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In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL
FOR SASKATCHEWAN

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
Appellant,

AND:

THE ATTORNEY-GENERAL FOR SASKATCHEWAN,
Respondent.

FACTUM OF THE APPELLANT

HAMILTON & KNOWLES,
Solicitors for Canadian Pacific Railway Company.

EWART, SCOTT, KELLEY AND HOWARD,
Ottawa Agents for Canadian Pacific Railway Company.

J. L. SALTERIO, ESQ.,
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PART I.

1. This is an appeal from a judgment of the Court of Appeal for Saskatchewan dated 29th January, 1949, (Case p. 7) answering four questions referred to that Court by Order of the Lieutenant Governor in Council dated 16th November, 1948, (Case p. 1). The reference was made pursuant to The Constitutional Questions Act, R.S.S. 1940, Chapter 72. The questions and answers are set out at pages 5, 6 and 7 of the Case.

2. This appeal is in respect of the answers of the majority of the Court (Martin, C. J. S., MacDonald, J. A. and Proctor, J. A.) to questions 1 and 3 (Case p. 7) and in respect of the answers of all members of the Court to questions 2(a) and 4(a) and (b) (Case p. 7; p. 36 l. 1). The answers of Gordon, J. A. to questions 1 and 3 were in favour of the contentions of the Appellant (Case p. 35 l. 39). The Court unanimously held that no answers should be given to questions 2(b) and (c) because they are academic or hypothetical in nature (Case p. 7; p. 26 l. 32; p. 36 l. 1; p. 42 l. 36; p. 66 l. 5).

3. The answers to the questions referred to the Court of Appeal depend upon the interpretation of clause 16 of the Contract between Her Majesty the Queen acting in respect of the Dominion of Canada and George Stephen and others, executed on 21st October, 1880. This Contract provided for the construction, operation and maintenance of the Canadian Pacific Railway (Case p. 174). Clause 16 provided for freedom from taxation as follows (p. 181 l. 9):

> "16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by

the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown."

4. By questions 1 and 3 the Court of Appeal was asked, in effect, whether the freedom from taxation in clause 16 applies to branch lines constructed under the authority of clause 14 of the Contract (p. 180 l. 34). By questions 2 and 4 the Court of Appeal was asked, in effect, whether the freedom from taxation in clause 16 applies to so-called business taxes provided for in certain statutes of the Province of Saskatchewan (Case p. 5).

5. Reference will now be made to the history and surrounding circumstances relating to the Contract.

6. The Contract dated 21st October, 1880, for the construction of the Canadian Pacific Railway was entered into only after both the Government of the old Province of Canada and the Dominion Government had met with failure in numerous attempts to induce private interests to undertake the construction of the railway and after the Dominion Government had become embarrassed by the difficulties it encountered in commencing to construct the railway as a Government work (Case pp. 282 to 300).

7. The construction of railways in what was known as Rupert's Land and the North-West Territory as a means of opening up the vast areas of fertile land for settlement was advocated before the middle of the last century (p. 286). Acts to incorporate companies for that purpose were introduced into the Assembly of the old Province of Canada in 1851, 1853 and 1855, but these were not passed (Case p. 286 l. 35). In 1858, however, the North-West Transportation Navigation and Railway Company, later re-named the North-West Transit Company, was incorporated for the purpose of establishing transportation facilities in the North-West Territory and British Columbia (Case p. 75 l. 1, l. 34). The Company was unable to obtain sufficient capital and no work was undertaken (Case p. 287 l. 13).

8. In a report made in 1858, Professor H. Y. Hind, who led an exploring expedition sent out by the Province of Canada, pointed out that the settlement of the belt of land from the Lake of the Woods to the Rocky Mountains was of the highest importance to British North America and indicated the need of a road or railway for this purpose (Case p. 78 l. 1; p. 300 l. 10). Captain John Palliser who led an exploring expedition for the British Government made a report to the same effect in 1859 (Case p. 76; p. 299 l. 29; p. 300 l. 10) and in addition pointed out that the continued control of the country by the Hudson's Bay Company would not be in the interests of the growing colony (Case p. 77 l. 14).

9. In 1863 Mr. Sanford Fleming, later Sir Sanford and the first Chief Engineer of Surveys for the Dominion Government, submitted a report to the Government of the Province of Canada in which he advocated the building of roads to be converted stage by stage into railways as a means of colonizing the fertile belt west of the Lake of the Woods (Case p. 78 l. 27).

10. The British North America Act, 1867, provided by section 146 (Case p. 81 l. 26) for the subsequent incorporation into the Union of "Rupert's Land and the Northwestern Territory", in addition to Newfoundland, Prince Edward Island and British Columbia. By the Rupert's Land Act, 1868, (31-32 Victoria, Chapter 105; Case p. 83) the way was paved by the Imperial Parliament for the surrender of the authority of the Hudson's Bay Company over Rupert's Land. Finally, in 1870, upon addresses from the Houses of Parliament of Canada, an order in council was issued by Her Majesty admitting Rupert's Land and The North-Western Territory into the Dominion of Canada (Case p. 88). In its addresses the Canadian Parliament made it clear that it intended by the establishment of stable government in these territories to promote their colonization, to develop their mineral wealth and to extend commercial intercourse with the other British possessions in North America (Case p. 90 l. 20).

11. The threat of the annexation of these territories by the United States (Case p. 85 l. 1) was a matter of concern to Canada at this time and provided an additional inducement to the Government to promote the construction of a railway (Case p. 86 l. 32). The building of the Northern Pacific Railway to the Pacific Coast through the territory contiguous to the Canadian prairies was looked upon by Americans as sealing the destiny of British Possessions in the West (p. 85 l. 1; p. 282 l. 28; p. 287 l. 21).

12. In 1869 and 1870 notice was given of three separate applications to be made to Parliament for railway company charters. The railways in each case were to run through the North-West Territory to, but not through, British Columbia (Case p. 85 l. 11; p. 85 l. 29; p. 86 l. 3).

13. In 1871, upon addresses from the Houses of Parliament of Canada, an order in council was issued by Her Majesty admitting British Columbia into the Dominion of Canada (Case p. 92). By the terms of Union with British Columbia the Government of the Dominion undertook to secure the construction of a railway which would connect the seaboard of British Columbia with the railway system of Canada, such railway to be completed within ten years from the date of Union (Case p. 94 l. 8). Thus from 1871 on, the Dominion had another reason to encourage the construction of a railway through the North-West Territory but the railway must now be constructed right to the Pacific. There is no indication, however, that at this time the need of a railway to promote colonization and to ward off the danger of annexation by the United States was any less urgent than it had been.

14. It was Parliament's intention in 1871 that the railway should be constructed and worked by private enterprise and not by the Government but that the Government should give assistance in the form of land and money (Case p. 91 l. 27).

15. The first general statute regarding the Canadian Pacific Railway was enacted in 1872 (Case p. 97). Pursuant to this Act, the Inter-Oceanic Railway Company of Canada (Case p. 100) and the Canada Pacific Railway Company (Case p. 102) were incorporated the same year. The Government attempted to induce these Companies to unite, but they refused to do so and a contract for the construction of the railway was not entered into with either of

them (Case p. 103 l. 30; pp. 289-291). Instead, in 1873 a charter was granted to another company called "The Canadian Pacific Railway Company" (Case p. 103). This Company, however, failed to raise the necessary capital and its charter was surrendered (Case pp. 291-294).

