

DOMINION - PROVINCIAL CONFERENCE

---

OPINIONS ON CONSTITUTIONAL LAW

---

No. 8. Validity of Dispositions of Dominion Taxation

By Vincent C. MacDonald, K. C.

VALIDITY OF DISPOSITIONS OF PROCEEDS OF DOMINION TAXATION

---

A passage in the judgment of the Privy Council in the Unemployment Insurance Case (1937) A.C. 355, at 366-7, has been said to cast doubt upon the ability of the Dominion to make grants in respect of old age pensions, unemployment relief and family allowances.

It is submitted herein that properly understood the passage does not support the doubts so expressed.

Lord Atkin said:

"It only remains to deal with the argument which found favour with the Chief Justice and Davis J., that the legislation can be supported under the enumerated heads, 1 and 3 of s.91 of the British North America Act, 1867, namely, (1) The public debt and property, (3) The raising of money by any mode or system of taxation. Shortly stated, the argument is that the obligations imposed upon employers and persons employed is a mode of taxation; that the money so raised becomes public property, and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality, in pith and substance, the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an Insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid."

This passage is part of the ratio decidendi and cannot be disregarded as a dictum for these reasons:-

1. The judgment proceeds on the ground that, as the subject-matter of the Act came prima facie within Provincial jurisdiction as affecting contracts of employment, it was necessary to examine the alleged grounds of validity.
2. The grounds on which "it was sought to justify the validity of Dominion legislation were: (a) "the special importance of unemployment insurance in Canada at the time of and for some time previous to the passing of the Act", i.e., on the ground of an "emergency" justifying such legislation under the Residuary Clause; and (b) "the argument which found favour with the Chief Justice and Davis J. that the legislation can be supported under the enumerated heads 1 and 3 of the B. N. A. Act, viz., "The Public Debt and Property"

and "The Raising of money by any mode or system of taxation."

3. Either ground if established would have been enough to support the legislation; but both contentions were rejected and accordingly their Lordships held "that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid."

The statement, as all judicial pronouncements on the Act, must be read in relation to the essential facts in the case. Thus in the Aeronautics Case (1932) A.C. 54 at p. 70, Lord Sankey uttered the caveat that "great care must be taken to consider each decision in the light of the circumstance of the case, in view of which it was pronounced . . . and not to allow general phrases to obscure the underlying object of the Act."

Accordingly the statement must be interpreted as directed simply to the particular contention made as to the particular statute whose validity was in question.

The particular statute was one which the Privy Council said "provided for a system of compulsory unemployment insurance" (p.364) "Under which persons engaged in employment as defined by the Act are insured against unemployment" (p. 365) and under which "the funds required for making the necessary payments (by the Commission set up by the Act) are to be provided partly from money provided by Parliament,

partly from contributions by employed persons, and partly from contributions by the employers of these persons" (p. 365) and under which "every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule"(p. 365). In the result, "this Act is an insurance Act affecting the civil rights of employers and employed in each Province." (p. 367)

The contention to which their Lordships were addressing themselves was a contention approved by Duff C.J. and Davis, J. It had two branches: (1) the compulsory contributions imposed on employers and employees were in the nature of taxation as to which the Dominion had undoubted jurisdiction; and (2) the proceeds thereof became part of the "public property" and that the Dominion had "complete legislative authority to direct that the money so raised, together with the assistance from money it raised by general taxation, shall be applied in forming an insurance fund." (p. 366)

The first branch of this contention the Privy Council assumed to be correct; i.e., that the fund came from contributions imposed by way of taxation.

Dealing with the second branch, it pointed out that it did not follow that any legislation disposing of that fund "IS NECESSARILY within Dominion competence." (p. 366)

It pointed out that Dominion legislation might deal with Dominion property in such a way as to invade civil rights within the Province. If it did so, either genuinely or colourably, it would be invalid "if on the true view it is found that in reality in pith and substance the legislation invades civil rights or . . . otherwise encroaches upon the provincial field." (p. 367) If this were not so, the Dominion could have an "easy passage into the provincial domain" (p. 367) by the simple device of applying its money to any purpose it desired. The particular case fell within the illustration of a type of legislation which was not "necessarily" within Dominion competence because the present case was one of "an insurance Act affecting the civil rights of employers and employees in each Province." (p. 367)

The net conclusion therefore was that the Dominion Act failed because it sought to apply the proceeds of taxation or "the public property" in such a way as to invade the civil rights of employers and employees. Accordingly in law the case is authority only for the principle that the proceeds of taxation cannot be disposed of in any way which involves direct interference with the "civil rights" of persons in a Province, or the encroachment on any other provincial head. It does not hold that in no case is the Dominion free to dispose of its property; it requires simply that it dispose

of it in a way which does not infringe the civil rights of persons or the legislative jurisdiction of the Province in relation thereto.

