

Privy Council Appeal No. 22 of 1947.

Attorney-General of Alberta - - - - - *Appellant*

v.

Attorney-General of Canada and another - - - *Respondents*

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

v.

Attorney-General of Alberta - - - - - *Respondent*

Consolidated Appeals

FROM

THE SUPREME COURT OF ALBERTA (Appellate Division)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1947

Present at the Hearing :

VISCOUNT SIMON

LORD MACMILLAN

LORD OAKSEY

LORD MORTON OF HENRYTON

LORD MACDERMOTT.

[*Delivered by VISCOUNT SIMON*]

In this matter consolidated appeals by the Attorney-General of Alberta and the Attorney-General of Canada respectively are brought before the Board from a judgment of the Supreme Court of Alberta (Appellate Division) to which, by the Order of the Lieutenant-Governor in Council of Alberta, the question of the validity of "The Alberta Bill of Rights Act" (Chapter 11 of 1946) had been referred. The Supreme Court decided that Part II of the Act was invalid inasmuch as the Alberta Legislature had no power to make a law in relation to the subject of "Banking" which is part of head 15 of the enumerated classes of subjects which Section 91 of The British North America Act exclusively assigned to the Parliament of Canada. The Supreme Court also held that Part I of the Act was *intra vires* of the Alberta Legislature and did not pronounce that the Act was invalid as a whole. The reasons for the judgment of the Supreme Court of Alberta were given by Harvey, C.J.A., and were concurred in unanimously by the rest of the Court which consisted of Ford, J.A., O'Connor, J.A., Macdonald, J.A., and Parlee, J.A.

The Attorney-General of Alberta contended before the Board that Part II was not legislation relating to "Banking" within the meaning of head 15 of Section 91 but was in pith and substance legislation relating to "Property and civil rights in the Province" (head 13 of Section 92). The Attorney-General of Canada contended that the decision of the Supreme Court of Alberta that Part II of the Act was invalid was correct and should be upheld, while in the Cross-Appeal he urged that the rest of the Act was not severable from Part II with the result that the whole Act

was invalid. The Canadian Bankers' Association which was the second respondent in the appeal of the Attorney-General of Alberta appeared before their Lordships to assist in upholding the decision of the Supreme Court as to Part II of the Act.

Their Lordships have therefore two questions before them, first, as to the validity of Part II of the Act, and, secondly, if Part II is held to be invalid, whether Part I of the Act none the less survives as severable and effective legislation.

Their Lordships will deal with these two questions in turn. It is first necessary to set out the relevant parts of the Act, both for the purpose of reaching a conclusion as to the validity of Part II and for the purpose of seeing whether the rest of the Act can stand if Part II goes. The Act begins with a long preamble which is preliminary to the division into two parts. The preamble is composed of seven paragraphs, the first three of which make reference to the purposes for which the two world wars were fought and to the duty which now rests on the Canadian people

"to win the peace by so ordering their internal economy that the freedom and security for which they fought may be experienced in reality by all of our citizens."

The fourth recital runs as follows:—

"Whereas the Province of Alberta possesses all the human and material resources necessary to provide for its citizens the material security essential to the enjoyment of personal freedom."

The fifth recital is:—

"Whereas The British North America Act imposes upon the Province the constitutional responsibility of providing its citizens with an opportunity to realize and enjoy their property and civil rights."

The sixth and seventh recitals are of considerable importance as indicating the main purposes of the Act and as bearing on the connection between Part I and Part II. They run as follows:—

"Whereas the discharge of the Province's responsibility necessitates the recognition of certain basic rights and responsibilities of citizenship and requires that its citizens have the necessary access to their resources so that they may produce the goods and services they require and provide for their equitable distribution in a manner that will ensure to all an opportunity to obtain social and economic security with personal freedom; and

Whereas the control of policy with respect to the issue, use and withdrawal of credit primarily determines the extent to which the citizens of Alberta may develop and enjoy the use of their resources and therefore must be a function of the electorate of the Province to be discharged on their behalf by their democratically elected representatives."

