

CANADA / JUDGMENT

Air Canada v. B.C. (A.G.)

[1986] 2 SCR 539

COURT

Supreme Court of Canada

DECIDED

27 November 1986

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Air Canada v. B.C. (A.G.)

Collection

Supreme Court Judgments

Date

1986-11-27

Report

[1986] 2 SCR 539

Case number

18089

Judges

Dickson, Robert George Brian; Beetz, Jean; McIntyre, William Rogers; Chouinard, Julien; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.

On appeal from

British Columbia

Subjects

State

Notes

SCC Case Information: 18089

Decision Content

Air Canada v. B.C. (A.G.), [1986] 2 S.C.R. 539

Air Canada Appellant

v.

The Attorney General of British Columbia Respondent

indexed as: air canada v. british columbia (attorney general)

File No.: 18089.

1985: November 4; 1986: November 27.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Wilson, Le Dain and La Forest JJ.

on appeal from the court of appeal for british columbia

Crown -- Proceedings against the Crown -- Petition of right -- Fiat -- Appellant seeking redress from Crown for benefits obtained pursuant to an invalid statute -- Fiat refused by Lieutenant Governor on advice of provincial Attorney General -- Whether mandamus may be issued to direct Attorney General to advise Lieutenant Governor to grant fiat -- Crown Proceeding Act, R.S.B.C. 1979, c. 86.

Appellant had in a separation action sought a declaration that the British Columbia Gasoline Tax Act was ultra vires and a declaration that it was entitled to be reimbursed all monies paid after August 1, 1974. For the monies paid before that date, however, appellant, in conformity with the Crown Proceeding Act, issued a petition of right seeking substantially the same relief. This Act preserved the traditional method of suit against the Crown by way of petition of right with respect to causes of action that arose before August 1, 1974, and required those seeking redress from the Crown to obtain a fiat. The provincial Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat and he did. Appellant then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act for an order in the nature of mandamus to compel the Attorney General to consider the petition of right and then to advise the Lieutenant Governor whether to grant his fiat. The application was dismissed and the judgment affirmed by a majority of the Court of Appeal. This appeal is to determine whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of right under which a claim is made for the return of money alleged to have been levied by the province under an unconstitutional statute.

Held: The appeal should be allowed and an order in the nature of mandamus should be issued directing the Attorney General of British Columbia to advise the Lieutenant Governor to grant his fiat to the petition of right.

It has been established that a statute cannot permit the retention of monies obtained under an unconstitutional statute. Consequently, a similar result cannot be attained indirectly under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. The discretion to grant or refuse a fiat, like other executive powers, must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must

govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Under the British Columbia Attorney General Act, the Attorney General is the Lieutenant Governor's principal legal adviser and the legal member of the Executive Council. Though his duty, technically, is simply to advise, the issue here was a legal one and one to which there was only one answer under the Constitution. The Attorney General was bound to advise the Lieutenant Governor to grant his fiat, and the Executive Council was in turn bound to accept that advice.

Cases Cited

Applied: *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; referred to: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *British Columbia Power Corp. v. British Columbia Electric Co.*, [1962] S.C.R. 642; *Ryves v. Duke of Wellington* (1846), 9 Beav. 579, 50 E.R. 467; *In re Nathan* (1884), 12 Q.B.D. 461; *Orpen v. Attorney General for Ontario*, [1925] 2 D.L.R. 366; *Bombay and Persia Steam Navigation Co. v. MacLay*, [1920] 3 K.B. 402; *Irwin v. Grey* (1862), 3 F. & F. 635, 176 E.R. 290; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Teh Cheng Poh v. Public Prosecutor, Malaysia*, [1980] A.C. 458; *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997.

Statutes and Regulations Cited

Attorney General Act, R.S.B.C. 1979, c. 23, s. 2(a), (e).

Crown Procedure Act, R.S.B.C. 1960, c. 89 [rep. 1974, c. 24, s. 16], s. 4.

Crown Proceeding Act, R.S.B.C. 1979, c. 86.

Gasoline Tax Act, R.S.B.C. 1979, c. 152.

