Privy Council Appeal No. 41 *of* 1923.

The Attorney-General of British Columbia - - - - *Appellant*

v.

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

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
LORD SHAW.
LORD SUMNER.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Canada, expressing the answers to two questions submitted to that Court by the Governor General of Canada in Council, under the Canadian Supreme Court Act. The first of the questions was whether the legislature of British Columbia had power to enact Chapter 49 of its Statutes for 1921, being an Act to validate and confirm certain Orders in Council and provisions relating to the employment of persons on Crown property. The second question was, if the Court thought the Act *ultra vires* in part only, in what particulars was it *ultra vires*.

The majority of the learned Judges in the Supreme Court replied that the Legislature of the Province had no power to enact the statute in question, and that the second question consequently did not arise.

The relevant facts are briefly these : In 1902 two Minutes were passed in the Executive Council of the Province and approved by the Lieutenant Governor. The Executive Council

set out in these Minutes resolutions passed by the Legislative Assembly, and recommended, in accordance with these resolutions, that all tunnel and drain licences issued under Section 58 of the Mineral Act and Section 48 of the Placer Mining Act, and all leases granted under Part VII of the latter Act, should contain provisoes that they were granted on the express condition that no Chinese or Japanese should be employed in or about the tunnels, drains or premises to which the licences or leases related, and that a similar provision should also be inserted in all instruments relating to a number of enumerated leases and licences which should be issued by the officers of the Provincial Government.

In 1913 a treaty was made between His Majesty the King and the Emperor of Japan by which it was among other things agreed that the subjects of each of the High Contracting Parties should have full liberty to enter, travel, and reside in the territories of the other, and in all that relates to the pursuit of their industries, callings, professions and educational studies, should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

Section 132 of the British North America Act provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. On the 10th April, 1913, the Parliament of the Dominion passed the Japanese Treaty Act of that year. The Act provided that the treaty just referred to should be thereby sanctioned and declared to have the force of law in Canada.

On the 2nd April, 1921, the Legislature of British Columbia proceeded to pass the Oriental Orders in Council Validation Act. This statute purported to validate and confirm the two Orders in Council of the Province already referred to, and passed in the form of recommendations of the Provincial Executive Council approved by the Lieutenant Governor in May, 1902. The statute further provided that the orders should be deemed to have been valid and effectual according to their tenor as from the dates of the approval, and that where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the Government of the Province, any provision had heretofore been inserted or was thereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision should be deemed to have been and to be valid, and always to have had the force of law according to its tenor. It was further enacted that every violation of or failure to observe any such provision on the part of any licensee or other person in whose favour the instrument operated, should be sufficient ground for the cancellation of the instrument by the Lieutenant Governor.

This is the statute the validity of which has been the subject of decision by the Supreme Court of Canada. Before, however, proceeding to the questions there discussed reference must be made to certain recent proceedings which resulted in an appeal to the Sovereign in Council and a decision which restricts the questions that are still open.

In 1912 licences had been granted by the Minister of Lands of British Columbia to certain persons, enabling them to cut and carry away timber on lands belonging to the Province. Each of these licences was granted for a year only, but under a provision in the Crown Lands Act the licences were renewable from year to year if these terms and conditions had been complied with. Among these was the stipulation, inserted in accordance with the Orders in Council of 1902, that no Chinese or Japanese were to be employed in connection with the licence. The stipulation had been violated by the grantees, but notwithstanding this the licences had been renewed down to 1920.

In that year the Lieut.-Governor of the Province referred to the Court of Appeal for British Columbia the question whether the stipulation was valid, having regard to sub-head 25 of Section 91 of the British North America Act, which reserves for the Dominion Parliament the exclusive power to legislate with reference to "Naturalisation and Aliens," and also to possible repugnancy to the Dominion Japanese Treaty Act of 1913. The Court of Appeal of British Columbia held the stipulation to be invalid on both grounds. However, the licences were in fact renewed for another year, and meantime the Oriental Orders in Council Validation Act was passed in April, 1921. Apparently relying on the new statute the Minister of Lands called the attention of the grantees to their breach of the stipulation, and threatened to cancel the licences.

