

DELISLE v. SHAWINIGAN WATER AND POWER COMPANY

[1941] 4 D.L.R. 556 (also reported: 79 Que. S.C. 353)

Quebec Superior Court , Demers J., 17 October 1941

Taxes / D--Indians--Sales tax on electricity--Order in Council authorizing equal charge to consumer--Whether Indians exempt.

The provision of Order in Council P.C. 2845 (September 25, 1939) authorizing suppliers of electricity to charge their customers an additional amount equal to the sales tax imposed by the *Special War Revenue Act*, R.S.C. 1927, c. 179 (am. 1939 (2nd Sess.), c. 8, s. 4), applies to Indians resident on a reservation in respect of electricity supplied to them for use in their dwellings. The tax is imposed not upon the consumer but upon the supplier, and hence there is no violation of s. 102 of the *Indian Act*, R.S.C. 1927, c. 98, which exempts Indians from taxation for their real or personal property.

Statutes Considered: *Special War Revenue Act*, R.S.C. 1927, C. 179, s. 86 [am. 1936, c. 45, s. 5]; *Indian Act*, R.S.C. 1927, c. 98, s 102; Order in Council P.C. 2845 (September 25, 1939).

EDITORIAL NOTE: This is an unusual case, but there would appear to be no answer to the learned Judge's reasoning. If the reverse were the case and the tax held to be imposed on the consumer, the problem of the Provinces in endeavouring to bring their tax legislation within the narrow field of direct taxation would become much simpler.

ACTION by an Indian resident on a reservation for the recovery of \$1.93 paid to defendant company under protest. Dismissed.

M. Gameroff, for plaintiff.

W. B. Scott, K.C., for defendant.

DEMERS J.:--The following facts are admitted:

(a) that the plaintiff is an Indian as defined by the provisions of the *Indian Act*, R.S.C. 1927, c. 98 and that he resides and is domiciled on the Indian Reservation situated in the Village of Caughnawaga, in the District of Montreal, and that he has always claimed and still claims his rights to such and has never renounced the same;

(b) that the plaintiff is a householder and has been furnished with electricity by the defendant Company for use in his dwelling;

(c) that the defendant Company has installed in the plaintiff's domicile a meter for the purpose of measuring the amount of electrical energy supplied for use in his dwelling, and that the defendant company is authorized by the Quebec Public Service Board to charge a certain rate in the said locality, in accordance with the tariff filed with the said Board and duly approved by it, the whole as provided by s. 31, c. 24 (25-26 Geo. V) of Quebec and 4 Geo. VI, c. 11;

(d) that on September 25, 1939, an Order in Council P.C. 2845 was passed by the Governor in Council (a copy of which is attached to the present "Admission of Facts") and that the defendant Company has demanded and received payment of an additional charge of 8% over and above the authorized rates, relying on the amendment of the *Special War Revenue Act* (R.S.C. 1927, c. 179) enacted by 1939 (Can.) (2nd Sess.), c. 8, s. 4 (removing electricity used in dwellings from the schedules of items exempted from the said sales tax), and also on the said Order in Council Number P.C. 2845 passed in the exercise of the powers conferred by the *War Measures Act*, R.S.C. 1927, c. 206;

(e) the said 8% additional charge mentioned in para. (d) amounts to \$1.93, and was paid under protest by the plaintiff.

In this case, the defendant filed a declaration in evocation before the Superior Court.

As the learned attorneys for the plaintiff have pointed out in their factum, this is a test case and all Indians, whether on the Reserve at Caughnawaga or any other Reserve in Canada, have an interest in the decision.

Plaintiff contends, in his factum, "that he is not obliged to pay the additional 8% tax imposed by the Order in Council of September 25, 1939, which has just been referred to, and declares that the Order in Council applies to all others except Indians, and since he is an Indian within the meaning of the Act contained in the Revised Statutes of Canada, 1927, he should not be charged with this excess tax of 8%."

Plaintiff relies on the *Indian Act*, R.S.C. 1927, c. 98, s. 102, which reads as follows: "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."