Their Lordships would observe before going further that the sixth recital asserts the necessity of two things which are united by the conjunction "and". It will be seen hereafter that the first of these elements is to a large extent the substance of Part I, while the second of them is sought to be dealt with in Part II. The final recital will be found to express the effective purpose of the Bill which, when it is read as a whole, seems plainly to be an application of the economic theory of what is called Social Credit.

The preamble is followed, in Section 2, by a number of definitions one of which, namely the definition of "Social security pension" is of special importance. Their Lordships would again observe that these definitions precede any division of the Act into parts. The definition referred to is as follows:—

"2.—(f) 'Social Security Pension' means the payment to individuals, as herein provided, of claims on goods and services, within the limitations of the natural resources of the Province and the productive capacity of the people, to ensure an annual income of not less than six hundred dollars a year on the basis of the 1945 price level for every single citizen of Alberta nineteen years of age and over.

Provided, however, that in the case of married persons, for the purpose of determining the amount of the payment to either spouse, the income of the two spouses shall be considered as if it were their joint income."

Then comes Part I, which consists of twelve sections, the first ten of which are all introduced by the words "it is hereby declared". Sections 3 to 8 appear to be mere declarations of common law rights. The language

employed might perhaps raise questions as to their precise application—for example, how does section 7 apply to the case where a man's property is requisitioned or acquired on compensation terms for a public work or railway? But it is unnecessary to delay over these sections since nobody can suppose that the purpose of the Alberta Legislature in passing this legislation would justify the view that they would intend these sections to stand if the clauses which carried out the main purpose of the Bill had to be regarded as a nullity.

There follow in Part I, sections 9 to 12, which must set out:—

“ 9. It is hereby declared that every citizen of Alberta of not less than nineteen years of age and not more than sixty years of age is entitled as a right of citizenship to—

- (a) the opportunity to engage in gainful employment; or
- (b) if gainful employment is not available, to a social security pension.

“ 10. It is hereby declared that every citizen of Alberta under nineteen years of age is entitled as a right of citizenship to—

- (a) the necessities of life adequate to ensure health and physical well-being;
- (b) educational benefits;
- (c) medical benefits.

“ 11. It is hereby declared that every citizen of Alberta who has reached the age of sixty years is entitled as a right of citizenship to retire from gainful employment and upon retirement to receive—

- (a) a pension of such amount as may from time to time be authorised by an Act of the Legislature provided that such pension shall not be less than the current amount of the social security pension;
- (b) medical benefits.

“ 12. It is hereby declared that every citizen of Alberta who becomes physically disabled and unable to engage in gainful employment is entitled to—

- (a) a social security pension;
- (b) medical benefits.”

Section 13 provides that in consideration of the foregoing rights of citizenship

“ it shall be the duty of every citizen of Alberta to discharge faithfully his responsibilities as an elector and citizen ”

to observe the law, respect the rights of other citizens and

“ to exercise his initiative and enterprise in promoting the spiritual, cultural and material welfare of the Province.”

There is nothing in the Act to indicate what is to happen to a citizen who does not do his duty in these respects.

Lastly, in Part I, comes section 14, according to which the Lieutenant-Governor in Council may make Orders to define gainful employment, may enter into agreements with any other Province or with the Dominion for the purpose of carrying out the intent and purpose of this Act and may make rules and regulations governing the determination of any question which may arise under Part I.

Part II of the Act which has the heading “ Constitution and Functions of Board of Credit Commissioners ” consists of fourteen clauses, of which the first, section 15, contains definitions. Of these the following must be specially noted:—

“ (a) ‘ Alberta Credit Certificates ’ means certificates issued to credit institutions authorizing a corresponding amount of credit deposits and issued in such form and in such denominations as the Board may specify for the purposes of carrying into effect the provisions of this Act.

(d) ‘ Credit ’ means the monetary evaluation of the capacity of the people of the Province to produce and distribute goods and services as when and where required.

(e) ‘ Credit deposits ’ means deposits of credit which have been made available to persons as claims on goods and services and in respect of which credit institutions have no corresponding reserve of currency.