Interpretation Act, R.S.B.C. 1979, c. 206, s. 29 "Lieutenant Governor", "Lieutenant Governor in Council".

Judicial Review Procedure Act, R.S.B.C. 1979, c. 209.

Authors Cited

Edwards, J. Ll. J. *The Law Officers of the Crown*. London: Sweet & Maxwell, 1964.

Halsbury's Laws of England, vol. 9, 2nd ed. London: Butterworths, 1933.

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689, dismissing appellant's appeal from a judgment of Callaghan J. (1982), 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415, dismissing its petition presented pursuant to the Judicial Review Procedure Act of British Columbia. Appeal allowed.

D. M. M. Goldie, Q.C., and W. S. Martin, for the appellant.

E. R. A. Edwards, Q.C., and Robert Vick Farley, for the respondent.

The judgment of the Court was delivered by

1. La Forest J.--The issue in this case is whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of rights under which a claim is made for the return of money alleged to have been levied by the province under an unconstitutional statute.
2. In July 1980, the appellant, Air Canada, commenced an action in the Supreme Court of British Columbia seeking a declaration that the Gasoline Tax Act, R.S.B.C. 1979, c. 152, does not apply to Air Canada or is ultra vires the province, an accounting of all monies paid under that Act by Air Canada and a declaration that the appellant is entitled to be repaid all monies paid after August 1, 1974. This action represented only a portion of Air Canada's claim. It had been paying taxes under the Act since 1937. However, as regards causes of action that arose before August 1, 1974, the Crown Proceeding Act, R.S.B.C. 1979, c. 86, preserved the traditional method of suit against the Crown by way of petition of right which requires those seeking redress from the Crown to obtain a fiat. In conformity with this procedure, Air Canada in July 1981 issued a petition of right seeking substantially the same relief as in the action described above, but for monies paid before August 1, 1974. It is with this petition of rights that we are concerned on this appeal.
3. The petition was duly served on the Provincial Secretary and a copy was forwarded to the provincial Attorney General. The Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat. The Provincial Secretary then forwarded a copy of the petition to the Lieutenant Governor along with the following advice:

After due deliberation and on the recommendation of the Attorney General, the Executive Council humbly advises that this is not an appropriate case for the granting of a Fiat. The Executive Council has instructed me to transmit this advice.

Pursuant to this advice, the Lieutenant Governor accordingly declined to grant the fiat and the Provincial Secretary communicated this fact to Air Canada.

4. Air Canada then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for:
 - (a) an order in the nature of mandamus compelling the Attorney General to consider the petition of right and then advise the Lieutenant-Governor whether to grant his fiat;
 - (b) a declaration that the Attorney General has omitted to exercise his statutory power of decision to advise the Lieutenant-Governor and that he has a duty to do so;
 - (c) a direction to the Attorney General to reconsider and determine whether the Lieutenant-Governor should be advised to grant his fiat together with reasons.

5. Air Canada's application was heard by Callaghan J. who dismissed it in a judgment pronounced on October 1, 1982: 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415. Air Canada then appealed to the British Columbia Court of Appeal which, by majority (Taggart and Aikins JJ.A., Anderson J.A. dissenting), dismissed the appeal: (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689. Air Canada was then granted leave to appeal to this Court, [1983] 2 S.C.R. v.
6. In this Court, counsel for Air Canada did not press the arguments regarding judicial review of statutory powers, but essentially sought an order in the nature of mandamus, which formed the basis of the judgment of Anderson J.A., the dissenting judge in the Court of Appeal. Since I am substantially in agreement with Anderson J.A., I need not enter into a discussion of the other issues raised in the case.
7. The applicable law on this issue evolved from the well established principle that neither Parliament nor a legislature can preclude a determination of the constitutional validity of legislation. That principle was thus expressed by Laskin J. (as he then was) in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151:

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied.