16. In 1874 a second general statute regarding the Canadian Pacific Railway was enacted (Case p. 104). It recited the failure of the 1872 Act to induce private interests to undertake the construction of the railway (Case p. 105 l. 20) and went on to provide for the construction of the railway either by private enterprise or as a public work of the Dominion. Under the terms of this Act in 1875 yet another company was incorporated (Case p. 114), but once again, the attempt to get the railway constructed came to nothing.

17. British Columbia complained to the British Government of the Dominion Government's delay in commencing the construction of a railway to the seaboard of British Columbia as provided by the Terms of Union. Lord Carnarvon who was Colonial Secretary and was appointed to settle the dispute recommended, among other things, that the date for the completion of that railway should be extended from 1881 to the end of 1890 (Case p. 110 l. 38; p. 131 l. 24).

18. Unable to interest capitalists in either the United States or England, the Government of Canada commenced the construction of certain sections of the railway as government works (Case pp. 294-296).

19. In 1879 the Government of Canada set out in a series of resolutions the purposes which it considered would be served by the construction of a railway to the Pacific and an outline of the plan by which it hoped to obtain the co-operation of the Imperial Government (Case pp. 121, 125). In these resolutions the Government emphasized the value of the railway as a means of opening up vast tracts of fertile land for occupation by immigrants from the Mother Country and expressed its desire to combine the promotion of colonization with railway construction (pp. 121 to 123; pp. 125 to 132).

20. Pursuant to these resolutions, the Imperial Government was requested to guarantee bonds to be issued as a means of financing the construction of a railway to the Pacific, the bonds to be secured on 100,000,000 acres of land which had been appropriated for that purpose and on the railway itself and its net revenue (Case p. 126 l. 12). Failing to obtain such guarantee and being unable to construct the railway itself without imposing much heavier taxation the Government again turned to private interests (Case pp. 296-298).

21. During this period of negotiation with private interests, the Government continued with its surveys in order to determine the best route for the main line of the railway (Case pp. 133-147). Sir John A. Macdonald, the Prime Minister and Minister of the Interior, had made up his mind that a system of local railways was needed in the North-West Territories as a means of attracting immigration (Case p. 281 l. 7). The Government's engineers, therefore, were careful to select good agricultural country for the railway even though the gradients in such country might not be as favourable and even though the length of the main line might thereby be somewhat increased (Case p. 138 l. 3; p. 139 l. 22). It was hoped that by so locating the main line the construction of

branch lines might be encouraged and a system of colonization railways developed (Case p. 138 l. 36; p. 147 l. 32).

The Government realized that its purpose of attracting settlers would not be achieved to any great extent by the construction of a single line of railway across the country. Such a line would only encourage settlement in reasonable proximity to that line. In order to attract settlers in large numbers branch lines would be required and, of course, the financial success of any railway which might be constructed would depend on the extent to which the country served by it was settled. Sir Sanford Fleming expressed it in these words: " . . . it is the speedy occupation of the land and the cultivation of the soil by prosperous settlers, that will lead to the successful working of the railway and the general advancement of the country." (Case p. 138 l. 11).

22. In September, 1880, after several months of negotiations (Case pp. 151-155), the Government on its second attempt was finally successful in reaching an agreement with Duncan McIntyre and associates as to terms upon which they were prepared to construct a railway to the Pacific. These terms were outlined in a memorandum of "Heads of Arrangement" (Case p. 156) in which the Government undertook to procure the passage of an Act of incorporation "which shall be on as favourable terms as have been granted by the Dominion Parliament to any Railway Company and to embrace all the necessary clauses to carry out this arrangement" (Case p. 156 l. 26).

In addition to substantial grants of land and money, broad exemption from taxation had been a prominent consideration in the attempts made in 1872 to induce private interests to undertake the construction of the railway (Case pp. 101 to 103).

23. A contract with George Stephen, Duncan McIntyre and their associates was executed on 21st October, 1880 (Case p. 174). Clauses 1 to 8 of this Contract provided for the completion of the main line of the railway in part by the Government and in part by the Company, for the conveyance to the Company of the sections of railway constructed by the Government, and for the equipment, maintenance and efficient running of the whole railway by the Company. Clause 9 provided for the grant by the Government to the Company of $25,000,000 and 25,000,000 acres of land in consideration for its undertaking. Clause 10 provided for the grant of lands required for the road bed, stations and other appurtenances and for the admission into Canada free of duty of construction materials for part of the main line. Clause 14 gave the Company the right to construct branch lines and provided for the grant of lands required for the road bed, stations and other appurtenances of the branch lines. Clause 16 provided for freedom from taxation.

24. The Act, pursuant to which the Company was incorporated was assented to on 15th February, 1881 (Case p. 172). The Act recited that "it is necessary for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said Railway" (Case p. 172 l. 21). The Act approved and ratified the Contract which was annexed as a schedule (Case p. 174). Letters Patent under the Great Seal of Canada were issued on 16th February, 1881 (Case

p. 198). The terms of the Contract are recited in the Letters Patent. The operative provisions of the Charter commence at p. 209 l. 6 of the Case.

25. The main line of the railway to the Pacific was completed in 1885, approximately six years before the date of 1st May, 1891, set by the Contract (Case p. 160 l. 38). That line, however, was differently located to that described in the 1874 Act (37 Victoria, Chapter 14; Case p. 105 l. 44) and referred to in clause 1 of the Contract (Case p. 174 l. 30). The new location was, pursuant to clause 13 of the Contract (p. 180), approved by a series of Orders in Council (pp. 225-252) and power was granted to the Company by an Act in 1882 (45 Victoria, Chapter 53) to locate the main line by some pass other than the Yellow-Head Pass (p. 236 l. 34). The Kicking Horse Pass was selected subsequently and approved by Order in Council in 1884 (p. 243).

26. In 1892, 1895 and 1898, under the authority of the Dominion Government, ordinances were issued respecting the taxation of railways in the North-West Territories (p. 253 l. 14; p. 254; p. 255) which included the territory which is now the Province of Saskatchewan. The Company was not called upon to pay the taxes levied by these ordinances either in respect of its main line or its branch lines constructed under clause 14. Thus the Dominion recognized that the Company was free from such taxes by virtue of clause 16 of the Contract. The President of the Executive Council, Mr. F. W. G. Haultain, and the man who later became the first premier of Saskatchewan, Mr. Walter Scott, acknowledged that the effect of the Contract was to free the railway property of the Company from such taxation forever (Case p. 264 l. 20; p. 265 l. 10).

27. By the Saskatchewan Act, 1905 (4-5 Edward VII, Chapter 42; Case p. 265) passed pursuant to The British North America Act, 1871 (34-35 Victoria, Chapter 28; Case p. 96), Saskatchewan was constituted a province of Canada. Section 24 of the Saskatchewan Act provided that the powers of the Province should be exercised subject to clause 16 of the Contract (Case p. 266 l. 18).

