

**The Executors of the Will of the Honourable Patrick Burns,
Deceased, and Others** - - - - - *Appellants*

v.

The Minister of National Revenue - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY, 1950**

Present at the Hearing:

LORD GREENE

LORD SIMONDS

LORD NORMAND

LORD MORTON OF HENRYTON

LORD RADCLIFFE

[*Delivered by* LORD GREENE]

This is an appeal by the executors of the Honourable Patrick Burns deceased (who died on the 24th February, 1937) and six added parties who are interested under his will from a judgment of the Supreme Court of Canada allowing in part an appeal by the appellants from a judgment of the Exchequer Court. That judgment had dismissed an appeal by the executors from a decision of the present respondent, the Minister of National Revenue, who had confirmed assessments to income tax in respect of the four years 1938 to 1941 inclusive under the provisions of the Income War Tax Act of the Dominion. The appeal relates to the liability to income tax of certain income received by the executors in the years in question and capitalised by them pursuant to directions in the will. The nature of the added parties and their interests in relation to this income require a more detailed explanation.

By the will of the testator his executors (called his "trustees") were directed in the events which happened to hold the residue of his estate (described as his "Trust Estate") subject to provision for an annuity to his son's widow and certain other fixed annuities upon trust until the death of the last of those annuitants or the death of the widow of his son (neither of which events has happened) to pay certain percentages totalling 60 per cent. of the net annual income of the Trust Estate by way of annuities to nephews and nieces of the testator and to invest the surplus as part of the capital of the Trust Estate at compound interest. On the death of the last fixed annuitant or that of the widow of his son, whichever should last happen, the trustees were to stand possessed of his "Trust Estate" with all accumulations and additions upon trust to distribute 67 per cent. thereof among nephews and nieces "and upon the further trust to pay and convey the rest, residue and remainder of 'my Trust Estate' unto the Royal Trust Company for the creation and establishment of a Trust to be known as the 'Burns Memorial Trust' to be administered

by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst " five named objects. The gifts in favour of these five objects were by order of the Supreme Court of Alberta dated the 11th December, 1939, declared to be valid charitable gifts. Object No. (1) described in the will as the " Father Lacombe Home at Midnapore " is part of the charitable work carried on by Les sœurs de Charité de la Providence and is the second added appellant. By the Order of the 11th December, 1939, the proper name of the body mentioned as object No. (2) in the will was declared to be " The Governing Council of the Salvation Army Canada West " under which name it appears as the third added appellant. The charitable objects mentioned in the will under the numbers (3), (4) and (5) not being existing charities, the same order directed that separate schemes in regard to them, all in substantially the same form, should be approved. The last three added appellants are the trustees of the schemes so approved. The nature of the trusts to be carried into effect under the said schemes appears sufficiently from the titles of the schemes as being for the benefit of " poor and indigent and neglected children ", " widows and orphans of members of the Calgary Police Force " and " widows and orphans of the Calgary Fire Brigade ". The first added appellant, " The Royal Trust Company ", referred to in the will is a commercial company whose objects are not limited to charitable objects.

In each of the years in question the executors paid out of the income of the trust estate the fixed annuities and other sums payable thereout and distributed 60 per cent. of the balance among the named nephews and nieces. The surplus, amounting to 40 per cent., they transferred for accumulation to capital account in their books. Sixty-seven per cent. of this surplus was ultimately divisible under the will between the nephews and nieces and 33 per cent. was ultimately payable to the Royal Trust Company. It is with income tax claimed by the respondent in respect of this 33 per cent. in the years in question that the present controversy is concerned.

It is to be noted that the ultimate destination of any fund which at the date of distribution will represent accumulations of this 33 per cent. will, under the terms of the will and pursuant to the Order of the Alberta Court, be in favour of charity. Those accumulations, however, will be and remain capital funds and will be held as such by the appellants the Royal Trust Company ; only the income of the accumulated fund will be payable to the last five added appellants for charitable purposes. Although the ultimate destination of the funds will be to constitute capital funds for charitable purposes the machinery for bringing them to the hands of those whom the testator nominates as the bodies to administer the several charities is somewhat complicated. The persons who will receive the 33 per cent. of surplus income during the period between the death of the testator and the date of distribution are the executors. They are the persons charged with the duty of receiving and accumulating it. When the date of distribution arrives 33 per cent. of the accumulations will be handed over to the Royal Trust Company as a capital fund. That company will continue to hold and administer this capital fund but the annual income of the fund is to be paid over to the last five added appellants. The purpose for which the 33 per cent. share of the accumulations is to be handed over to the Royal Trust Company is stated to be " for the creation and establishment of a Trust to be known as The Burns Memorial Trust to be administered by it (i.e. the Royal Trust Company) as trustee."

The appellants' first and most important claim is that the income in question was not liable to taxation by reason of section 4 (e) of the Act which exempts from liability:—

" The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein."

The income, they submitted, was the income either of the five added appellants or of the "Burns Memorial Trust". All of these, they claim, were "charitable institutions" and the 33 per cent. of the surplus income was entitled to the exemption.