The grantees or the persons who had succeeded them in title then commenced an action in the Supreme Court of British Columbia claiming a declaration that, notwithstanding the stipulation, they were entitled to employ Chinese and Japanese on the timber lands, and an injunction against interference with their enjoyment under the licences. On an interlocutory motion, the Judge of first instance, holding himself bound by the opinion previously given by the Court of Appeal, granted an injunction. The Provincial Government, by arrangement, appealed directly to the Supreme Court of Canada. While this appeal was pending, the Governor General referred to the Supreme Court the questions in the appeal now before their Lordships, as to the validity of the Provincial statute. The Supreme Court heard the two matters before it together, and gave successive judgments in them. As already stated, the majority held the Provincial statute to be invalid. But on the appeal in the action they allowed the appeal and dismissed the action itself, mainly on the ground that, even though the stipulation as to not employing Oriental labour were void, it not the less formed one of the

conditions of the licences, and could not be treated as struck out of them, with the result that the only right to renewal was one which, being founded on a condition which was its foundation notwithstanding any illegality, must fail.

This last question was brought on appeal to the Privy Council. Their Lordships considered both of the points made. They held, first, that the stipulation was not void as violating Section 91 of the British North America Act. For it related only to the way in which the Province claimed to be free to manage its own property as distinguished from a claim to regulate the general status of aliens. Whatever might be said about the stipulation as affecting this in the case of Japanese labour, there was nothing in the Treaty Act which affected the status of Chinese labour, and it was therefore only under Section 91 that the stipulation as to Chinese labour, which was severable, could be struck at. As their Lordships were of opinion that this particular stipulation was not inconsistent with Section 91, the appellants had no right to renewal. The point as to the Treaty Act thus became immaterial, and their Lordships did not deal with it, but dismissed the appeal on the ground just stated.

This decision (*Brooks-Bidlake and Whittall, Limited*, v. *Attorney General for British Columbia* [1923], A.C. 450) thus leaves the question now before their Lordships for decision untouched. The views taken of it by the learned Judges in the Supreme Court of Canada were divergent. Davies C.J. thought that the Provincial Act of 1921 was *ultra vires* (1) as infringing the provisions of Section 91 of the British North America Act, and (2) as conflicting with the provisions of the Treaty Act, 1913, by prohibiting the employment of Japanese subjects. Idington J. (who dissented from the conclusion of the majority) was of opinion that the powers of the Provincial Government over the lands of the Province were as extensive as those of private owners, and that a private owner could have determined not to have Japanese subjects on his property, and could have stipulated to that effect. He thought that, this being so, the terms of the Treaty must be construed as leaving intact the right of the Province to exercise that liberty of a private owner, which he held the Treaty not to touch. Duff J. devoted the first part of an exhaustive judgment to the question whether the Provincial statute of 1921 was *ultra vires* as being an attempt at legislation in regard to aliens, the capacity for which was conferred exclusively on the Dominion Parliament by Section 91. He came to the conclusion that the statute was not such an attempt, but was so far a legally valid exercise by the Provincial Legislature of a power confided to it of making provision for settlement on Provincial property of a suitable population. He pointed out that the two Orders in Council and the condition which they imposed related only to specific and limited kinds of such property. What was excluded was not the employment of subjects of foreign Powers, in particular, but that of Chinese and Japanese, whether aliens,

naturalised subjects or native-born subjects, under particular circumstances. But when the learned Judge passed to Section 132 he came to the conclusion that the Treaty Act was the exercise of an authority to the Dominion to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only. He thought the scope of the section broad enough to support the Treaty Act, and to put Japanese subjects in the same position before the law as the subjects of the most favoured nation. The statute of 1921 he held to contravene the right so given to Japanese subjects, by excluding them from employment in certain definite cases. And this was not the less so in that the Province in so doing was administering its own corporate and economic affairs. The new Provincial law was repugnant to the treaty and could not stand. Since the statute of 1921 treats Chinese and Japanese as constituting a single group, the learned Judge thought that it was inoperative, not merely as regards Japanese subjects, but *in toto*. Anglin J. based his opinion entirely on Section 91, which he held the statute of 1921 to contravene. It was in substance a statute passed to deprive Chinese and Japanese of general capacity. He expressed no opinion about the effect of the Treaty Act. Mignault J. delivered judgment to the same effect as Anglin J. Brodeur J. thought the Provincial Statute *intra vires* so far as Section 91 was concerned, and authorised by Section 92 (5), which confers on the Province authority to manage the public lands belonging to it. But he considered the statute to be *ultra vires* in so far as Japanese subjects were concerned, as conflicting with the provisions of the Treaty Act. He considered it, however, to be *intra vires* as regards the Chinese.

