Privy Council Appeal No. 45 *of* 1946

British Columbia Electric Railway Company, Limited *Appellant*

v.

His Majesty The King on the information of The Attorney-General of Canada - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD WRIGHT
LORD PORTER
LORD UTHWATT
SIR LYMAN DUFF

[*Delivered by* VISCOUNT SIMON]

This is an Appeal by special leave from a Judgment of the Supreme Court of Canada dated February 11th, 1946, which allowed the Appeal of the present respondent from a Judgment of the Exchequer Court of Canada, dated May 25th, 1945. The action was brought by the present respondent to recover the amount of a tax, and interest thereon, which it was alleged that the present appellant should have withheld from dividends paid to such holders of its 5 per cent. Cumulative Perpetual Preference Stock as were non-residents of Canada during the period between April 1st, 1933, and April 29th, 1941. The Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock J.J.), reversing the Judgment of the President, held that the action, which took the form of an Information of the Attorney-General of Canada filed on April 1st, 1943, succeeded.

Chapter 41 of the Statutes of Canada, 1932-33, added the following provisions, *inter alia,* to the Income War Tax Act, and these are the Sections upon which the controversy turns:—

> 9B.—(1) In addition to any other tax imposed by this Act an income tax of five per centum is imposed on all persons resident in Canada, except municipalities, or municipal or public bodies which in the opinion of the Minister perform a function of Government, in respect of all interest and dividends paid by Canadian debtors directly or indirectly to such persons, which interest by the terms of the mortgage deed, hypothec or other instrument under which the debt was contracted or which dividends by the terms of issue, are payable in a currency which is at a premium in excess of five per centum in terms of Canadian funds.

(2) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(*a*) All dividends received from Canadian debtors irrespective of the currency in which the payment is made, and

(*b*) All interest received from or credited by Canadian debtors, if payable solely in Canadian funds, except the interest from all bonds of or guaranteed by the Dominion of Canada.

. . . . . .

(4) In the case of interest or dividends in respect of fully registered shares, bonds, debentures, mortgages or any other obligations, the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver-General of Canada.

. . . . . .

(9) Every agreement for payment of interest or dividends in full without allowing any such deduction or withholding shall be void.

. . . . . .

84.—(1) Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum.

(2) Any person who fails to remit any sum of money collected or withheld as required by this Act, or at such time as the Minister may in special cases prescribe, shall in addition to being liable for such sum of money so collected or withheld, be liable to a penalty of ten per centum of the said sum together with interest at the rate of ten per centum per annum.

. . . . . .

86. No action shall lie against any person for withholding or deducting any sum of money as required by this Act or regulations made thereunder.

87. The receipt of the Minister for any sum of money collected, withheld or deducted by any person as required by this Act or regulations made thereunder shall constitute a good and sufficient discharge of the liability of any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt.

Thus, by Section 9B (2) (*a*) it is provided that non-residents of Canada are taxed in respect of all dividends received from Canadian debtors, and by 9B (4) the tax is to be collected by the Canadian debtor who is to withhold five per cent. of the dividend and remit the same to the Receiver-General of Canada. The appellant failed to do this, and the Attorney-General of Canada claims that it is accordingly liable under Section 84 (1) for the amount with interest at the rate of ten per centum per annum upon it. The Appellant Company resists this claim, contending that it is not a " Canadian debtor " within the meaning of the section above quoted, and secondly that if it is a " Canadian debtor " within the meaning of these sections, the legislation is *ultra vires* of the Parliament of Canada, notwithstanding the Statute of Westminster of 1931.

On the first question the Exchequer Court took the view that a " Canadian debtor " meant a debtor of Canadian nationality and, as applied to a company (which is plainly included by reason of the reference to dividends) meant a company registered under Canadian Law. It is not perhaps entirely clear from the President's judgment whether he would regard a company incorporated under the Law of a Canadian province as a " Canadian debtor " in respect of its dividends or whether he would apply the term only to companies registered under Dominion Law, but

the material point is that he considered the test to decide who was a " Canadian debtor " in the case of an individual depended on the individual's nationality and not on his place of residence, and therefore logically held that in the case of an incorporated company the test was the place of the incorporation of the company and not its place of " residence " as understood in the Law relating to companies, i.e. the place where the Company had its " head and seat ".