(f) ‘ Credit Institution ’ means any person, corporation or organization whose main business is dealing in credit by keeping accounts of customers' credit deposits, transferring credit deposits from the account of any customer to any other person, exchanging credit deposits for currency or

making credit deposits available to customers; but shall not include any person, corporation or organization whose main business is the production or distribution of goods or the rendering of any service to the public which is not concerned mainly or exclusively with dealing in credit deposits; and likewise shall not include the Bank of Canada or credit unions operating pursuant to The Credit Union Act."

Their Lordships would observe that the definition of "Credit Institution" does not, in terms, include Banks, but, while "Credit Institution" is a wider term, it is obvious (and is not disputed) that Chartered Banks are included, i.e., Banks created by or under legislation of the Dominion, while the final words of the definition exclude the Bank of Canada.

Section 16 provides for the setting up of the Board of Credit Commissioners and section 17 (1) purports to confer on the Board authority to license all credit institutions in the Province. There is nothing in the Act to suggest that the Board must license Chartered Banks operating within Alberta and it follows that the enactment purports to confer on the Board the right to refuse such a licence. Sub-section (3) of Section 17 authorises, on summary conviction, a penalty of not less than \$1,000 and not more than \$5,000 for each day that a credit institution which has not obtained a licence carries on its operations, and sub-section (4) adds the additional consequence that the Board or its agents, with the approval of the Lieutenant-Governor in Council, "may enter the premises of such institution and assume full control and management of its business on behalf of its directors and shareholders." There follows a proviso which, in the view of their Lordships, is a proviso to sub-section (4) alone. It runs as follows:—

"Provided, however, that nothing herein contained shall be deemed to empower the Board to take over or interfere with any operations which the credit institution is authorized to perform by virtue of the provisions of The Bank Act nor to impair in any way the deposits any person may have with the credit institution, nor to interfere with any such person in dealing with his deposits in any way he may deem proper."

Section 18 requires the Board to establish what is called a Capital Assets Account of Alberta, which is to include "an estimated valuation of the economic resources of the Province" as therein defined and clause 19 requires the Board to establish a Consolidated Credit Adjustment Fund to which the Board shall issue credit deposits "in such amounts as may from time to time be required as a reserve for providing an adequate volume of credit deposits to finance the production and distribution of goods and services within the Province and for maintaining a balance between the aggregate purchasing power of the people of the Province and the estimated collective prices of goods for sale within the Province and for providing for their equitable distribution, having due regard to all the factors involved."

There follows section 20, according to which the Board is to transfer to the General Revenue Account of the Province "such amounts of credit deposits and in such manner as may be required" for the payment of social security pensions and other benefits therein set out. Sub-section (2) of Section 20 must be set out *verbatim*. Its text is as follows:—

"For the purpose of effectively controlling and regulating the issue and withdrawal of credit deposits within the Province, the Board, with the approval of the Lieutenant-Governor in Council, shall issue to licensed credit institutions Alberta Credit Certificates in such amounts and on such terms as the Board may deem advisable in order to enable such credit institutions to issue credit deposits to customers over and above the deposits against which a reserve of currency is held, and the amount of Alberta Credit Certificates so issued shall be debited to the Consolidated Credit Adjustment Fund."

Their Lordships call attention to the phrase, "licensed credit institutions" in this sub-section as clearly indicating that the enactment purports to confer on a Provincial authority power either to grant or to withhold the issue of Credit Certificates to any Chartered Bank and thus to restrain any Bank from creating an expansion of credit by loans exceeding its reserve of currency.

Section 24 is of special importance, and indeed contains the essence of the scheme requiring the deposits of the banks to be backed to the extent

of 100 per cent. by currency or by the proposed Credit Certificates. The section must be set out in full:—

" 24.—(1) Every licensed credit institution shall keep and operate the accounts of its customers, and arrange for the transfer of credit deposits from one account to another account in such manner and by such instruments as the Board may from time to time direct and the Board and its duly authorized agents shall at all times have access to the books, records and accounts of such credit institutions, and every member of the Board or its authorized agents having access to such records shall take and be bound by an oath of secrecy properly executed before a person authorized to administer oaths within the Province.