28. Between 1905 and 1908 the ordinances of 1898 respecting the taxation of Railways (Case p. 255) were still in force in Saskatchewan. The Province, however, did not call upon the Company to pay taxes on its main line or branch lines during that period, thereby recognizing, as the Dominion had recognized, that the Company was free from such taxation by virtue of clause 16 of the Contract. The 1898 Ordinance was repealed in 1909 (Case p. 273).

29. In 1908 the Legislature of Saskatchewan passed The Railway Taxation Act (8 Edward VII, Chapter 32; Case p. 266) which provided that a gross earnings tax should be paid by every railway company operating in the province. The payment of such tax was to exempt railway companies from all other provincial and municipal taxes on their property or earnings.

30. The Appellant disputed its liability under that Act for taxes on earnings in respect of its main line and its branches constructed under the authority of the Contract (Case p. 269 l. 23). By this time, however, the Company also operated branch lines constructed pursuant to special Acts and lines acquired from other companies. A special arrangement was agreed upon, therefore, whereby the Company paid, without prejudice, a specified sum as a con-

tribution toward the revenues of the Province in lieu of taxes claimed under the Act. The Treasurer of the Province stated that "The popular feeling throughout Saskatchewan today (1909) is that we need railways rather than taxation from railways" (Case p. 270 l. 12).

31. The Legislature of Saskatchewan passed resolutions in 1911, 1912 and 1913 (Case pp. 274, 275) in which it expressed the opinion that the special burden imposed upon the Province by the exemption granted to the Company should be borne by the Dominion at large. No suggestion was made in these resolutions that the exemption of the Company was limited in the manner now alleged by the Province on this Reference.

32. Special arrangements under which the Company paid a contribution to the revenues of the Province in lieu of taxes continued in effect until 1942. In that year the Province under an agreement with the Dominion enacted The Taxation Agreement Act, 1942 (6 George VI., Chapter 2; Case p. 301), by virtue of which The Railway Taxation Act of Saskatchewan was suspended in operation. The exemption in section 14 of The Railway Taxation Act (section 15 of the 1908 Act; Case p. 267 l. 38) was, however, continued.

33. The Province, under a new agreement with the Dominion, enacted The Taxation Agreement Act, 1947 (11 George VI., Chapter 23; Case p. 328). This Act, like the 1942 Act, suspends the operation of The Railway Taxation Act, but it does not continue in force the exemption from municipal taxes as provided by that Act. In 1948 the Province amended The Village Act (Case p. 304), The Rural Municipality Act (Case p. 308), The Local Improvement Districts Act (Case p. 312), The Town Act (Case p. 316) and The City Act (Case p. 322) to provide for the taxation of the Appellant by Saskatchewan municipalities. The sections of those five Acts which are material to this Reference are substantially similar.

34. The result of the Reference to the Court of Appeal may be stated briefly.

35. By questions 1 and 3 the Court was asked to determine whether the freedom from taxation in clause 16 of the Contract extends to branch lines of the Appellant constructed under the authority of clause 14 of the Contract and situated in Saskatchewan (Case p. 5). Martin, C. J. S., MacDonald, J. A. and Proctor, J. A. were of the opinion that the exemption from taxation in clause 16 does not extend to such branch lines. In their view the meaning given to the words "The Canadian Pacific Railway" in clause 1 of the Contract applies throughout the Contract, including clause 16 (Case p. 16 l. 15; p. 37 l. 1; p. 56 l. 44). Gordon, J. A. took a contrary view. He found that the meaning given to "the Canadian Pacific Railway" in clause 1 was only applicable in that clause and held that the stations, station grounds, workshops, yards and other property on the branch lines built under the power conferred by clause 14 of the Contract are exempt from taxation under the provisions of clause 16 of the Contract (p. 33 l. 3; p. 34 l. 27: p. 35 l. 39).

36. By questions 2(a) and 4(a) and (b) the Court was asked to determine whether the freedom from taxation in clause 16 of the Contract extends to business taxes, so-called, on the main line and branch lines of the Appellant in

Saskatchewan (Case p. 5). All members of the Court were of the opinion that the business tax in question is a personal tax, not a tax on the property of the Appellant. They followed a decision of their own Court in *City of Moose Jaw v. British American Oil Company Limited* (1937) 2 W.W.R. 309. In their view the exemption extends only to taxes on real property and the so-called business tax is a personal tax and not a tax on that property (Case p. 27, l. 11; p. 34 l. 44; p. 42 l. 41; p. 63 l. 12).

PART II.

37. The Appellant submits that the judgment below is erroneous in the following respects:

(*a*) Martin, C. J. S., MacDonald, J.A. and Proctor, J. A. erred in their answers to question 1. That question should have been answeredin the affirmative, as it was by Gordon, J. A.

(*b*) The Court of Appeal erred in its answers to question 2(a). That question should have been answered in the affirmative.

(*c*) Martin, C. J. S., MacDonald, J. A. and Proctor, J. A. erred in their answers to question 3. That question should have been answered in the negative, as it was by Gordon, J. A.

(*d*) The Court of Appeal erred in its answers to question 4(a) and (b). Both parts of that question should have been answered in the negative.

PART III.

38. *Question 1.*—

"Does clause 16 of the contract set forth in the Schedule to Chapter 1 of the Statutes of Canada, 44 Victoria (1881), being an Act respecting the Canadian Pacific Railway, exempt and free from taxation the stations and station grounds, work shops, buildings, yards, and other property, used for the working of the branch lines of the Canadian Pacific Railway Company situated in Saskatchewan?"

(Answered in the negative, Gordon, J. A. dissenting.)

39. It will be observed that this question is so worded as to apply to all branch lines of the Appellant in Saskatchewan. In the Court of Appeal, however, only branch lines constructed under the authority of the contract were in issue and the Appellant does not contend in this Reference that the freedom from taxation in clause 16 of the Contract extends to branch lines other than those constructed under the authority of clause 14 of the Contract.

40. The Appellant submits that the words "the Canadian Pacific Railway" in clause 16 of the Contract mean the railway contemplated by the Contract. Such railway was to be composed of a main line and an indeterminate number of branch lines. It is in respect of that whole railway that freedom from taxation was provided by clause 16.

41. It is submitted that the majority in the Court of Appeal erred in applying to "the Canadian Pacific Railway" in clause 16 the meaning given to these words in clause 1 of the Contract. Clause 1 is as follows:

> "1. For the better interpretation of this contract, it is hereby declared that the portion of Railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said Railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said Railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words 'the Canadian Pacific Railway' are intended to mean the entire Railway, as described in the Act 37th Victoria, cap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government."

42. The definition of "the Canadian Pacific Railway" in the above clause is for the better interpretation of that clause only. It cannot be applied throughout the Contract, as was held by the majority of the Court of Appeal. That definition reads "And that the words 'the Canadian Pacific Railway' are intended to mean the entire railway as described in the Act, 37th Victoria, Chapter 14".

43. The entire railway as described in that Act (of 1874) consisted of seven sections, four of which were described in section 2 (p. 105 l. 44), two of which were described in sections 3 and 4 (p. 106 l. 12) and the seventh of which was described in an amending Act of 1879 (p. 123 l. 22). This amending Act expressly provided that all the provisions of the 1874 Act with respect to branches of the said railway were to apply to this added branch (p. 123 l. 25).