In order that the income may be exempted under the relevant words of section 4 (e) two conditions must exist. The body claiming exemption must be a "charitable institution" and the income must be its income. If either of these conditions is absent the claim to exemption must fail. The learned Deputy Judge in the Exchequer Court held that the income in question was not "income" of any of the added appellants and consequently he did not find it necessary to decide whether any of them was a charitable institution within the meaning of the section. He expressed, however, the following opinions:

(1) that the Royal Trust Company is obviously not a charitable institution ;

(2) that the "Burns Memorial Trust" is nothing more than a name attached to a fund and is not a charitable institution.

The same opinions were expressed by all the judges of the Supreme Court and their Lordships take the view that they are manifestly correct. With regard to the argument that the last five added appellants are "charitable institutions" entitled to claim exemption the learned Deputy Judge said:

"But holding as I have done that no part of the income for any of the relevant years will at any time reach the beneficiaries (i.e. the five bodies in question) as income, it is quite unnecessary for me to determine this point and I make no finding in regard thereto."

In the Supreme Court this claim to exemption was held to fail for the same reason although in the opinion of the majority the Lacombe Home and the Salvation Army were religious or charitable institutions. This latter expression of opinion was however not necessary to the decision. Their Lordships, while not desiring to throw any doubt on its correctness, prefer to base their decision on the view taken both by the learned Deputy Judge and by all the members of the Supreme Court that the income was not income of any of the five added appellants. The executors are the recipients of the income. It is their duty to accumulate it and ultimately to hand over the accumulation to the Royal Trust Company. That Company will receive these accumulations not as income but as a capital fund which will always remain capital in its hands. All that it will disburse, all that the five bodies will receive, will be the income of that capital fund. It is true that the Company and the five bodies are entitled to enforce the obligations in respect of the income which the will imposes upon the executors and the five bodies will also be entitled to enforce the obligations in respect of the administration of the accumulated fund and the distribution of its income which are imposed on the Company. But this does not make the income received by the executors or the capital fund to be received by the Royal Trust Company in any sense or at any time the income of those bodies. This being in their Lordships' view a conclusive answer to the whole of the claim based on paragraph (e) of section 4 they prefer to express no opinion on the question whether any of the five bodies are institutions within the meaning of that paragraph.

But this does not dispose of the matters in issue. The learned Deputy Judge of the Exchequer Court had held that the whole of the income was covered by the charging provisions of the Act and dismissed the appeal to that court. In the Supreme Court a different view was taken and the appellants obtained a measure of success. The majority (consisting of the Chief Justice, Kerwin and Hudson, JJ.) thought that two-fifths of the income in question (being that proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) were free from income tax for the years 1938 and 1939 on the ground that in those years there was no relevant charging section in the Act which applied to that proportion. The minority (consisting of Rand and

Estey, JJ.) took a view more favourable to the appellants. They considered that the entirety of the 33 per cent of the income and not merely two-fifths of it was free from income tax for those two years and also for the year 1940 on the ground that no charging section applied to any of it until the year 1941. Their Lordships are of opinion that the majority of the High Court were right in thinking that the two-fifths of the income indicated by them was free from tax but they agree with the view of the minority that it was so free also for the year 1940. They are unable, however, to accept the view of the minority that the remaining three-fifths of the income was free from tax for any of the years in question.

The questions here involved turn on the construction of certain provisions of section 11 of the Act and on the effect of two amendments made in subsection (4) of that section, one having effect for the year 1940, and the other for the year 1941. The general scheme of the Act in the case of trust property is to impose the tax on the persons beneficially entitled to the income and not on the trustees. But in some cases this would have led to administrative difficulties in enforcing the tax against anyone. Examples of cases where the tax is imposed on trustees are to be found provided for in section 11. The first sub-section of that section refers to the general scheme. It provides as follows:—

“The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.”

It is convenient here to interpose a reference to an argument which was at one time advanced on behalf of the appellants viz. that the income in question could be regarded as income of the five bodies they being (it was suggested) “beneficiaries” to whose “credit” the income was accruing. Their Lordships are of opinion that this argument cannot prevail. They consider that this income is not “income” accruing to the credit of any of them. All that they are entitled to is to receive at a future date a capital sum built up from receipts which, as has been already pointed out, could never be carried to their credit as income. The sub-clause, in their Lordships’ opinion, is dealing with income “accruing to the credit” of a “taxpayer” only in the sense that it is income which is his although not yet paid to him.

Sub-section (2) of the section so far as material provides as follows:—

“Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like persons acting in a fiduciary capacity, as if such income were the income of a person other than a corporation, provided that he shall not be entitled to the exemptions provided by paragraphs (c), (d), (e) and (i) of sub-section one of section five of this Act . . .”

It was argued on behalf of the respondent that the whole of the income in question was chargeable under this sub-section as being income accumulating in trust for the benefit of “unascertained persons”. The majority of the Supreme Court accepted this argument as regards the proportion of the accumulating income which will ultimately be handed over to the three sets of trustees. In the case of those bodies they considered that the accumulations were in trust for the benefit of the several objects of the charities namely the poor, indigent and neglected children, the widows and orphans of members of the Police Force and the widows and orphans of members of the Fire Brigade. These they considered to be “unascertained persons” so that the wording of the sub-section was precisely applicable. Rand and Estey JJ., on the other hand thought that the income could not be said to be accumulating in trust for the “benefit” of those objects who would never receive it as income since all that they will receive as income will be the income of the accumulated fund, not that fund itself.

