File No.: 38059

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant
(Appellant/Respondent on Cross-Appeal)

- and-

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Respondent
(Respondent/Appellant on Cross-Appeal)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA

Respondent
(Respondent/Respondent on Cross-Appeal)

-and-

ATTORNEY GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ALBERTA

Interveners

FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW

1. The Attorney General of Ontario ("Ontario") intervenes pursuant to the Constitutional Question served by the Respondent, British Columbia Investment Management Corporation, on November 13, 2018.

2. Ontario supports a broad interpretation of the guarantee of inter-governmental tax immunity entrenched in section 125 of the *Constitution Act, 1867*. This section's protection is an important reflection of the divided sovereignty inherent in a federal arrangement, and in Canada is particularly important to provincial governments given other constitutional constraints on their fiscal powers. The scope of this immunity should therefore not be diluted by an approach which would treat provincial property as private on the basis that the Crown uses it in a fashion which has a secondary benefit to third parties, or on the basis of deeming provisions in a federal tax statute which alter the legal concepts that would otherwise determine tax liability.

PART II – POSITION ON CONSTITUTIONAL QUESTION

3. Ontario takes no position on the Constitutional Questions raised by the parties, which turn on the specifics of British Columbia's statutory scheme, and limits this intervention to submissions on the general interpretation of how section 125 protects Canadian provinces from being taxed by the federal government.

4. Ontario takes no position on the question of when inter-governmental agreements are binding, the jurisdiction of the Tax Court of Canada, or Crown immunity as a principle of statutory interpretation.

PART III – ARGUMENT

A. A broad interpretation of section 125 is essential to protecting the autonomy of provincial governments due to other constitutional rules favouring the federal government

5. Section 125 is an essential element of Canada's constitutional architecture and a necessary implication of the federalism principle, which recognizes "the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction".[1] In the absence of inter-governmental tax immunity, the practical fiscal autonomy of provincial governments would be severely circumscribed because their property would be subject to the nearly unlimited scope of the federal taxing power in subsection 91(3).

6. Policy arguments for tax neutrality between private and public property are inherently contrary to the text and purposes of section 125. They are better suited as a basis for voluntary arrangements between governments than as constitutional imperatives.[2]

7. The provinces are the level of government with the most at stake in the interpretation of section 125 because it is one of few doctrines in the Canadian division of powers which operates symmetrically, protecting provinces from direct intrusion by the federal government in the same way that provinces are precluded from taxing federal Crown property. Indeed, the protections of section 125 might be considered redundant[3] as applied to the federal government given the

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[1] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57.

[2] See Factum of the Appellant at para 66.

[3] *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1065 [*Exported Natural Gas*].

significant doubt as to whether a provincial law can constitutionally bind the federal Crown, despite the strong arguments against this type of gap.[4]

8. Conversely, while provinces have appropriately broad powers to legislate generally, their fiscal powers are subject to several constitutional constraints which militate in favour of a broad interpretation of section 125 as a counterweight.

9. Even in regards to private property, for example, provincial taxation is limited to being direct by subsection 92(2). While this "restrictive" taxing power was considered reasonable at the time of Confederation when the role of government in society was small, it quickly became inconsistent with the need for provincial fiscal capacity,[5] and its soundness as an economic concept is doubtful.[6] Despite the judicial interpretation of subsection 92(2) becoming less strict over time, it remains a limitation on provinces but not on the federal government.

10. In the context of inter-governmental taxation, the prohibition on indirect taxation precludes the ability of a province to do indirectly what it cannot directly: imposing a tax that private parties are meant to pass on to the federal Crown. Section 125 should provide the same protection to provinces from any federal attempt to indirectly tax provincial Crown property.[7]

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[4] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2016) (loose-leaf updated 2018, release 1), at 10.9(d) [Hogg].

[5] Gerald La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, (Toronto: Canadian Tax Foundation, 1981) at 93 [La Forest].

[6] *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 at para 42, citing La Forest, *supra* note 5 at 79.

[7] *Montreal v Montreal Locomotive Works Ltd*, [1947] 1 DLR 161 at 251 (UK JCPC).

11. Provincial fiscal powers are also subject to the doctrine of federal paramountcy which allows tax immunity granted by federal legislation or order – whether to the federal Crown or to private parties – to prevail in the face of valid provincial taxing statutes, where the immunity is validly connected to relevant heads of power.[8] As noted by Professor Hogg in the context of constitutional inter-governmental immunity generally, "provinces have the stronger claim to judge-made immunity from federal law, because the provinces cannot protect themselves through the doctrine of paramountcy".[9]

12. A robust section 125 is also warranted due to the lack of provincial fiscal autonomy in two other areas.

13. First, the federal government can conscript provincial officers and delegates to carry out Parliament's desired functions at the expense of the provincial treasury.[10] To date, this power has not been limited to narrow, justifiable circumstances such as in in relation to the national defence or emergency federal powers, and instead appears to be available subject only to the usual requirements of legislative validity. Indeed, in this appeal the Attorney General of Canada emphasizes the federal power to require provincial employees to carry out a function as mundane as the collection of federal taxes.[11]

14. Second, provincial Crown property is subject to federal expropriation without compensation where the property is needed for a federal head of power to be "effectually

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[8] For example, *Foreign Missions and International Organizations Act*, SC 1991, c 41, s 4(2).

