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HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

*Oct. 2, 3

1946

AND

*Feb. 11

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Companies—Income War Tax Act (R.S.C. 1927, c. 97, as amended), ss. 9B (2) (a), 9B (4), 84 (as the same were enacted by 1932-33, c. 41)—Tax on non-residents of Canada in respect of dividends received from "Canadian debtors"—Crown claiming from company for amount not withheld and remitted, from dividends paid to non-residents of Canada—Whether, in all the circumstances, the company (incorporated in England but carrying on its business in Canada) was a "Canadian debtor"—Whether legislation intra vires.

Subs. 2 (*a*) of s. 9B (as enacted by statutes of 1932-33, c. 41, s. 9) of the Dominion *Income War Tax Act* imposed an income tax of 5 per centum on all non-residents of Canada in respect of all dividends received from "Canadian debtors", and subs. 4 of said s. 9B required the debtor to collect such tax by withholding 5 per centum of the dividend and remitting the same to the Receiver General of Canada. S. 84 made any person, who failed to collect or withhold any sum as required by the Act, liable for the amount thereof.

Respondent was a company incorporated in England. Its registered office was in London, England. It was registered in British Columbia as an extra-provincial company. It carried on the business of supplying electric power and light and operating electric railways and motor buses in British Columbia. Its head office was at Vancouver, B.C. During the period in question its whole business, except such formal administrative business as was required by the statutes governing it or by its articles of association to be transacted at its registered office, was conducted and carried on in Canada. All its directors and officers were residents of Canada. All stockholders' and directors' meetings were held in Canada. All its assets, except for certain records and books of account kept in London, England, and certain cash remitted there from time to time, were situate in Canada. All the income from which the dividends in question were paid was earned in Canada. Its register of members in respect of the stock in question was kept at London, but, pursuant to an Imperial statute, a Dominion register of members in Canada was kept at Vancouver, and stock registered in the Dominion register could be transferred only upon that register, and all other stock could be transferred only upon the register in London; but there was provision for change of registry.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

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The Attorney General of Canada claimed on behalf of the Crown against respondent for amounts not withheld and remitted by respondent in respect of dividends paid by respondent to holders not resident in Canada of its cumulative perpetual preference stock. Such dividends were paid by respondent's registrar and paying agent in London after funds had been remitted to London from Canada.

Held: Respondent was a "Canadian debtor" within the meaning of said subs. 2 (*a*) of s. 9B and came within the aforesaid requirements of the Act, and in respect of the dividends in question was liable for amounts not withheld and remitted by it in accordance with such requirements. (Judgment of Thorson J., [1945] Ex. C.R. 82, reversed). Said provisions of the Act, applied in accordance with such holding, were *intra vires (B.N.A. Act,* s. 91, head 3; *Statute of Westminster, 1931* (Imp.), particularly s. 3 thereof; its effect discussed) and must be given effect by Canadian courts.

APPEAL by the Attorney General of Canada from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the action, which was brought by information of the Attorney General of Canada on behalf of His Majesty the King to recover from the defendant (a company incorporated in England, registered in British Columbia as an extra-provincial company, and carrying on its business in that province) the amount of 5 per cent. of the dividends paid or credited by the defendant during the period between April 1, 1933, and April 29, 1941, to non-residents of Canada on the defendant's fully registered 5 per cent. cumulative perpetual preference stock; and to recover interest on said amount claimed. The Attorney General alleged that in respect of such dividend payments the defendant was a "Canadian debtor" within the purview of s. 9B (2), paragraph *a*, of the *Income War Tax Act,* and that, having failed to deduct or withhold, from the amounts paid or credited to such non-residents of Canada, at the time of payment or crediting, the tax of 5 per cent. due under s. 9B (2) (and particularly said paragraph (*a*) thereof) of said Act (R.S.C. 1927, c. 97, as amended by c. 41 of the statutes of Canada, 1932-1933) and to remit the same to the Receiver General of Canada (as provided by s. 9B (4) of said Act as so amended), the defendant was liable (under s. 84 of said Act as so amended) for the amounts which should have been withheld out of said dividends.

(1) [1945] Ex. C.R. 82; [1945] 3 D.L.R. 613; [1945] C.T.C. 162.

The material facts of the case and the questions involved are sufficiently stated in the reasons for judgment in this Court now reported.

