RE KANE

[1940] 1 D.L.R. 390

Nova Scotia County Court, McArthur Co.Ct.J., 30 December 1939

Indians--Constitutional Law III A--Taxes I A--Unenfranchised Indians outside Reserve--Provincial poll tax--Field occupied by Dominion.

Unenfranchised Indians resident outside a Reserve are not subject to a poll tax imposed by provincial legislation, the field of taxation in respect to Indians having been occupied by the Dominion Parliament in ss. 102-3-4 of the *Indian Act*, R.S.C. 1927, c. 98, and it being incompetent to a provincial Legislature to supplement, change or restrict such Federal enactments.

Cases Judicially Noted: *G.T.R. v. A.-G. Can*., [1907] A.C. 65; *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden v. Nelson*, [1899] A.C. 626, apld.

Statutes Considered: *B.N.A. Act*, ss. 91(24), 92(2), (8); *Indian Act*, R.S.C. 1927, c. 98, ss. 102, 103, 104; *Sydney City Charter*, 1903 (N.S.), c. 174, s. 100.

Indians--Taking person of Indian under civil process--Provincial statute.

The person of an Indian may not be taken under civil process issued under a provincial statute which permits the imprisonment of a debtor only in default of goods whereon to levy, the Indian's only property being exempt from seizure under s. 105 or the *Indian Act*, R.S.C. 1927, c. 98.

Cases Judicially Noted: *Ex p. Tenasse* (N.B.C.A.), [1931] 1 D.L.R. 806, 2 M.P.R. 523; *Re Caledonia Mllg. Co. v. Johns*, 42 O.L.R. 338, folld.

Statutes Considered: *Indian Act*, R.S.C. 1927, c. 98, s. 105; *Sydney City Charter*, 1903 (N.S.), c. 174, s. 146.

EDITORIAL NOTE: For other cases on Indians see ALL-CANADA DIGEST and CANADIAN ANNUAL DIGESTS and CHITTY'S ABRIDGMENT OF CANADIAN CRIMINAL LAW, Vols. I and II, under Indians.

APPLICATION for discharge of Indians imprisoned for failure to pay poll tax imposed under *Sydney City Charter*. Granted. *Colin Mackenzie*, K.C., for accused. *Finlay MacDonald*, for City of Sydney.

McARTHUR CO.CT.J.:--This is one of several applications for the discharge of Indians confined in the common jail at Sydney, under a warrant for city poll tax.

During the summer of 1939 some eleven unenfranchised Indians, residing on the Coughnowago Reservation, Quebec, came to Sydney and were employed in certain construction work at the Dominion Iron & Steel Corp. plant, as skilled mechanics.

The appellants have been residing in Sydney for several months. They have no property, real or personal, except what is on their Reservation.

It was agreed between the parties that the grounds of this application are as follows: 1. An Indian is not liable for the payment of a municipal poll tax, and 2. That if he is subject, by reason of residence, to the payment of a municipal poll tax, its payment cannot be enforced by imprisonment.

In order that the questions involved herein may be fully considered, it is well to set out such legislation, imperial, federal, provincial and municipal, as may have any bearing.

Subsection (24), s. 91, of the *B.N.A. Act* confers upon the Parliament of Canada exclusive jurisdiction upon the subject of "Indians, and Lands reserved for the Indians," and s-s. (2), s. 92, confers upon the provincial Legislature power to raise revenue for provincial purposes within the Province, and s-s. (8) to legislate regarding "Municipal Institutions."

Chapter 98, R.S.C. 1927, the *Indian Act* provides as follows: "102. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the Reserve or special Reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

"105. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections."

The City Charter of the City of Sydney (1903 (N.S), c. 174), s. 100, provides that "Every person between the age of twenty-one and sixty, residing within the City of Sydney, within any portion of