[9] Hogg, *supra* note 7 at 10.9(f).

[10] *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at 481-485.

[11] Factum of the Appellant at paras 29, 61, 64, 71.

exercised".[12] This is so even in the clearest of cases where there is no dispute that such property is immune from federal taxation under section 125. This power is obviously more fiscally and operationally intrusive than simply taxing the property in question. There has not yet been recognized a corresponding provincial ability to expropriate federal Crown property in service of valid provincial purposes (even in exigent circumstances) despite the otherwise broad powers of the provinces to legislatively modify property rights.[13]

15. Ontario does not seek a reconsideration of these principles in this appeal. Instead, Ontario submits that this background of federal fiscal power is a reason to apply a broad interpretation to section 125, which allows provinces maximum flexibility in structuring their property holdings without the penalty of a federal tax bill.

B. A benefit to private parties from the use of Crown property is not sufficient to nullify section 125 immunity

16. The public is an aggregation of private persons, and therefore when a provincial government holds property in the public interest, it is in some sense always doing so for the benefit of private parties in the aggregate — the public at large. While this does not preclude the notion of government as the actor in our society uniquely able to serve the public interest, it does mean that any standard under section 125 which treats Crown property as private on the basis of the benefits it provides to third parties will soon become unworkable and overbroad. Instead, immunity should only lapse when there is a clear and identifiable private property interest.

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[12] *Quebec (Attorney General) v Nipissing Central Railway Company*, [1926] 3 DLR 545 (UK JCPC).

[13] La Forest, *supra* note 9 at 182.

17. It is presumably for this reason that Professor La Forest, as he then was, concluded that "a property tax cannot be levied against a person in respect of Crown property if he has no legal interest in it even though he derives considerable benefit from it" (emphasis added).[14] It is notable that the case law he relied on for this claim originated from public employees who benefit from Crown property in the context of their employment relationship: an employee residing on Crown land, for example, could not be subject to a property tax despite the obvious financial implications of this arrangement.[15]

18. Absent a clear and identifiable *private property interest*, which Ontario agrees is not subject to immunity, it should not be open to Parliament to isolate merely a *private benefit* that employees receive from Crown property as somehow separate from the inherently public purpose served by provincial ownership of the property in question.

19. This distinction is relevant, for example, to the section 125 analysis of a public sector pension plan because a pension plan member's right to a stream of future monetary payments from the government or a government agency, while obviously of significant benefit, is distinct from a traditional interest in the property in itself. This is so even where the property is held for the specific purpose of satisfying the obligation to make future payments.

20. As explained by this Court:

> A [pension] plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a

[14] La Forest, *supra* note 9 at 190.

[15] *Stinson v The Township of Middelton*, [1949] 2 DLR 328 (ON CA).

> pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund.[16]

21. Such a scenario is distinguishable from the historic case law relied on the by Appellant, which only deal with real property. For example, in a scheme providing for the privatization of Crown land that was complete in all but the transfer of title, identifying a private interest was straightforward and did not raise the complexities associated with the trust principles in the modern pension context:

> From the evidence before us it is clear that the lands in question were earned by the railway company, that they with others were selected by the company to answer the subsidy grant; that application was made to the Governor in Council for the necessary allotment of the lands to them; that the necessary order-in-council was passed "reserving and setting apart for the purposes of the land grant" to that railway company, (inter alia), the lands in question; that prior to the date when the taxes complained of were imposed the railway company had sold, assigned and transferred the lands in question with others to the appellants in this action, and that subsequently, on the 19th June, 1907, the patent for the lands in question issued to the appellants.[17]

22. It is also distinguishable from a lessee who pays to use Crown property for an immediate purpose and is taxed only for the duration of the lease,[18] during which there is a clear property interest held by the lessee. This is something very different from the “passive and limited right” that a pension plan member has in the ongoing management of property, owned by the Crown, that will some day be used by the Crown pension plan to provide a flow of monetary payments to them.

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[16] *Buschau v Rogers Communications Inc*, 2006 SCC 28 at para 34.

[17] *Calgary & Edmonton Land Co v Alberta (Attorney-General)*, [1911] 45 SCR 170 relied on at para 70 of the Factum of the Appellant.

[18] *Smith v Rur Mun of Vermilion Hills*, [1916] 30 DLR 83 at 84 (UK JCPC), relied on at para 81 of the Factum of the Appellant.

