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IN THE MATTER OF an Act for Expediting the Decision of Constitutional and other Provincial Questions, being Chapter 44 of the Revised Statutes of Manitoba, 1954,

AND

IN THE MATTER OF a Reference Pursuant Thereto by the Lieutenant-Governor in Council to the Court of Appeal for the Hearing or Consideration of Certain Questions Arising With Respect to Section 198 of the Railway Act, being Chapter 234 of the Revised Statutes of Canada, 1952, and The Real Property Act, being Chapter 220 of the Revised Statutes of Manitoba, 1954, and The Law of Property Act, being Chapter 138 of the Revised Statutes of Manitoba, 1954.

THE ATTORNEY GENERAL OF CANADA ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAYS ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Subject-matters of legislation—Validity and application of the Railway Act, R.S.C. 1952, c. 234, s. 198—Effect of provincial legislation in respect of title to real estate.

Railways—Acquisition of lands in Manitoba—Whether mines and minerals pass to railway in absence of express provision—The Railway Act, R.S.C. 1952, c. 234, s. 198—The Real Property Act, R.S.M. 1954, c. 220, s. 91—The Law of Property Act, R.S.M. 1954, c. 138, s. 4.

Section 198 of the *Railway Act* is not *ultra vires*, in whole or in part, and its effect is that, with the exception there stated, no railway to which the Act applies acquires title to mines and minerals in any land acquired by it, either by purchase or by compulsory taking under the Act, unless the mines and minerals are expressly purchased by and conveyed to it, notwithstanding the provisions of provincial legislation to the effect that a conveyance of land shall be deemed to include mines and minerals.

Per Kerwin C.J. and Taschereau, Rand, Kellock, Cartwright and Fauteux JJ.: Parliament is clearly competent to provide for the acquisition of land by a railway, and to limit by conditions the effect of acquisition, and it must also be able to provide reasonable means for ensuring that limitation. The question in such a case is not primarily how far Parliament can trench on s. 92 of the *British North America Act*, but to what extent property and civil rights are within

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

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the scope of the paramount power of Parliament. *Tennant v. The Union Bank of Canada*, [1894] A.C. 31, referred to. The section clearly binds the Canadian Pacific Railway Company, but its application to the Canadian National Railways is subject to different considerations, because of the varying statutory provisions applicable at different times to the railways now included in that system. All that can be said, in the circumstances of this appeal, is that in the case of such constituent companies as were subject to the *Railway Act* when they acquired land, between 1904 and 1919, and as between the railway company and the grantor of lands, the minerals did not pass to the grantee railway.

Per Locke and Abbott JJ.: The effect of ss. 197 to 201 inclusive of the *Railway Act* is to ensure that when a railway is carried over lands that contain mines or minerals there is adequate protection for the interest of the owner of the minerals, the travelling public, and the railway company. They are clearly legislation in relation to railways, and therefore within the competence of Parliament, under head 29 of s. 91 of the *British North America Act*. This being so, the fact that part of s. 198, limiting the manner in which railway companies to which the Act applies may acquire mines and minerals, conflicts with provincial legislation is of no moment. The whole subject-matter is removed from provincial competence. *Proprietary Articles Trade Association et al. v. Attorney- General for Canada et al.*, [1931] A.C. 310; *Tennant v. The Union Bank of Canada, supra*; *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65; *Attorney-General for Canada v. Attorney-General for Quebec*, [1947] A.C. 33, applied. The Manitoba statutes referred to are unquestionably within provincial powers, but they do not apply to transfers or conveyances made since s. 198 came into force in 1904 to railways that are subject to the *Railway Act*. That section accordingly applies to and governs the title to all lands acquired since 1904 by the Canadian Pacific Railway Company. Although at the time of its incorporation that company was subject to the *Consolidated Railway Act*, 1879, which contained no provision corresponding to s. 198, it is, by force of s. 20(*b*) of the *Interpretation Act*, subject to the *Railway Act* as it is in force from time to time. *Northern Counties Investment Trust Ltd. v. Canadian Pacific Railway Company* (1907), 13 B.C.R. 130, approved. The section also applies in respect of lands acquired between 1904 and June 6, 1919 (when the Canadian National Railway Company came into existence) by the Canadian Northern Railway Company, the two companies formerly operating in Manitoba that were amalgamated into it, and the Grand Trunk Railway Company. There is not sufficient material before the Court to enable it to deal with the matter as it affects lands acquired since 1919 by the Canadian National Railway Company or the other companies now included in the definition of "Canadian National Railways" in s. 2(*b*) of the *Canadian National Railways Act*, R.S.C. 1952, c. 40.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], on a reference by the Lieutenant-Governor in Council. Appeal allowed.

[1] (1956), 17 W.W.R. 415, 73 C.R.T.C. 254, 2 D.L.R. (2d) 93 (*sub nom. Reference re Validity of Section 198* of the Railway Act).