The seven sections of the railway so provided for were as follows:

(1) The first section was "to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake

Superior, to a point where it shall intersect the second section hereinafter mentioned" (p. 105 l. 45).

(2) The second section was "to begin at some point on Lake Superior, to be determined by the Governor in Council, and connecting with the first section, and to extend to Red River, in the Province of Manitoba" (p. 106 l. 3).

(3) The third section was "to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains to be determined by the Governor in Council" (p. 106 l. 6).

(4) The fourth section was "to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean" (p. 106 l. 9).

(5) The fifth section was to be a "branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council" (p. 106 l. 14).

(6) The sixth section was to be a "branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof" (p. 106 l. 17).

(7) The seventh section was to be a "branch of the Canadian Pacific Railway . . . from some point west of the Red River on that part of the main line running south of Lake Manitoba, to the City of Winnipeg, there to connect with the branch line from Fort Garry to Pembina" (p. 123 l. 22).

The railway consisting of the foregoing seven sections is hereinafter for convenience referred to as the 1874 Railway.

44. By clause 1 of the contract of 1880:

(1) the section corresponding with the first section of the 1874 Railway is called "the Eastern section" (p. 174 l. 30);

(2) the section corresponding with the second section of the 1874 Railway is called "the Lake Superior section" (p. 174 l. 35);

(3) the section extending from Selkirk to Kamloops is called "the Central section" (p. 174 l. 38). This section corresponds with the third section and part of the fourth section of the 1874 Railway.

(4) the section extending from Kamloops to Port Moody is called "the Western section" (p. 174 l. 41). This section corresponds with part of the fourth section of the 1874 Railway.

45. The fifth section of the 1874 Railway known as the Georgian Bay Branch is not provided for in the Contract of 1880 and was never built.

The sixth section of the 1874 Railway known as the Pembina Branch is not expressly mentioned in the Contract. It had then been completed and was later conveyed to the Company pursuant to clause 7 of the Contract (p. 176 l. 32).

The seventh section of the 1874 Railway known as the Winnipeg Branch is not provided for by the Contract of 1880 and as such was not built.

46. By the Contract the Government was to cause to be completed the Lake Superior Section and the Western Section (p. 176 l. 15). The Company was to construct the Eastern Section and the Central Section (p. 175 l. 14). Upon completion of the Eastern and Central Sections by the Company the Government was to convey to the Company those parts of the railway constructed or to be constructed by the Government "which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company;" (p. 176 l. 41).

47. Thus it will be seen that the 1874 Railway was one consisting of seven defined sections. On the other hand the railway contemplated by the 1880 Contract was one consisting of four defined sections, the Pembina Branch section, and an indeterminate number of branches which the Company was given the right to construct. It is clear, therefore, that when, subsequent to clause 1, reference is made in the Contract to "the Canadian Pacific Railway" it cannot mean the 1874 Railway since that railway was a railway of seven defined sections for two of which no provision was made in the Contract.

48. There are further reasons for the view that the definition of "the Canadian Pacific Railway" in clause 1 does not apply throughout the Contract.

49. One of the principal concepts underlying this Contract is of a railway to open up the North-West Territories (p. 172 l. 21). For this purpose the railway was to consist of a main line and an indeterminate number of branches. This concept is shown by the authority given to the contractors by clause 14. This is a totally different concept to the railway described in the 1874 Act, and it would be impossible to apply the description of the 1874 Railway to this new concept. The definition of the Canadian Pacific Railway in clause 1 is therefore inappropriate as a description of "the Canadian Pacific Railway" throughout the Contract.

50. The "entire railway as described in" the 1874 Act was, prior to the execution of the 1880 Contract, fixed as to location by various orders in council issued pursuant to that Act (pages 116 to 119; 120; 133 to 149). Contracts had been made by the Government for the building of 722 miles of the 1874 Railway. The Pembina Branch section had been completed at the time of the Contract and work was well advanced on the second and fourth sections. Little work had been done on the 100 miles west of the Red River (p. 150; p. 176 l. 6). The contractors in their negotiations leading to the 1880 Contract demanded freedom in locating those portions of the railway which they offered to construct (p. 155 l. 21 and l. 31). The Government because of its outstanding contracts made under the 1874 Act could not very well repeal that statute but acceded to the demands of the contractors as to the location of the portions to be built by them (p. 180 l. 27). The result was that the railway provided for by the 1880 Contract was a different railway from the "entire railway described in" the 1874 Act. Therefore, it is submitted that the definition of "the Canadian Pacific Railway" in clause 1 is inappropriate as a description of "the Canadian Pacific Railway" throughout the Contract. In clause 13 the Company was given power to fix the exact location of the sections of the railway it was to construct. Those sections must have been parts of a railway different from the

"entire railway described in" the 1874 Act since the orders in council fixing the location of the 1874 Railway were still in effect.

51. In clause 1 the following seven phrases are defined: "the Eastern section", "the Lake Superior section", "the Central section", "the Western section", "the Company", "the Government" and "the Canadian Pacific Railway".

There can be no doubt that the first six of these phrases are defined "For the better interpretation" of the other clauses of the Contract. It is submitted, however, that the seventh phrase, "the Canadian Pacific Railway", is defined for the better interpretation of clause 1 only. This submission is based on a number of grounds.

52. Each of the first six phrases only appears in clause 1 at the place each of such phrases is defined. The definitions of those phrases, therefore, are clearly for the better interpretation of the other clauses of the Contract. In contrast to these phrases, the phrase "the Canadian Pacific Railway" as well as appearing in its own definition, appears twice in the earlier part of clause 1. In its definition it, unlike the other phrases, appears in quotation marks. The reasonable inference is that this phrase was defined for the better interpretation of the earlier part of clause 1.

53. In the case of each of the first six phrases it is stated that it shall "hereinafter" bear the meaning assigned to it in clause 1. In contrast, it is not stated of the phrase "the Canadian Pacific Railway" that it shall "hereinafter" or "herein" bear the meaning assigned to it in clause 1. From this fact also it is reasonable to infer that its definition was intended to apply only to the phrase as used in clause 1 and not to the phrase as used elsewhere in the Contract.

54. It is to be noted that the first six phrases are given meanings which are adhered to consistently whenever those phrases appear in the other clauses of the Contract. In contrast, the phrase "the Canadian Pacific Railway", as will be observed by examining the context in which it appears in these other clauses, is used with a variety of meanings. That being so, the parties must have intended the definition of "the Canadian Pacific Railway" in clause 1 to be for the better interpretation of clause 1 only.

The reason why the words "the entire railway as described in the Act, 37 Victoria, Chap. 14" are used in clause 1 of the Contract was because of the necessity of defining the phrase "the Canadian Pacific Railway" used in that clause in connection with the description of the four sections of the main line. It was of particular importance to define clearly the three of the seven sections of the 1874 Railway which were constructed or were being constructed and which, on completion, were to be operated by the Company and later conveyed to the Company (p. 176 l. 32). If the sections of railway to be conveyed to the Company were not defined as clearly as possible the company would be running the risk of disputes as to what the Government was to convey to it.

