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IN THE PRIVY COUNCIL

Council Chamber, Whitehall, S.W.1.

Friday, 21st November, 1924.

Present:

VISCOUNT HALDANE,
LORD JUNEJIN,
LORD ATKINSON,
LORD WREMBURY, and
LORD SALVESEN.

On Appeal from the Appellate Division of the
SUPREME COURT OF ONTARIO.

Between:

TORONTO ELECTRIC COMMISSIONERS

Appellants

and

SNIDER AND OTHERS

Respondents

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF ONTARIO

Intervenants.

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
8, New Court, Carey Street, London, W.C.2. and Cherer & Co.,
2, New Court, Carey Street, London, W.C.2.).

FOURTH DAY.

MR DUNCAN:- My Lord, may I read your Lordship two of Mr Lefroy's rather useful propositions? I think your Lordships have spoken in high terms of Mr Lefroy's book.

VISCOUNT HALDANE:- I think there are three books.

MR DUNCAN:- Yes, this is his last.

VISCOUNT HALDANE:- I am not sure that I did not like the first even better.

MR DUNCAN:- He had a very fine mind. It is propositions 54 and 55, those are on the "aspect" doctrine which Lord Dunedin characterized as the view of the legislation, the only possible test as I submit which can be applied to the British North America Act to make it workable because as was said in one case the enumeration in sections 91 and 92 do not embody the exact disjunction of a perfectly logical scheme, but they overlap, and the only way in which one can say: Is that legislation intra vires, or ultra vires, is by taking the aspect, and as I suggest it is founded on the words of the Act; that is the only possible test: "Subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures under section 92 of the British North America Act may in another aspect and for another purpose fall within the jurisdiction of the Dominion Parliament under section 91."

VISCOUNT HALDANE:- It is not necessary to recite Lefroy for that; it was said in the earlier cases.

MR DUNCAN:- Yes, my Lord, and I submit also in the later cases.

VISCOUNT HALDANE:- It was said over and over again.

MR DUNCAN:- It is the test.

VISCOUNT HALDANE:- You will find that in the Parsons case.

MR DUNCAN:- It is in the Parsons case, and it is in Russell v The Queen and Hodge v The Queen explained and approved; Russell v The Queen put it on the aspect ground.

VISCOUNT HALDANE:- It is copiously referred to in the Parsons case.

MR DUNCAN:- Yes, and subsequently applied by this Board in the Railway cases.

LORD ATKINSON:- What does the word "aspect" mean; is it the aspect of the framer of the Act, or the object and purpose to which it was evidently directed?

MR DUNCAN:- The aspect, I submit, on what your Lordships says, is is it the true aim and object of the Act.

LORD ATKINSON:- That, I can understand.

MR DUNCAN:- Is it truly aimed at altering the civil rights of persons, or is it truly aimed at preventing an industrial disturbance, the alteration of civil rights being incidental and necessarily ancillary to the true object of the Act. Now that test has been applied in all cases, my Lords, in the Railway case, the Canadian Pacific Railway v Bonsecours, and the other railway cases. In the Canadian Pacific Railway v Bonsecours this question came up: Could the Provinces by legislation compel a Dominion railway to create a ditch on its line. Your Lordships held that it could not because that in its true aspect would be legislation qua railway, the alteration of the structure of the railway, but if the Provinces said that all persons in the Province must clean out ditches so that they shall not be choked with silt and rubbish, that in its true aspect was municipal legislation within the Province, not municipal institutions but legislation falling under No. 16 of section 92. That was applied in subsequent cases in railway matters. A Western Province put in certain regulations saying that if the railways did not put in a certain type of flue to catch sparks they should be liable in damages for fires. That was held by the Supreme Court of Canada, following the Canadian Pacific Railway v Bonsecours, to be legislation qua railway, that it was the construction of the engine which was intended to be dealt with, and not "property or civil rights". That has been applied in other cases, in the Aliens case and in The Union Colliery v Bryden, and your Lordships held that Provincial legislation depriving Chinese and other aliens of the right to work underground in mines was not in its true aspect intended

to be with reference to local works and undertakings although it dealt with local works and undertakings, ^{means} means in the Province, but was legislation on aliens which was a Dominion subject, and therefore it was held to be ultra vires. Then in another case that was discussed before this Board, in the Tomey Homa case it was said that no Chinese or Japanese could have a Provincial franchise. The question was: Was it in its true aspect legislation on aliens, and your Lordships held that it had to do with the Constitution, the voting of aliens, in its true aspect. Now that is the test in every case, and I suggest to your Lordships the only possible test, and it must be applied impartially.

LORD ATKINSON:- In other words, it is the purpose and object of the Act, was it to deal with Provincial matters, and not Dominion matters?

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- In the Tomey Homa case where the question was whether Chinamen should be deprived of the vote, they said in its aspect it deals with aliens, but the primary and dominant aspect is dealing with the Provincial franchise?

MR DUNCAN:- Yes. I suggest what is the true aspect in this case is, it is an attempt to regulate the civil rights of employers in the Province. Is that the paramount matter dealt with? Is it not the disturbance of trade, the possibility of riot, and the necessity for the use of the Militia, and all those other consequences which follow from industrial disturbances, not in every case.

VISCOUNT HALDANE:- Now, Mr Duncan, is not the difficulty in your argument there that undoubtedly this does interfere with civil rights, and therefore you must find some justification for it; you cannot find it under "trade and commerce" because, according to the decisions of the Board, that is not specific enough to cover these things; you cannot find it under criminal law, you cannot find it under the general power at the beginning of section 91, and unless you can show that Russell v The Queen

has decided conclusively that there is a principle of universality which interferences there, do not you come back to the extent of the decision in Russell v The Queen? Undoubtedly it is a binding decision to this extent, that the Canadian Temperance Act was within the power of the Dominion. Whether you can draw any inference from that decision as to any underlying principle is a question you can only answer if you look at the long series of authorities that have been decided since.

MR DUNCAN:- May I, with great respect, point out what I think is the real answer to that question? Your Lordship said this Act does interfere with property and civil rights. Now I suggest to your Lordships that that is not the test -- interference, that is vital here.

VISCOUNT HALDANE:- What is my civil right if it is not to look out?

MR DUNCAN:- I grant it is a civil right; this is an interference with civil rights unquestionably, there is interference with the conduct of a local work or undertaking.

LORD ATKINSON:- I think you mean it is not the primary purpose, it is part of the machinery which they must resort to, to effect it; is that it?

MR DUNCAN:- That is part of the answer. I am dealing for the moment with this test, is interference the test, and I concede that it interferes, this legislation, not in its substantive provisions, but in its ancillary provisions with property and civil rights. In a moment I am going to say the ancillary provisions take their colour from the substantive provisions. I am dealing only with the test of interference.

VISCOUNT HALDANE:- Interference, that is not the test. If you can get back to a substantive power of the Parliament of Canada, then you have got something that can interfere, but you have got to get that something first before interference can be put out of the way.

MR DUNCAN:- With all respect, is not the test first: Does it fall within section 92?

LORD WRENBURY:- What is the antithesis to civil rights? I suppose "civil rights" means my rights as a citizen.

VISCOUNT HALDANE:- Criminal rights, I should think it would be.

LORD WRENBURY:- You could have it that the right of the criminal to be tried by the particular tribunal is his right as a citizen; when you get to "criminal", certainly that is outside. I cannot myself find a true antithesis to civil rights. What is the other adjective?

MR DUNCAN:- Not a very precise phrase, but one which was used in Russell v The Queen is, that the antithesis was between "civil rights" and "public wrongs".

LORD WRENBURY:- A right not to suffer a wrong; you are speaking of rights not wrongs.

LORD ATKINSON:- I should say a civil right is a right which the civil law, as distinguished from the criminal law, entitles you to exercise.

VISCOUNT HALDANE:- Yes, you are recognised as a citizen.

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- You can answer that if you turn to the criminal law of England which is the common law there, that everybody is at liberty to do what he pleases; liberty is the basis-principle of the Constitution; you find that fully laid down and explained by Mr Dicey in his book on ^{the} "The Constitution". If it is interfered with, it must be interfered with by the political Parliament as far as the Prerogative arises.