In the present case there could be no doubt at all that the " residence " of the Appellant Company was Canadian. The Company was incorporated in the United Kingdom and had its Registered Office in England. It was Registered in British Columbia as an extra-provincial company under the Companies' Act 1897 of British Columbia. Under the Companies' Act 1929 of the United Kingdom (19 and 20 George V. Ch. 23) its Register of Members was kept at its registered office, and under section 103 of that Act it kept a Dominion Register of Members resident in Canada at its offices at Vancouver. The stock on this Register can be transferred only on such Register, but all other stock can be transferred only on the Register kept in England. More important than these technical details, however, are the following facts, which left it beyond dispute that the Company, though of United Kingdom origin, was " resident " in Canada. The Company carried on the business of supplying electric power and light and operating electric railways and motor omnibuses in British Columbia and had its Head Office at Vancouver. Since 1929 the whole business of the Company, except certain formal administrative business, was required by its Articles of Association to be controlled, managed, conducted and carried on in Canada. All general meetings of the Company and all meetings of directors were required to be held in Canada, and all directors were required to be resident in Canada. All its assets, excepting certain records and books of accounts kept at its Registered Office in England and certain cash remitted there from time to time, were situated in Canada. All the income from which its dividends were paid was earned in Canada. In short, the undertaking of the Company which produced its profits was in every respect Canadian and, in the sense in which " residence " is attributed to an incorporated company for income tax purposes, the " residence " of the Appellant was unquestionably Canadian.

The Supreme Court rejected the view of the President of the Exchequer Court and held that " Canadian debtors " means debtors who are resident in Canada and that as applied to companies the phrase is equivalent to companies resident in Canada who owe dividends to their shareholders. Their Lordships agree with this view. It is true that there are sections in the Income War Tax Act where the test of residence in Canada is expressly applied both with respect to individuals and companies, but it does not follow that " Canadian debtors " may not have the same meaning as debtors resident in Canada. If the view contended for by the Appellant on this point was adopted, extraordinary results would follow. A Canadian citizen who owed a debt for interest would be caught by the Act wherever he resided, purely because of his nationality. The language of the Statute would require him to make a deduction when paying his debt, say, when paying interest on a loan made to him by a foreigner, though neither of them was residing in Canada, and to transmit the amount deducted to the Receiver General of Canada. The view which their Lordships reject would require a company registered in Canada but carrying on all its business and making all its profits at the other end of the world, to deduct the amount of the tax when paying a dividend to its shareholder, wherever the shareholder might be found, and whatever his nationality might be, although there was nothing whatever Canadian about the circumstances except the place of registration of the company. It appears to their Lordships that the test to be applied in deciding who is a " Canadian " debtor is not the test of nationality in an individual or of registration in a company, but the test of residence. On this first point, therefore, their Lordships must decide against the Appellant. The Appellant is within the language of the Act.

Next, it is contended by the Appellant that, even though it is to be regarded as a " Canadian " debtor, the duty imposed upon it by sub-section (4) of Section 9B does not on the true construction of the Act, extend to the case where dividends are being paid to persons who are non-residents of Canada because Section 84 and Section 87 must be regarded as inter-related sections so that the penalty imposed by Section 84 can only be inflicted in instances where the receipt of the Minister under Section 87 constitutes a good discharge of the company's liability to its shareholder in any Court in which the shareholder sues for the balance of his dividend. The company, being registered in England, could be sued in an English Court for any part of the dividend which was unpaid, and the Appellant contends that if this happened the receipt of the Minister under Section 87 would not provide it with an adequate defence for withholding the amount of the tax, and that therefore if the company in such a case withheld the amount of the tax and remitted it to the Receiver General of Canada, it would have to pay the same amount to the shareholder as well, and thus in effect would itself be taxed instead of the shareholder. This argument is re-enforced by pointing out that the tax in question is, by sub-section (2) of Section 9B expressly imposed on the non-resident shareholder and is not described as a further tax on the company or its profits.

Their Lordships have given full consideration to this argument, which is by no means without weight. But in their view, the governing consideration is that Section 84 is absolute in its terms and cannot be read with the qualification that the receipt referred to in Section 87 must give effective protection to the company in every case. Their Lordships are therefore not required to decide whether the Appellant is right in saying that if a shareholder sued the Appellant in England for a portion of the dividend which the Appellant has withheld, the receipt of the Minister would, or would not, in an English Court provide a valid discharge. The Appellant contends it would not, and reference may be made to such cases as *Spiller* v. *Turner* (1897) 1 Ch. 911, and *New Zealand Loan Co.* v. *Morrison* (1898) A.C. 349, as well as to Dicey's *Conflict of Laws* 5th Edition pages 678 *et seq.* The Respondent, on the other hand, does not admit that the receipt would fail to provide the Appellant with an efficient shield in an English Court. Their Lordships' conclusion does not require them to decide on this point of controversy, if controversy there be, for, as already stated, the Board does not take the view that the Appellant has no liability to deduct unless Section 87 provides it in all Courts with a sufficient discharge. If the shareholder who claims that the Appellant has not paid him the full amount to which he is entitled brings his action in the Canadian Courts, Section 87 will of course provide the Appellant with a defence, for Canadian Law gives a valid discharge. But whether this is so or not in the event of a shareholder suing the Appellant in England, the fact remains that Section 84 requires the Appellant to make the deduction and to remit the amount and imposes, without qualification, a liability to the prescribed penalty if it fails to do so. The declared objective of Section 9B (2) is, no doubt, to make the non-resident bear the tax, but the circumstance that the machinery provided by the Act may in certain circumstances work so as to make the Company the sufferer, is no reason for construing Section 84 as though it only applied with a qualification which is neither expressed nor necessarily implied. It would indeed be exceedingly difficult to determine whether the penalty imposed by Section 84 could properly be exacted if the right to exact it depended on the question in what Court an aggrieved shareholder might thereafter sue for his dividend, and what are the correct propositions of private international law which would determine whether the Appellant would have a good defence if it was sued in the country of its registration.