55. For the reasons that have been given the phrase "the Canadian Pacific Railway" cannot throughout the Contract be taken to mean "the entire railway, as described in" the 1874 Act. An analysis of certain clauses in

which the phrase "the Canadian Pacific Railway" appears reveals that the parties intended it to have other meanings.

56. In clause 7 as used at line 44 of p. 176 the phrase "the Canadian Pacific Railway" refers to that part only of the railway which had been or was to be constructed by the Government because it would be that part only which would be conveyed to the Company and thereupon become the absolute property of the Company. As used at line 2 of p. 177 the phrase must include the clause 14 branches. It could not have been contemplated that only the main line would be efficiently maintained, worked and run and that the Company would be free from any such obligation in respect of branches constructed under clause 14.

57. As used in clause 8 (p. 177 l. 4) the phrase refers to those portions of the railway which had been or were to be constructed by the Government and thus could not be given the same meaning as in clause 1. It is, of course, those parts only that were being dealt with in clause 8.

If it had been intended that the phrase as used in clause 8 was to embrace more than the Government portions of the railway the words "each of the respective portions" would in all likelihood have been qualified by the addition of words such as "constructed or to be constructed by the Government". In that event the introductory words of clause 8 would have read "Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway constructed or to be constructed by the Government, the Company shall equip the same", etc. If clause 8 had been so written, the phrase might then be taken to have meant more than the Government portions. Not being so qualified, the phrase must be taken to mean only the portions constructed by the Government, since these would be the only portions to be received from the Government.

58. As used in clause 9 (p. 177 l. 12) the phrase "the Canadian Pacific Railway" refers to the portions of the railway to be "completed". This must mean the portions to be completed by the Company since the portions to be completed by the Government and turned over to the Company were themselves in the nature of a subsidy. On the other hand, the same phrase also refers to the railway "to be equipped, maintained and operated". This must refer to the whole of the railway, not only the portions to be constructed by the Company. In view of this inconsistency it is difficult to determine its true meaning in this context. In any event it can scarcely be said that the definition appearing in clause 1 can apply to the phrase as here used.

59. As used twice in clause 15 (p. 181 ll. 2 and 3) the meaning of the phrase "the Canadian Pacific Railway" may be open to some doubt.

One view may be that the phrase refers only to the main line stretching from Lake Nipissing to the Pacific because this would provide a clearly defined northern boundary of the area from which other railways were to be excluded. If so, the clause 1 definition would not be appropriate because "the entire railway as described in" the 1874 Act (as amended) included three branches.

Another view may be that the phrase refers to the railway as defined in

clause 1. This view is not, however, altogether satisfactory. Clause 15 provides that "no line of railway shall be authorized . . . to be constructed south of the Canadian Pacific Railway". If this means that no railway is to be constructed south of the most southerly point, the provision would be absurd because the most southerly point would be Pembina on the international boundary. If, on the other hand, it means that no railway is to be constructed south of any point, one might have expected that when the main line was re-located approximately 200 miles to the south of the 1874 Act railway (Case p. 17 l. 45; p. 251—Map), clause 15 would have been amended by the 1882 Act (p. 236) so as to continue the monopoly in respect of the original area.

A third possible view may be that the phrase "the Canadian Pacific Railway" here refers to the whole railway including branch lines authorized by clause 14. If clause 15 means that no railway is to be constructed south of any part of the railway, it would not have been unreasonable for the Government to have extended the monopoly to the area served by the clause 14 branch lines. The monopoly was, of course, only for a period of 20 years and was in fact removed by statute in 1888 (p. 253).

60. The phrase "the Canadian Pacific Railway" as used in clause 17 (p. 181 l. 31) would appear to refer to the five sections of the railway to be constructed by the Government and the Company. Clause 17 provides for the giving of security for performance of the Contract in respect of the maintenance and continuous working of the railway by the Company, as agreed, "for ten years after the completion thereof".

61. In clause 22 (Case p. 183 l. 7), the phrase must refer to the whole railway, including the clause 14 branches. Surely it could not have been the intention of the parties to the Contract that the application of The Railway Act of 1879 should apply to anything less than the whole railway.

This view is confirmed by the Act of incorporation then contemplated and set out as Schedule "A" to the Contract (p. 183 l. 30). Clause 17 of that Schedule provided that the Railway Act of 1879 in so far as its provisions "are applicable to the undertaking authorized by this charter" was to be incorporated with the charter (p. 188 l. 11). The undertaking authorized by clause 15 of such charter included "other branches to be located by the Company from time to time as provided by the said contract" (p. 187 l. 28; p. 213 l. 29).

62. It is thus apparent from the analysis that has been made that the phrase "the Canadian Pacific Railway", unlike the other six phrases in clause 1, is not used throughout the Contract in the sense in which it is defined in clause 1. As has been shown, it is given various meanings.

63. It is submitted, therefore, that the definition of the phrase "the Canadian Pacific Railway" in clause 1 of the Contract was for the interpretation of that clause alone. It is not a definition of the phrase as that phrase is used in other clauses of the Contract. In the absence of a definition which is applicable to "the Canadian Pacific Railway" in clause 16, it is necessary to examine the context in which the phrase is there used to determine its true meaning.

64. Before examining the context in which "the Canadian Pacific Railway" appears in clause 16, reference should be made to the statement in the judgment of Martin, C.J.S. to the effect that "the exemption contained in clause 16 is statutory and must be strictly construed" (Case p. 19 l. 25). It is submitted that Martin, C.J.S. erred in holding that the principle of strict interpretation generally applied to an exemption section in a taxing act is applicable to the interpretation of clause 16 of the Contract.

65. At the time the Dominion and the contractors agreed to the terms of clause 16, there was no Company and no Company property to be taxed. The property to be granted by the Government for main line and branches alike was tax-free. If the railway had been built as a government work it would not have been taxable. Moreover, the freedom from taxation granted by clause 16 was not in respect of existing municipal taxation, but in respect of taxation for which provision might be made at some future date. Clause 16 is a term of a contract and is a very different type of provision from an exemption section in a taxing act: *Canadian Pacific Railway Co. v. Burnett* (1889) 5 Man. L.R. 395.

66. The general principle of interpretation properly applicable to clause 16 is that applied by Lord Sumner in *City of Halifax v. Nova Scotia Car Works Ltd.* (1914) A.C. 992. In that case the Privy Council had to consider the effect of an exemption clause in an agreement which had been sanctioned by the Legislature. Lord Sumner stated as follows at p. 996:

> "So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing pro tanto the burthen on the others."

As in that case, the Company here has carried out its part of the bargain by constructing the railway and by maintaining and operating it efficiently. Clause 16, therefore, should be in the words of Lord Sumner "construed favourably" to the Company.

67. Appearing as it does in a Contract which contemplates the construction not only of a main line but as well of branch lines from any point or points along that main line, the natural presumption is that "the Canadian Pacific Railway" in clause 16 refers to the whole of the railway contemplated by the Contract. This, of course, includes clause 14 branch lines.