MR DUNCAN:- May I say in answer to that question, when one looks at the genesis of the Act the desire was to give to the Provincial Legislatures exclusive power to pass laws dealing with civil rights, whatever that is. The original conception was to preserve to Quebec its civil laws in all those matters which were dear to the inhabitants of Quebec, and that English law should not be brought in.

LORD WRENBURY:- You confine it to rights under the civil law?

MR DUNCAN:- No, I do not think it can be confined to rights under the civil law. The Citizens Insurance Co. v Parsons goes

further. Although the Provincial Legislature is given the sole right of giving rights to persons the Dominion is not thereby deprived of the right of imposing duties on Dominion subjects under peace, order and good government. I oppose public duties to civil rights.

VISCOUNT HALDANE:- I think you are putting a very wide proposition, that under peace, order and good government, you can restrict the liberty of the subject of the Province.

MR DUNCAN:- Under the United States Constitution they can apply the police power, although there is no residuum; we have a residuum.

VISCOUNT HALDANE:- I have been looking closely into that; both the States and the Dominion have police power, but merely as ancillary, and as a way of working out the power that they have already got.

MR DUNCAN:- That is my answer for the moment, if I may say so.

Now may I return to the question which we were discussing, the question whether you can say that legislation prima facie deals with section 92 because it interferes with an enumerated subject? Now it cannot be put better, I submit to your Lordships, ^{than} ~~that~~ in the very precise words of Russell v The Queen at page 838: "It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion".

VISCOUNT HALDANE:- No wonder Lord Watson expressed a note of thankfulness that he was relieved from the difficult task of deciding whether that was right.

MR DUNCAN:- But, my Lord, is that the test?

LORD ATKINSON:- Take an example; take an Act requiring

publicans to close their doors at a certain time. That would interfere with their rights because by their license they would be able to sell up to the closing hours, and if you ^{shorten} threaten it that would be interfering. If you pass a law preventing a man from driving or walking along a public road except under certain conditions you interfere with his civil rights because, according to the common law, he has a right to walk along a public highway; there is no mistake about it.

MR DUNCAN:- I accept that entirely. May I give your Lordship what I conceive to be the answer to that, that that is the first of two steps; one says to begin with: Does it interfere with any civil right, and, secondly, if so, is it the true aspect of the legislation in relation to that civil right, or is it legislation in relation either to an enumerated head of section 91, or under peace, order and good government?

LORD ATKINSON:- I understand that perfectly well; interference was not its primary purpose, but its subordinate purpose; its primary purpose was a different thing.

VISCOUNT HALDANE:- How can you assert that "peace, order and good government" gives authoritative sanction to interfere with civil rights under section 92? The words of section 91 say expressly it is not to be so.

MR DUNCAN:- May I, with all respect, refer to the words of the Act, the two sections 91 and 92. Under section 91 the Dominion is given power to legislate for "the peace, order and good government of Canada in relation to all matters ^{not} coming within the enumeration in section 92?"

VISCOUNT HALDANE:- Yes.

MR DUNCAN:- "In relation to"; the phrase is not, so as to interfere with, but "in relation to all matters".

VISCOUNT HALDANE:- All matters not coming within a class of subjects.

MR DUNCAN:- They suggest aspect as a test, is it true, in relation to "property and civil rights", is that its main purpose?

VISCOUNT HALDANE:- If it is the main purpose you have no power to do it.

MR DUNCAN:- If it is in relation to "property and civil rights"

VISCOUNT HALDANE:- Yes. If you get that in relation to something that is not within section 92 then you can do it, but if it is within section 92 the express words of the Statute you are not to do it, it is ultra vires.

MR DUNCAN:- My point is that the Legislature in passing this Act did not say the Dominion may not legislate so as to interfere with any of the matters set out in section 92.

VISCOUNT HALDANE:- I thought it did.

LORD ATKINSON:- Surely that which interferes with the particular right must have relation to the right.

MR DUNCAN:- That is not the aspect, the true pith and substance of the Act.

VISCOUNT HALDANE:- You may make laws and regulations with regard to anything not coming within section 92, but this comes within section 92.

MR DUNCAN:- You must read the words exclusively to make laws in relation to civil rights.

LORD WRENBURY:- If there is something that requires peace, order and good government which is not in relation to a thing for which power is given to the Province where is the power given?

MR DUNCAN:- It is in the Dominion. This Board has said that the whole legislative power is divided between the Provinces and the Dominion, that is to say, they have taken the absolute plenary power from the Imperial Parliament, in Canada, with the possible exception of laws giving extra territorial jurisdiction; you have within Canada the absolute plenary powers divided between the Provinces and the Dominion.

VISCOUNT HALDANE:- Assume that to be so for the sake of argument.

MR DUNCAN:- It has been decided here.

VISCOUNT HALDANE:- It has not been decided here; there were certain points with regard to education where we could not find

any power. It is a small matter section 93. Do not dwell on it. It is only the outcome of this, that a bifurcation was made of all subjects which the Imperial legislation handed over to Canada, they handed over all that Canada asked for. It is, however, true that Canada did not ask for a scientific division, they said peace, order and good government except with regard to what the Legislatures of the Provinces generally do. What is not under section 92 we include to-day in the numerous heads of section 91, that is all.

MR DUNCAN:- May I give your Lordship in a moment a reference to the case that I am relying upon, and which says, as I understand it, that it is decided by this Board that the whole legislative power is divided between the two.

VISCOUNT HALDANE:- That is a popular expression, and even Judges in the Judicial Committee are human; you must not strain casual expressions in connections where they are not applied. It is not true.

MR DUNCAN:- Now my Lord on "aspect" Mr Clement says the same thing in his book, the third edition in 1916, at page 484: "The one great cause of difficulty in all these cases is the fact that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91, and therefore at the threshold of every case this test question of aspect and purpose confronts one. Various phrases have been used by the Privy Council to frame the issue in a clear and practical shape. Collecting these, the test to be applied may be thus stated: In order to ascertain the class to which a particular enactment really belongs, the primary matter dealt with by it, its subject-matter and legislative character, the true nature and character of the legislation, its leading features, its pith and substance must be determined". Then at page 488: "The cases as to the liquor traffic also make merit special notice. What is popularly known as the Scott Act

or more accurately the Canada Temperance Act providing for prohibition throughout Canada on a local option basis was upheld in Russell's case, as dealing with the traffic in its large Canadian aspect as affecting the body politic of the Dominion; while Provincial regulations and even prohibition of the traffic in its Provincial aspect has been upheld by the Privy Council. On the other hand, the Dominion Liquor License Act, commonly known at the time as the McCarthy Act was held to be a dealing with the traffic in what was really its Provincial aspect, and was for that reason presumably held to be ultra vires". Then Mr Justice Clement treats of "colourable legislation" and gives a quotation from Mr Justice Duff in the Companies case: "If a Province professing to legislate in exercise of the powers conferred by section 92 shows by its legislation that it is in reality attempting to exercise some power conferred upon the Dominion, exclusively, then the legislation may be ultra vires".

Then: "But it has never been held, and manifestly it would be impossible to hold, that the Court has any power to effect the nullification of a Provincial statute because of the motives with which the legislation was enacted".

Viscount Haldane:-

All these things are truisms, it is their application that counts. You have an admirable application of the aspect in the Montreal case in 12 Appeal Cases, that a Railway in a Provincial territory could not be interfered with because of the Dominion expressed power giving exclusive jurisdiction over the inter-Provincial railways to the Dominion. That is a case where the subject did not come within property and civil rights which were handed over to the Province. Take banking, that is a Dominion subject, but it also obviously interferes with civil rights; it is expressly provided where ~~§§~~ 91 conflicts with 92, 91 is to prevail.

Mr DUNCAN:- I think, if I may say so, it is quite clear that aspect is the test universally applied, and I suggest to your Lordships it must be applied in testing Provincial legislation under section 92 as to whether in its true aspect it is legislating about section 91 or not; testing Dominion legislation under the enumeration of section 91 and also testing Dominion legislation under the peace, order and good government clause, and it is to be implied, I suggest, impartially.