F. P. Varcoe K.C. and *W. R. Jackett* for the appellant.

Aimé Geoffrion K.C. and *A. B. Robertson* for the respondent.

The judgment of the Chief Justice and Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The first question for determination in this appeal depends upon the construction of the expression "Canadian debtors" in subsection 2, paragraph (*a*), of section 9B of the *Income War Tax Act,* as enacted by section 9 of chapter 41 of the Statutes of 1932-33. Prior thereto, the main (but not the only) charging provision in the Act was section 9 wherein, speaking generally, Parliament dealt with incomes of persons who were resident, or ordinarily resident, or who sojourned in Canada, or who were employed or carrying on business therein, or who, not being resident in Canada, derived income from services rendered therein. In order to understand what Parliament was really doing by the particular enactment with which we are concerned, it is necessary to set forth subsections 1, 2, 3 and 4 of section 9B:—

9B. (1) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons resident in Canada, except municipalities, or municipal or public bodies which in the opinion of the Minister perform a function of government, in respect of all interest and dividends paid by Canadian debtors, directly or indirectly to such persons, in a currency which is at a premium in terms of Canadian funds.

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

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

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

(3) In the case of bearer coupons or warrants, whether representing interest or dividends, the taxes imposed by this section shall be collected by the encashing agent or debtor who shall withhold five per centum of the obligation and remit the same to the Receiver General of Canada,

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provided that any encashing agent so withholding and remitting shall be entitled to recover one hundred per centum of the obligation from the debtor.

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

The remaining subsections are subsidiary.

At the same session, section 84 was also added to the principal Act and it provides:—

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

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

Section 21 of the 1932-33 enactment provides that sections 9B and 84 of the principal Act as therein enacted shall be deemed to have come into force April 1st, 1933.

It will be noticed that in section 9B the expression "Canadian debtors" is used thrice. By subsection 1 an additional income tax of five per centum is imposed on all persons resident in Canada (except as stated) in respect of all interest and dividends paid by Canadian debtors but only when so paid "in a currency which is at a premium in terms of Canadian funds." This subsection was amended in 1940 but the purpose for which I refer to it is not affected by the wording of the amendment.

When we come to subsection 2 we find that a tax is imposed on non-residents of Canada. While in subsection 1 dividends and interest are dealt with together, in subsection 2, paragraph (*a*), reference is made to dividends only, and paragraph (*b*) deals with interest only. As to dividends, it does not matter in what currency the payment is made, but as to interest, it is only payments in Canadian funds that are covered. In both cases, however, the payments or receipts are from "Canadian debtors." Paragraphs (*c*) and (*d*), which were added to sub-

section 2 of section 9B in 1934, do not concern us, but paragraph (*e*), enacted by chapter 40, section 9, of the Statutes of 1935, should be noted:—

> (*e*) All payments received directly or indirectly from Canadian debtors in respect of
>
> (i) any copyright, used in Canada, relating to books, music, articles in periodicals, newspaper syndicated articles, pictures, comics and other newspaper or periodical features, and
>
> (ii) any rights in and to the use of any copyrighted work subsequently produced or reproduced in Canada by way of the spoken word, print or mechanical sound on or from paper, composition, films or mechanical devices of any description.
>
> The tax payable by virtue of this paragraph shall be deducted by the Canadian debtor from the amount paid or credited to such non-resident at the time of payment or crediting and shall be remitted to the Receiver General of Canada.

Thus, for the fourth time, "Canadian debtors" are mentioned. One purpose of section 9B as first enacted and as amended from time to time was to ease the foreign exchange situation, and the expression in question should receive the same meaning throughout the section.

It could hardly be contended that in subsection 1 or in paragraph (*e*) of subsection 2 the expression meant anything except an individual who resided in Canada or an incorporated company which—in the sense in which that word is explained in well-known tax decisions—resided in Canada. It can surely have no reference to the nationality of the individual so as to exempt an alien resident in Canada nor, if the expression is applicable, to that of a company. The same meaning should be applied to it when it is found in subsection 2, paragraph (*a*).

It is under that paragraph that the Attorney General of Canada on behalf of His Majesty the King filed an information in the Exchequer Court against British Columbia Electric Railway Co. Ltd., alleging that an income tax of five per centum had been imposed on the non-resident holders of the Company's five per cent. cumulative perpetual preference stock in respect of the dividends received by them from the Company from April 1st, 1933, to April 29th, 1941; that by subsection 4 of section 9B this tax was to be collected by the Company and remitted to the Receiver General of Canada and that this was not done. Therefore, under section 84, the amount which should

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have been collected was claimed, together with interest at the rate of ten per cent. per annum from the respective dates upon which the dividends became payable.

