CANADIAN PACIFIC RAILWAY COMPANY .... APPELLANT;

1948
*Feb. 17, 18, 19.
*April 27

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA............ RESPONDENT;

AND

THE ATTORNEY-GENERAL OF CANADA .... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional Law—Application of Hours of Work Act, R.S.B.C., 1936, c. 122, to Employees of C.P.R. Hotel—Whether hotel part of the "undertakings" of a railway—Whether "lines of" includes "railways"—Whether hotel included in the term "railways"—Whether Parliament has made a declaration as to hotels—Property and Civil Rights—Effect of Collective Bargain and P.C. 1003 (Dom.)—The B.N.A. Act, s. 91 head 29, s. 92 head 10 (a) and (c)—The Railway Act, 1868, S. of C., 1868, c. 69, ss. 5 (16), 7 (8) (10)—The Consolidated Ry. Act, 1879, S. of C., 1879, c. 9, ss. 7 (8) (10) Am. 1883, c. 24, s. 6—Canadian Pacific Ry. Act, 1881, S. of C., 1881, c. 1, Schedule "A" s. 17—The Railway Act, 1888, S. of C., 1888, s. 2 (9), Am., 1892, c. 27, s. 1 (q)—Canadian Pacific Ry. Act, 1902, S. of C., 1902, c. 52; ss. 8, 9—The Railway Act, 1903, S. of C., c. 58, s. 2 (s) (w)—The Railway Act, R.S.C., 1906, c. 37, ss. (15), (21), (28), (33), (151) (c) (g)—The Railway Act, 1919, S. of C., 1919, c. 68 ss. 2 (21), (28), 6 (c)—War Measures Act, R.S.C., 1927, c. 206—The Canadian National-Canadian Pacific Act, 1933, S. of C., 1933 c. 33, ss. 3 (g), 27A as enacted by, 1947, c. 28, s. 1—The National Emergency Transitional Powers Act, 1945, S. of C., 1945, c. 25.

An hotel is not an integral part of a railway and therefore does not fall within the meaning of the term "railways" as used in section 92 head 10 (*a*) of the *British North America Act*; nor has the Parliament of Canada made a declaration as to hotels under section 92 head 10 (*c*) of the Act. An hotel therefore does not fall with the class of subjects to which in virtue of section 91 head 29 of the Act, the exclusive Legislative Authority of the Parliament of Canada extends.

(Appeal dismissed and judgment of the Court of Appeal for British Columbia (1) affirmed.)

APPEAL from the judgment of the Court of Appeal for British Columbia dated March 27, 1947, holding that the *Hours of Work Act*, R.S.B.C., 1936, c. 122, is applicable and binding upon the Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

1948

CANADIAN PACIFIC RAILWAY CO. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

The question referred to the Court of Appeal for British Columbia pursuant to the provisions of the *Constitutional Questions Determination Act,* R.S.B.C., 1936, c. 50, and the relevant statutory provisions are set out in the judgments now reported.

C. F. H. Carson K.C., H. A. V. Green K.C. and *I. D. Sinclair* for Canadian Pacific Railway Co.

J. W. deB. Farris K.C. and *J. Farris* for the Attorney-General of British Columbia.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General of Canada.

C. R. Magone K.C. for the Attorney-General of Ontario.

T. D. MacDonald for the Attorney-General of Nova Scotia.

H. J. Wilson K.C. for the Attorney-General of Alberta.

A. M. Nicol for the Attorney-General of Saskatchewan.

KERWIN J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia (1), dated 27th March, 1947, answering the following question referred to that Court by Order of the Lieutenant-Governor in Council dated 21st September, 1946, made pursuant to the *Constitutional Questions Determination Act,* chapter 50, of the Revised Statutes of British Columbia, 1936:—

> Are the provisions of the "Hours of Work Act" being Chapter 122 of the "Revised Statutes of British Columbia, 1936", and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent?

By its terms, the Act applies, *inter alia,* to some classes of persons that are employed by the Company at the Empress Hotel at Victoria, British Columbia, and, among other things, provides for a forty-four hour week. The majority of the Court answered the question in the affirmative and stated that the whole Act applies. O'Halloran, J.A., dissented and answered the question in the negative.

The Company, incorporated under statutes of Canada, owns and operates in Canada extensive lines of railways from coast to coast, and leases and operates the lines of

(1) [1947] W.W.R. 927; [1947] 2 D.L.R. 723.

the Esquimalt and Nanaimo Railway between Victoria and Courtenay on Vancouver Island. It owns and operates lines of steamships, plying between Victoria, on Vancouver Island, and Vancouver on the mainland, and Seattle in the State of Washington. For the purpose of its lines of railways and steamships and in connection with its said business, the Company built the Empress Hotel at Victoria, which it has operated for over thirty-eight years for the comfort and convenience of the travelling public. The operation of the hotel is a means of increasing passenger and freight traffic upon the Company's lines of railways and steamships but the hotel also caters to public banquets and permits the use of its hotel ball-room for local functions for reward. In addition to these facts, which are set out in the Order of Reference, it was stated on behalf of the Company that the Empress is but one of a chain of hotels throughout Canada, which is an integral part of its transportation system; that all employees of the Railway Company at the hotel are entitled to free transportation on the Company's railways; and that these employees are governed by and enjoy the same pension rules and privileges as other employees of the Company.

Normally the legislation in question comes within the classes of subjects by section 92 of the *British North America Act* assigned exclusively to the legislatures of the provinces—namely, Property and Civil Rights in the Provinces: *In re Legislative Jurisdiction over Hours of Labour* (1); *Attorney-General of Canada* v. *Attorney-General for Ontario* (Labour Conventions Case) (2) at 350. Does legislation in relation to the hours of labour of employees of the Company at the hotel also fall within the legislative powers given by section 91 to the Dominion Parliament.

The Company and the intervenant, the Attorney-General of Canada, contend that it falls within the expression "Railways" in head 10 of section 92, which by force of head 29 of section 91 is transferred to the latter as one of the enumerated heads so as to give the Dominion Parliament the exclusive power to legislate upon the subject: *Montreal* v. *Montreal Street Railway* (1912) A.C. 711. Head 10 reads as follows:—

(1) [1925] S.C.R. 505.
(2) [1937] A.C. 326.
(3) [1912] A.C. 333.