Now may I mention to your Lordships a phrase which is to be found in 1916 1. Appeal Cases, the Insurance case, in which, for the first time, it appears to be suggested that that doctrine is not to be applied always. At the middle of page 596 your Lordships see: "The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction". In the Board of Commerce case, the only other criticism that I have been able to find of the aspect doctrine is at page 200, at the bottom of the page. Your Lordships see: "Such an aspect may conceivably become of paramount importance, and of dimensions

that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen*, both here and in the Courts in Canada, has always been applied with reluctance". Now those are the only two references to the reluctant application of the doctrine that I have been able to find. My learned friend Mr Geoffrey Lawrence says that in 1896 Appeal Cases Lord Watson says it must also be applied with caution.

LORD ATKINSON:- I think I can give an illustration. Supposing there was a plague in the country and an Act was passed that no person should frequent a Theatre or a tramway or a train till 10 days or a fortnight after he had recovered from the plague; he has certainly a civil right to travel. Of course the primary purpose of that legislation is not to prevent him travelling, the primary purpose is to prevent the spread of infection, but incidentally the way you do that is by not allowing a person who has the disease to go into the company of others till a certain time has elapsed.

VISCOUNT HALDANE:- If you have the power in the Dominion you can do that.

Mr DUNCAN:- Does not that apply precisely in this case; the primary purpose is to prevent industrial disputes.

VISCOUNT HALDANE:- That is another matter, Lord Atkinson said a plague.

Mr DUNCAN:- This is a dispute that affects the body politic.

VISCOUNT HALDANE:- Plague is a thing that affects the whole community.

Mr DUNCAN:- And so, my Lord, do industrial disputes.

VISCOUNT HALDANE:- I think the British North America Act would have been very differently framed if that had been imagined to be the effect of it.

Mr DUNCAN:- At the time I think the British North America Act was framed in 1867 there was no conception of industrial disputes in the sense in which they are understood today;

Canada was a farming community and master and servant law was of a very stringent character, it was quasi slavery legislation, there were in 1892 only on the average $4\frac{1}{2}$ employees to an industrial establishment; just as in the American Union they did not, ~~know~~ in 1775 when they formed their Constitution, know anything about railroads, still the railroads ~~had~~ ^{have} come under the general jurisdiction by legislation and decisions and spirit of the Constitution, so I suggest here that matters not enumerated, as your Lordship said in one case, that an unenumerated subject matter falls under the head of peace, order and good government -- matters not enumerated such as industrial disturbances and strikes are very real matters, quite as real as the plague, and more disastrous than the plague, because they can strike at the foundation of the State.

Your Lordship will remember the case of The King v Russell on the Manitoba strike which was brought to this Board on an application for leave to appeal. That is reported in 51 Dominion Law Reports, and it is in the year 1920. That came up under Dominion legislation dealing with criminal law, dealing with strikes and so on. The Court of Appeal of Manitoba held -- this is the Winnipeg strike which was directed not only against the economic, but also the political life of Canada -- "Under section 590 of the Criminal Code it is lawful for workmen to combine in a strike in order to get higher wages, and persons who aided or encouraged such a strike would not be committing an unlawful act because they were endeavouring to bring about something that was legal, but this section can be no protection where the conspirators did acts and caused acts to be done which were offences punishable by Statute, and therefore not protected by section 590, and where the ultimate purpose of the strike as declared in public speeches and propaganda was revolution the overthrow of the existing form of Government in Canada and the introduction of a form of socialistic or Soviet rule in its place which was to be accomplished by general strikes, force and terror, and if necessary bloodshed, the conspirators of such a strike are guilty of seditious conspiracy under section 134 of the Criminal Code". Your Lordships will find in the judgments of Chief Justice Perdue, Mr Justice Cameron and Mr Justice Dennistoun details of the matter. At page 24 they speak of the meetings of these people prior to the strike which, as Mr Murdock says, broke out in quite an ordinary way in three small industrial establishments in Winnipeg which were not under the Industrial Disputes Act and at once spread to other Provinces of Canada; there were strikes at Brandon, at Edmonton and other places, sympathetic strikes, and his own men from the best disciplined labour organization in the United States and Canada, the labourhood of railway train men, law abiding as he considered them, adhering to their contracts, went out and

struck in sympathy because of class feeling, and the belief that class interests were in jeopardy, and Mr Murdock, who was at the time the Vice-President of the Canadian branch of the International brotherhood which has about 175,000 labour men in it, 14,000 or 15,000 of whom were in Canada, went to Winnipeg to break the strike of his own unlawful strikers, and he did his ^{very} best; he said he would not have believed it possible that men previously law-abiding would be carried away by this propaganda in this way; there was a riot. The Strike Committee

allowed the Board to be called only under the permit of the Strike Committee; they seduced the police and special police had to be put in; the moving theatres were allowed to be run only with a ^{sign} thing up at the beginning of each film which said:

"Permitted by authority of the Strike Committee, and it was most serious. If your Lordships have any doubt about it I would ask your Lordships to look at the findings in The King v Russell.

VISCOUNT HALDANE: That brings it into the conception of negotiation. Strikes were illegal by the Common Law of England. The strike legislation of England never authorised strikes of that kind, they remained a crime.

MR DUNCAN: Yes.

VISCOUNT HALDANE: And it was a crime in the statute book, and no English statute such as was incorporated within the Act would permit such a crime to be permitted, indeed no English Act. They were treated as an illegality altogether, not a civil right.

MR DUNCAN: I was replying to Lord Atkinson's suggestion that strikes are not serious, like plagues.

VISCOUNT HALDANE: Some strikes are.

LORD ATKINSON: I did not say that; of course a strike may be very serious.

VISCOUNT HALDANE: And very grossly illegal.

LORD ATKINSON: This is directed to discourage violence and crime.

MR DUNCAN: It is not only in Winnipeg in 1919, but this propaganda is going on throughout Canada.

VISCOUNT HALDANE: Assume that to be so.

MR DUNCAN: May I refer to another case. There is the case in the very last Ontario Law Reports, where Mr Justice Kelly in Ontario, in trying the case which had to do with the Ukrainian Society -----

VISCOUNT HALDANE: What has that to do with this; if we were dealing with legislation under the Act as to criminal law, it would be very relevant, but you are not suggesting that ?

MR DUNCAN: I suggest this, that if strikes in the present condition of labour organisation throughout Canada could start and be very quickly turned into an attack on the State, the Parliament of Canada must have power and jurisdiction over that subject, because one cannot say in advance what strike will turn into this sort of paralysis at any moment.

VISCOUNT HALDANE: If your first proposition is true, there is a great deal in it. It is a proposition we are more familiar with on the political platforms than in the law Courts.

MR DUNCAN: I would suggest in the interpretation of the British North America Act, if there is room for doubt, that your Lordships are entirely clear to decide in this case, because there is only dicta to the contrary, that the jurisdiction in present conditions must be given to the Dominion; no harm can possibly come to the Provinces, because under the legal decisions there is the co-ordinate jurisdiction in the Province to deal with strikes as matters of local concern, provided only that provincial legislation is not repugnant to the general Dominion legislation.

VISCOUNT HALDANE: We are unfortunately sitting here construing an Act of Parliament. If in Canada you wish it to be amended, I have not the least doubt, as far as getting over the technicalities are concerned, that the Imperial Parliament here will amend it for you at once. You can say that from Canada, but it has not yet been said from Canada.

LORD DUNEDIN: I gather what you want to say is this, that industrial unrest is just as all-pervading an evil as intemperance was said to be?

MR DUNCAN: Much more so.

LORD DUNEDIN: It cannot be more than all-pervading.

VISCOUNT HALDANE: Do you put that forward as Canadian opinion?

MR DUNCAN: There are plenty of people in Canada who like their glass of beer. I say industrial unrest is more all-pervading, if one can put it that way, than the plague because it is with us all the time; we are constantly having sympathetic strikes and the other effects that are in actual operation.