As the result of the opinion delivered in the Supreme Court of Canada, the Governor General in Council on the 31st March, 1922, being within the year from the passing of the statute of 1921 during which his power of disallowance remained operative, disallowed it.

Leave to appeal to the Sovereign in Council against the judgment of the Supreme Court was subsequently given. On the decision in the present appeal depends, therefore, the ascertainment of the limits within which the Legislature of the Province can attempt further legislation on the subject. What their Lordships have to consider is whether the statute of 1921 is invalid on any of the grounds alleged. The main reasons submitted in favour of its invalidity are, first that Section 91 (25) of the British North America Act has debarred the Provincial Legislature from enacting what was really in its pith and substance legislation dealing with the rights of aliens. It is said that although the statute contains provisions regulating the mode of dealing with its own property by the Province, it not the less is a statute which affects radically the status of classes of aliens. Whether it relates to Chinese or Japanese it thus equally trenches to an extent which cannot be exhaustively defined on the subject

matter assigned to the Dominion by Section 91 (25). The principle which applies is alleged to be that laid down in *Union Colliery Company of British Columbia, Ltd.* v. *Bryden* [1899] A.C. 580, and not that applied in *Cunningham* v. *Tomey Homma* [1903] A.C. 151.

In the appeal in the *Brooks-Bidlake* case what their Lordships decided was that the stipulation in the licences against the employment of Chinese was a severable stipulation which had been broken, with the result that the licensees could not claim a renewal. Such a stipulation was held to be in itself consistent with Section 91 (25), and so far as Chinese labour was concerned no question could arise under the Japanese Treaty.

On the present occasion a wholly different question presents itself. The statute of 1921 not only confirms the stipulations provided for in the Orders in Council of 1902, but it enacts that where in any instrument of a similar nature to any of those referred to in these Orders a provision is inserted relating to or restricting the employment of Chinese or Japanese, the provision is to be valid and to have the force of law, and failure to observe it is to be ground for cancellation by the Provincial Government of the licence or other instrument. Their Lordships observe that this provision may not altogether unreasonably be looked on as containing an approach to the laying down of something more than a mere condition for the renewal of the right to use Provincial property. Still, the question is far from free from difficulty, for the reasons assigned by Duff J. in his judgment in the Supreme Court.

In the view, however, which their Lordships take of the bearing of the Treaty Act on the statute it becomes unnecessary for them to express any opinion about it, and they refrain from doing so in accordance with the practice which they have repeatedly laid down for their own guidance of deciding no more than is necessary in appeals relative to the interpretation of the British North America Act.

As regards the question arising as to the application of the Treaty Act itself, they entertain no doubt that the Provincial statute violated the principle laid down in the Dominion Act of 1913. This conclusion does not in any way affect what they decided on the previous appeal as to the title to a renewal of the special licences relative to particular properties. It is concerned with the principle of the statute of 1921, and not with that of merely individual instances, in which particular kinds of property are being administered.

The statute has been disallowed, and if re-enacted in any form will have, in their Lordships' opinion, to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation. They are unable to accept the view that as the terms of the statute

stand they do not infringe this principle so far as concerns subjects of the Emperor. That others who are not such subjects happen to be included can make no difference to this conclusion.

As the result, their Lordships will humbly advise His Majesty that the first of the questions submitted to the Supreme Court of Canada should be answered in the negative, as that Court has answered it. The second question does not arise for the reason they have indicated. The statute has been disallowed. It may not be necessary to enact it in a fresh form, but if this is to be done it may be possible so to re-draft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with Section 91 (25) of the British North America Act. The question whether there has been success in the latter respect can only be answered when the terms of any fresh statute are known. The appeal should accordingly be dismissed, and, in accordance with a practice that is usual, without costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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