the year, who has not been assessed in that year on real or personal property shall be liable to pay a poll tax for the general purpose of the City, of twelve dollars, $12.00..."
Section 144 provides that if any person does not pay his poll tax when due the city treasurer may forthwith issue a warrant directed to any constable or policeman of the city for the collection of the same; and under s. 146, the constable is directed to levy the same by distress and sale of the goods and chattels of such person, and in default of goods and chattels to take the body of such person and commit him to the common jail for such a period of time, not exceeding 15 days, as may appear in such warrant.
It appears clear, that under s-s. (24), s. 91 of the *B.N.A. Act*, there has been assigned to the Federal authorities power to legislate in respect to "Indians, and Lands Reserved for the Indians" and that this power may extend to all matters affecting their welfare and civil rights.
On the other hand, it is quite clear that a great many matters may directly or indirectly affect Indians in their course of living, come under the heading of certain subjects assigned exclusively to the provincial Legislatures.
The result is, that legislation permissive to the Dominion Parliament in the exercise of the powers given to it under s. 91(24) *B.N.A. Act*, "Indians, and Lands Reserved for the Indians," may be legislation which if enacted by the Province, would be in relation to matters falling within the class of subjects specified in s. 92, *B.N.A. Act*, and exclusively assigned to the provincial Legislatures.
Without elaborating, it is quite apparent that the subject-matter of "Indians, and Lands Reserved for the Indians" creates a domain in which provincial and Dominion legislation may overlap, and in such cases, the established rule is that neither legislation, provincial or federal, will be *ultra vires* if the field is clear; but if the field is not clear, and the two legislations meet, the Dominion legislation must prevail: *G.T.R. v. A.-G. Can*., [1907] A.C 65.
As a matter of construction, it is now well settled that it is not competent to the Legislature of a Province, so to legislate as to impair or restrict in a substantial degree, legislation of the Federal Parliament enacted in pursuance of its exclusive legislative authority under s. 91 of the Act.
It is also admitted to be within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial Legislature, under s. 92, are necessarily incidental to effective legislation by the Parliament of the Dominion upon subjects of legislation expressly enumerated in s. 91: *A.-G. Ont. v. A.-G. Dom*., [1896] A.C. 348.
Apart from where the Dominion Parliament has legislated in respect to "Indians and Lands reserved for the Indians" and thereby entered the field to the exclusion of the provincial Legislature, it appears from the reported cases, that unenfranchised Indians are, in their dealings and acts outside the Reserve, amenable to the general laws of the Province, as are ordinary citizens.
I think the language used by the Judicial Committee in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367 at pp. 372-3, clearly establishes this principle:
"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 . . . It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would . . . . be a piece of municipal legislation competent to the" provincial Legislature.
Along with this case it is helpful to read the reasoning of the Privy Council in *Madden v. Nelson & Fort Sheppard Ry*., [1899] A.C. 626 wherein it was held that the provisions in the British Columbia *Cattle Protection Act*, 1891, as amended in 1895, to the effect that a Dominion Ry. Co. unless they erect proper fences on their railway shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial Parliament.
In simple language, no statute of the provincial Legislature dealing with Indians or their lands as such, would be valid and effective; but there is no reason why general legislation within provincial scope may not effect them; provided the field is not invaded by Dominion legislation.
It is generally conceded that an Indian who commits an offence against a provincial law, beyond the limits of an Indian Reserve, may be convicted and punished just as all other persons may be: *R. v. Hill* (1907), 15 O.L.R. 406; *R. v. Bebonning* (1908), 13 Can. C.C. 405, 17 O.L.R. 23; *R. v. Martin* (1917), 39 D.L.R. 635, 29 Can. C.C. 189, 41 O.L.R. 79; *R. v. Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. R. 139.
I think I may well add that, except where provisions are made in the *Indian Act*, R.S.C. 1927, c. 98, which expressly or by implication declare the Indians' obligations and the consequences which attach to their breach, or which otherwise specially deal with him, the conduct and duty of an Indian in his relations with the public outside the Reserve, are subject to the control of provincial laws in

the same manner as those of an ordinary citizen. The Dominion Parliament may remove him from their scope, but to the extent to which it has not done so, he must in his dealings outside the Reserve govern himself by the general laws which apply there. He should not be free to infringe an Act of the Legislature or disregard a municipal by-law, the general protection of which he enjoys, when he does not limit the operations of his life to the Reserve, but, though unenfranchised, seeks a wider sphere.

If this statement of the law is sound, and an Indian, in the absence of Dominion legislation to the contrary, is subject to the general laws of the Province, we are, in this case, faced with the plain but difficult question--do ss. 102, 103 and 104 of the *Indian Act*, under the heading "Taxation" create an exhaustive occupation of this particular field, so as to exclude from it the taxation provisions of the City Charter, ss. 100, 144 and 145, providing for the payment of a poll tax insofar as they may apply to Indians.

The Dominion Parliament, as it had legislative power and authority so to do in relation to Indians and Lands reserved for Indians, entered the field of taxation, and has provided for the taxation of real and personal property held by an Indian outside the Reserve, in his individual right. In the domain of taxation, the two Legislatures meet, and if they are in conflict, the enactment of the Dominion must prevail over that of the Province.