LORD DUNEDIN: I do not see why you say it is more all-pervading than intemperance, but you can say it is more hurtful.

VISCOUNT HALDANE: The late Mr MacLaren in Canada would have denounced that very much.

MR DUNCAN: May I refer to the criticism which my friend Mr Geoffrey Lawrence made about my statement, that there are only two cases which suggest that the aspect doctrine is not to be dealt with. ^{applied} My friend referred to the beginning of page 361, of 1896 Appeal Cases, in which your Lordships say: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada". I submit that, looked at critically does not affect the aspect doctrine at all.

VISCOUNT HALDANE: I am not suggesting that it does.

MR DUNCAN: The whole of the four liquor cases, Russell v The Queen Hodge v The Queen, the Attorney-General of Ontario v Attorney-General for Canada and the Manitoba Licence Holders' Association case all proceed on the aspect doctrine, and I suggest that it is not attacked anywhere until 1916 Appeal Cases. Then as to the question of co-operation, may I refer to Dobie v The Temporalities Board, in 1882, 7 Appeal Cases, at page 136.

VISCOUNT HALDANE: That is a case we know very well.

MR DUNCAN: Yes, my Lord, I will not read it.

VISCOUNT HALDANE: It is very far away from anything we have got here.

MR DUNCAN: It seemed to me, my Lord, to be relevant in this way.

VISCOUNT HALDANE: It prevented the Legislature of Quebec from taking away rights which other people had got previous to Confederation.

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McDUNCAN: Did not it say that where you have an Act which affects two Provinces, although it affects civil rights, the only power which can pass it is the Dominion Legislature? Now here I say that is not co-operation, that is the antithesis of co-operation.

VISCOUNT HALDANE: I do not know that it did decide definitely that the Dominion could legislate; that was not before the Board; the question was whether Quebec could legislate.

MR DUNCAN: Yes, and they said it must be by the Dominion.

LORD ATKINSON: I do not think it follows at all, that if one Province can legislate for itself and another, that therefore the Dominion can legislate for the two combined.

MR DUNCAN: I only mean it is truly for Canada as distinguished from the Provinces.

VISCOUNT HALDANE: Even then it does not follow, because the Imperial legislation may not give the Dominion power.

MR DUNCAN: That doctrine of co-operation first appeared in 1912 Appeal Cases in the Montreal Street Railway case. I suggest there is no suggestion of it in any previous cases. I suggest to the contrary, that Dobie v The Temporalities Board is quite the other way. You do not look for co-operation where you need legislation in more than one Province or for the whole Dominion and it can only be passed under the British North America Act.

VISCOUNT HALDANE: That is a doctrine I hear for the first time.

MR DUNCAN: I advance it quite seriously, my Lord. I say that co-operation first appeared in 1912 Appeal Cases.

VISCOUNT HALDANE: I do not think that co-operation appeared in 1912 Appeal Cases; all that was said was that the Dominion must have the authority to deal with an inter-provincial railway.

MR DUNCAN: It is the first time I have been able to trace co-operation mentioned. There are only three references to co-operation. The next is in the Board of Commerce case, reading the sentence on page 201 and running on to the top of page 202: "In the case before them, however important it may seem to the

Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures".

VISCOUNT HALDANE: I am glad I have escaped as lightly as Lord Atkinson. After what you read I plead not guilty to the enormity charged.

MR DUNCAN: Your Lordship appreciates the difficulty I am in. I am here to put a certain case to your Lordships, and I must discuss the case.

VISCOUNT HALDANE: And you do it excellently. You are putting the whole case before us from the point of view of the Ministry of Labour as powerfully as it could be put.

MR DUNCAN: From the point of view of the Dominion Government.

VISCOUNT HALDANE: The Ministry of Labour is a Dominion Ministry.

MR DUNCAN: I may say, if my learned friend will permit me to say something out of the Record, that I brought a message over here to Counsel from the Prime Minister himself in connection with this matter; it is his own child.

VISCOUNT HALDANE: We will treat it with more reverence than we did.

MR DUNCAN: I mention it only on that point, that your Lordship said it is the Ministry of Labour only that is interested in this; it is not.

VISCOUNT HALDANE: I did not suggest that; I said you had a very powerful plea on behalf of the Ministry of Labour. You have no message from the Prime Ministers of the Provinces?

MR DUNCAN: The Provincial Legislation on this subject is a dead letter.

VISCOUNT HALDANE: I wonder what they would say about that?

MR DUNCAN: British Columbia had a statute and they repealed it last year by the Obsolete Statutes Repeal Act.

VISCOUNT HALDANE: I should like to know why; they probably had some political reason that seemed to them good. Do not go into it. You cannot go into it. It involves discussions in the British Columbia Legislature.

MR DUNCAN: On page 41 of the Record there is a letter from Mr Rollo, the Provincial Minister of Labour, to Mr Gunn, who was acting for the men at that time, dated April 18, 1923, in which he says: "Dear Mr Gunn, I have your letter of the 9th. inst. re a dispute between the Toronto Electrical Commissioners and the Canadian Electrical Trades Union, and asking that a registrar be appointed under the Trades Disputes Act. Although this Act has been in existence for a number of years" --since 1890 as a matter of fact ---"we have never before had occasion to use it, and consequently have no machinery immediately available. The matter is, however, receiving careful consideration, although I am still not convinced that it is not a matter which should be dealt with under the Dominion Industrial Disputes Act". That was all that happened, nothing further was done. Now contrasting that evidence with the evidence of Mr Acland, which is to be found at page 106 at the bottom of the page, what he says is: "Altogether during the period I have indicated, from March 22nd., 1907, down to March 31st., 1923" --1907 was when the Act was passed --"there were 597 cases referred under the terms of the Act, and 428 Boards of Conciliation were established".

VISCOUNT HALDANE: This is the ^{Limestone} Limestone Act ?

MR DUNCAN: Yes. At the top of the next page he says goes on: "In 428 cases Boards were established. Out of 597 disputes referred under the Act, in each of which cases there were sworn statements to the effect that a strike or lockout (although a lockout practically never occurred) would occur to the best of the knowledge and belief of the applicants, all were disposed of without strikes and lockouts with the exception of 37 cases".

LORD ATKINSON: Were these cases dealt with under the Act that you are defending ?

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MR DUNCAN: Under this Act in practical operation. The British North America Act may have unfortunately put jurisdiction in a wrong place, but as a practical proposition in Canada, all these disputes came under the ^{Limeaux} Limeaux Act, the only Act competent to look at Canada as a whole.

VISCOUNT HALDANE: I am not the least questioning that the ^{Limeaux} Limeaux Act may be a great success, it has already been said so here; we cannot concern ourselves to enquire into these matters. The Limeaux Act was taken up here and was said to have been very successful.

MR DUNCAN: On the evidence of some of the witnesses which was given, it was at first opposed by Labour, but it has been since supported. As my friend said, it is a sedative measure, and Labour, which is liable to fly off, looks at the Act and believes in its justice. It is the only Act that could possibly deal with the subject satisfactorily from a Labour point of view, because if you have a provincial Act in each Province differing, as many of them will in terms, because some Provinces will say: We are not going to treat Labour generously, we are going to say we will not have machinery for your Act, we will not have a recognition in the case of some of the Provinces, and you may have a dispute breaking out in Ontario, and you may go under a Provincial Act, and then you may find that that spreads to Quebec, and possibly to some other industry.

VISCOUNT HALDANE: I think in Parliament last year it was said that it has not been the practice under the ^{Limeaux} Limeaux Act, or it has not been necessary, to impose fines, it is a way to avoid a strike.

LORD ATKINSON: There have been strikes in face of the provisions of the ^{Limeaux} Limeaux Act.

VISCOUNT HALDANE: They have not put the criminal law in force.

MR DUNCAN: People have been convicted and sent to gaol.

VISCOUNT HALDANE: This has been said in favour of the Act, that it has been so much accepted that there has been very little

necessity for that.