Plaintiff argues as follows: "Electricity is personal property; electricity may be the subject of ownership or sale. As in spite of its invisibility electricity is considered in law as personal property subject to ownership, sale and disposal as inanimate objects (See Curtis, *The Law of Electricity*, p. 7). In any case the statute and schedule and Order-in-Council all define electricity to be *goods* subject to sales tax. Applying 1474 C.C. the sale of electricity is perfected as and when measured on the meter on the premises of the Plaintiff. And as the sale is only perfected after measurement from the meter, the situs must be held to be the domicile of the Plaintiff. If, however, the tax is looked upon as being imposed not on the goods, but on the sale price, it is, therefore, a tax on monies and again the situs must be considered to be the domicile of the Plaintiff. Either such monies has situs or it has not, in any case by fiction of law, it must be considered to be the domicile of Plaintiff, *mobilia sequuntur personam*."

And he resumes his contention this way:

(a) that the additional charge of 8% is an indirect tax imposed on the Utility Company which it is expected to collect from the consumer. (b) that it is a tax on the personal property of plaintiff because: (1) it is either a tax on electricity which he purchases, or

(2) it is a tax on his money, *i.e.*, the purchase-price which he is compelled to pay.

(c) that the electricity purchased is the personal property of the plaintiff.

(d) that the quantity of the electricity purchased being measured by the meter, it is personal property on the reserve, or if it is tax on money its situs is the domicile of plaintiff, *i.e.*, the reserve.

(e) that if the 8% additional charge is a tax to which the plaintiff is not liable, then the defendant Company has no right to impose it as an additional charge and he would not then be protected by the Order in Council allowing exemption for the maximum amount allowed by provincial statute.

The Order in Council referred to reads as follows:

"It shall be lawful for the selling utility to add to its regular charge to the consumer or user and to collect from such consumer or user the amount of consumption or sales tax imposed by the provisions of the *Special War Revenue Act* in respect to electricity and gas and the amount so added and collected for consumption or sales tax shall not be deemed to be an increase in the rate charged for electricity or gas and such addition and collection may be made by the selling utility notwithstanding the provisions of any statute of Canada or of any Province thereof or any regulation or order made pursuant thereto relating to or purporting to relate to the rates to be charged by such selling utility."

As we have seen before, the plaintiff does not attack the validity of that Order in Council, his contention being only that it does not apply to the Indians.

The contention of counsel for plaintiff is that the words "notwithstanding the provisions of any Statute of Canada" do not refer to the *Indian Act* but rather refers to any statute existing which may relate to the rate charged for electricity by the selling Utility.

I must admit that the question is not without doubts. Of course, the main object of that disposition was to permit to the electricity company to charge over the rates fixed by the electricity Commission or statutes, but very likely the legislator at that time did not think of the Indians in particular, but his main purpose after all was to permit the electricity company to collect that tax without any obstacle from any law.

But it is not necessary to pronounce on this point, because the *Indian Act* does not apply in this case.

What does that Indian Act say? "No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property."

I maintain that there is no tax imposed on the plaintiff. The essential characteristics of a tax, says Cooley, 4th ed., para. 3, p. 68, are that it is not a voluntary payment or donation, but an enforced contribution.

The plaintiff is not bound to take electricity. People may illumine their homes by other means. The party who is taxed by the Order in Council and the law is the defendant;--nobody else.

Section 86 of the *Special War Revenue Act* says:

"(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,--

"(a), produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof." [am. 1936 c. 45, s. 5]

Then, as we see, this tax, which evidently is an indirect tax, imposed on the defendant, not on the plaintiff. That is what Cooley, *Taxation*, 4th ed., vol. 1, para. 50, pp. 141-2, says: "In direct taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, *not as taxes*, but as part of the market price of the commodity."

It is of that tax, as of the Customs Taxes or Excise Taxes-- all those indirect taxes are imposed on the importer or on the manufacturer. In the end, it is the consumer or buyer who must pay for the increase of the cost of the goods imported or manufactured. Indians, when they buy imported goods subject to Customs or Excise duties, must, like the others, pay higher prices; so they must

do for this indirect tax on their electricity, and they cannot pretend that any tax is being imposed on their *real or personal property*.
For these reasons, the action is dismissed with costs.
Action dismissed.