the two exemptions. Their Lordships have already given their reasons for thinking that the decision of the Supreme Court of Canada in the Saskatchewan case was correct and they need not repeat them.

Their Lordships would however observe that the wording of by-law 148 is in one respect wider than the wording of clause 16 in that it grants exemption not only from taxation but also from rates and levies and assessments of every nature and kind. There is therefore some support for the view expressed by McPherson, C.J., in the Court of Appeal for Manitoba that an additional reason for holding that the exemption in by-law 148 covered business tax was that the by-law prohibited the City from making the assessment necessary before the amount of the tax could be ascertained.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent company's costs of the appeal.

In the Privy Council

THE CITY OF WINNIPEG

v.

CANADIAN PACIFIC RAILWAY COMPANY

DELIVERED BY LORD COHEN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1953