MR DUNCAN: Comparatively little. Possibly the ^{closest} ~~greatest~~ criticism of the Act up to that time, was that made by Sir George Askwith, who made a special study of the matter when he was in Canada. The Act has been uniformly successful, one may say, leaving out a few exceptions, and has the support of Labour; it has Labour's sympathy, and Labour recognises the justice of the provisions. It is a great piece of political work in reaching that point, and if, unfortunately, the framers of the British North America Act were not so wise as they believed, and the legislation properly falls under the other head of these decisions, it is a question of quieta non movers.

VISCOUNT HALDANE: You are speaking as a politician.

MR DUNCAN: No, my Lord, I am not.

q VISCOUNT HALDANE: There is a great deal in what you say as a lawyer. My point is that you are speaking as a lawyer to a lawyer. I cannot look at these things.

MR DUNCAN: The only other case in which co-operation was mentioned was in 1923 Appeal Cases, the Fort Frances case, at page 704, in which your Lordships say this: "The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose".

VISCOUNT HALDANE:- That was in time of war and we were speaking of a war measure.

Mr DUNCAN:- Yes. Your Lordships said this is not a case where we can depend on collective action of the ^{Legislatures} ~~Legislators~~ even in war.

VISCOUNT HALDANE:- Particularly in war.

Mr DUNCAN:- The suggestion I draw from the case is that in war you may have decisions of, not this Board, but of a subsequent Board, saying: But while we think this is a case in which you should have collective action of the Legislators ^{were} such a decision may vary with the composition of the Board, because there are no legal principles on which the Board can say this is an emergency, or that is an emergency. If it is an emergency what is the legal principle. Does emergency depend on evidence or are the parties to bring evidence here of conditions in Canada? Emergency is not a legal conception under the British North America Act, and I submit to your Lordships that the true test is, ^{is it} in its relation to, or is its aspect peace, order and good government. As to what is its paramount purpose your Lordships are the sole judges of that. If your Lordships say no, that settles the question, but to say that in cases of emergency we will write into the Constitution an overriding clause saying: now the Dominion may legislate because we are satisfied, on the evidence given to us, that there is an emergency of greater or less degree, I submit is a most dangerous kind of doctrine, because under a Constitution such as this one must have certainty in advance that what one is dealing with is within their power.

LORD ATKINSON:- I will put this question to you. If you have an Act of the Dominion very drastic in character whose paramount and primary purpose was dealing with a plague, suppose there was no plague and the validity of that Act were brought ^{up} here, are we to take it for granted that there was a plague

when there is abundant evidence to show that there is no plague?

Mr DUNCAN:- No.

LORD ATKINSON:- That is an extreme case. I thought your argument yesterday was that if you find a Dominion Act dealing with any particular state of circumstances you have to assume that that state exists because the Legislature have said they are the best judges whether it does or not.

Mr DUNCAN:- No, that is not my argument at all.

VISCOUNT HALDANE:- Surely if it purports to provide for or to deal with a certain thing which in fact does not exist, it can be questioned.

Mr DUNCAN:- Yes.

LORD SALVESEN:- I think you suggested there was a presumption?

Mr DUNCAN:- Yes.

LORD SALVESEN:- I do not think you went so far as to say it was an irrebuttable presumption.

Mr DUNCAN:- No, I say there is a presumption, that the cases have laid down that the presumption is to be made in favour of the validity of the Act, and it is only when the onus is discharged that you can say, but this is not in the regulations for peace, order and good government.

LORD ATKINSON:- Does it apply to a Dominion State that interferes with the rights of the local Provincial Constitution?

Mr DUNCAN:- That would be, if it is in relation to that, it would not be within Dominion competence. What is its true legislative character? Is it dealing with a Provincial Constitution, if so then it is outside Dominion jurisdiction in this Act.

LORD ATKINSON:- Supposing it is an Act of the Dominion that plainly interferes with civil rights sacred to the inhabitants of Toronto, is that assumed to be all right, is there any prima facie presumption that it is all right?

Mr DUNCAN:- I submit that interference is not the test; it is not the aspect; it is not the incidence.

LORD ATKINSON:- Supposing the Constitution of Toronto had given its inhabitants certain rights, and supposing that the Dominion takes away those rights by a Statute from Toronto, are we to assume that that Statute of the Dominion is prima facie justifiable?

Mr DUNCAN:- You would assume it until you saw its true aspect, and then you would see from its true aspect it is not that.

LORD ATKINSON:- If you saw that its purpose was to take away certain rights from the inhabitants of Toronto that were given to it by the Local Legislature, are we to assume in the absence of all evidence that the Dominion have materials before them which would justify that legislation?

Mr DUNCAN:- No, my Lord. You can conclude from the terms of the enactment itself that its true purpose is to deal with a Provincial matter and it does not require evidence.

LORD ATKINSON:- The letter of the Act tells you that, but suppose they said the inhabitants of such Provinces shall only have certain rights which were narrowed from what they would be under the original Constitution, are you to assume that the state of facts existed which justifies that Dominion legislation?

Mr DUNCAN:- No, I do not think you are to assume it any longer than up to the point that you can see that it is not.

VISCOUNT HALDANE:- You were going to give us something about the evidence.

Mr DUNCAN:- Yes, my Lord.

VISCOUNT HALDANE:- I think we have got to a point now where we may have that.

LORD WRENBURY:- Have you finished all you want to say about the law.

Mr DUNCAN:- No, my Lord, I have not.

VISCOUNT HALDANE:- I did not intend to stop you.

Mr DUNCAN:- May I then turn to another branch of the matter, and that is, I want to refer to the conception of the British North American Act which I think is the true conception, that in 92 one has matters of local concern and in 91 of national concern.

VISCOUNT HALDANE:- We have told you that we will hear Sir John Simon notwithstanding that Mr Clauson may have to speak today in his absence. We certainly will hear Sir John Simon so you are not cutting him out.

Mr DUNCAN:- I understood that or I would not have thought of going on. I understood from what your Lordship was kind enough to say at the commencement that that was the case.

VISCOUNT HALDANE:- We are particularly anxious to hear from you, without breaking into what you have to say on the law, something about the evidence, because you fought the case.

Mr DUNCAN:- I have been much longer than I expected to be.

LORD WRENBURY:- I should like to hear you out on the law.

VISCOUNT HALDANE:- Do not for a moment think I am wishing to interrupt you, I am only reminding you.

Mr DUNCAN:- Your Lordship has a reference in that case to the Quebec Resolutions. May I refer your Lordship to those Quebec Resolutions agreed to?

VISCOUNT HALDANE:- That cannot affect the construction of the words of the Act of Parliament. They are read ~~as~~, Mr Duncan, by an irregularity which has been sanctioned by usage, just as I think the Resolutions in Australia have been read, where they cannot modify the construction. As if we were dealing with a diplomatic document it would be otherwise. When it is a Treaty all ~~kind~~ kind of things are read as material to qualify the particular construction, but it is not so with an Act of Parliament of the Empire.

Mr DUNCAN:- I quite realise the criticism there. May I as a matter of indulgence, because your Lordship has referred to this, read them, the ones I intend to rely upon.

VISCOUNT HALDANE:- Do not apologise; I will not interrupt you again.

Mr DUNCAN:- May I refer your Lordship to what is well known by the Board, that the British North America Act was agreed to and drafted at the time of the American Civil War was raging, and the principal conception of the founder was to give to the Dominion Parliament unquestioned jurisdiction over matters of national concern and at the same time to preserve inviolate these matters of pure Provincial concern which were dear, particularly to the people in the Province of Quebec .

VISCOUNT HALDANE:- You say preserve entire, but you must remember the Provinces of Canada were independent Colonies at that time.

Mr DUNCAN:- Yes, and what they did -- I am coming to that -- was this, they did not do as in Australia, Australia reverted to the United States model, and South Africa comes again to a very closer legislative Union, it is true a legislative Union, but Canada did this, it said: We will form all the Provinces into one State which is the new State; they disappear as Provinces; and then we can carve out little Provincial jurisdictions out of that State.

VISCOUNT HALDANE:- I do not think they ever became one State, but they did receive their legislative power from the Imperial Parliament on a bargain that the Imperial Parliament would re-create these powers fashioned forth in a manner agreed at Quebec.