68. There is support for this presumption in clause 16 itself.

It is "The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property used for the construction and working thereof" that are free of taxes. The word "all" must be given due weight. There is no suggestion by this language that stations, station grounds, etc., had to be located on the main line to be exempt. As Gordon, J.A., stated in the Court below: "If this had been the intention, the words 'located thereon' would have been used in the clause "(p. 34 l. 2).

It is also to be noted that the freedom from taxation extends to "rolling stock and appurtenances required and used for the construction and working" of the railway. It would be manifestly impossible to segregate the rolling stock used on the main line from that used on branches. Had it been intended to extend the freedom from taxation to only a proportionate part of the rolling stock, it is to be expected that some qualification to this effect would have been made.

69. It is to be noted, too, that clause 16 follows closely after the clause which authorizes the construction of branch lines. By clause 14 (p. 180 l. 34) the Government undertook to grant lands required for the road bed of the branch lines and for "all stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working" of the branches. Parallel language was employed in clause 16 in describing to what property of the Company the exemption was to extend. The inference is that the Government intended that one of the purposes to be served by the granting of freedom from taxation in clause 16 should be the purpose which would be served by the granting of land by clause 14. The purpose of granting land by clause 14 was, of course, to encourage the construction by the Company of branch lines and thereby promote the settlement of the North-West Territories.

Since the exemption provided by clause 16 follows so closely upon clause 14 conferring upon the Company the right to extend the railway by the construction of branch lines, it would seem only reasonable that in the absence of an express provision in clause 16 that the exemption should not apply to the railway so extended, such exemption was not to be limited to the main line and the branches referred to in the 1874 Act.

Martin, C.J.S. stated in his judgment (page 18 l. 28) that by clause 10 of the contract, provision had been made for the Government granting to the Company the lands required for the road bed of the railway, stations, etc. From this, he deduced that the provisions in clause 14 indicated that the branches to be constructed under that clause were not considered to be a part of the Railway, the construction of which was provided for in the Contract. It is submitted with respect that the expression "the railway" in clause 10, in the light of the context in which it is used, refers only to the two sections of the main line to be constructed by the Company and the grant of lands provided for by this clause was necessarily limited to the requirements of those two sections.

70. Martin, C.J.S. (Case p. 18 l. 36) and MacDonald, J.A. (Case p. 37 l. 9) in the Court of Appeal attached importance to the fact that the Company was under an obligation to construct the main line, but was only given the right to construct branches. The inference which they appeared to draw from this was that the Government might be expected to agree that the main line should be free from taxation, but would not be expected to agree that the branch lines would be similarly free.

71. It is submitted with respect that this inference is scarcely justified by the facts. It is true that the Government agreed to provide the Company with a subsidy in money and in land in consideration of the construction by the

Company of two sections of the main line, but this subsidy was also in consideration of the equipping, maintaining and operating of the whole railway including the clause 14 branches (p. 177 l. 9). Moreover, just as the Government by clause 10 undertook to grant lands required for the two sections of the main line, so by clause 14 it undertook to grant the land required for the branch lines constructed under that clause (p. 179 l. 24; p. 180 l. 34). It will thus be seen that substantial assistance was to be given to the Company not only for its main line but for its branches.

The reasonable inference would appear to be that the Government intended to encourage branch line construction and that there is no foundation for the inference drawn in the Court of Appeal by Martin, C.J.S. and MacDonald, J.A.

72. If, contrary to the above submissions, it is not clear that the phrase "the Canadian Pacific Railway" in its context in clause 16 refers to the whole railway, including branch lines, then at the very least, the phrase is ambiguous. In this event extrinsic evidence may be admitted to resolve the ambiguity—

Maxwell on Interpretation of Statutes, 9th ed. (1946), pp. 23 and 308;
Charrington & Co. Ltd. v. Wooder (1914) A.C. 71 at 82.
Rural Municipality of Cornwallis v. C.P.R. Co. (1891) 19 S.C.R. 702;
Balgonie Protestant School v. C.P.R. Co. (1901) 5 Terr. L.R. 123;
Rural Municipality of North Cypress v. C.P.R. Co. (1905) 35 S.C.R. 550;
In Re Branch Lines C.P.R. (1905) 36 S.C.R. 42.

73. The extrinsic evidence which is available to assist in the interpretation of clause 16 is of two kinds. There is evidence of what took place prior to the execution of the Contract indicating the intention of the parties in entering into the Contract, what the Government's policy was and what the Government wished to achieve by having a railway constructed, the difficulties confronting a company which undertook the work and the amount of assistance which would be required to induce a company to agree to do so. There is also evidence of what took place after the Contract was executed indicating the construction put upon the Contract by the parties themselves.

74. In dealing with events both prior to and after the execution of the Contract, it should be borne in mind that the intention of the contractors is of as much significance as that of the Government. It is not enough to consider what the Government might reasonably be expected to have undertaken to give. What the contractors might reasonably be expected to have insisted on receiving must also be considered. The undertaking was an extremely hazardous one and the risk of losing the $1,000,000 security (Case p. 175 l. 4) must have been a source of no small concern to the contractors.

75. A review of the events and the circumstances leading to the Contract affording some clue to what the parties to the Contract must have intended clause 16 to mean is set out in paragraphs 6 to 22 herein.

76. Certain conclusions can fairly be reached from a study of those events and circumstances. It is clear, for example, as is recited in the Act pursuant to which the Company was incorporated (Case p. 172 l. 21), that the Government's purpose in arranging for the construction of the railway was

two-fold: "the development of the North-West Territory" and "the preservation of the good faith of the Government in the performance of its obligations" (Case p. 172 l. 22). The fulfilment of these obligations was a matter of some urgency because of the time limit set forth by the Terms of Union and later by Lord Carnarvon's Report. But it is submitted that this did not make that purpose any more important than the Government's other major purpose, namely, of developing the North-West Territory.

77. Certainly in point of time the development of the North-West Territory was the Government's prime purpose in promoting the construction of the railway. The need for railways as a means of opening up the vast areas of fertile land for settlement was fully appreciated long before Confederation and prior to 1871 numerous attempts both by the Government of the old Province of Canada and by the Government of the new Dominion of Canada had been made to induce financial men in Canada, the United States and England to undertake the construction of colonizing railways in the North-West Territories. It was only in 1871 that the Dominion Government became obligated to construct a railway which would extend to the Pacific. It is clear, however, that the Dominion continued to be most anxious to promote colonization and realized that to do this branch lines would be required. As Gordon, J.A. expressed it (p. 32 l. 43) "In view of all these facts and the public statements of the Dominion Ministers of the Crown as to settlement of the North-West Territory, how can it be said that the right to build branches from the main line was not of the very essence of the Contract ?"

78. The difficulties which would confront a company undertaking the construction of the railway were well known to the Government, especially after its own experiences in constructing certain sections of the railway. The various inducements offered by it prior to 1880, considerable though they had been, had not been sufficient. It must also have been clear to the Government that its assistance must be sufficient not only to enable the main line to be constructed, but also to enable it to be operated at a profit. To operate the railway at a profit it was essential that there should be branch lines.

