Privy Council Appeal No. 107 of 1938
Privy Council Appeal No. 45 of 1939

The Board of Trustees of the Lethbridge Irrigation District and another - - - - - *Appellants*

v.

The Independent Order of Foresters - - - *Respondent*
and the Attorney-General of Canada - - - *Intervener*

The King - - - - - - - *Appellant*

v.

The Independent Order of Foresters - - - *Respondent*
and the Attorney-General of Canada - - - *Intervener*

FROM

THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH MARCH, 1940

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT CALDECOTE)
VISCOUNT SANKEY
VISCOUNT MAUGHAM
LORD ROCHE
LORD PORTER

[*Delivered by* THE LORD CHANCELLOR]

These two appeals raise questions of the validity of three Acts of the Legislative Assembly of the Province of Alberta, all passed on the 14th April, 1937. In the first appeal the Provincial Guaranteed Securities Interest Act, Chapter 12 of the Statutes of Alberta, 1937, and the Provincially Guaranteed Securities Proceedings Act, Chapter 11 of the Statutes of Alberta, 1937, in so far as it relates to the subject matter of the proceedings under appeal, have been declared *ultra vires* by the Appellate Division of the Supreme Court of Alberta dismissing an appeal from a judgment of Mr. Justice Ewing dated 29th October, 1937. In the second case the Provincial Securities Interest Act, Chapter 13 of the Statutes of Alberta, 1937, has likewise been declared *ultra vires* the Legislature of the Province as the result of a decision of the Appellate Division dismissing an appeal from a judgment of Mr. Justice Shepherd dated 11th February, 1939. Similar questions arise in the two appeals as to the interpretation of sections

91 and 92 of the British North America Act, and they were heard together. It is necessary now to deal with the two cases separately.

The respondent in the first appeal (the plaintiff in the action) is the holder of a number of debentures, dated 21st May, 1921, each of the principal sum of one thousand dollars, issued by the first-named appellant and guaranteed by the Province of Alberta. The debentures bore interest at the rate of six per cent. per annum payable half-yearly in gold coin of or equivalent to the standard of weight and fineness fixed for gold coins at the date of the debentures by the laws of the United States of America upon presentation and surrender of the coupons attached to the debentures, as the coupons severally became payable. The debentures provided that payment of interest should be made at the holder's option at the principal office of the Imperial Bank of Canada in Toronto, Montreal or Edmonton, or at the office of the Bank of Manhattan Company in New York.

On the 15th December, 1936, the respondent presented for payment at the Imperial Bank of Canada in Toronto coupons attached to the debentures and dated 1st November, 1936, for thirty dollars each, being in respect of interest at the rate of six per cent. The Bank, acting on the instructions of the Government of the Province of Alberta, refused payment of the amount of the coupons except to an amount representing interest at the rate of three per cent. The respondent thereupon took proceedings in the Supreme Court of Alberta to recover the full amount of the interest. The first-named appellant met the claim by relying on the provisions of the Provincial Securities Interest Act, Chapter 11 of the Statutes of Alberta, 1936 (Second Session), reducing the interest payable on the debentures from six per cent. to three per cent. and prohibiting any action from being brought or maintained in the Courts of the Province in respect of the debentures. At the trial of the action the Act relied on by the first-named appellant was held by Mr. Justice Ives to be *ultra vires* the Legislature, and judgment was given for the amount claimed. Notice of appeal was given, but before the appeal was heard the two Acts in question in the present appeal were passed by the Legislative Assembly, and by section 5 of the Provincial Securities Interest Act, Chapter 13 of the Statutes of Alberta, 1937, the Provincial Securities Interest Act, Chapter 11 of the Statutes of Alberta, 1936 (Second Session), was repealed. A few days later the appeal from the judgment of Mr. Justice Ives was abandoned.

On 1st May, 1937, a further amount of interest became payable and on 11th May the respondent presented the appropriate coupons for payment at the Imperial Bank of Canada in Toronto. The Bank again, on the instructions of the Government of the Province of Alberta, refused payment of the full amount of the interest. The respondent thereupon began the action out of which the present appeal arises to recover the interest due on the debentures. The

first-named appellant in answer to the claim relied on the Act, Chapter 12 of the Statutes, 1937, by which the interest due at the rate of six per cent. was reduced to three per cent., and also on the Act, Chapter 11 of the Statutes, 1937, as a bar to the action without the consent of the Lieutenant-Governor in Council. The question in this appeal is whether these two Acts are within the powers of the Provincial Legislature having regard to the provisions of sections 91 and 92 of the British North America Act, 1867, by which the distribution of Legislative Powers between the Parliament of Canada and the Provincial Legislatures was made.