Mr DUNCAN:- Yes. Really we come back to the Quebec Resolutions for their intention. I do not speak of what their language now is said to have done, but their intention, and

as a historical fact it is unquestioned that their intention was to make a legislative union with respect to matters of national concern and leave it to the Provinces in matters of Provincial concern.

VISCOUNT HALDANE:- I wish you to be carefully guided by my own unfortunate example in the case about the Australian States for the reasons you are putting. The Constitution of Canada is not a true federal ^{Constitution} condition, it is not a case in which the original Provinces remained independent States and took certain powers which should be exercised by the Commonwealth. For that sentence in that Judgment I was criticised in a series of articles that extended over 10 ^{two} years, and I need not say that the criticism came from Toronto.

Mr DUNCAN:- I do not know why I should be responsible for all the sins of prohibition and others of Toronto.

VISCOUNT HALDANE:- I think you are on very delicate ground with regard to what you are saying now.

MR DUNCAN:- I want to refer to the latest book on the Constitution of Canada, Mr Kennedy's book which was published in 1892.

VISCOUNT HALDANE:- I have read it. I think you will find some reference to the Commonwealth judgment which I was warning you about, standing where you are, as to the responsibility with which you utter words.

MR DUNCAN:- Unfortunately, Mr Kennedy is an Irishman, and I do not take all he says. He says at page 303: "Firstly, Mr Macdonald, that is Mr Macdonald who was afterwards Sir John Macdonald; never for a moment abandoned his consistent support of a strong central government", he is speaking of the Quebec momentous discussions before the Quebec Resolutions.

VISCOUNT HALDANE:- The real contest was between Sir John Macdonald and Lord Watson.

MR DUNCAN:- Aply assisted by other Noble Lords: "When one of the delegates from New Brunswick pointed out that the proposal to specify the powers of the local Legislature tended to create a legislative Union Macdonald accepted the challenge and insisted that any imitation of the United States in this connection would end in disaster. Macdonald's wishes prevailed". Turning to the Quebec Resolutions may I refer to No. 2. That will be found in Mr Clements book on the Constitution at page 965: "In the Federation of the British North American Provinces the system best adapted under existing circumstances to protect the diversified interests in the several Provinces and secure efficiency, harmony and permanency in the working of the Union would be a general government charged with matters of common interest to the whole country; and local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island charged with the control of the local matters in their respective sections; provision being made for the admission into the Union on equitable terms of Newfoundland, the North West Territory, British Columbia and Vancouver". Then there is No. 29 which is the forerunner of section 91 of the

British North America Act: "The general Parliament shall have power to make laws for the peace, welfare and good government of the Federated Provinces (Saving the Sovereignty of England) and especially laws relating to the following subjects". Then they are enumerated, and the last which is No. 37 is: "And generally respecting all matters of a general character not specially and exclusively reserved for the local governments and Legislatures", the corresponding provision is No. 43.

VISCOUNT HALDANE:- That was not carried out.

MR DUNCAN:- The enumeration in both is just the same.

VISCOUNT HALDANE:- There is no reference even to the enumeration in section 91.

MR DUNCAN:- They are in section 91.

VISCOUNT HALDANE:- I think if your point is right attention is not directed to the fact that the Dominion Government were to remain with the power by enumeration.

MR DUNCAN:- It is: "and especially laws respecting the following subjects"; then comes regulation of trade and commerce, postal services, militia, military and naval services and defence and so on, banking and so on and legal tender. There are all those enumerations.

VISCOUNT HALDANE:- What I mean is they speak as though the powers to legislate on peace, order and good Government, or peace, welfare and good government were simply to be altered by these, but, as a matter of fact, they were not so, there was to be such a residuum as was left from section 92.

MR DUNCAN :- I am relying on that phrase in No. 2, that they are charged with matters of common interest to the whole country.

VISCOUNT HALDANE:- No, that is just what they did not do.

MR DUNCAN:- I think so. There is No. 45 also which I have not read yet, and that is important. No. 43 says the local Legislatures shall have power to make laws respecting the following subjects. Then there is an enumeration very similar to this in section 92 of the British North America Act, and No. 15 is

"property and civil rights except in those portions thereof assigned to the general Parliament"; then No. 18 is: "And generally all matters of a private and local nature not assigned to the general Parliament", the conception being in matters of common concern for the whole State the Dominion Parliament might legislate, and in matters that were local and of private concern the Provincial Parliament might legislate.

VISCOUNT HALDANE:- I say that was not carried out.

MR DUNCAN:- I say in the Quebec Resolutions they intended to do that, and now I am coming to the other point.

VISCOUNT HALDANE:- That is why I put in a word of warning about citing these Canadian Resolutions. There are points in which they were not carried out in the Act of Parliament.

MR DUNCAN:- May I read No. 45: "In regard to all

matters over which jurisdiction belongs to both the general

and local Legislatures, the laws of the general Parliament shall

control and supersede those made by the local Legislature, and

the latter shall be void so far as they are repugnant to or

inconsistent with the former".

VISCOUNT HALDANE:- That is only true of the enumerated subjects in section 91?

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- What no doubt happened when the Canadian draft which Lord Carnarvon prepared was completed was they sent it over to Canada, and it was discussed there.

MR DUNCAN: I think there were Canadian Delegates in London.

VISCOUNT HALDANE:- With authority to vary it, they must have had.

MR DUNCAN:- There was no further Quebec Conference.

VISCOUNT HALDANE:- I believe there was not. They must have assented to the alterations in the draft, or else they never would have been passed.

MR DUNCAN:- However, it was done, I do not think there is any question historically that those who came here thought that they were putting through an Act in accordance with the spirit of the Quebec Resolutions; there is no suggestion anywhere to the contrary.

VISCOUNT HALDANE:- The spirit, certainly, not the letter.

MR DUNCAN:- The Quebec Resolutions were framed at a most momentous Conference and with great care.

VISCOUNT HALDANE:- I think so. I think you may put it here that nobody would assume responsibility for the exact words of the Act, but they said: This is the draft of the bill we have more or less agreed, and we recommend it to Parliament. Did you ever look at Lord Carnarvon's speech to see what he said?

MR DUNCAN:- Yes, I do not remember what he said, but I have read it. I do not think there is any doubt, it has never been suggested in any historical book, and I have never seen any original document, that the people who agreed to the British North America Act thought they were getting what they had agreed to in the Quebec Resolutions, and that was the conception, as your Lordship said the other day, of Chief Justice Ritchie and Mr

Justice Strong; all the people realised that, and it only began to be thrown the other way afterwards, not by 1896 Appeal Cases, but after that time, and principally, I suggest, it started in 1912.

VISCOUNT HALDANE:- It was Ontario that did it.

MR DUNCAN:- Yes, my Lord, I know Sir ^{Oliver} Alfred Mowat was the Champion of the Provinces, and by degrees Quebec and the other Provinces began to back him up.

VISCOUNT HALDANE:- They appeared in the Appeals; I recollect there was a great conflict.

MR DUNCAN:- I submit to your Lordship with all respect, that the co-operation only appeared in 1912, that was when we first hear of co-operation.

VISCOUNT HALDANE:- No. I held Sir ^{Oliver} Alfred Mowat's general retainer, so I ought to know.

MR DUNCAN:- I also suggested to your Lordship if it is possible to interpret the British North America Act in accordance with the spirit of the Quebec Resolutions that should be done, if it can be done.

May I now turn to the two sections, and I shall be very brief on that. There are some propositions that I would ask your Lordships to agree to: First, may I mention the rather important case in 1914 Appeal Cases at page 237, The Attorney General for the Commonwealth of Australia v The Colonial Sugar Refining Company Limited?

VISCOUNT HALDANE:- Take care how you endorse those words, otherwise another book will appear in Canada criticising you.

MR DUNCAN:- May I refer your Lordship to a passage on page 253. If I may say so, I think this decision is precisely in point. All that your Lordships have at present before this Board is the Constitutionality of the substantive provisions of the Act, those appointing a Board to inquire, and one or two ancillary provisions, that provision which gives the Board power

to subpoena witnesses and enter premises; the other provisions, the criminal provisions, are not before the Board, although I accept the statement that one must look at them.