The action came on for trial before the President of the Exchequer Court upon written admissions and certain exhibits. From these, it appears that the Company was incorporated in England in 1897 under the Companies Acts, 1862 to 1893. Since 1898 it has been registered in British Columbia as an extra-provincial company under the 1897 Companies Act of that province; it carries on the business of supplying electric power and light and operating electric railways and motor buses in British Columbia, and has its head-office at Vancouver. During the entire period under review, its whole business, except such formal administrative business as was required by the statutes governing it or by its articles of association to be transacted at its registered office, was conducted and carried on in Canada. All its directors and officers were residents of Canada; all such stockholders' meetings as were held and all directors' meetings were held in Canada; all its assets, except for certain records and books of account kept in London, England, and certain cash remitted there from time to time, were situate in Canada; and all the income from which its dividends were paid was earned in Canada. There is no question about these facts and the others mentioned in the President's judgment and the Company does not dispute his conclusion on those facts that it was resident in Canada for income tax purposes.

The President decided that because of the use of the word "dividends" in paragraph (*a*), the word "debtors" therein would apply only to companies, and with that I agree. He then proceeded, however, to take a further step and it is there that I find it necessary to part company with him. That was to construe "Canadian debtors" as "Canadian companies." This is substituting one phrase for another by applying the adjective "Canadian" to a noun that Parliament did not use and is, I think, an unjustifiable alteration of the language actually employed. Further difficulties in that connection would arise as to whether

"Canadian companies" would include the respondent, which was incorporated in England and not in Canada although doing business and earning all its income here.

The President stated that a reference to various other sections of the Act indicated that a clear distinction was throughout drawn between a resident in Canada and a non-resident, both with respect to individuals and companies, and from that he concluded that, if it had been the intention in paragraph (*a*) to denote as payors, companies resident in Canada, the same words indicating residence would have been used. This does not follow. In 1932-33 Parliament chose to use a certain expression to which some meaning must be attached but there is no rule whereby that expression may not mean the same as a different set of words in other provisions of the same Act. Particularly is this so when one bears in mind the foreign exchange position with which Parliament was concerned in enacting section 9B. The President also expressed the view that if it were the intention that "Canadian debtors" should mean debtors who are resident in Canada, it would follow that there would be no duty to collect the tax imposed upon a company incorporated in Canada and that was not resident therein. That is so but, in my view, Parliament has covered the former class and not the latter. For the reasons indicated, the expression means the same throughout 9B and the meaning in paragraph (*a*) is "Companies resident in Canada."

This being so, I should add that I do not understand that the Deputy Attorney General, either in the Exchequer Court or before this Court, argued alternatively that if the expression should not be interpreted as I have construed it and as he contended, it meant a person or company who owed a Canadian debt. I understood his position to be that if the Company's contention that Canadian debtors meant persons owing Canadian debts was right, then he would contend that the dividends constituted a Canadian debt. The Company did argue that and also that as it was incorporated in England the dividends, although declared here, were governed by English law and that, therefore, they were English and not Canadian debts.

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That argument also would alter and not construe "Canadian debtors" and fails for the same reason as the suggestion to read the phrase as if it were "Canadian companies."

As to the second question raised in the appeal, viz., that on the construction of "Canadian debtors" I have concluded is the correct one, subsection 2, paragraph (*a*), of section 9B is *ultra vires* Parliament on the ground that it is extra-territorial legislation, the *Statute of Westminster, 1931,* and particularly section 3, leaves no basis for the argument. By head 3 of section 91 of the *British North America Act,* Parliament was authorized to make laws with reference to "the raising of money by any mode or system of taxation." As long as Parliament legislates with reference to such matters, the permitted scope of the legislation is not restricted by any consideration not applicable to the legislation of a fully sovereign state. Such a state may tax persons outside its territory. Here it is clear that it has done so and the Canadian courts must obey the enactment. It is true that the Company might find itself in difficulties if holders of its preference stock chose to sue it in England for any taxes withheld by it under subsection 4 of section 9B but that is because the courts of one country will not enforce the fiscal legislation of another. The Company was under a duty to obey the injunction in subsection 4 and since it did not do so it is liable to the penalty prescribed by section 84.