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kerwin J.

10. Local Works and Undertakings other than such as are of the following Classes:—

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The majority of the Court of Appeal, and apparently the dissenting judge, considered that the opening words in (*a*), "Lines of", refer as well to railways, canals and telegraphs as to "Steam or other Ships", but they are certainly inappropriate to canals and, in any event, the natural reading of the clause is to restrict "Lines of" to "Steam or other Ships". Indeed, while in a proceeding of this nature the Court cannot accept an admission upon a question of law, it may be noted that counsel for British Columbia agreed that this is the proper construction. He also stated that he could not rely upon the decision in *Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (1), referred to in the reasons of the majority of the Court of Appeal, and I agree with his submission that that case is of no assistance.

These matters, however, are merely preliminary to the solution of the question whether undertakings such as railways include the business of an hotel proprietor and operator. The Company may under its special Acts engage in many activities and in fact section 8 of chapter 52 of the Dominion Statutes of 1902 provides:

8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient.

But, while " 'Undertaking' is not a physical thing, but is an arrangement under which of course physical things

(1) [1915] A.C. 152.

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kerwin J.

are used", *In re Regulation and Control of Radio Communication in Canada* (1) at 315, yet, however greatly the operation of the Empress Hotel may contribute to the success of the Company's railway activities, it is impossible to say that an hotel business is part of a railway undertaking within the ambit of head 10.

Merely because the Company has been endowed by its creator, the Dominion, with power to enter into various fields of endeavour, it cannot have been intended by the *British North America Act* that all those fields which the Company might choose to occupy should be merged in its main undertaking—railways. The mere fact that it was enabled to venture into other activities does not permit it to claim that because it integrated these activities with those of its main business, the former thus became part and parcel of its railways. While as to one point the decision of the Judicial Committee in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (2), is as to the effect of a declaration by Parliament under paragraph (*c*) of head 10 of section 92, the remarks of Duff J., as he then was, speaking on behalf of the Committee, at 207 and 208, are important to the point now under consideration. After pointing out that in 1905, by an Act of Parliament, the "railway" of the Esquimalt and Nanaimo Railway Company was declared to be "a work for the general advantage of Canada" and that the word "railway" in this statute signified by force of s. 2, subsec. 21, of the *Dominion Railway Act* (R.S. Can. 1906, c. 37):

Any railway which the company has authority to construct or operate, and * * * all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct.

He continues:—

Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the *British North America Act,* 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part

(1) [1932] A.C. 304. (2) [1922] 1 A.C. 202.

1948 CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA — Kerwin J.

of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authorty was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

For the same reasons the operation of an hotel is not necessarily incidental to a railway undertaking. Such cases as *Canadian Pacific Railway* v. *Notre Dame de Bonsecours* (1), *Madden* v. *Nelson and Ford Sheppard* (2) and *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (3), dealt with things or circumstances applicable strictly to railways and their operation.

It was next contended that the hotel had been declared to be for the general advantage of Canada so as to bring it within clause (*c*) of head 10 of section 92, and reliance was placed upon sections 5 and 6 of the present *Railway Act,* R.S.C. 1927, chapter 170. Section 5 provides in effect that the Act shall apply to all persons, railway companies and railways (with certain exceptions) within the legislative authority of the Parliament of Canada, and section 6 enacts that the provisions of the Act shall, without limiting the effect of section 5, extend and apply to

> (*c*) every railway or portion thereof * * * and every railway or portion thereof now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby deemed to be a work for the general advantage of Canada.

We were then referred to subsection 21 of section 2 of the *Railway Act*:—

> (21) "railway" means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway;

The contention that "other structure", or any of the other words, include an hotel cannot prevail as the latter does not fall within the genus of the previously mentioned things which the definition of railway is stated to include. There is no declaration by Parliament under clause (*c*) of head 10 as to hotels and, on this branch of the matter, the decision in *Wilson* v. *Esquimalt,* already referred to, is conclusive.

(1) [1899] A.C. 367.
(2) [1899] A.C. 626.
(3) [1907] A.C. 65.

The hours of work and other working conditions of the Company's employees at the Empress Hotel are included in a collective bargaining agreement negotiated and signed by the bargaining representatives of such employees and the Company and provide, *inter alia*, that the employees shall work a forty-eight hour week. The agreement became effective September 1, 1945, for a period of one year and thereafter subject to termination on thirty days' notice in writing from either party, and no notice has been given. Under Dominion Order in Council P.C. 1003 dated 17th February, 1944, the Wartime Labour Relations Board was established by the Dominion. This Order in Council was passed under the authority of the *War Measures Act*, R.S.C. 1927, chapter 206, and continued in effect under *the National Emergency Transitional Powers Act*, 9-10 George VI (1945) (1st Session) chapter 25, by Order in Council P.C. 7414 and further continued in effect by (1947) 11 George VI, chapter 16. Finally, it was continued in force by Order in Council P.C. 5304, issued December 30, 1947, to March 31, 1948.

In the meantime and in fact prior to the agreement between the Company and its hotel employees, the Province had passed chapter 18 of the Statutes of 1944, by section 4 whereof Dominion Order in Council P.C. 1003, referred to above but called Dominion Regulations in the Act "shall apply in the case of employees whose relations with their employers in matters covered by the Dominion Regulations are ordinarily within the exclusive legislative jurisdiction of the Legislature in respect of their relations with their employers and to the employers of all such employees in their relations with such employees and to trade-unions, employees' organizations, and employers' organizations composed of such employees or employers." It is sufficient to say that whatever view may be taken as to the legal power which originally gave the agreement vitality, the latter may now operate only to the extent that it does not conflict with the *Hours of Work Act* as amended.

Finally, reference is made to chapter 33 of 23-24 George V, providing for co-operation between the Canadian National Railways and the Canadian Pacific Railway system, in which "Pacific Railways" is stated to mean the Canadian Pacific Railway Company as owner, operator, manager and otherwise and all other companies which are

1948

CANADIAN PACIFIC RAILWAY Co. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kerwin J.

elements of the Company's transportation, communication, and hotel system. The title of the Act is indicative of its purpose but nothing of importance turns upon its provisions except the words "hotel system" and it is only because of an amendment, chapter 28 of the Statutes of 1947, assented to on June 27th of that year, that the Company suggests the argument now under consideration. By this Act, section 27A (1) is added to the principal enactment and reads as follows:—

> 27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representatives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport.