The following questions were asked and were answered as follows by the Court of Appeal:

1. Is Section 198 of the Railway Act *ultra vires* of the Parliament of Canada either in whole or in part, and if in part, in what particular or particulars and to what extent?

ANSWER: Section 198(1) and (2) is *ultra vires* of the Parliament of Canada except insofar as it prohibits a railway company from expropriating mines and minerals by compulsory proceedings.

2. When title to land without exception of mines and minerals is or was acquired by one of said railway companies without any proceedings being commenced under the compulsory powers given by the Railway Act but as a result of agreement made with the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) deed to which said The Law of Property Act applies?

ANSWER: No. 2(*a*): Yes.

No. 2(*b*): Yes.

3. When title to land without exception of mines and minerals is or was acquired by one of said railway companies by purchase after commencement but before completion of proceedings under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) by deed to which said The Law of Property Act applies?

ANSWER: No. 3(*a*): Yes.

No. 3(*b*): Yes.

4. When title to or ownership of land without exception of mines and minerals is or has been taken by one of said

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railway companies under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the conveyance of the land, does such railway company own such mines and minerals when that title or ownership is or was acquired

(*a*) under said The Real Property Act, or

(*b*) by virtue of the registration of a vesting order or other authorized evidence of the company acquiring ownership under The Registry Act, Revised Statutes of Manitoba, 1954, Chapter 223 or the Registry Act for the said Province heretofore from time to time in force within the Province?

ANSWER: No. 4(*a*): Yes.

No. 4(*b*): Yes.

A. E. Hoskin, Q.C., and *D. H. W. Henry, Q.C.*, for the appellant.

C. F. H. Carson, Q.C., *Allan Findlay, Q.C.*, and *H. M. Pickard*, for the respondent Canadian Pacific Railway Company.

R. D. Guy, Q.C., and *E. B. MacDonald*, for the respondent Canadian National Railways.

John A. MacAulay, Q.C., *A. A. Moffat, Q.C.*, and *R. K. Williams*, for Imperial Oil Limited, intervenant.

J. J. McKenna, for the Attorney-General for Ontario, intervenant.

The judgment of Kerwin C. J. and Taschereau, Rand, Cartwright and Fauteux JJ. was delivered by

RAND J.:—The first and the substantial question of law raised by this reference is whether s. 198 of the *Railway Act*, R.S.C. 1952, c. 234, is in whole or part *ultra vires*. The section is as follows:

(1) The company is not, unless the same have been expressly purchased, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

giving power to take lands and in furnishing machinery for taking them. As s. 17 it was again considered in *Bell Telephone Company of Canada v. Canadian National Railway*[1]. At p. 577 Lord Macmillan, referring to the comment in *Boland,* adds that the amended form "cannot be said to present a more happily inspired example of legislation".

A second proposition advanced by Mr. Guy can be dealt with shortly. Under the charters of many of the constituent companies in the National system power to acquire land for the purposes of the undertaking is conferred. His argument is that by virtue of s. 3 of the *Railway Act,* by para. (*b*), of which it is provided that

> where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act

the charter power is unaffected by the limitation of s. 198. With this I am unable to agree. The power given under the special Act goes to the capacity generally of the company to acquire and hold land; it does not embrace the taking of land without the owner's consent. Purchases in the course of construction are carried out under a code of sections in the general Act and are within the application of the special Act in no other sense than that of capacity. That code contains the element of coercion, in the background of which the purchases are made. To resort to or to take the benefit of the code and that element is action outside of the charter power. The authority under the special Act is admittedly subject to the provisions of the general Act which require plans to be submitted, approved and filed and to those dealing with compensation; but these, on Mr. Guy's contention, would, strictly speaking, seem to "relate to the same subject-matter" and to be restrictions of the charter power. Section 198 does not affect the capacity or the right of the company to acquire minerals, but it does prevent their acquisition directly or indirectly by compulsory action, including purchases that do not carry the express consent of the owner. These provisions, in short, serve to regulate the exercise of the

[1] [1933] A.C. 563, 41 C.R.C. 168, [1934] 1 D.L.R. 310.

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Rand J.

charter capacity as the company moves to construct its railway under the powers, procedures and limitations of the general Act.

The application of ss. 198 to 201 to the National company is thus seen to involve questions of the time of purchase, of special legislative enactments and of amalgamations of constituent companies, apart from the interpretation of the *Canadian National Railways Act* itself. In these circumstances, by answering questions 2, 3 and 4 we would be expressing an opinion that might seriously affect private rights in the absence of those claiming them, a step which would be contrary to the fundamental conception of due process, the application of which to opinions of this nature has long been recognized.

In *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec, and Nova Scotia*[1], the Judicial Committee spoke of it in these words:

> Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

In *Attorney-General for Ontario v. Hamilton Street Railway Company et al.*[2]:

> With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it.

In *Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*[3] (a reference in which the power of

[1] [1898] A.C. 700 at 717. [2] [1903] A.C. 524 at 529, 7 C.C.C. 326.
[3] [1912] A.C. 571 at 588-9, 3 D.L.R. 509.