79. Whatever may be said to have been the Government's intention in agreeing with the contractors to clause 16, it must be admitted that the contractors would have realized that branch lines were absolutely essential to the successful operation of the railway and that substantial Government assistance including freedom from taxation would be required to induce the new company to construct branch lines in advance of the settlement of the country.

80. A review of events and circumstances subsequent to the Contract affording a clue to what the parties to the Contract considered clause 16 to mean is set out in paragraphs 25 to 33 herein.

In re Canadian National Railway Company and City of Ottawa (1924) 56 O.L.R. 153 at 158; (1925) S.C.R. 494 at 497.

81. Had it not been for clause 16, the clause 14 branch lines of the Company would have been taxable under the taxing ordinances which were issued under the authority of the Dominion in 1883, 1892, 1895 and 1898 (p. 253, 254, 255; for 1883 Ordinance see Ordinances of North-West Territories 1883, No. 2).

The fact that the Company was not required to pay taxes under these ordinances is powerful evidence of the interpretation placed on clause 16 by the Dominion, a party to the Contract. The same interpretation was placed on the clause by both the President of the Executive Council of the North-West Territory and by the first premier of Saskatchewan (Case pp. 264, 265). Both of these men must have been familiar with the views of the Dominion. Mr. Haultain urged the Prime Minister of Canada to remove the exemption conferred by clause 16, indicating that the administration of the North-West Territories was anxious to tax the Company's property if at all possible (p. 264 l. 1 and l. 24).

82. It is not without significance that the Company was not taxed by the Province of Saskatchewan from the creation of the Province in 1905 down to the passing of the Railway Taxation Act, 1908. Until at least 1909, the province appeared to consider that it could not tax such branch lines (p. 272 l. 27), although it later insisted from time to time that such branch lines were taxable.

The view of the Company, which as successor to the contractors was in effect a party to the Contract, is also entitled to be considered. The Company has consistently maintained since the execution of the Contract, as it does now, that its clause 14 branch lines are free from taxation under clause 16. Any payments made by the Company to the Province have been made without prejudice and as contributions to the revenues of the Province, not as taxes.

83. In addition to the evidence indicating that the freedom from taxation in clause 16 extends to the clause 14 branch lines, the only judicial authority available on this point supports the Appellant's contention.

84. Scott J. in the case of *In re Canadian Pacific Railway Co. and Town of Macleod* (1901) 5 Terr. L.R. 192, at p. 193 stated as follows:

> "I think the reasonable interpretation of the agreement referred to is that the clause is applicable only to the main line of the C.P.R. and to such branches thereof as respondent company was authorized by clause 14 of the agreement to construct from points on the main line, and that it does not extend, nor was it intended to extend to the other distinct lines of railway which the company might subsequently be authorized to construct."

Scott J. had to decide whether a branch line which had not been constructed under the authority of clause 14 was taxable and his remarks as to clause 14 branches were, of course, not necessary to his decision. In the absence of any authority to the contrary, however, it is submitted that his view is entitled to great respect. A North-West Territory court in 1901 would have been in a good position to interpret what the parties meant by the phrase "the Canadian Pacific Railway" in clause 16.

85. Sedgewick J. in the case of *In re Branch Lines Canadian Pacific Railway* (1905) 36 S.C.R. 42 at p. 69, referring to clause 16 of the Contract, stated as follows:

> "It had exempted the company's property, so far as it was within the

North-West Territories and was used for railway purposes, from taxation forever."

It is true that this statement is too broadly stated to the extent that "the company's property" would include branch lines other than those authorized by clause 14. In that case, however, the court was considering the Company's power to construct branch lines under clause 14 and it would appear, therefore, that in its context the statement of Sedgewick J. was not intended to apply to other branches. Again, as in the *Town of Macleod case,* the statement was not strictly necessary to the decision, but in the absence of any judicial authority whatsoever to the contrary it is none the less entitled to great respect.

86. *Question 2.*—

Does clause 16 of the contract aforesaid exempt and free the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of the business carried on as a railway

(a) based on the area of the land or the floor space of buildings used for the purposes of such business,

(b) based on the rental value of the land and buildings used for the purposes of such business,

(c) based on the assessed value of the land and buildings used for the purposes of such business, but not made a charge upon such land or buildings?

(2 (a) answered in the negative, 2(b) and (c) not answered.)

87. It will be observed that this question, like question 1, is so worded as to apply to all branch lines of the Appellant in Saskatchewan (cf. paragraph 39 herein). The Appellant does not contend, however, that the freedom from taxation in clause 16 of the Contract extends to the so-called business taxes on those branch lines which were not constructed under the authority of clause 14 of the Contract.

88. The Court of Appeal unanimously held that clause 16 of the Contract does not free the Appellant from the tax described in question 2(a) It held that clause 16 grants freedom from taxation on property only and the tax described in question 2(a) is a personal tax, not a tax on property. (Case p. 27 l. 11; p. 35 l. 15; p. 42 l. 42).

89. In one sense the tax described in question 2(a) is a personal tax. It is imposed upon the Company and is recoverable from the Company. In exactly the same sense, however, every tax is a personal tax, including the so-called real property tax. The so-called real property tax is imposed upon the owner or occupier of land and the owner or occupier is primarily liable to pay the tax. Land does not pay taxes. Only persons pay taxes.

90. The tax described in question 2(a), unlike the so-called real property tax, is not made a charge on property. For this reason, it might be suggested that the tax described in question 2(a) is not a tax on property. The effect of making the tax a charge or lien on property, however, is only to give the tax collector an additional means of collecting the tax. It does not affect the nature

of the tax. The following statement of Mr. Justice Clifford delivering a judgment of the United States Supreme Court and adopted by Mr. Justice Taschereau in *Fortier v. Lambe* (1895) 25 S.C.R. 422 at p. 432 is in point:

> "Nor is the tax in question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

Reference is also made to *City of Halifax v. Wallace* (1906) 38 N.S.R. 564.

91. If the answer to the question of whether or not clause 16 of the Contract grants freedom from a particular tax were to depend upon whether or not that tax is made a charge or lien on property, it is obvious how absurd would be the result. The Province could validly authorize the imposition of the so-called real property tax on the Company by the simple expedient of imposing such tax on the Company while providing that such tax should not be charged on the Company's property. It is submitted, therefore, that the test of whether or not a tax is a tax on property as distinct from a personal tax, for the purpose of this Reference, is not whether or not the tax is made a charge on property.

92. It might also be suggested that since the tax described in question 2(a) is a tax "in respect of the business carried on as a railway", therefore it is a tax on the business of the Company, not on its real property.

93. It is true that the type of tax described in question 2(a) is generally called a "business tax" or a "tax on business", but it is submitted these terms are loosely used and do not indicate the true nature of the tax. The tax described in question 2(a) is not based either on the volume of business carried on or on the earnings of business, as might be expected from its name.

94. It is submitted that the term "business tax" is merely a short and convenient expression to distinguish this type of tax from other types of municipal taxes and does not indicate the true nature of the tax. The Court of Appeal in Manitoba in *Dominion Express Co. v. City of Brandon* (1911) 17 W.L.R. 71 had to consider the true nature of a so-called business tax which was based on the rental value of premises used or occupied. It held unanimously that the tax in question might have been more accurately termed an "occupation tax" or a "rental tax". Richards J. A. stated as follows at p. 73:

> "It is true that (the section in question) says the tax it authorizes is to be called the 'business tax'. But merely so naming it does not make it a business tax, within the real meaning of the word 'business'."