8. I cannot believe that if there was no Crown Proceeding Act permitting suits against the Crown, a court could, where the case was not frivolous, refuse access to the court to test the constitutionality of a statute simply because a fiat was refused. What is sought here, however, is more involved. The action is an attempt to obtain redress from the Crown for benefits obtained pursuant to an invalid statute.
9. This Court took an important step in that direction in *British Columbia Power Corp v. British Columbia Electric Co.*, [1962] S.C.R. 642. There the plaintiff sought the appointment of a receiver over property owned by a corporation whose common shares had been vested in the Crown in right of the province by a statute whose constitutional validity was contested. The Crown resisted the appointment of the receiver on the ground that this would affect its property and interests. This Court, however, rejected the Crown's contention. Kerwin C.J., giving the majority judgment, set forth the following principles at pp. 644-45:

In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same

results as if the legislation were valid.

10. In *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, this Court went further and held ultra vires a statute that prohibited the recovery of taxes paid under protest pursuant to an unconstitutional statute. Dickson J. (as he then was) succinctly put the principle in these terms at p. 592:

The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be ultra vires because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

11. Let us examine the present situation in the light of these principles. Until the passage of the Crown Proceeding Act, the traditional way to sue the Crown, we saw, was by petition of right, but no court would take cognizance of a case until the Lieutenant Governor had issued his fiat. This traditional procedure has been retained in British Columbia in respect of causes of action against the Crown that arose before August 1, 1974. The present is such an action. The Lieutenant Governor has refused his fiat. Thus, if this refusal is constitutionally permissible, what Amax declared was not possible has been effectively, if indirectly, accomplished by the exercise of the Crown's prerogative to refuse a fiat.
12. In my view, if even a statute cannot permit the retention of monies obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supported discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.
13. There was considerable discussion in the courts below regarding the extent of the discretion of the Lieutenant Governor to grant or deny his fiat. There are indications in some cases that there is, in effect, a duty to grant the fiat unless a claim is frivolous; see *Ryves v. Duke of Wellington* (1846), 9 Beav. 579, 50 E.R. 467, at p. 475; *In re Nathan* (1884), 12 Q.B.D. 461, at p. 479. The fiat, Bowen L.J. states in the latter case, is granted as a matter of "invariable grace" by the Crown and it is the constitutional duty of his adviser not to advise refusal of a fiat unless the claim is frivolous. In *Orpen v. Attorney General for Ontario*, [1925] 2 D.L.R. 366 (Ont. H.C.) at p. 372, however, Riddell J. explained these remarks as simply re-flecting the usual practice. The constitutional duty of the sovereign's advisers in such a case, he stated, is to act conscientiously in their best judgment (p. 375).
14. I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Assuming there might still be a residual power to

refuse a fiat in a truly frivolous case, no one can claim this is such a case, and no such contention was put forward.

15. It does not follow, as Taggart J.A. suggested, that if the foregoing constitutional position is correct, then there is no need for Air Canada to seek a fiat. The principle I have enunciated must be applied within the context of the institutional arrangements provided by law. The only machinery provided for obtaining a judgment for money against the Crown in circumstances like the present is, by virtue of the Crown Proceeding Act, by petition of rights, and to pursue a claim in that way, a fiat is necessary.
16. To achieve this result, Air Canada seeks to obtain an order by way of mandamus directing the Attorney General to advise the Lieutenant Governor to grant a fiat because the Lieutenant Governor acts on his advice in considering the grant of a fiat. This power of the Attorney General is exercised in conformity with s. 2(a) and (e) of the Attorney General Act, R.S.B.C. 1979, c. 23, which read as follows:

2. The Attorney General

- (a) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council;

...

- (e) is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are applicable to the Province, and also with the powers and duties which, by the laws of Canada and of the Province to be administered and carried into effect by the government of the Province, belong to the office of the Attorney General and Solicitor General;

These provisions make the Attorney General the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council and, by s. 2(e), entrusts him with the duties of the Attorney General of England as far as these are applicable to the province. This includes the right to advise the Crown regarding the grant of a fiat; see J. L1. J. Edwards, *The Law Officers of the Crown* (1964), at p. 154; *In re Nathan*, supra, at pp. 468, 475, 479; Halsbury's *Laws of England* (2nd ed. 1933), vol. 9, para. 1180, note (c). It is true that some cases mention that in England the sovereign acted on the advice of the Secretary of State; see *Bombay and Persia Steam Navigation Co. v. MacLay*, [1920] 3 K.B. 402, at p. 408; *Irwin v. Grey* (1862), 3 F. & F. 635, 176 E.R. 290 (C.P.), at p. 291. But as is obvious from the latter case, the Secretary's duties in this area were essentially to receive petitions of right and, after seeking the opinion of the law officers thereon, to advise Her Majesty accordingly.