The agreement above referred to has been filed in the office of the Minister of Transport. It will be noticed that this statute was enacted not only after the date of the reference to the Court of Appeal but also after the question had been answered. However, accepting the view that an answer is desired in the light of the present position of affairs, it follows from what has already been said that the Dominion statute of 1947 is ineffective so far as concerns any employees of the Empress Hotel.

The appeal is dismissed.

The judgment of Taschereau and Estey JJ. was delivered by:

ESTEY J.:—The Government of British Columbia, under the provisions of the *Constitutional Questions Determination Act,* R.S.B.C. 1936, c. 50, submitted to the Court of Appeal of that province the following question:

> Are the provisions of the *Hours of Work Act* being Chapter 122 of the "Revised Statutes of British Columbia, 1936", and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent?

The majority of the learned judges of that Court, O'Halloran J.A., dissenting, answered this question in the affirmative. The Canadian Pacific Railway Company appeals from that decision.

The *Hours of Work Act* provides that, subject to certain exceptions, the working hours shall not exceed eight in the day and forty-four in the week. The appellant does not dispute that legislation of this type is intra vires of the province but rather contends that it cannot affect the employees in the Empress Hotel, owned and operated as part of its railway and steamship system.

The respondent on its part concedes that the appellant owns and operates a railway throughout Canada which is subject to Dominion legislation only, but contends that its hotels are not a part of its railway within the meaning of section 92(10) of the *British North America Act.*

The relevant provisions of the *British North America Act* are sections 91(29) and 92(10), reading as follows:

91. * * * the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—

* * *

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

* * *

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—

* * *

10. Local Works and Undertakings other than such as are of the following Classes:—

(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

* * *

(*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The appellant's first submission is that hotels are an integral part of its system and included in the term "railway" as that word is used in 92(10) (*a*). The Privy Council has not defined the word "railway" as used in section 92(10) but has indicated in a general way the meaning of the term when defining the jurisdiction of the Parliament of Canada in the field of railway legislation.

Lord Watson in *C.P.R.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) at p. 372; 1 Cam. 558 at p. 562, stated:

> The *British North America Act,* whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation", strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament.

In *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (2) the Privy Council held that the Dominion Parliament had full power to authorize the taking of provincial Crown lands by the company "for the purposes of this railway." This case was followed in *Attorney-General for Quebec* v. *Nipissing Central Ry. Co.* (3). In *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada* (4), the Privy Council used the phrase "truly railway legislation" and "truly ancillary to railway legislation". In this Court in *In re Alberta Railway Act* (5), Duff, J. (later Chief Justice) at p. 38 stated:

> In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority.

Throughout the foregoing cases the phrases "legislative control of * * * railway *quâ* railway", " 'railway legislation' strictly so called", "truly railway legislation", "for the purposes of this railway" indicate that, while the meaning of the term "railway" is not restricted to the roadbed and the rails, it cannot be given a meaning sufficiently wide as to include the term "hotel". Moreover, this seems to be in accord with the definition found in the Oxford Dictionary:

> Railway * * *
>
> * * *

(1) [1899] A.C. 367.
(2) [1906] A.C. 204; 1 Cam. 624.
(3) [1926] A.C. 715; 2 Cam. 411.
(4) [1907] A.C. 65; 1 Cam. 636.
(5) (1913) 48 S.C.R. 9.

2. A line or track consisting of iron or steel rails, on which carriages or wagons conveying passengers or goods are moved by a locomotive engine. Hence also, the whole organization necessary for the conveyance of passengers or goods by such a line, and the company or persons owning or managing it.

While it is true that definitions subsequently adopted in railway legislation of Canada cannot affect the meaning of the term "railway" as it appears in the *British North America Act,* it is not without significance to observe that in 1939 the Privy Council referred to the present definition of "railway" (The *Railway Act,* 1927 R.S.C., c. 170, s. 2(21)) as follows:

"Railway" is defined by the Act (s. 2, sub-s. 21) in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances. *Montreal Trust Co.* v. *Canadian National Ry. Co.* (1).

It would appear, therefore, that neither in legislation, decision nor in the dictionary has the word "railway" acquired a meaning sufficiently broad and comprehensive to include hotels.

Moreover, the hotel business antedates that of the railway and has generally been regarded as a separate and distinct business. While it is true that for the travelling public hotels are necessary, they are not an essential or an integral part of the means of conveyance. Indeed, it was not until 1902 that the Parliament of Canada enacted The *Canadian Pacific Railway Act, 1902,* (1901-2 S. of C., c. 52) authorizing the company, for the purposes of its railway and steamships and in connection with its business, to acquire and operate hotels.

If in fact the company did operate hotels prior to that date, it did so, as was suggested at the hearing, mainly in the mountain sections, in the days before Pullman and dining cars and on a much smaller and entirely different basis from that which the company's hotels are operated today. Moreover, the material indicates that the Empress Hotel was built about thirty-eight years ago and therefore under the authority of the 1902 enactment. The conclusion appears to be unavoidable that hotels are not included under the term "railway" as used in section 92(10) (*a*).

(1) [1939] A.C. 613 at 625.

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Estey J.

The appellant submits that under section 92(10) (*c*) the Parliament of Canada by enacting section 6(*c*) of *The Railway Act*, (1927 R.S.C., c. 170), has declared the appellant railway "a work for the general advantage of Canada" and that the term "railway" in that declaration includes hotels, and therefore the latter are by virtue of the provisions of 91(29) and 92(10) (*c*) of the *British North America Act* under the legislative jurisdiction of the Dominion. *City of Montreal* v. *Montreal Street Ry.* (1); *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (2). It therefore becomes pertinent to determine whether hotels are included in this declaration.

6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to

* * *

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company * * * is hereby declared to be a work for the general advantage of Canada.

A somewhat similar declaration has been included in all of the railway Acts since 1888 and although the language in successive enactments has varied, it has always been restricted to a declaration with respect to the railway, indeed, in the earlier enactments to the "lines of the railway", and there is nothing in these statutes to suggest that hotels are included under the term "railway". Nor is there anything in the present section 6 (*d*) to suggest that the word "railway" should be there construed otherwise than as defined in the interpretation section of the present statute, which reads:

2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires—

* * *

(21) "railway" means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway.