In the admissions signed by the solicitors for the parties, it was admitted that between April 1st, 1933, and April 29th, 1941, the Company paid to holders of its five per cent. cumulative perpetual preference stock, whose addresses entered in its register of members as required by section 95 of the Imperial Companies Act of 1929 were elsewhere than in Canada, dividends upon the said stock amounting to $2,780,682.37, and that some, at least, of the said holders were non-residents of Canada. It was also agreed that should the Court decide that the Company should have deducted a tax of five per cent. from those dividends paid to any holders who were non-residents of Canada, a reference might be directed for the taking of an account to determine which of the said hold-

ers were non-residents of Canada within the meaning of section 9B of the Act. Such a reference should be directed, to be proceeded with before the Registrar of the Exchequer Court or, if the parties think it more convenient, before some one else to be agreed upon. The appellant is entitled to its costs of the action and appeal. The costs of the reference may be disposed of by a Judge of the Exchequer Court upon the confirmation of the report.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The respondent was incorporated in 1897 under the Companies Acts (Imperial), 1862-1893, and was registered as an extra-provincial company under the British Columbia Companies Act of 1897 on January 3rd, 1898. The head office is in Canada, all directors and officers are residents of Canada, and all meetings of shareholders and directors are held in Canada. The business of the Company is that of supplying electric power and light and operating electric railways and motor buses; and all of it, except such formal administrative matters as are required by statute or its articles of association to be transacted at its registry office in London, England, is carried on, all of its income earned and all of its assets, except certain records and books of account, are, in Canada. The Company's principal register is kept at London and in accordance with sec. 103 of the Companies Act (1929) (Imperial) a dominion register at Vancouver, on both of which holdings of its five per cent. cumulative perpetual preference stock are registered: a duplicate of the dominion register is kept in London and is deemed there to be part of the principal register. Stock registered in the dominion office can be transferred only upon that register and all other only upon the register in London, but there is provision for change of registry.

The controversy concerns dividends paid to the holders of the perpetual preference stock who reside in England. They were paid by the Company's registrar and paying agent in London after funds had been remitted to London from Canada. The Crown has assessed taxes under section 9B of the *Income War Tax Act* on these dividends, and the right to do so is the question presented for decision.

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Section 9B, subsections 2 and 4, are the charging provisions and are as follows:

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

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

* * *

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

It is the contention of the Crown that under this language the Company is a Canadian debtor and that it is bound to deduct the tax imposed from the dividends. The President of the Exchequer Court construed the expression "Canadian debtors" in paragraph (*a*) to mean "Canadian company debtors" and "Canadian company" a company incorporated in Canada: and he dismissed the action.

The substitution of "Canadian company debtors" for "Canadian debtors" in paragraph (*a*) effects a subtle transfer of meaning which I think has escaped the President. Undoubtedly "Canadian company"—and the expression is used in a number of instances in the Act—imports a national characteristic, but that is due to the special and abstract nature of the concept "company" which is not present in the collocation "Canadian debtors." What is done by the importation is in fact to qualify the meaning of "Canadian debtors" by introducing a new and significant word.

The same expression is used in paragraph (*b*) of subs. 2:

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

If the meaning so given to "Canadian" in (*a*) is applied to (*b*), it means that (*b*) in relation to natural persons is applicable only to Canadian nationals. It would exempt foreign citizen debtors who might have spent their lifetime in Canada and whose nationality would have no relevancy

to their being debtors in Canada. We would have also the apparent anomaly in (*a*) of Canadian companies carrying on their entire business outside of Canada being forced to pay over monies in respect of dividends which would never be in Canada and would move within or between foreign countries.

It was argued by Mr. Geoffrion that the expression, itself ambiguous, is in (*a*) limited to one of two interpretations, either Canadian company or foreign company, that in neither case was any further qualification to be attached, and that, construing the section in the light of the presumptions as to inherent limitations on jurisdiction and the rules of comity between states, the judicial choice must be the former. But I see nothing in the statutory matter to drive us to any such exclusive or limited alternatives, certainly not as the initial step in interpretation.

He argued also that "Canadian debtor" meant the debtor of a Canadian debt, *i.e.*, a debt arising by virtue of Canadian law; that the dividend as a debt arose from English law and that it was therefore outside the scope of the provision. But there is nothing in the context of the statute that gives significance to the place of origin of the debt or the law from which it arises, and where the creditor is admittedly a non-resident, it would be quite unwarranted and in fact invidious to do so.