The Act, Chapter 12 of 1937, effects its object in simple and straightforward language. After defining guaranteed securities so as to include *inter alia* the debentures concerned in this appeal, the Act proceeds by section 3 to reduce the rate of interest payable upon any guaranteed security from and after 1st June, 1936, "notwithstanding any stipulation or agreement as to the rate of interest payable" in respect of the security. In order to bolt the door more firmly against a holder of any guaranteed security who might wish to test his rights in the Courts of the Province, it is provided by section 3 (2) that "no person shall be entitled to recover in respect of any guaranteed security any interest at a higher rate than the rate" prescribed by the Act and the rights of the holder of a guaranteed security are stated to be such as are set out in the Act. The Act, Chapter 11 of 1937, carries the alteration of the rights of the debenture holder a little further. Section 2 defines "guaranteed securities" as in the Act, Chapter 12. Section 3 which is the only operative section of the Act prohibits any action or proceeding of any kind for the recovery of any money payable "in respect of any guaranteed security or for the purpose of enforcing any right or remedy whatsoever for the recovery of any such money or for the purpose of enforcing any judgment or order at any time heretofore or hereafter given or made with respect to any guaranteed security or for the purpose of enforcing any foreign judgment founded on a guaranteed security, without the consent of the Lieutenant Governor in Council."

The validity of these two Acts depends upon the interpretation and application of sections 91 and 92 of the British North America Act of 1867. These sections have been the subject of repeated examination in the Judicial Committee, and there can no longer be any doubt as to the proper principles to their interpretation, difficult though they may be in application. Lord Haldane, in delivering the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King*, ([1921] 2 A.C.) p. 91 and p. 116, said, "The rule of construction is that general language in the heads of section 92 yields to particular expressions in section 91 where the latter are unambiguous." In a later decision of the Judicial Committee (*Attorney-General for Canada* v. *Attorney-General for British Columbia* [1930] A.C. 111 at p. 118), Lord Tomlin summarised in four propositions the

result of the earlier decisions of the Board on questions of conflict between the Dominion and the Provincial legislatures. The first proposition is to the effect that the legislation of the Parliament of the Dominion so long as it strictly relates to subjects of legislation expressly enumerated in section 91 is of paramount authority, even though it trenches upon matters assigned to the Provincial legislatures by section 92. Lord Tomlin referred to the case of *Tennant* v. *Union Bank of Canada* ([1894] A.C. 31) as the authority for this statement. In applying these principles as their Lordships propose to do to the present case an enquiry must first be made as to the " true nature and character of the enactments in question " (*Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96), or to use Lord Watson's words in delivering the judgment of the Judicial Committee in *Union Colliery Co.* v. *Bryden* ([1899] A.C. 580) as to their " pith and substance ". Their Lordships now address themselves to that enquiry.

The long title of the Act, Chapter 12 of 1937, is " An Act respecting the interest payable on debentures or other securities guaranteed by the Provinces." The sole purpose and effect of the Act are to reduce the rate of interest on a number of securities. The holders of the securities affected by the Act were entitled, before the Act was passed, to receive interest at a rate according to the terms on which their securities were issued. The Act substituted a different rate of interest for the agreed rate. The Act clearly deals with interest and " interest " is one of the classes of subject which by section 91 are reserved exclusively for the Dominion Legislature. Unless, therefore, a restricted interpretation is to be given to " interest " in section 91 (19) instead of its ordinary meaning, it would appear on a first examination that the Act, Chapter 12, is not within the competence of the Province. Their Lordships, however, were invited by counsel for the appellants to say that the inclusion of " interest " in the Dominion subjects in section 91 is to be explained by the history of earlier legislation on the subject of usury, and therefore " interest " must be read as meaning only interest which is exorbitant or usurious. This interpretation is open to the objection that as no standard is laid down by which interest is to be adjudged exorbitant or usurious, " interest " standing as it does in section 91 without any word of qualification or limitation would seem a very uncertain description of a class of subject for the purpose of defining the exclusive legislative authority of the Dominion. Their Lordships' attention was called to section 4 of the Dominion Interest Act of 1927 (R.C.S. c. 102) by which no interest exceeding the rate of five per cent. per annum shall be chargeable unless the contract contains an express statement of the yearly rate of interest. Legislation of this sort was said by Counsel for the appellants to be akin to legislation dealing with usury. Their Lordships would be slow in forming this opinion, but even if it were so, it carries the argument no further. The Dominion Parliament in exercising the power to legislate upon