The appellant submits that although hotels are not specifically mentioned, they are included in either of the phrases "and works connected therewith" or "other structure" as they appear in section 2(21). It is important

(1) [1912] A.C. 333; 1 Cam. 711. (2) [1922] A.C. 202; 2 Cam. 244.

to note that both of these phrases were part of the definition in the Act of 1888 and that notwithstanding this, Parliament has added many words since that time.

The word "railway" was first defined in *The Railway Act* of 1868 (31 Vict., c. 68, s. 5(16)):

5. (16) The expression "the Railway" shall mean the Railway and works by the Special Act authorized to be constructed.

This definition was substantially repeated until in *The Railway Act*, 1888, (51 Vict., c. 29), "railway" is defined as:

2. (*q*) The expression "railway" means any railway which the company has authority to construct or operate, and includes all stations, depots, wharves, property, and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act.

In *The Railway Act* of 1892, (55-56 Vict., c. 27) the words "rolling stock" and "equipment" were inserted into this definition after the word "wharfs". In *The Railway Act* of 1903, (1903 S. of C., 3 Edw. VII, c. 58), further additions were made by inserting the words "branches" and "sidings" before the word "stations", the word "stores" after the word "equipment", the words "real or personal" after the word "property" and the word "tunnel" after the word "bridge". Thereafter the definition remained substantially the same until in 1919 (9-10 Geo. V, c. 68, s. 2(21)), the words "and, except where the context is inapplicable, includes street railway and tramway" were added.

This definition is continued in the present Act R.S.C., 1927, c. 170, s. 2(21). It is significant that in 1903 when Parliament deemed it desirable to insert into the definition the words "branches", "sidings", "stores" and "tunnel", it did not include hotels, notwithstanding the fact that in the previous year Parliament had enacted *The Canadian Pacific Railway Act, 1902* (1901-2 S. of C., c. 52), and thereby for the first time authorized the company to acquire and operate hotels.

If Parliament had intended that these phrases should have been so comprehensive in meaning as to include hotels, these same phrases would have included all of the words that have been added since 1888. The history of section 2(21) indicates that Parliament did not entertain any such view and therefore from time to time, and more

1948 CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA — Estey J.

particularly in 1903, inserted the words above mentioned, all of which indicate that these phrases should be interpreted not to include hotels, but rather in accord with the *ejusdem generis* rule under which, having regard to the enumerations, would not include hotels.

The appellant submits that *The Canadian Pacific Railway Act, 1902,* (1901-2 S. of C., 2 Edw. VII, c. 52), and *The Canadian National-Canadian Pacific Act, 1933,* (1932-33 S. of C., 23-24 Geo. V, c. 33), read in association with *The Railway Act* demonstrates that its hotels are included in the railway. The Canadian Pacific Railway Company was incorporated by Special Act of the Parliament of Canada in 1881 (44 Vict., c. 1), and by letters patent under the Great Seal of Canada in the form set out in the schedule of that Act; and by section 17 of *Schedule A* to that Act it is provided that:

> 17. *"The Consolidated Railway Act, 1879",* in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.

Then in section 7(10) of *The Consolidated Railway Act, 1879,* (1879, 42 Vict., c. 9), the company is authorized:

> 7. (10) to construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act.

This subsection appears among a large number of subsections detailing powers of the company and immediately follows authority to erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, etc., to make branch lines and to manage same, and it is suggested that this very general language justifies the inclusion of hotels as an integral part of a railway. Clauses of this type following specific authorizations are obviously intended to authorize some matter closely related and necessary to the authority already given, but do not and are not intended to give authority for the undertaking of works such as hotels.

Since Confederation successive railway Acts have expressly provided that the provisions thereof are to be read into and form a part of the Special Acts, except in so far as they may be inconsistent with the provisions of the latter. In the present *Railway Act,* 1927 R.S.C., c. 170, it is provided:

3. Except as in this Act otherwise provided,

(*a*) this Act shall be construed as incorporate with the Special Act; and

(*b*) 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 it is necessary to give effect to such Special Act, be taken to override the provisions of this Act.

The phrase "Special Act" as used in the above quoted section 3 is defined in section 2(28):

2. (28) "Special Act", when used with reference to a railway, means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes

(*a*) all such Acts,

(*b*) with respect to the Grand Trunk Pacific Railway Company, the National Transcontinental Railway Act, and any amendments thereto, and any scheduled agreements therein referred to, and

(*c*) any letters patent, constituting a company's authority to construct or operate a railway, granted under any Act, and the Act under which such letters patent were granted or confirmed;

The Canadian Pacific Railway Act, 1902, (1901-2 S. of C., c. 52) is a Special Act within the meaning of sections 2(28) and 3(*a*), *supra,* and therefore *The Railway Act of 1927* "shall be construed as incorporate with" it. Sections 6(*c*) and 2(21), (both already quoted), are therefore to be construed as part of the 1902 Act.

It will be observed that the definition 2(21) applies not only to *The Railway Act* itself, but to any Special Act unless the context otherwise requires. Nothing appears in the context of section 8 of *The Canadian Pacific Railway Act, 1902,* to justify a construction of the word "railway" as therein used other than as defined in section 2(21). Section 8 reads in part:

8. The Company may, for the purposes of its railway and steamships and in connection with its business * * * acquire * * * hotels and restaurants * * * and may carry on business in connection therewith for the comfort and convenience of the travelling public * * *

This section permits and empowers but does not obligate the Canadian Pacific Railway Company to acquire and operate hotels as an essential or an integral part of its railway. The language of the section appears to negative that idea. It provides that "the company may, for the

1948

CANADIAN PACIFIC RAILWAY Co. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Estey J.

purposes of * * * in connection therewith". This language negatives the appellant's submission and suggests that these hotels may be operated in association with the railway and "for the comfort and convenience of the travelling public", but not as a necessary or indispensable part of the railway and steamship system. Moreover, in this section the phrase "travelling public" is not restricted to those enjoying the company's lines, and while the statute authorizes these hotels for the purpose of its railway and steamship business and to be located as specified, the statute does not limit or give any preference with respect to the accommodation, and indeed, in practice the hotels cater to the public.