Finally, the Appellant contends that if the sections of the Income Tax Act on which this case turns bear the construction set out above, Section 9B (2) (*a*) is *ultra vires* of the Parliament of Canada, notwithstanding the enlarged scope conferred by the Statute of Westminster of 1931. The Judges of the Supreme Court of Canada have dealt in a most effective fashion with this contention, and their Lordships entirely concur with the

views they have expressed. Mr. Justice Kerwin, in a Judgment with which the Chief Justice of Canada and Mr. Justice Taschereau concurred, observed that Section 3 of the Statute of Westminster left no basis for the argument, and he went on:

> " by Head 3 of Section 91 of the British North America Act, the Canadian Parliament was authorised to make Laws with reference to ' the raising of money by any mode or system of taxation '. As long as Parliament legislates with reference to such matters, the permitted scope of the legislation is not restricted by any consideration not applicable to the legislation of a fully sovereign state. Such a state may tax persons outside its territory. Here it is clear that it has done so and the Canadian Courts must obey the enactment."

Mr. Justice Rand, with whom Mr. Justice Kellock agreed, put the matter thus:—

> "The legislative competence of Parliament to tax non-resdients was challenged. It is argued that the power ' to make laws having extra-territorial operation ' as enacted by the Statute of Westminster (1931), Section 3, is subject to two conditions: that the legislation deal with matter assigned by the British North America Act to the federal legislature; and that it be of such a nature as under international public or private law would be accorded extra-territorial effect. It is then contended that the power of the Dominion under Section 91 (3), ' the raising of money by any Mode or System of Taxation ' does not extend to taxation of non-citizens outside the boundaries of Canada; and that international comity, apart from any rule against giving effect in one state to fiscal measures of another state, would not for any purpose recognise the validity of, much less enforce, what Parliament is said to purport by this legislation to do.
>
> " The power of the Dominion to tax is to be interpreted as being ' as plenary and as ample within the limits prescribed . . . as the Imperial Parliament in the plenitude of its power possessed or could bestow ': *Hodge* v. *The Queen*, 9 A.C. 117. But there is obviously a distinction between the standing of legislative enactments by a sovereign state within its boundaries and beyond them. In an effective sense, a declaration by such a legislature that it imposes a tax upon a citizen of a foreign country toward whom there is no internationally recognised bond or relation, is, beyond the territories of that state, a futile act, and it is futile for the reason that beyond them it is incapable of enforcement. Within the state, however, it becomes an obligatory rule to be enforced whenever enforcement is feasible. The specific investment of extra-territorial power by Section 3 of the Statute of 1931 was designed no doubt to remove the generally accepted limitation of colonial legislative jurisdiction, a limitation which the courts of the colony itself were bound to recognise: *McLeod* v. *New South Wales* (1891) A.C. 455: and any such jurisdictional inadequacy no longer hampers the legislative freedom of the Dominion. Within its field, there is now a legislative sovereignty. That the enactment of Section 9 (*b*) is an exercise of taxing power within that jurisdiction does not, I think, admit of doubt. It is an assessment uniformly imposed in respect of special items of a general class of defined subject-matter in an elaborated tax system; there is admitted jurisdiction over an act essential to the subject-matter, i.e., the act of performance of an obligation; and these, taken with the language used, satisfy the taxation criteria. Legislation so enacted will be effective in, and must be enforced by the courts of this country. To what extent, if at all, it will receive recognition in the tribunals of foreign countries depends upon different considerations: but that circumstance, apart from its function in interpretation, is not one in which the local tribunal is interested."

Their Lordships would point out that what is here in issue is the extent of the legislative power of a Dominion legislature having regard to the language of the Statute of Westminster. This is not the same question as the question whether legislative power is so used as to extend beyond what will prove to be effective. A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account and the Courts of its country must enforce the law with the machinery available to them. The law in this case has been validly enacted, for the effect of the Statute of Westminster upon Section 91 of the British North America Act, Head 3, is to make that Head read: " the raising of Money by any Mode or System of taxation, even though such laws have an extra-territorial operation."

For these reasons their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

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In the Privy Council

BRITISH COLUMBIA ELECTRIC
RAILWAY COMPANY, LIMITED

v.

HIS MAJESTY THE KING
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DELIVERED BY VISCOUNT SIMON

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