23. It should also be recalled that, as explained by Professor La Forest, the failure to extend section 125's immunity to private property interests in public land may have been influenced by the practicality of the federal dominance of land in the prairie provinces and the federal practice of holding title for a significant time as part of encouraging settlement.[19] This concern is long lapsed, especially in the context of a broad-based federal sales tax, and therefore provides no reason to carve out an exception to the normal section 125 rule that publicly held property is immune.

24. A private law or statutory obligation to pay in the future should also not dilute the scope of inter-governmental tax immunity given that such obligations are, except in certain narrowly defined areas, subject to parliamentary sovereignty.[20] Crown property held by one government to satisfy a future obligation to private parties could be redirected to a different purpose by subsequent legislation. Any tax paid during the interim on the basis of the former intended use of the property would, viewed retrospectively, violate section 125. This illustrates how the Crown's *intended use (*pursuant to an existing statute or otherwise) of property owned by the Crown should not determine whether section 125 immunity applies. Such complications are avoided where the constitutional rule is that the property is immune from taxation while it is publicly owned.

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[19] La Forest, *supra* note 9 at 189.

[20] *Clitheroe v Hydro One Inc* (2009), 96 OR (3d) 203 at para 77 (Sup Ct); aff'd 2010 ONCA 458.

C. The use of a deeming provision is an indication that a taxing statute deviates from the use of default legal concepts, which should govern in inter-governmental tax immunity

25. When a taxing statute levies taxes on property through the use of a deeming provision creating a legal fiction, it means that the law which would otherwise govern has been altered:

> … a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes. A person is deemed to be single even though they may be married; a notice is deemed to have arrived on a certain day regardless of when it actually arrived; a provision is deemed to have come into force on a certain day even though the legislation was not in fact in force on that day. Although a sovereign legislature cannot change reality, it can declare that for legal purposes reality is to be considered different from what it was or is.[21]

26. Professor Sullivan's final sentence in the above passage requires the important qualifier of being subject to constitutional limitations. Ontario submits that while the legislatures of either level of government are free to declare an alternative reality for the purposes of a law within their own sphere of sovereignty, this cannot be true of the scope of constitutional immunities. Reality must be treated as reality for the purposes of delineating one government's protection from another.

27. This is the approach which is taken to conflicts between provincial property law and federal bankruptcy law,[22] rendering the provincial law inoperative under paramountcy where a provincial deeming provision does not sufficiently align with the necessary substantive private law obligation. It should therefore equally apply to the province's benefit when considering whether a federal taxing provision has deemed substantively public property to be private.

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[21] Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2014) at §4.106.

[22] *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 40; *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at para 21.

28. In particular, in the absence of well-defined inter-governmental tax immunity under section 125, it would be open to the federal government to use its broad paramount tax power to sweep within its purview all manner of provincial property by deeming it as private regardless of its proper classification under provincial law. A rigorous interpretation of section 125 would not open the door to provincial abuses since provincial legislation seeking to extend its protections to property that is not public property would fail as a matter of vires or federal paramountcy.

29. The interpretative challenges of distinguishing between public and private property for the purposes of section 125 is no more challenging that the process of characterization and classification under the federal division of powers. The starting point is to examine the impugned law in its full legislative context to determine whether the property is held by the Crown as a matter of private law of general application in the province. Where it is asserted that provincial law has treated the property exceptionally in order to obtain more favourable tax treatment, more challenging issues arise. Similarly, close scrutiny is called for where federal legislation relies on a deeming technique, such as creating a "notional" non-Crown taxpayer,[23] altering a "normal private law principle" for the purpose of taxation,[24] or "alter[ing] the legal landscape with a view toward capturing certain transactions that might otherwise not be considered to be taxable transactions".[25] These are strong indicators that section 125 immunity should apply because the "real bite" of the tax is on provincial property.[26]

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[23] Factum of the Appellant at para 56.

[24] Court of Appeal decision at para 72, recounting the submissions of the Appellant.

[25] *Ibid* at para 73.

[26] *Exported Natural Gas*, *supra* note 7 at para 74.

30. Provincial concerns about the erosion of section 125 are not alleviated by limiting its protections to federal laws that single out public property for disadvantageous deeming provisions; it is no answer to say the deeming provision applies on its face to public and private property alike.[27] Section 125's immunity is not reserved for federal taxing statutes which single out the provincial Crown for adverse treatment, or vice versa.[28] Instead, its purpose of preserving fiscal autonomy for both levels of government is carried out through rendering taxing schemes of general application inapplicable when they attempt to tax Crown property. A deeming provision cannot defeat this purpose even where it is also unobjectionably applicable to private property.

PART IV – COSTS

31. Ontario seeks no costs and asks that no costs be awarded against it.

PART V – ORAL ARGUMENT

32. Ontario requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF MARCH, 2019

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[27] Factum of the Appellant at para 56.

[28] *Exported Natural Gas*, *supra* note 7 at 1033.

PART VI – TABLE OF AUTHORITIES

Cases	**Paragraph(s) Referred to in Factum**
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