17. A similar position prevails in British Columbia. There the Provincial Secretary is assigned the task of receiving petitions for transmittal to the Lieutenant Governor for consideration. This is done by s. 4 of the Crown Procedure Act, R.S.B.C. 1960, c. 89, which reads as follows:

4. (1) The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done.
- (2) No fee or sum of money shall be payable by the suppliant on so leaving the petition, or upon his receiving back the same.
18. As Taggart and Anderson JJ.A. in the Court of Appeal explain, however, the Provincial Secretary seeks the advice of the Attorney General, the legal member of the Executive Council, before referring the matter to the Executive Council. The Executive Council then advises the Lieutenant Governor as to the manner in which he should dispose of the matter on the recommendation of the Attorney General.
19. From the foregoing, it seems to me that the appropriate officer against whom an order by way of mandamus should issue in this case is the Attorney General. He is the Lieutenant Governor's principal legal adviser, and I am inclined to agree with Anderson J.A.'s view that, by virtue of s. 2 of the Attorney General Act, he is entrusted with the sole power and duty to advise the Lieutenant Governor whether or not to issue a fiat. That was the English position, which s. 2(e) adopts. One must make a distinction here between the Lieutenant Governor and the Lieutenant Governor in Council. The latter includes the Executive Council; the former does not; see Interpretation Act, R.S.B.C. 1979, c. 206, s. 29. It is to the Lieutenant Governor alone that the power to issue a fiat is given by the Crown Procedure Act. That being so, as Anderson J.A. notes, there is no legal scope for the involvement of the Executive Council. The referral to the Council becomes a mere formality.
20. It is not really necessary, however, to pronounce definitively on the latter issues. Even on the assumption that under ordinary circumstances there is a meaningful role for the Executive Council to play in deciding whether or not a fiat should issue, I would retain the same view. Technicality must be tempered with realism. The Attorney General is the Lieutenant Governor's principal legal adviser and the legal member of the Executive Council. Though his duty is technically simply to advise, the issue here is a legal one, one moreover to which under the Constitution, there is only one answer. In giving advice, the Attorney General must conform to the requirements imposed by the federal structure of the Constitution. He is bound to advise the Lieutenant Governor to grant his fiat. I cannot accept the proposition advanced by Callaghan J. and the majority of the Court of Appeal to the effect that the Attorney General complied with his duty to advise the Lieutenant Governor when he advised him to refuse a fiat.
21. The Executive Council is in turn bound to accept the advice of the Attorney General in a case like the present. For, even if it has a right to advise the Lieutenant Governor, it, too, is under an obligation to exercise that right consistently with constitutional imperatives. In any event, one could look at the order sought as being directed to the Attorney General in a representative capacity; see *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

22. Finally, I would note that there is precedent for the kind of order sought here. *Teh Cheng Poh v. Public Prosecutor, Malaysia*, [1980] A.C. 458 (P.C.), stands for the proposition that mandamus lies to compel a minister to properly advise the executive where there has been a constitutional abuse of power by the Crown; see also *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.)
23. Finally, counsel for the respondent argued that a judgment along these lines would preclude the province's relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain monies collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of monies under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this Court, can be examined in depth.
24. For these reasons, I would allow the appeal, set aside the decision of the judge who heard the application, reverse the judgment of the Court of Appeal of British Columbia, and direct that an order in the nature of mandamus issue directing the Attorney General to advise the Lieutenant Governor to grant his fiat to the petition of right in this case.

Appeal allowed.

Solicitors for the appellant: Russell & DuMoulin, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Victoria.

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Prepared on 26 October 2026 · Esheria