(2) The Board may require every licensed credit institution to hold against all or any credit deposits of customers, not being deposits against which a reserve of currency of an equivalent value is held, Alberta Credit certificates of an aggregate value not exceeding the aggregate value of such credit deposits.

(3) In the case of any credit institution licensed to operate within the Province, having branches and operating outside the Province, the proportion of its reserves of currency to its total deposits within the Province shall be deemed to be in the same ratio as its total reserves of currency to its total deposits in Canada.

(4) The Board may direct that any balance due by one credit institution to another credit institution on account of any transfers of credit deposits between their respective customers shall be settled by the transfer of Alberta Credit Certificates of a corresponding value."

Section 26 provides for severe penalties for breach of the provisions of Part II, including the cancellation of the licence of a credit institution, and, in the case of an individual other than a credit institution, a fine not exceeding \$1,000, or one year's imprisonment, or both.

The final section of the Act runs as follows:—

" 28. This Act shall come into force on a day fixed for that purpose by Proclamation of the Lieutenant-Governor in Council, but no such Proclamation shall be made until after the question of the validity of this Act has been referred to the Supreme Court of Alberta pursuant to the provisions of The Constitutional Questions Act, and it is certified upon any such reference that this Act is valid, and if no appeal is for the time being pending, until the time for giving any notice of any such appeal has elapsed."

Such being the main contents of the Act, their Lordships proceed first to deal with the question of the validity of Part II. They are not, of course, called upon to form, or to express, any opinion as to the economic thesis upon which what is called Social Credit is based. Their duty is to examine the enactment itself, without considering what may be its economic merits or demerits, and to determine, in the first place, whether the Supreme Court of Alberta was right in holding that Part II is *ultra vires* of the Legislature of Alberta. It cannot be disputed that the object and effect of Part II are to interfere with and control the business carried on by a Chartered Bank in the Province by which (subject to any restrictions imposed by Dominion legislation), it makes loans to customers to a total amount which exceeds the liquid assets which the Bank holds. The question, therefore, is whether operations of this sort fall within the connotation of "Banking" as that word is used in Section 91.

Their Lordships entertain no doubt that such operations are covered by the term "Banking" in Section 91. The question is not what was the extent and kind of business actually carried on by Banks in Canada in 1867, but what is the meaning of the term itself in the Act. To take what may seem a frivolous analogy, if "skating" was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the Central Legislature. Other illustrations may be drawn from Section 91 as it stands: take, for example, head 5, "Postal Services". In 1867 postal services in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of aeroplanes for carrying mail is, on that account, not within the phrase. The concept of banking certainly includes the granting of credit by banks; "a banker", as Chief Justice Duff said in dealing with

the *Alberta Legislation Reference*, [1938] S.C.R. 100 at p. 116, "has been defined as a dealer in credit." Whether the expansion of credit now effected by bankers' advances is regarded as wise or unwise, as just or unjust, as economically desirable or economically unjustifiable, does not, in the view of their Lordships, affect the point here at issue at all. If it is fairly included within the conception of "Banking" it is a matter exclusively reserved for the Legislature of Canada.

In the well-known decision of the Privy Council in *Tennant v. The Union Bank of Canada*, [1894] A.C. 31, Lord Watson laid it down at p. 46 that the head "Banking" was an expression "wide enough to embrace every transaction coming within the legitimate business of a banker." He further said that, notwithstanding that "Property and civil rights" was a topic allocated to Provincial Legislatures under Section 92, "Banking" was one of the matters concerning which the exclusive legislative authority of the Parliament of Canada could not be operated without interfering with and modifying civil rights in the Province. This view of the width of the expression "Banking" has been recently confirmed by another decision of this Board, in *A.G. for Canada v. A.G. for Quebec* [1947] A.C. 33.