By virtue of Section 91, No. 1, the Dominion has jurisdiction to make laws in relation to "the public debt and property" and as Clement (p. 475) says, "what is covered by this item is clearly the public debt of Canada . . . and the property of the Crown held in the right of the Dominion and for purposes of Dominion Government."

All that is required to give validity to a Dominion statute dealing with Dominion property is that it be found in pith and substance to be in relation to that class of subject and not to relate to a class within Section 92. Accordingly the Privy Council conceded the general proposition that the Dominion "may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities." It was for the same reason that Duff C.J. and Davis J. (1936) at pp. 331 ff., held that it could not be disputed "that in point of strict law, Parliament has authority to make grants out of the public monies to individual inhabitants of any of the Provinces; for example, for relief of distress, for reward of merit, or for any other reason which Parliament in its wisdom may deem to be a desirable one." Similarly Kerwin J. agreed that Parliament "by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. It is evident that the Dominion

may grant sums of money to individuals and that the gift may be accompanied by such restrictions and conditions as Parliament sees fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions."

Of course if the Act is directed to the attainment of some purpose other than the disposition of public property, it cannot be upheld under Section 91, No. 1; and so it was that Kerwin J., although subscribing to the proposition above, held that it did not apply to the Unemployment Insurance Act, for the Dominion was dealing with the civil rights of employers and employees. Similarly, Rinfret J. found that the purpose of the Act was not to confer gifts on employees with conditions attached which the employees were free to accept or not, but rather to make the conditions compulsory terms of all contracts in the specified employments.

Accordingly the freedom of the Dominion to deal with its own property is incontestable, the only limitation being that although the Dominion is "dealing with" its own property, its legislation will be invalid if it does so for a non-property purpose such as, for ~~an~~ example, the purpose of subjecting employers and employees to compulsory levies as part of a scheme of insurance.

Viewed thus in relation to the contention made and to the character of the legislation involved in the Unemployment Insurance Case, the statement of Lord Atkin is of limited application and does



not restrict the Dominion's power to legislate in re its own property, except by way of expressing, and illustrating, the caveat that legislation "dealing with" Dominion property may be so framed as to be invalid and will be invalid if the property is so dealt with as to encroach on provincial heads - as did the compulsory insurance features of the Act in question.

Viewed in this light the statement is slight foundation for Mr. Cahan's conclusion that it "raises grave doubts as to the validity of appropriations of current revenues for such objects as old age pensions, unemployment relief, etc."

Similarly it affords slight (if any) foundation for the argument that it is beyond Dominion competence to pay to parents allowances in respect of children. This is particularly true where the payments take the form of outright payments or gifts with no restrictions attached. It can hardly be contended that the Dominion cannot make free grants of its lands to inhabitants of a Province. Nor can it be contended as to an Act which imposes no duties and restricts no rights that it is an invasion of the "civil rights" of an intended beneficiary who is not compelled to receive the benefits extended and whose position before the Provincial law remains the same whether he accepts or rejects such benefits.

The "civil rights" of individuals cannot be abridged or curtailed or modified by the Dominion; for they are within the protection of the Provincial Legislatures who alone may abridge or curtail or modify them. Thus the Dominion cannot, by an insurance measure, attach incidents to the contracts of employment in a Province, as was held in the Unemployment Insurance Case. But all this is irrelevant to an Act which makes a bona fide disposition of public property of Canada in such a way as to involve no change in the civil rights of persons within a Province.

Accordingly it is submitted that by a properly framed measure the Dominion may validly grant allowances to individuals out of its revenues so long as such grants involve no compulsory change in the status of the recipient and do not qualify his contractual rights or impose duties upon him.

This principle is applicable to a grant to a Province for defraying all or part of the cost of an Old Age Pensions scheme to be set up by Provincial legislation and administered by the Provinces. For the Dominion to provide its money for an Old Age Pensions scheme involving compulsory exactions or contributions may well be ultra vires; but for it to make such a grant as above does not involve anything restrictive of Provincial jurisdiction, nor anything restrictive of the civil rights of any beneficiary.

Similarly the stated principle applies to validate grants for unemployment relief or those in aid of vocational training etc. The general proposition stated by Lord Atkin cannot be denied and is sufficient to give prima facie justification to such grants - a justification to be lost only when examination of a particular measure shows that the Dominion is doing something other than spending its own money.

Considerable support for the conclusions of this Opinion are to be found in the Report of the Parliamentary Counsel to the Senate, 1939, Annex I at p. 145, where the thesis is that the Crown Dominion may itself embark on a specified activity as a matter of executive power.

August, 1944.

Vincent C. MacDonald.