"Canadian debtor" must, I think, be considered from the point of view of the Canadian Parliament. It can be said with some force that here we have a creditor in England who purchased his stock in England, who receives his dividend from the agent of the company at the registry office in England, and who looks only to the symbol of the company as that is present in England. But the creditor knows that the substance of the company is in Canada, that it "keeps house and does its business" there, a business completely within Canadian legislative power; and that he must look to Canada for the act of the company which declares the dividend and for the dividends themselves. The fact that the money is remitted in a lump sum to England and there distributed among the shareholders entitled is not significant.

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The cheques could have issued direct to the shareholders from the head office, as they were to shareholders shown as resident in Canada on the principal register and to all shareholders on the dominion register.

The imposition of the tax on the non-resident, subs. 2 (*a*), and the obligation of the debtor "to withhold" and to pay to the Receiver General, subs. 4, are express: and it is chiefly the latter provision by which, I think, are indicated the distinctive marks of the debtor intended to be charged: a person over whom there is actual power of compulsion; from whom in Canada payment of the debt is to proceed; on whom there is an obligation to pay the dividend *qua* dividend; and who, in the course of that act, is "to withhold". The expression, then, means a debtor resident in Canada by whom the act of paying the dividend as such is, under the obligation itself, to be initiated in and the payment to proceed from this country.

It may be and doubtless is the case that such an exercise of taxing power or, as it may be called, exacting power, is so extraordinary that the court should require a clear identification of any relation to which it is proposed to be applied. With the policy of legislation we have, of course, nothing to do, but I think the subject-matter with reference to which the non-resident is taxed is here clearly identified, and that it embraces the correlatives of the obligations of the respondent under consideration.

The legislative competence of Parliament to tax non-residents was challenged. It is argued that the power "to make laws having extra-territorial operation" as enacted by the *Statute of Westminster, 1931,* section 3, is subject to two conditions: that the legislation deal with matter assigned by the *British North America Act* to the federal legislature; and that it be of such a nature as under international public or private law would be accorded extra-territorial effect. It is then contended that the power of the Dominion under section 91 (3), "the raising of money by any Mode or System of Taxation," does not extend to taxation of non-citizens outside

the boundaries of Canada; and that international comity, apart from any rule against giving effect in one state to fiscal measures of another state, would not for any purpose recognize the validity of, much less enforce, what Parliament is said to purport by this legislation to do.

The power of the Dominion to tax is to be interpreted as being "as plenary and as ample within the limits prescribed by section 92 (91) as the Imperial Parliament in the plenitude of its power possessed or could bestow": *Hodge* v. *The Queen* (1). But there is obviously a distinction between the standing of legislative enactments by a sovereign state within its boundaries and beyond them. In an effective sense, a declaration by such a legislature that it imposes a tax upon a citizen of a foreign country toward whom there is no internationally recognized bond or relation, is, beyond the territories of that state, a futile act, and it is futile for the reason that beyond them it is incapable of enforcement. Within the state, however, it becomes an obligatory rule to be enforced whenever enforcement is feasible. The specific investment of extra-territorial power by section 3 of the Statute of 1931 was designed, no doubt, to remove the generally accepted limitation of colonial legislative jurisdiction, a limitation which the courts of the colony itself were bound to recognize: *Macleod* v. *Attorney General for New South Wales* (2), and any such jurisdictional inadequacy no longer hampers the legislative freedom of the Dominion. Within its field, there is now a legislative sovereignty. That the enactment of section 9B is an exercise of taxing power within that jurisdiction does not, I think, admit of doubt. It is an assessment uniformly imposed in respect of special items of a general class of defined subject-matter in an elaborated tax system; there is admitted jurisdiction over an act essential to the subject-matter, *i.e.*, the act of performance of an obligation; and these, taken with the language used, satisfy the taxation criteria. Legislation so enacted will be effective in, and must be enforced by the courts of, this country. To what extent, if at all, it will receive recognition in the

(1) (1883), 9 App. Cas. 117. (2) [1891] A.C. 455.

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tribunals of foreign countries depends upon different considerations: but that circumstance, apart from its function in interpretation, is not one in which the local tribunal is interested.

I would, therefore, allow the appeal and direct judgment against the respondent for such sum as may be found to be owing, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondent: *Robertson, Douglas & Symes.*