The appellant emphasizes the provisions of *The Canadian National-Canadian Pacific Act, 1933,* (1932-33, 23-24 Geo. V, c. 33), as a Special Act and submits that its provisions support its contention that hotels are included within the term "railway" as used in the declaration embodied in section 6(*c*). It is an Act respecting the Canadian National Railway Company and to provide for co-operation between the Canadian National Railways and the Canadian Pacific Railway system. If we assume that it is a Special Act as the appellant contends, it does not follow that it includes the hotel system of the appellant so as to bring hotels within the terms of section 6(*c*). The Act in section 3(*g*) defines "Pacific Railway" to include the hotel system. It does not follow, however, that this definition, made for the purpose of that Act, alters or changes in any way the definition of the word "railway" in section 2(21) or as it is used in section 6(*c*), both of which are to be read as parts of the *Canadian National-Canadian Pacific Act.* Moreover, a perusal of the 1933 Act, in so far as it affects the appellant company, indicates that its intent and purpose is to assist the appellant and the Canadian National Railways in working out a scheme of co-operation in all of their operations as defined under the respective headings "Pacific Railway" and "National Railway". It does not purport to alter or affect the powers or obligations, nor the general character of the business of the appellant company. It would rather appear that Parliament in 1933 intended that the definition of "Pacific Railways" and "National Railways" should be applied only to the relevant sections as they are set out in that Act, but not as applicable to the provisions of *The Railway Act,* though they "shall be construed as incorporate" therewith (section 3, Railway Act, *supra*).

The appellant submits that in any event legislation with respect to its hotels is necessarily incidental or ancillary to effective legislation in respect of its railway system and therefore provincial legislation which may be intra vires of the province in general is not applicable to the appellant's hotels. The scope or field of Dominion legislation under this head is indicated in *Attorney-General for Ontario* v. *Attorney-General for The Dominion,* (Ontario Liquor License Act) (1). In that case the Privy Council pointed out that the framers of the B.N.A. Act contemplated that in the exercise of the enumerated powers under section 91 the Dominion would be called upon to pass legislation necessarily incidental to these powers in relation to matters which prima facie were within the exclusive legislative jurisdiction of the province under the enumerated heads of section 92. It was because of this that the concluding part of section 91 was enacted providing that any matter included in one of the enumerated classes under 91 should not be deemed to come within the classes enumerated under section 92. At p. 359 (1 Cam. 490), Lord Watson states:

> It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91.

In the application of the foregoing principle the Privy Council has recognized the impossibility of laying down any general principle which would be applicable to all of the specified heads under 91. *John Deere Plow Co.* v. *Wharton* (2). It has rather indicated that each case must be determined upon its own facts. Notwithstanding this, the judgments already delivered are of assistance in determining the issue in any given case.

As already pointed out, the Privy Council in determining the jurisdiction of the Dominion in respect to railways has used such phrases as "*quâ* railway", "railway legislation strictly so called" and "truly railway legislation". It is

(1) [1896] A.C. 348; 1 Cam. 481 (2) [1915] A.C. 330; 1 Cam. 806

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Estey J.

the railway as a vehicle of transportation that is envisaged throughout and if legislation with respect to hotels is necessarily incidental thereto it must be within the authorities established that the transportation system would be in respect of its passenger service, in any practical sense, ineffective.

Mr. Justice Duff (later Chief Justice) in *B.C. Electric Rly. Co.* v. *V.V. and E. Rly. & Navigation Co. and The City of Vancouver* (1), at p. 120 stated:

In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. *The City of Montreal* v. *The Montreal Street Railway Co.*, (1912) A.C. 333, at pages 342-345.

The conclusion arrived at by Mr. Justice Duff was accepted by the Privy Council: (1914) A.C. 1067.

In *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2), the Dominion had by legislation required the operator of a fish cannery to obtain a licence. In support of this legislation it was contended that the operation of canneries and curing establishments were both inseparably connected with the conduct of fisheries as contemplated in section 91(12), "sea coast and inland fisheries", or that it was reasonably necessary or ancillary to effective legislation under section 91(12). Both contentions were dismissed by the Privy Council and the legislation held ultra vires. As to the first, it was stated at p. 121, (Plaxton, p. 10):

In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."

As to the second, at p. 121-2, (Plaxton, p. 11):

It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject-matters.

That hotels are from the appellant's point of view desirable and serve a useful purpose may be admitted, but it does not follow that they are essential to the appellant's railway and steamship system in the sense that the latter can only be effectively operated and maintained on the

(1) (1913) 48 S.C.R. 98.

(2) [1930] A.C. 111; Plaxton, 1.

basis that legislation with respect to hotels is necessary and incidental to effective railway legislation. That such legislation is necessary and incidental does not appear from the nature and character of the business of the railway and such has not been established as a fact in this particular case.

The foregoing is not affected by the provisions of *an Act to amend the Canadian National-Canadian Pacific Act, 1933*, (1947 S. of C., c. 28), which added section 27A providing as follows:

27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees * * * shall be such as are set out in any agreements * * * made * * * between * * * Pacific Railways * * * and the representatives of interested employees * * *

In the view already expressed to the effect that hotels are not included in the term "railway" nor that legislation in respect to hotels is necessarily incidental or ancillary to railway legislation within section 92(10), this section 27A can have no application to hotels, and in so far as it may purport to do so is ultra vires of the Parliament of Canada. *City of Montreal* v. *Montreal Street Ry. Co., supra*; *B.C. Electric Ry. Co. Ltd.* v. *V.V. and E. Ry. & Navigation Co.*, (1).

I am therefore in agreement with the majority of the learned judges in the Appellate Court that the question submitted should be answered in the affirmative.

RAND J.:—The Canadian Pacific Railway Company was incorporated by Dominion charter under the authority of and with the effect declared by chap. 1 of the Statutes of Canada, 1881. Later on, in 1883, chap. 24 purported to declare the railway as a system, including branch lines, to be a work for the general advantage of Canada. Chap. 52 of the statutes of 1902 enacted that:—

8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway, and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient.

(1) [1914] A.C. 1067.

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Rand J.

By the Act of 1881 the provisions of *The Consolidated Railway Act, 1879,* are, generally, incorporated into the charter of the company. Section 7 of the Consolidated Act vests the company with authority.