It is urged that inasmuch as s. 102 "The Indian Act" deals only with "real or personal property" the two Legislatures do not meet so as to create any conflict in respect to a poll tax, and that therefore ss. 100 and 144 of the City Charter remain operative.

There can be little doubt, that many of the provisions of the *Indian Act* were designed with the view of safeguarding to the Indian such rights and privileges as were or became his under the articles of capitulation signed at Montreal in 1760, the Royal Proclamation following the Treaty of Paris in 1763, and the Treaties entered into with various tribes from time to time, but as there is no material before me upon which I can base a judicial opinion as to those rights and privileges, I will merely assume that the Dominion Parliament in its legislative enactments regarding "Indians and Lands reserved for the Indians" constantly kept in mind the duty and obligation of the Crown to safeguard all Indian rights, and fulfil all promises contained in those treaties with the exactness which honor and good conscience would dictate, and that the special matters which it saw fit to legislate concerning, rather than leave to the general laws of the land, were subjects which ought to be governed by the Parliament of which the Indians were wards.

We find the Act deals with schools, Reserves, descent of property, trespassing on Reserves, sale and transfer of Indian lands, taxation, etc., and it would appear to me that in respect to those matters, the Dominion having legitimately entered the field, should be deemed to have occupied it generally.

Under ss. 102, 103 and 104 of the *Indian Act*, the Dominion Parliament has legislated in respect to the subject of taxation as it may affect "Indians and Lands Reserved for the Indians," a subject assigned exclusively to that legislative body, and having done so, I do not see under what principle, provincial legislation can be made to supplement, change or restrict such federal enactment.

True the federal enactment makes no reference to poll or income tax, but its failure to do so does not in my opinion, give a provincial Legislature power to add that which the federal enactment may have omitted.

In the words of the Lord Chancellor in *Madden v. Nelson & Sheppard Ry. Co.*, [1899] A.C. at p. 628: "In other words, the provincial legislatures have pointed out in their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly ultra vires."

It is my view that ss. 102, 103 and 104 of the *Indian Act* are exhaustive on the subject of Indian taxation so as to exclude provincial legislation, and therefore the provisions of the City Charter providing for the payment of a poll tax, has no application to an unenfranchised Indian whether residing on or off the Reserve.

With regard to the second ground, it would appear from the authorities, were those Indians liable for the payment of poll tax, payment could not be enforced by arrest, and imprisonment. The Indian is a ward of the Dominion Government, and as such cannot be imprisoned for a civil debt under a civil process.

In the case of *Ex p. Tenasse*, [1931] 1 D.L.R. 806, 2 M.P.R. 532, it was held that a civil Court has jurisdiction, notwithstanding s. 105 of the *Indian Act* to entertain a claim and enter a judgment against an unenfranchised Indian living upon an Indian Reservation, but doubt was expressed as to the right under such judgment to take the person of an Indian in execution, though certain of his property may be taken.

In the case of *Re Caledonia Mllg. Co. v. Johns* (1918), 42 O.L.R. 338, at p. 339, Middleton J. (now J.A.), said: "The Indian Act has not given any right to take the person of an Indian in execution.

Certain of his property may be taken; but the Indian is, by the British North America Act, sec. 91(24), subject to the legislation of the Dominion, and is a ward of the Dominion Government."
Section 105 the *Indian Act* provides "No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections."
This section creates for an Indian the situation in purely civil matters, that he may have property ample and sufficient to satisfy a judgment or other claim, but such property is exempt from seizure, levy or distress, by reason of the fact that it cannot be made subject to any lien or charge.
In a poll tax claim the body may be taken only "in default of goods and chattels whereon to levy." (City Charter, s. 146) If a *right to levy* does not exist, then it follows that the right to take the body in default must fail. The facts in this case disclose that the applicant has no property, save what is exempt from any lien or charge and therefore not a subject for distress.
For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised, and the Minister of Interior, as Superintendent General of Indian Affairs, is given the control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring the friendly care and directing hand of the Government in the management of their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government, and I do not think in such circumstances, it was ever contemplated that the body of an Indian should be taken in execution under a civil process pure and simple.
For debts or other purely civil liabilities, judgments may be recovered but payment may be enforced only by seizure of such property as may be acquired and held by an Indian in his individual right outside the Reserve.
The application will be granted, and the twelve applicants discharged from custody.
Application granted.