LORD ATKINSON:- The provisions obligigx them to work until the decision.

MR DUNCAN:- That is not before the Board. It has been held in this Court the Act can be divided.

VISCOUNT HALDANE:- I am not clear about that. Is the only question before us the question as to the power to subpoena and search? Is there no question as to the power to stop the strike and fine?

MR DUNCAN:- No.

VISCOUNT HALDANE:- I thought the validity of the Act was before us %

LORD ATKINSON:- I understood from Mr Bevan that was one of the things you are entitled to look at to see the scope and purpose of the Act, and the scope of its invasion of civil rights.

VISCOUNT HALDANE:- I thought Mr Bevan was challenging the whole Act?

MR STUART BEVAN:- Undoubtedly, I want to make that clear.

MR DUNCAN:- I think my friend is challenging the whole Act. The matter arises in this way.

VISCOUNT HALDANE:- Are there any instructions for any proceedings against him under the Act?

MR DUNCAN:- Under those sections of the Act.

VISCOUNT HALDANE:- I thought he put it generally?

MR STUART BEVAN:- If your Lordship remembers it was some time ago, I asked your Lordships to be good enough to go through the provisions of the Act to see how far they invaded civil rights.

LORD SALVESEN:- It may be the occasion of your challenge was limited to the subpoena.

MR STUART BEVAN:- Well, my Lord, we had not arrived at the subpoena; we objected to the appointment of the Board. The

Board would have then had to proceed to act in the matter, but it was upon the appointment of the Board and the power that was given to the Board by the Act that we applied for an injunction to prevent the Board from sitting and from exercising any of the powers conferred by the Act upon it. The time had not come at which subpoenas had been served.

VISCOUNT HALDANE:- It is open to us to say certain things are lawful enough and others are not; you in limine challenge the whole of it?

MR STUART BEVAN:- Certainly.

MR DUNCAN:- I understand my learned friend challenges the whole Act. I suggest to your Lordship the only case here is the subpoena. The matter arose in this way. The Board was appointed under the Act by the Minister; the Board held one or two sittings, and the plaintiffs in this action refused to recognise the Board; they took the Constitutional point that this is an ultra vires act and they refused to recognise the Board; they attended by counsel and made a formal protest. Then the Board adjourned until I think it was the 20th of a certain month saying that on that date they would attend and hear such witnesses as wished to come before them, or words to that effect -- my learned friend will correct me if I am wrong. There was no threat by the Board of using its summary powers. Now the Respondents are not relying on that, but I wish to make it clear to your Lordships how the matter arose. There was no threat of that, the matter was being fought out on a technicality there. The Defendants would say there was no evidence on which Mr Justice Orde could grant an injunction because the Board never said it would exercise its compulsory powers, it merely said that they would sit on a certain day and proceed to hear certain parties that came before it. However, we are not as I say, relying on that point at all, because on the question at issue before the Board we are here and wish the matter decided.

LORD WRENBURY:- You say there is no such Board?

MR DUNCAN:- I say there is a Board; my friend says there is no such Board.

LORD WRENBURY:- He says there is no such Board, the Act never had effect at all.

MR DUNCAN:- That is so.

VISCOUNT HALDANE:- Never mind what its powers are, it is a number of people sitting at a table.

MR DUNCAN:- Yes, and they issued a Writ endorsed asking for an injunction to restrain the Board from exercising its power under the Act, and for a general declaration as to the Act being ultra vires. Now the only point before your Lordships is assuming that the Board was intending to exercise its compulsory powers if necessary are those sections ultra vires. Now that is the case here in this case to which I refer; that was an Australian case in which the question came up of the power of the Central Government in Australia to appoint a Royal Commission to take evidence and report with power to subpoena witnesses and so on.

LORD ATKINSON:- It is contended that the whole Board is not legal, that the Act did not authorize its construction.

MR DUNCAN:- Suppose my learned friend and I constituted ourselves a Committee of two to investigate an alleged labour dispute, and we said: We will sit on Thursday next and we will hear such parties as come before us, can my learned friend go to the Court and get an injunction to restrain me from going on sitting?

VISCOUNT HALDANE:- There is no law against that.

MR DUNCAN:- He cannot get his injunction, his action fails. If I say that I will subpoena witnesses and

enter premises then he in advance could.

VISCOUNT HALDANE:- I am not sure about that.

MR DUNCAN:- If my attitude is sufficiently fierce, and there is a real threat perhaps he can; we accept that.

VISCOUNT HALDANE:- If you were to try to administer an oath you might get into trouble.

MR. DUNCAN: We would have gone on to exercise the power given to the Board. The criminal provisions are before your Lordships, and it is on that branch of the case that the case to which I have referred, in 1914 Appeal Cases, is precisely in point. May I refer your Lordships to page 253, where the Lord Chancellor, Lord Haldane, delivering the judgment of the Board, says: "But there remains the question which goes to the root of the controversy between the parties. Were the Royal Commissions Acts *intra vires* of the Commonwealth Parliament? This is a question which can only be answered by examining the scheme of the Act of 1900, which established the Commonwealth Constitution. About the fundamental principle of that Constitution there can be no doubt. It is federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shows. The British North America Act of 1867 commences with the preamble that the then Provinces had expressed their desire to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom." May I pause there to refer to the two sections in the British North America Act. The preamble says: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom" -- that is to say, the new State was to have a constitution similar in principle to that of the United Kingdom -- "And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire". That is the argument. Then, section 3: "It shall be lawful for the Queen, by and with the advise of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall

form and be one Dominion under that name accordingly." Then section 5: "Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick."

VISCOUNT HALDANE: Nothing is said about the North West Territory there. How did that come in? Was there a special section?

MR. DUNCAN: There is a special section.

VISCOUNT HALDANE: How were they got in? I rather think it was by a section very late in the statute?

MR. DUNCAN: There is an Order in Council admitting Ruperts Land and the North West Territory.

VISCOUNT HALDANE: That is under statutory powers?

MR. DUNCAN: Yes, under an Order in Council.

Mr. Clouston:

~~VISCOUNT HALDANE:~~ In Mr. Munro's Book there is an Order in Council of the 24th June, 1870 under the authority of section 146 of the Act

LORD DUNEDIN: Rightly or wrongly, it is really settled in a way on which we could not go back, that the Australian constitution is federal and the Canadian constitution is not. The practical question is: Where is the residuum?

MR. DUNCAN: Yes.

LORD DUNEDIN: In the case of Australia the residuum is in the province and in the case of Canada the residuum is in the Dominion.

MR. DUNCAN: Precisely, that is my point.

LORD DUNEDIN: I do not think you need labour that, because that is settled beyond all doubt.

VISCOUNT HALDANE: Whether it is federal or not is another question?

MR. DUNCAN: Yes.

LORD DUNEDIN: I am convicted of using the words of Lord Haldane. He says in this case that it is federal in the strict sense.

VISCOUNT HALDANE: I said so, and I say so still. There was some discussion in which I cited Professor Bryce, Mr. Dicey and Mr. John Austin, but Professor Kennedy and someone from Harvard University cited authorities the other way, so what in the real sense is federal still remains to be settled, I hope not by this Board.

MR. DUNCAN: I am not interested in the definition at all. The

decision, I take it, in this case was, after contracting the two federations, your Lordships' Board said that in Canada the residuum lay with the Dominion and in Australia with the Provinces or States, and your Lordships held that it was only because of that and because there was no creation of a central State, as in the case of Canada, that the Australian Commonwealth Government had not power to give its Royal Commission the right to subpoena witnesses.

VISCOUNT HALDANE: I do not think we said Canada would have had it, but we said: Certainly Australia had not got it.

MR. DUNCAN: I wish to refer to the middle of page 254.

VISCOUNT HALDANE: I am sure we were not deciding on the principle of the Canadian constitution by an aside.