(8). To erect and maintain all necessary and convenient *buildings,* stations, depots, wharves, and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the railway;

* * *

(10). To construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act.

In *The Railway Act, 1919,* chap. 170 of the Revised Statutes, 1927, "Special Act" with reference to a railway is defined as meaning "any Act under which a company has authority to construct or operate a railway or which is enacted with special reference to such railway, whether heretofore or hereafter passed * * * ." By section 6 of this Act its provisions extend and apply to

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada * * *; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

Under these powers, the railway has been established throughout the Dominion and with it a number of hotels. One of them was built about 1909 in Victoria, B.C., a point reached by steamship services of the company as well as by its railway system. The company built the hotel "for the purpose of its lines of railway and steamships and in connection with its said business" and it is operated "for the comfort and convenience of the travelling public." It "is available for the accommodation of all members of the public as a public hotel." It "caters to public banquets and permits the use of its hotel ballroom for local functions, for reward." With 573 rooms, it provides accommodation for large numbers of travellers and tourists from Canada, the United States of America and elsewhere. Its operation is a means of increasing passenger and freight traffic upon the company's lines of railway and steamships. Meals are prepared and served in the hotel by the catering department. There are also hotel clerks, bookkeepers and other persons engaged in clerical work.

The controversy concerns a labour agreement between the employees of the hotel and the company. Under section 6 of the *Wartime Labour Regulations*, made by Order in Council P.C. 1003 dated February 17, 1944, the War Labour Relations Board (National) certified the Canadian Brotherhood of Railway Employees and other Transport Workers, Empress Division No. 276 and certain persons named in the Order, to be the bargaining representatives for the employees except certain of the latter named in the certificate.

Following that action, a collective agreement was negotiated which became effective on September 1, 1945 to continue for one year and thereafter to be subject to termination on thirty days' notice by either party. By this agreement the rates of pay, hours of work and other terms and conditions of employment were dealt with, and it has remained and is now in force.

By chap. 122 of the Revised Statutes of British Columbia (1936) called the *Hours of Work Act* the hours of labour of hotel clerks, including room clerks or persons otherwise engaged in clerical work in hotels, and employees in the catering industry, among others, are prescribed. General administrative powers are given for carrying the provisions of the Act into effect. The question raised is whether or not these provisions apply to and bind the company in respect of such employees and if so, to what extent.

The case for the appellant is put on several grounds. It is said, first, that the hotel is an integral part of the railway; that the relations between the company and the hotel employees are matters essential to the management of the entire enterprise; and that consequently they are within the exclusive legislative jurisdiction of the Dominion. If this is not so, then the regulation of the terms of service of the hotel employees is necessarily incidental to railway legislation and Parliament in the exercise of such powers has occupied the field. Finally it is said that the hotel has been declared to be a work for the advantage of Canada, and is so within the same exclusive jurisdiction.

1948

CANADIAN PACIFIC RAILWAY CO. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Rand J.

The first point involves the view that every authorized activity of the company which may promote the interest of the railway and is carried on under the general administration becomes part of its works and undertaking within the meaning of section 92, (10) (*a*). The company no doubt is bound to furnish reasonable accommodation to persons who travel on its lines. In the long carriage from the Atlantic to the Pacific reasonable provision of facilities for both food and rest and incidental convenience is an integral part of the service it has undertaken toward the public. It is conceivable, also, that dining rooms and sleeping quarters along its lines, certainly in the early days of its operation, might well have come within its public obligations towards passengers and to have been a necessary part of its railway functions. But I think it impossible to bring this hotel within that accommodation. It is a public hotel to which all travellers have a right of access. It may no doubt serve the convenience of patrons of the company's railway, as well as of the steamship and communication services, for all of which it possesses advertising value as well; but it is a distinct and separate business, not different from a score of means by which subsidiary offices having similar effects could be rendered. As a public hotel, the common law obligations would, in the absence of legislation, bind it and it would seem an extraordinary proposition that, so far, the law of innkeepers as the substantive law of this constituent element would now be brought within Parliamentary jurisdiction over railways. But to say that legislation in relation to such collateral adjuncts even in its limited application as here to employees, is railway legislation strictly, is, I think, to confuse the total business of the company with its transportation business. Its corporate organization is a creation of Parliament and under the residual power of section 91 its capacities may be unlimited. But from that source Parliament draws power to deal only with essential corporate incidents; and none of the enumerated heads of section 91 apart from 29 has been suggested as capable of supplementing that power to the extent of supporting any legislation relied on here.

If not railway legislation strictly, can the Dominion enactment dealing with the working hours of these employees be deemed necessarily incidental to railway legislation as that expression is used in: *Attorney-General of Ontario* v. *Attorney-General of Canada* (1); *Attorney-General of Ontario* v. *Attorney-General of Canada* (2) at p. 360; *City of Montreal* v. *Montreal Street Ry.* (3) at p. 343; *Reference re Natural Products Marketing Act* (4) at p. 414; *Attorney-General of Canada* v. *Attorney-General of British Columbia* (5).

The legislation is section 27(A) of *The Canadian National-Canadian Pacific Act, 1933,* chap. 33 of the Statutes of Canada (1932-33) enacted by chap. 28 of the Statutes of 1947:—

27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representatives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport.

(2) Nothing in this section shall affect the operation of any other Act of the Parliament of Canada or regulations thereunder.

For the purposes of that section the expression "Pacific Railways" includes the hotels and the hotel department of the company.

No doubt the conception of an articulated organization of many elements all contributing in greater or less degree to a total result is attractive by its symmetry and unity. The analogy of *Toronto Corporation* v. *The Bell Telephone Company* (6) is urged but there the question was simply whether for the purposes of legislation the local telephone services were to be deemed a separate business or whether the entire services were to be taken as one. The true analogy to that case lies in railway operations proper both within and without the provinces. But if a telephone company should embark on the business of manufacturing radio or television receiving sets, a question of a different sort would be presented. As appears from the answers to the Reference on Hours of Labour [1925] S.C.R. 505, general legislation on that subject is prima facie valid

(1) [1894] A.C. 189.
(2) [1896] A.C. 348.
(3) [1912] A.C. 333.
(4) [1936] S.C.R. 398.
(5) [1930] A.C. 111.
(6) [1905] A.C. 52.