"interest" might very well include in an Act dealing generally with the subject of interest provisions to prevent harsh transactions. Nor does the history of legislation in Canada on the subject of interest support the appellants' argument. Their Lordships' attention was called to a number of Canadian Acts of Parliament on the subject of usury from 1793 down to 1858. In 1858 an Act was passed by the Parliament of Canada (c. 85) which was the forerunner of the Interest Act of 1927 of the Dominion. The Act of 1858 by section 2 in effect abolished restrictions as to rates of interest, except in the case of certain persons named in the Act. From that time forward the usury laws, which the policy of an earlier generation demanded, ceased to have effect. Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of head 19 of section 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt to lay down any exhaustive definition of "interest". The word itself is in common use and is well understood. It is sufficient to say that in its ordinary connotation it covers contractual interest and contractual interest is the subject of the Act now in question.

For these reasons their Lordships have come to the conclusion that the Act, Chapter 12 of Alberta, 1937, is in pith and substance an Act dealing with interest within the meaning of section 91 (19) of the British North America Act. Having regard to this conclusion, it becomes unnecessary to discuss at length the classes of subjects enumerated in section 92 as being within the powers of Provincial Legislatures. It was suggested on behalf of the appellants that the Act in question is legislation concerning "Municipal Institutions in the Province" (head 8), or concerning "property and civil rights in the Province" (head 13), or failing these that the Act fell under head 16, "generally all matters of a merely local or private nature in the Province". Their Lordships are unable to accept any of these contentions. In so far as the Act in question deals with matters assigned under any of these heads to the provincial legislatures, it still remains true to say that the pith and substance of the Act deals directly with interest and only incidentally or indirectly with any of the classes of subjects enumerated in section 92. Even if it could be said that the Act relates to classes of subjects in section 92, as well as to one of the classes in section 91, this would not avail the appellants to protect the Provincial Act against the Interest Act of 1927 passed by the Dominion Parliament the validity of which in the view of their Lordships is unquestionable. Section 2 of the Interest Act is as follows, "Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract or agreement whatsoever any rate of interest which is agreed upon". This provision cannot be reconciled with the Act, Chapter 12 of Alberta, 1937, and as Lord Tomlin made clear in the case already cited of *Attorney*

General for Canada v. *Attorney General for British Columbia,* Dominion legislation properly enacted under section 91 and already in the field must prevail in territory common to the two Parliaments.

Their Lordships were pressed with the decision of the Board in *Ladore* v. *Bennett* ([1939] A.C. 468). In that case a Provincial Legislature passed Acts amalgamating and incorporating in one city four municipalities which were in financial difficulties. As part of the consequent adjustment of the finances of the municipalities, debentures of the new city of equal nominal amount to those of the old municipalities were issued to the creditors, but with the rate of interest reduced. It was held by the Judicial Committee that a Provincial Legislature, which could dissolve a Municipal Corporation and create a new one to take its place, could legislate concerning the financial powers of the new corporation and incidentally might define the amount of interest which the obligations incurred by the new city should bear. On this ground it was decided that legislation directed bona fide to the creation and control of municipal institutions is in no way an encroachment upon the general exclusive power of the Dominion Legislation over interest. Having come to the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under section 92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new city was not an invasion of Dominion powers under head 19 of section 91.

The decision of the Court of Appeal of British Columbia in *Day* v. *City of Victoria* (1938, 3 W.W.R. 161) holding the Victoria City Debt Refunding Act, 1937, *intra vires* of the provincial Legislature was also cited as a case in which it was held permissible for a Provincial Legislature to pass an Act relating to interest. On examination the decision is found to give no support to the appellants' argument. The Act there in question did not purport to be an Act relating generally to interest, and while some of its provisions dealt with interest as an incident effecting the general object of the enactment, it was held, rightly as their Lordships think, not to be an Act in relation to interest or to conflict with the Dominion Interest Act. In *Attorney General for British Columbia* v. *Attorney General for Canada* ([1937] A.C. 391), which was also cited, the question was whether Acts of the Dominion Parliament dealing with the liabilities of farmers and with creditors' arrangements came under head 21 of section 91 of the British North America Act "Bankruptcy and insolvency" or head 13 of section 92, "Property and civil rights in the Province." The Judicial Committee held that the Acts in question related to "bankruptcy and insolvency". The case is one more illustration of the rule that in resolving the questions that are bound to arise between these two famous sections of the British North America Act, it is essential first to examine the "true nature and character" of the legislation in question.