The question is not free from difficulty but their Lordships find themselves in agreement with the view of the majority of the Supreme Court. The expression "for the benefit of" appears to them to be wide enough in its ordinary significance to cover the case where the unascertained persons will receive an interest in the income to be derived from the fund built up from the accumulating income. It is true that if the view of the majority of the Supreme Court is accepted there might in that class of case be a certain measure of overlapping with sub-section 4, at any rate in its form as finally amended. The view which their Lordships favour does, however, find support in the language used by Lord Romer in delivering the opinion of the Board in *The Minister of National Revenue v. Trusts and Guarantee Co.* (1940 A.C. 138). He said of sub-section 2:—

"the subsection applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons will or will not ultimately take a vested interest in such income and whether they will or will not ever become entitled to specific portions of it. In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the Municipal Council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained. The case, therefore, seems to fall within the very words of the subsection."

No doubt the accumulating fund in that case (and not merely its income) was itself to be applied for the benefit of the aged and deserving poor so that they would be the ultimate recipients of the fund built up of the accumulating income (although they would not have received it as income). The language used does not, however, confine the principle expounded to cases of that character but is wide enough and in their Lordships' view intentionally wide enough to cover such a case as the present. Their Lordships therefore are of opinion that with regard to the three-fifths of the income in which the three sets of trustees are interested the majority of the Supreme Court came to the right conclusion. That proportion is covered by sub-section 2 which is admittedly a charging provision and as it is not exempted under section 4 (e) the appeal to that extent fails.

As regards the Lacombe Home and the Salvation Army all members of the Supreme Court took the view that the proportions of income in which those bodies were interested were exempt from taxation under sub-section 2 for the years 1938 and 1939. The majority based their conclusion on the view that these bodies were ascertained persons and as such were the persons for whose benefit the income was accumulating. There is no cross-appeal from this decision. The minority on the other hand considered that these proportions escaped taxation under the general principle enunciated by them that the income could not be said to be accumulating for their "benefit" and they will never receive it as income. Their Lordships have already given reasons for not accepting this reasoning of the minority. Accepting, therefore, the view of the majority of the Supreme Court as they do, there is nothing which imposes a charge to tax upon these two-fifths. But sub-section 4 of section 11 remains to be considered. For the years 1938 and 1939 this sub-section was in the following form:—

"Dividends received by an estate or trust and capitalised shall be taxable income of the estate or trust."

It was not contended that the sub-section in this form operated to charge these shares of income in those two years. In 1940 Parliament substituted a new 4 (a) for the original sub-section 4 in these terms:—

"(4) (a) Income received by an estate or trust and capitalised shall be taxable in the hands of the executors and trustees, or other like persons acting in a fiduciary capacity."

The majority of the judges of the Supreme Court took the view that unlike the original sub-section 4 this substituted provision operates as a true charging section notwithstanding that it does not expressly say what the rate of taxation is to be. That omission, they thought, could be supplied on the ground that this Board, in *Holden v. Minister of National Revenue* (1933 A.C. 526), construed section 11 (2) in its then form as a valid charging section, the rate of taxation being sufficiently indicated by the words then present in that sub-section which provided that the income there dealt with should be taxed "as if such income were the income of an unmarried person". Their Lordships cannot agree with this reasoning. They share the difficulties expressed by Rand J. and Estey J. in their dissenting judgments. As Estey J. said: "Without a rate or determinable amount there can be no impost" and neither of those learned judges was prepared to imply a reference either to the rate expressly specified for cases falling under section 11 (2) or any other rate. With this view of the matter their Lordships are in agreement. The two-fifths of the 33 per cent. in which the two named bodies are interested is accordingly not subject to tax for the year 1940.

For the year 1941, however, the omission was made good. Parliament for that year and following years added a new paragraph (c) to sub-section 4 reading as follows:—

"Income taxable under the provisions of this sub-section shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (c), (d), (e) and (f) of sub-section 1 of section 5 of this Act."

Their Lordships agree with the unanimous opinion of the Supreme Court that this addition states with sufficient precision what the basis of the impost is to be and turns the sub-section into a valid charging provision covering the whole of the income in question.

In the result their Lordships will humbly advise His Majesty that in the Order and Declaration made by the Supreme Court the year 1940 should be added to the years 1938 and 1939 for which the two-fifths of the income in question (being the proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) are declared to be free of income tax and that this appeal should be allowed to that extent but no further.

The Order of the Supreme Court as to costs will stand. The appellants having failed on their main contention must pay three-quarters of the respondent's costs of the appeal.



In the Privy Council

THE EXECUTORS OF THE WILL OF THE
HONOURABLE PATRICK BURNS,
DECEASED, AND OTHERS

v.

THE MINISTER OF NATIONAL REVENUE

DELIVERED BY LORD GREENE

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