1948

CANADIAN PACIFIC RAILWAY Co. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Rand J.

either under head 13 or 16 of section 92, and where, as here, those matters are in relation to a public hotel it would be unique that in effect ownership of the hotel would fix its legislative subjection.

In dealing with this category of Dominion power, it is well to keep in mind the distinction between subject matter and legislation relating to it. Where works or undertakings as such are brought within Dominion jurisdiction, the delimitation of the field for legislative purposes involves the consideration of property and functions which go to make up the specific subject. But the incidental necessity with which we are dealing arises from the exercise of admitted powers and its purpose is to make them effective or to prevent their defeat: that is, that on a fair and reasonable view of the exclusive field, the ancillary provisions are essential to give the main legislation a practical completeness depending on the intimacy of underlying facts and relations: *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1) where at p. 68 Lord Dunedin says "it cannot be considered out of the way that the Parliament which calls them (railway corporations) into existence should prescribe the terms which were to regulate the relations of the employees to the corporation."

Applying that criterion to the situation of this hotel, I am unable to accept the view that, whether the hotel is considered alone or as one of a chain or system of hotels, and notwithstanding that the central general administration of all under uniform regulations would be practically convenient and advantageous, an ancillary power even restricted to the limited relations of these employees, can be said to be necessary to obtain the full effect of legislation relating to or to secure a like effect of the substantive law applicable to the company's transportation works or undertaking.

The last point is whether the hotel has been the subject of a declaration under section 92, head 10 (*c*). This arises, it is said, from two legislative sources. The first is the declaration of section 6 of *the Railway Act, 1919* and its predecessor provisions. The definition of "railway" in section 2(21) of that Act includes "property, real or personal, and works connected therewith, and also any railway

(1) [1907] A.C. 65.

bridge, tunnel or other structure which the company is authorized to construct". It is argued that the hotel is within either "property" or "works" or "structure". Then, it is said that *The Canadian National-Canadian Pacific Act,* being a special Act and so incorporating the Railway Act of 1919, presents to the provisions of the latter the definition of "Pacific Railways" therein which includes the hotel system; and that the declaration of section 6 of *The Railway Act* automatically embraces that system distributively with the railway proper as a work under section 92(10) (*c*).

The railway as it originated in 1881 was a "work or undertaking connecting two or more provinces", within head 10(*a*). Under 10(*c*) a work must be wholly confined within one province and at the time within provincial legislative jurisdiction to be the subject of a declaration and the so-called declaration of 1883 as well as those later so far as they purport to deal with the railway as a whole have been no more than ineffectual motions. It seems impossible moreover to construe any words in the various definitions of "railway" quoted, such as "property" or "works" or "structures", to include public hotels as such. These words deal with the physical structures of the railway proper; and the legislaiton of 1902, although said to have provided powers more by way of caution than necessity, supports that view. Whatever may have been the actual situation in Great Britain in 1867 of railway hotels, the history of the railways of the United States, which our own development has followed closely, has never associated hotels with railway functions. I am unable, therefore, assuming that a hotel can be a "work" within 10(*c*), to agree that the hotel here has been drawn by any of these declarations into the Dominion orbit; and that in conjunction with the legislation of 1933 such a result could have been brought about is, I think, somewhat fantastic. The expression "Pacific Railways" is nowhere used in the *Railway Act* and could not be connected with any of its provisions. The relation of special Acts to the *Railway Act* arises under section 3 of the latter which provides that "except as in this Act otherwise provided,

(*a*) This Act shall be construed as incorporated with the Special Act; and

(*b*) Where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject matter,

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kellock J.

the provisions of the Special Act shall, insofar as is necessary to give effect to such a Special Act, be taken to override the provisions of this Act.

The purpose of this provision is obvious and it leaves the language of each Act interpretatively unaffected by that of the other.

The appeal should therefore be dismissed.

KELLOCK J.:—The first submission on behalf of the appellant is that by reason of section 91 (29) and section 92(10) (*a*) of the *British North America Act*, the field covered by the provincial statute here in question, is wholly withdrawn from the legislative jurisdiction of the province, the hotels of the appellant being, it is said, included in the term "railways". It is submitted, and I think correctly, that the words "lines of" with which clause (*a*) of section 92(10) begins, apply only to "steam and other ships" and not to the other things enumerated in the clause.

In my opinion there is nothing to support the appellant's contention with respect to the import of the word "railways" in the statute. It is railway legislation "strictly so-called" which is here committed to the Dominion; *C.P.R.* v. *Bonsecours,* (1) per Lord Watson at 372. In the first edition of Murray, "railway" is defined as "A line or track consisting of iron or steel rails on which carriages or wagons conveying passengers or goods are moved by a locomotive engine, hence also, the whole organization necessary for the conveyance of passengers or goods by such a line and the company of persons owning or managing it". Sedgewick J. in giving the judgment of himself and Strong C.J., in *Grand Trunk* v. *James* (2) said at p. 432:

Everyone knows what the word "railway" ordinarily means; ("a way on which a train passes by means of rails"), quoting Huddleston, B., in *Doughty* v. *Firbank,* 10 Q.B.D., 358 at 359.

Counsel for the appellant sought support for his position in Canadian railway legislation commencing with the Act of 1868, 31 Vict., *cap.* 68. He referred to section 7, subsections 8 and 10, as illustrating that at the time of the passing of the Constitution Act, "railways" were regarded as inclusive of hotels. Those subsections are as follows:

7. The Company shall have power and authority:

* * *

(1) [1899] A.C. 367. (2) (1901) 31 S.C.R. 420.

(8) To erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the Railway;

* * *

(10) To construct, and make all other matters and things necessary and convenient for the making, extending and using of the Railway, in pursuance of this Act, and of the Special Act;

For my part I find nothing in these subsections which indicate any legislative intention of the character contended for. The words "necessary for the accommodation and use of the passengers, freight and business of the Railway" in subsection 8 do not, in my opinion, apply to the whole of the subsection but only to those items following upon the word "purchase". In any event there is no evidence that a hotel was a "necessary" building in connection with railways in Canada or elsewhere in 1867 and I think the word "convenient" in subsection 8 is not used in any larger sense than in subsection 10, where it is only what is convenient for the making, extending and using of the "railway" which is authorized. "Railway" is defined in section 5, subsection 16, as "the railway and the works by the Special Act authorized to be constructed." We have no evidence that up to 1868 any special railway legislation had authorized the construction of a hotel, and I find nothing in the Special Act relating to the appellant, 44 Vict. (1881) *cap.* 1, which contains such authority.