Undoubtedly the business of banking has developed and expanded greatly since Confederation, though it is by no means clear that even before 1867 banks in Canada were not practising to a more limited extent the kind of operation which it is the object of the Alberta Act now under consideration to prevent or restrict. Chief Justice Harvey points out that as early as 1859 the Legislature of the then Province of Canada was enacting (Section 1 of Chapter 55 of the Consolidated Statutes of that year):—

"The business of banking shall, for the purposes of this Act, mean the making and issuing of Bank Notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities, and such other trade as belongs legitimately to the business of banking."

Moreover, Section 85 of that Act provided that "the total liabilities of any Joint Stock Bank shall never exceed three times the amount of its capital"—a provision which sets some limit to bank lending, but not a limit measured by the currency which the bank holds. But in any event, it appears to their Lordships to be impossible to hold that it is beyond the business covered by the word "Banking" to make loans which involve an expansion of credit. Legislation which aims at restricting or controlling this practice must be beyond the powers of a Provincial Legislature. It is true, of course, that in one aspect Provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the "pith and substance" of the legislation is "Banking" (the phrase "pith and substance" can be traced back to Lord Watson's judgment in *The Union Colliery v. Bryden* [1899] A.C. 580) this is the aspect that matters and Part II is beyond the powers of the Alberta Legislature to enact.

There remains the second question whether when Part II has been struck out from the Act as invalid, what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is *intra vires* "either in whole or in part," but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all. Chief Justice

Harvey dealt with the second question very briefly and answered it by merely saying that Part I is *intra vires*. Their Lordships, as just explained, think that notwithstanding the form of the question put, the matter cannot be disposed of so summarily.

Looking at the Act as a whole, it is clear that its intent and purpose is to establish machinery sufficiently complete in itself to secure that, in accordance with the economic concept of Social Credit, it will severely restrict Chartered Banks from continuing to carry on a legitimate part of their present operations. When Part II is cut out, what is left? In the first place, there is left the preamble, some of the later paragraphs of which would have little or no application to Part I standing alone. The sixth paragraph, as already pointed out, when reciting that the discharge of the Province's responsibilities necessitates an achievement of two results, is, as to the second suggested result, plainly pointing to Part II. Again, the definition of "Social security pension", as meaning the payment to individuals "as herein provided", of claims on goods and services, etc., within the limitations there indicated, is anticipating and pointing to provisions in Part II, such as Section 15 (e) and Section 18 (1). Their Lordships have already indicated that they cannot suppose that clauses 3 to 8 in Part I are other than preliminaries to what follows and while it is true that clauses 9 to 12 include a declaration that citizens of Alberta in certain circumstances are entitled to social security pensions, these declarations remain mere aspirations unless Part II operates to provide how this is to be done. The Attorney-General for Alberta ingeniously argued that Part II was only one method of securing these results, and that Part I standing alone left it in the power of the Lieutenant-Governor in Council to make the necessary provisions "by Order" in some other undefined and unascertained form; but, in their Lordships' opinion, this is not the scheme of the Act nor do the words in Section 14 empower the Lieutenant-Governor in Council to make new machinery which will take the place of Part II. The whole thing hangs together, and if Part II goes there is nothing left to be added to the statute law of Alberta which would have any effective operation. The view which their Lordships have formed is confirmed by the language of Section 28 which shows that the Act cannot come into force unless "it is certified . . . that this Act is valid" etc. Since Part II is invalid, there cannot be a certificate that "this Act" is valid, and thus by the terms of the Act itself, the Act cannot ever come into force.

For these reasons their Lordships do not find it possible to agree with the Supreme Court of Alberta that, when Part II has gone, there is yet some part of the Act which survives.

Their Lordships will humbly advise His Majesty that Part II of the Act is *ultra vires* and that, having regard to the relation between Part II and the rest of the Act, the Act as a whole cannot be regarded as valid.

In the Privy Council

ATTORNEY-GENERAL OF ALBERTA

2.

ATTORNEY-GENERAL OF CANADA AND
ANOTHER

ATTORNEY-GENERAL OF CANADA

2.

ATTORNEY-GENERAL OF ALBERTA
(Consolidated Appeals)

DELIVERED BY VISCOUNT SIMON

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1947