The Act, Chapter 11 of 1937, prohibiting actions or proceedings to enforce rights with respect to guaranteed securities without the consent of the Lieutenant Governor in Council must, in their Lordships' judgment, stand or fall with the Act, Chapter 12. Each of the two Acts applies to "guaranteed securities" as defined in identical terms. The Acts are in fact designed to effect one and the same purpose, namely to reduce the rate of interest on the securities to the level fixed by the Act, Chapter 12. If the Act, Chapter 11, can properly be passed as relating to one or other of the classes of subjects in section 92, it enables the Government of Alberta acting through the Lieutenant Governor in Council to allow proceedings in the Courts to recover interest at the rate which the Government fix, but at no higher rate. By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Act, Chapter 12. In other words the Act, Chapter 11, is an attempt to do by indirect means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of sections 91 and 92. Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in *Madden* v. *Nelson and Fort Sheppard Railway* ([1899] A.C. at 627). "It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly." The substance and not the form of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that under colour of an Act relating to the class of subject described in head 14 of section 92, the Provincial Parliament has passed legislation which is beyond their powers.

In the result their Lordships agree with the judgments of Ewing J. and of the majority of the Appellate Division of the Supreme Court of Alberta, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

The question in the second appeal is whether the Act, Chapter 13 of the Statutes of Alberta, 1937, is within the powers of the Alberta Legislature. The respondent began the proceedings by way of petition claiming that the Act is *ultra vires* the Alberta Legislature and asking for a declaration of the Court accordingly. The respondent is a body corporate in accordance with the law of the Province, and owns a number of debentures to the amount of 373,000 dollars, lawfully issued by the Province under powers conferred on the Province by Statutes of Alberta and Orders of the Lieutenant Governor in Council. The debentures which were issued at different dates bear rates of interest varying according to the conditions of the several debentures. The respondent on presenting interest coupons from time to time has been refused payment of interest by the defendant at the agreed rates. The defendant relied on, and now pleads, the provisions of the Act, Chapter 13 of 1937, entitled "An Act respecting the Interest payable on Debentures and other securities of the Province". The Act

applies to all debentures theretofore issued by the Province. Section 3 (1) of the Act provides that: "Notwithstanding any stipulation or agreement as to the rate of interest payable in respect of any security on from and after the first day of June 1936 the rate at which interest shall be payable in respect of any security shall be as follows:". The new rates are then set out and in general they are half the agreed rates. Section 3 (2) declares the rights of holders of the debentures of the Province covered by the Act to be those set out in the Act. These two subsections are the whole Act apart from a section protecting trustees or fiduciaries, and another section repealing the Act of the previous session of which the short title was the Provincial Securities Interest Act.

Their Lordships have considered the Act with a view to ascertaining its "true nature and character", or "its pith and substance". It relates in substance not to borrowing but to payment of interest in respect of existing debentures and other securities at less than the contract rates. The appellant made submissions similar to those presented in the first appeal and their Lordships, without repeating the reasons already given in deciding the first appeal, take the same view of this Act as of the two Acts, Chapters 11 and 12 of 1937. Their Lordships were invited to hold that the Act, Chapter 13, could be justified by reference to head 3 of section 92, "the borrowing of money on the sole credit of the Province". The argument, in their Lordships' view, is not well-founded on the facts of this case and fails by reason of their view that in pith and substance this Act relates to "interest".

The appellant submitted one other argument with which it is necessary to deal. It was said that the position of the Crown is not touched by section 2 of the Interest Act of Canada by reason of the provisions of section 16 of the Interpretation Act (R.S.C. Chapter 1), which enshrines the doctrine that the Crown is not bound by any Act unless it is expressly mentioned therein. The argument could only be relevant on the assumption that the Act, Chapter 13, would be valid but for the fact that it conflicts with the Dominion Interest Act. Their Lordships, however, take the view that the Provincial Act is *ultra vires* on the ground that its pith and substance relate to interest. If it was necessary to deal with the appellant's submission that the Crown is not bound by the Interest Act, their Lordships would be content to adopt the judgment on this point of Shepherd J.

Their Lordships will humbly advise His Majesty that this appeal also should be dismissed.

The appellants will pay the respondent's costs.

(22614—3A) Wt. 8075—41 .50 3/40 P. St. G. 338

In the Privy Council

THE BOARD OF TRUSTEES OF THE LETHBRIDGE IRRIGATION DISTRICT AND ANOTHER

v.

THE INDEPENDENT ORDER OF FORESTERS AND THE ATTORNEY-GENERAL OF CANADA

THE KING

v.

THE INDEPENDENT ORDER OF FORESTERS AND THE ATTORNEY-GENERAL OF CANADA

DELIVERED BY THE LORD CHANCELLOR

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