Privy Council Appeal No. 101 *of* 1936

The Attorney-General of Canada - - - - *Appellant*

v.

The Attorney-General of Ontario and others - - - *Respondents*

In the matter of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact the Employment and Social Insurance Act of the Statutes of Canada, 1935

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1937

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT (Master of the Rolls).
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

This is an appeal from the judgment of the Supreme Court, delivered on 17th June, 1936, in the matter of a reference by the Governor-General in Council dated 5th November, 1935, asking whether the Employment and Social Insurance Act, 1935, was *ultra vires* of the Parliament of Canada. The majority of the Supreme Court, Rinfret, Cannon, Crocket and Kerwin JJ. answered the question in the affirmative, the Chief Justice and Davis J. dissenting. The Act in its preamble recited Article 23 of the Treaty of Peace, by which in the Covenant of the League of Nations the members of the League agreed that they would endeavour to maintain fair and humane conditions of labour (omitting, however, in the recital that this agreement was subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed), and Article 427 of the said treaty, by which it was declared that the well-being, physical, moral and intellectual, of industrial wage earners, was of supreme international importance. It then recited that it was desirable to discharge the obligations to Canadian labour assumed under the provisions of the said treaty: and that it was essential for the peace, order and good government of Canada to provide for a national employment service and insurance against unemployment, &c. It consists of five Parts, Employment and Social Insurance Commission

(sections 4-9), Employment Service (sections 10-14), Unemployment Insurance (sections 15-38), National Health, (sections 39-41) and General (sections 42-48). In substance the Act provides for a system of compulsory unemployment insurance. Part I sets up a commission charged with administering the Act and obtaining information and making proposals to the Governor in Council for making provision for the assistance of persons during unemployment who would not be entitled to unemployment insurance benefit under Part III. Part II provides for the organisation by the commission of employment offices similar to the labour exchanges in the United Kingdom. Part III provides for unemployment insurance, while Part IV merely provides that the commission shall co-operate with other authorities in the Dominion or Provinces and shall collect information concerning any plan for providing medical care or compensation in cases of ill-health. Part V provides for regulations and reports. There are three schedules. The first defines employment within the meaning of Part III and excepted employments which include employment in agriculture and forestry, in fishing, and in lumbering and logging. The second enacts the weekly rates of contribution and rules as to payment and recovery of contributions paid by employers on behalf of employed persons. The third enacts the rates of unemployment benefit and supplementary provisions concerning the payment of unemployment benefit.

The substance of the Act is contained in the sections constituting Part III. They set up a now familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or if necessary in certain cases by action.

There can be no doubt that *prima facie* provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. Counsel did not seek to uphold the legislation on the ground of the treaty-making power. There was no treaty or labour convention which imposed any obligation upon Canada to pass this legislation.

and the decision on this question in the reference on the three labour Acts does not apply. A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of and for some time previous to the passing of the Act. On this point it becomes unnecessary to do more than to refer to the judgment of this Board in the reference on the three labour Acts and to the judgment of the Chief Justice in the National Products Marketing Act which on this matter the Board have approved and adopted. It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

It only remains to deal with the argument which found favour with the Chief Justice and Davis J. that the legislation can be supported under the enumerated heads, 1 and 3 of section 91 of the B.N.A. Act, 1867. (1) The public debt and property, namely (3) The raising of money by any mode or system of taxation. Shortly stated the argument is that the obligation imposed upon employers and persons employed is a mode of taxation: that the money so raised becomes public property and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied. Whether in such an Act as the present, compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation, it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State, or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon

the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed up with the insurance provisions of Part III that it is impossible to sever them. It seems obvious also that in its truncated form, apart from Part III, the Act would never have come into existence. It follows that the whole Act must be pronounced *ultra vires,* and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed.

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In the Privy Council.

THE ATTORNEY-GENERAL OF CANADA

v.

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS

DELIVERED BY LORD ATKIN.

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