In fact it was not until the Act of 1902, 2 Ed. VII, *cap.* 52, section 8, that the appellant was authorized to operate hotels and to "carry on business in connection therewith for the comfort and convenience of the travelling public". It is noteworthy that by the following section, section 9, the appellant was also, in order to utilize its land grant, (which by clause 11 of the Schedule to the Act of 1881, extended for twenty-four miles on each side of the "railway") authorized to engage in general mining, smelting and reduction, the manufacture and sale of iron and steel and lumber and timber manufacturing operations. And by section 11 it was authorized to exercise the powers of an irrigation company. I do not discover in any of this legislation an intention that any of the matters to which the

1948

CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kellock J.

legislation of 1902 extended, was intended to be included in the word "railways" as used in the legislation of 1867. I think this contention fails.

It is next contended that appellant's hotels, including the Empress, have been declared to be works for the general advantage of Canada within clause (*c*) of section 92 (10). Counsel for the appellant points first to *The Consolidated Railway Act* of 1879, 42 Vict., *cap.* 9, section 5 (16), which defines "the railway" as meaning "the railway and the works by the Special Act authorized to be constructed". He then refers to clause 17 of Schedule "A" to the Act of 1881 which provides that the Act of 1879 insofar as applicable and not inconsistent with the provisions of the 1881 legislation and save and except as otherwise therein provided, is incorporated therewith. Down to this point of course there was no authority for the construction of hotels. Next followed the Act of 1902 and *cap.* 33 of 23-24 Geo. V. Counsel then refers to section 3(*a*) of R.S.C., 1927, *cap.* 170, which provides that that statute shall be construed as incorporate with the "Special Act", which by section 2 (28) means "any Act under which the Company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes (*a*) all such Acts". It is argued that the result of this legislation is that hotels have become an integral part of the appellant's "railway" and come within section 6(*c*) of the 1927 Act, which reads as follows:

> 6. The provisions of this Act shall * * * extend and apply to * * *
>
> (*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada * * * and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

In my opinion there is infirmity in this argument. It is sufficient to refer to one point. "Railway" is defined by section 2(21) as:

> Any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and

works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway.

Under clause (*c*) of section 92 (10) a declaration may be made only with respect to a work "wholly situate within the province"; *Toronto* v. *Bell Telephone Company* (1) at 60. The "railway" of the appellant company is not so situate. It is, however, sought to read "other structure" in section 2(21) as including a hotel and then to read section 6 (*c*) as meaning "every railway or every hotel thereof", so that there is a declaration not only as to the whole "railway" which would be ineffective, but also as to each "bridge", "tunnel", "hotel", etc.

In my opinion this is not a legitimate interpretation of the statute. Whatever the words "or portion thereof" apply to, they may not, in my opinion, be applied as appellant seeks. I do not think "structure" is to be read as including such things as hotels or mine buildings or an irrigation work. It is to be noted that it is only structures which the company is authorized to "construct" which are included. In the legislation of 1902 the company is authorized not only to "build" buildings for hotels but to "purchase, acquire or lease" them. On appellant's contention a hotel built by appellant would be included in the declaration while one purchased or acquired would not. In my opinion the structures included in section 2(21) are limited *ejusdem generis* to the ones specified in the clause. These are clearly limited, to employ the language of Lord Russell of Killowen in *Montreal Trust Co.* v. *C.N. Ry. Co.* (2) at 625: "* * * to the track and its physical appurtenances", unless the context otherwise requires. I see no such requirement in the context here in question. However the argument is put, it comes back to the question of the proper interpretation of the definition section of the Act of 1927 which, in my opinion is to be interpreted as above indicated.

In *Wilson* v. *Esquimalt* (3) also, Duff J., as he then was, in delivering the judgment of the Privy Council dealt with the definition of "railway" in the *Railway Act,* 1906, R.S.C., *cap.* 37, section 2, subsection 21. After referring to an Act of Parliament of 1905 declaring the railway of

(1) [1905] A.C. 52.
(2) [1939] A.C. 613.
(3) [1922] 1 A.C. 202.

1948

CANADIAN PACIFIC RAILWAY CO. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kellock J.

the respondent company to be a work for the general advantage of Canada, he said at page 207:

> Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

In my opinion therefore there is no basis for the contention of the appellant that with respect to the Empress Hotel such matters as hours of work are within the exclusive jurisdiction of Parliament.

It is, however, submitted that in any event such legislative jurisdiction is nevertheless necessarily incidental to effective legislation by the Dominion on a subject enumerated in section 91 and it is said that the Dominion has by *cap.* 28 of 11 Geo. VI occupied the field.

The authorities on this aspect of the matter are well known and it is not necessary to discuss them at length. In *Montreal* v. *Montreal Street Railway* (1) Lord Atkinson at 344 said with respect to such a contention, "that it must be shown that it is necessarily incidental to the exercise of control over the traffic of a federal railway * * *" that it should have the power in question there. I find no such compelling necessity in the present case. I do not think such legislation is "necessarily incidental to effective legislation by the Parliament of the Dominion" with respect to "railways"; *Attorney-General for Canada* v. *Attorney-General for Quebec* (2) at 43.

If this be so then Parliament may not give itself jurisdiction by enacting legislation such as the Act of 1947, by including in it the employees of the appellant's hotel system and in so far as it purports to do so, the legislation is, in my opinion, ultra vires. We are not called upon to deal with the question of severability, which was not argued.

(1) [1912] A.C. 333. (2) [1947] A.C. 33.

The only argument addressed to us by counsel for either of the appellants with respect to P.C. 1003 was founded upon the basis that this order depended for its application upon bringing the appellant's hotel employees within section 3(1) (*a*) or (*b*). For the reasons already given this cannot be done and in my opinion therefore the order has no application.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for Canadian Pacific Railway Co., *J. A. Wright.*

Solicitor for The Attorney-General of British Columbia, *H. Alan MacLean.*

Solicitor for The Attorney-General of Canada, *F. P. Varcoe.*