Cameron J. A. expressed a similar view as follows at p. 76:

> "In using the words 'a tax to be called a "business tax" ', the legislature evidently did not mean to define the nature of the tax, but intended, rather, merely to stamp it with a short and convenient name."

Likewise, the tax described in question 2(a) might more accurately have been termed an "occupation tax". The amount of that tax is based upon the area of the premises rather than on their rental value, as in the *City of Brandon*

case, but both taxes are imposed on the occupier and the reasoning applied by the Court of Appeal of Manitoba in that case applies with equal force to the tax described in question 2(a).

95. The reason for calling the type of tax described in question 2(a) a business tax is apparently because it is payable by persons engaged in business. It is submitted that, at least for the purpose of determining in the interpretation of clause 16 whether or not a tax "in respect of business" is a tax on business or a tax on property, the fact that the tax is payable only by persons engaged in business cannot be decisive. If that fact determined the nature of the tax, presumably the Province could create a tax "in respect of business" based on the area of the land or the floor space of buildings *owned* and that tax, being regarded as a tax on business rather than on property, could be validly imposed on the Company. Yet that tax would be essentially the same tax as the real property tax from which it is conceded the Company is free by virtue of clause 16.

96. It might, however, be suggested that clause 16 of the Contract grants freedom from taxes which are imposed in respect of the ownership of premises but not from taxes, such as the tax described in question 2(a), which are imposed in respect of the occupation of premises. It is submitted that such a distinction cannot be made in interpreting clause 16.

97. The so-called real property taxes are not invariably imposed in respect of the ownership of real property. In Canada, it is true, they are generally imposed on the owner of premises, but in certain circumstances are imposed on the occupier instead of the owner. In England, on the other hand, the reverse is true. There, municipal rates, corresponding to our municipal real property taxes, are generally imposed on the occupier, but in certain circumstances are imposed on the owner instead of the occupier (Halsbury 2nd ed. Vol. 27, p. 351). All such taxes by whomsoever payable are rightly regarded as being taxes on real property.

98. It is submitted that the tax described in question 2(a) which likewise is a tax in respect of the occupation of real property must be regarded for the purpose of this Reference as being a tax on property. Taxes of the type described in question 2(a) have been held to be taxes on property: *Pigeon v. Recorders Court and the City of Montreal* (1890) 17 S.C.R. 495; *City of Halifax v. Fairbanks Estate* (1926) S.C.R. 349; (1928) A.C. 117.

While the issue in *City of Halifax v. Fairbanks Estate* was a constitutional one and the ultimate finding was that the tax was a direct tax, it was essential to this finding to hold first that the tax was a tax on property. In the court below, Martin C. J. S. (p. 28 l. 41) said in reference to that case "The judicial mind was not directed to the question whether the tax was a tax in rem or in personam." It is submitted with respect that the judicial mind was directed to the question of whether or not the tax was a tax on property as this was essential to the decision.

99. If, as the Court of Appeal held, Clause 16 of the Contract frees the Company from taxes in respect of the ownership of its property, but not in respect of the occupation of its property, the intention of clause 16 may easily

be defeated. By the simple expedient of providing for the assessment of the Company as occupier rather than as owner of its property, the property of the Company could be effectively taxed. Clause 16 must, therefore, free the Company from the tax described in question 2(a):

Hedley Shaw Milling Co. v. City of Medicine Hat (1918) 1 W.W.R. 754;
Halifax v. Dill (1929) 1 D.L.R. 643;
Re Nova Scotia Power Commission and Bank of Nova Scotia (1935) 3 D.L.R. 494.

100. The Court of Appeal relied on its own decision in *City of Moose Jaw v. British American Oil Co. Ltd.* (1937) 2 W.W.R. 309 in which it held that the Saskatchewan business tax was not a tax on property. The Court considered that it was bound to follow this earlier decision. It also relied on the following decisions of the Ontario courts:

Re Hydro-Electric Power Commission of Ontario and City of Hamilton (1920) 47 O.L.R. 155.
City of Kitchener v. Allen Theatres Ltd. (1922) 22 O.W.N. 231.
Re Hertzman and Hertzman (1931) 40 O.W.N. 561.

101. It would also appear that the learned judges below were influenced by their view that they must interpret clause 16 as though it were an exemption section in a taxing Act. In determining the correct interpretation of the provision in clause 16 of the Contract that certain property of the Company "shall be forever free from taxation", it is submitted that rules of strict construction are not applicable. In this connection reference is made to paragraphs 64 to 66 herein and to the cases cited in paragraph 72 herein.

102. It is submitted, therefore, that the Court of Appeal erred in holding that the tax described in question 2(a) is a personal tax and not a tax on property, and that clause 16 does not free the Appellant from such a tax.

103. As to questions 2(b) and 2(c), it is submitted that the Court of Appeal was right, for the reasons given, in not answering them.

104. *Question 3.*—

Are the provisions of the said The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947, and The Town Act, 1947, all as amended, relating to the assessment and taxation of the real estate of railway companies, operative in respect of branch lines of Canadian Pacific Railway Company in the Province of Saskatchewan constructed pursuant to clause 14 of the said contract?

(Answered in the affirmative, Gordon J. A. dissenting.)

105. The power of Saskatchewan to levy taxes is limited by section 24 of the Saskatchewan Act, 1905 (Statutes of Canada, 4-5 Edward VII, Chapter 42; Case p. 266 l. 18) which provides:

24. The powers hereby granted to the said province shall be exercised

subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the Statutes of 1881 being an Act respecting the Canadian Pacific Railway Company.

The effect of this section is to place a constitutional limitation upon the power of Saskatchewan to levy taxes: *Reference re Constitutional Validity of Section 17 of the Alberta Act* (1927) S.C.R. 364.

106. The Appellant submits that the provisions referred to in this question are inoperative in respect of branch lines of the Appellant constructed under the authority of clause 14 of the Contract. In support of this submission the Appellant refers to paragraphs 38 to 85 herein.

107. *Question 4.*—

Are the provisions of the said The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947, and The Town Act, 1947, all as amended, relating to the assessment and taxation of railway companies in respect of the business carried on as a railway, operative with respect to Canadian Pacific Railway Company in respect of the stations, workshops, and other buildings, used for the working of

(a) the main line of its railway in Saskatchewan, and

(b) its branch lines in Saskatchewan.

(Answered in the affirmative.)

108. The provisions referred to in this question purport to impose a tax of the type considered in answering question 2(a). In answer to question 4(a), therefore, the Appellant submits that those provisions are inoperative with respect of property of the Appellant used for the working of the main line in Saskatchewan and in support of this submission refers to paragraphs 86 to 103 herein. In answer to question 4(b), the Appellant submits that those provisions are inoperative with respect of property of the Appellant used for working its clause 14 branch lines in Saskatchewan and in support of this submission refers to paragraphs 38 to 103 herein.

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of Counsel for the Appellant.