MR. DUNCAN: I am not suggesting that, my Lord. I suggest that the difference between the Australian federation and the Canadian federation was that in Canada the Provinces were united into one State with a constitution similar in principle to that of the United Kingdom, and certain defined powers were withdrawn from that State and given to the provinces, and the conception in section 91 and section 92 is that matters of national concern belong to the central Government, and the enumerated matters are only those of a local and private nature ^{and} did belong to the Provinces.

Now, may I refer to the sections which are printed in the Appendix. There are one or two points I should like to make; first, that there are matters outside the enumerations of section 91 and section 92. There will be no matters, ^{of} ~~if~~ interference is the test, it means there is no residuum. That is the effect of Mr. Justice Orde's judgment, and that is the conclusion to which both Mr. Justice Hodgins and Mr. Justice Ferguson are reluctantly driven by certain observations in decisions of your Lordships' Board.

LORD WRENBURY: Every Act of legislation is an interference?

MR. DUNCAN: Yes. Therefore that cannot be the test, and the argument has been destroyed by that very phrase: Does it interfere? Then

there is no residuum, because it must interfere with some kind of property and civil right if those words are given their widest possible meaning. Therefore we come to aspect. It is not the incidence of the legislation which is important, but it is its aspect.

VISCOUNT HALDANE: There is another phrase which has been used pretty often "pith and substance".

MR. DUNCAN: Yes: What is its pith and substance; is it clearly dealing with property and civil rights; is it changing them for that sole purpose, or is it changing ^{them} ~~that~~ incidentally, although its purpose is something else.

VISCOUNT HALDANE: Is it in the exercise of some power which is given to the Dominion?

MR. DUNCAN: Yes, on the question of ancillary provisions, raised by my Lord Atkinson, it has been held that the Dominion, legislating under its enumerated heads, has power to pass all reasonably necessary ancillary provisions to the end that the legislation may be completely effective. Why? Because the provisions which are truly ancillary take their aspect from the substantive provisions to which they are ancillary. I apply that same reasoning and I suggest there can be no different reason ^{-ing,} to legislation under the residuum. If the aspect of the substantive provisions is not in truth to alter civil rights or to deal with them, if it is not trying to do that, then the ancillary provisions, if they are truly ancillary and reasonably incidental, take their complexion from the substantive provisions, and are of that aspect. As you find here, the substantive provisions are those providing for the establishment of a Board to enquire; that is all. What could less effect property and civil rights, leaving out the ancillary provisions? What could be more innocent; what else could fall under the residuum; is there anything conceivable that could fall under the residuum that is more innocuous, from the point of view of property and civil rights, than enquiry? It is inconceivable. The ancillary provisions are the only provisions

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which are challenged. I will deal with all the ancillary provisions.

LORD ATKINSON: They are made for a particular purpose, and the machinery that is set up to effect that purpose does interfere with civil rights.

MR. DUNCAN: The ancillary provisions.

LORD ATKINSON: I do not see how you could disjoint the thing so as to consider the two classes providing for the creation and meeting of the Board, without looking at what they can do when they have met, and how they can do it.

MR. DUNCAN: I suggest it is a well known recognised way of examining statutes by this Board under the British North America Act.

LORD DUNEDIN: I think you would get out of a good deal of trouble and criticism if, instead of using the phrase "interference with civil rights", you used the phrase "dealing with civil rights". Taking the matter under section 92, civil rights, you never deal with civil rights legislation without interfering with civil rights at the same time, and, therefore, when you say interference is no test I agree with you it is not a test, but "dealing with" may be a test, that is to say, this may be legislation which deals with civil rights, and, as such, is prima facie within section 92.

MR. DUNCAN: Yes.

LORD DUNEDIN: Then you have to show that for some reason or other it has, so to speak, swelled to such a magnitude that the evil which is wanted to be cured can no longer be dealt with as a civil right under section 92, but under the residuum of power, which is under section 91.

MR. DUNCAN: Yes.

LORD WRENBURY: Every man has a civil right, but the civil right with which it is suggested the legislation is interfering is the collective right of everybody; it is the whole community. They are not dealing with the individual right of a particular person?

MR. DUNCAN: That is so.

LORD WRENBURY: Your contention would be that when you get such a

state of things that what you are dealing with is not the right of the individual as distinguished from the right of the community, then you fall into the Dominion?

MR. DUNCAN: Yes. May I say one more word, and I will pass from this subject. May I endeavour to emphasise the distinction between section 91 and section 92, section 91 dealing with matters of international concern and section 92 only with matters of local and private concern, the clause at the end of section 91, I submit, gives the interpretation that all that is in section 92, and the clause at the end of section 92, also makes it clear that the antithesis is between matters of national concern and those of a small and local private nature, and I say all the enumerations in section 92 are coloured by that phrase. "Any matter coming within any of the classes of subjects enumerated in this section" -- that is, in section 91 -- "shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by this exclusively assigned to the legislatures of the Provinces." I say that is directly following the Quebec Resolutions. It characterises all the matters in section 92 that they are of the class of matters of a local or private nature, and, further, at the end of section 92 the Provinces are given authority to make laws generally of a merely local or private nature in the Province. I submit, if it is truly dealing with a local or a private matter in the Province, the Dominion cannot do it, except under an enumerated head, and that is why this clause at the end of section 92 is put in, that under the enumerated heads the Dominion can deal with a local and private matter ~~to be dealt with~~, such as insolvency or banking, or whatever it may be; but, if it comes under peace, order and good government, the Province cannot be interfered with, and they cannot go into the matter of its dealing with a matter of a local or private nature as such, but, if it is, as Lord Watson says, that it has ceased to be local and private, that is another matter.

LORD ATKINSON: He did ^{not} say that. He said the thing to be dealt with

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had so expanded that it became a Dominion and not a provincial matter?

MR. DUNCAN: Yes.

LORD ATKINSON: So as to get outside that enumeration?

MR. DUNCAN: Yes, just as in 1867 the Local Trades Associations would have become virtually local matters. Now they extend across the whole of Canada, without regard to provincial boundaries, and they are controlled in many cases from outside the country, and there is no Government in a position to deal with that except the central Government, firstly, because of its organisation, secondly, because of the effect of strikes on Dominion trade throughout the country, and, thirdly, because of class feeling, which also pervades the Dominion and makes it impossible to say in advance whether any one strike will be local or not. The fact that it breaks out locally, I submit, is not the criterion. The fact that it must be dealt with locally, even under the Dominion Act, is not the test. Everything is localised in some province.

LORD ATKINSON: One of my difficulties in following it is this. If all fact is to be set aside, there is not a single one of these things enumerated in section 92 that the Dominion could not deal with. They could say: We think the solemnization of marriage in Ontario is a subject on which we ought to legislate, and accordingly do so, because they think it is of importance that they should do so.

e/ LORD DUNEDIN: I think your answer to that must be that it is exceedingly improbably, probably impossible, that each and all of the separate headings of section 92 should be, so to speak, too small. Supposing you ~~me~~ found that all over Canada it was proclaimed that the best form of marriage was free love, and the central Government thought that was absolutely destructive of the Kingdom, could not they then do something?

MR. DUNCAN: I should fancy they could.

LORD DUNEDIN: Of course, I have put a very absurd case. I think the real answer is the absurdity of the illustration which I put, but

a great many of those sub-divisions never could assume what I may call a national aspect.

VISCOUNT HALDANE: Marriage has been the subject of a decision of this Board.

MR. DUNCAN: Yes, my Lord.

VISCOUNT HALDANE: It has been touched in other cases, but there is one main one.

MR. DUNCAN: May I refer your Lordships to the place where this matter is discussed by Mr. Justice Clement. At page 276 he says: "To what extent the Courts may, in deciding such a question of fact, take judicial notice of conditions political, social and industrial through the Dominion may be a very difficult problem. It was held in an early case that the onus is on those who assert that a matter in itself local or provincial does not come within one of the enumerated classes of section 91; and it may well be argued that the onus would be still harder to satisfy if it were sought to have it established that the matter was unquestionably one of Canadian interest and importance."

VISCOUNT HALDANE: That is, the matter was one of Canadian concern.

LORD ATKINSON: If there is anything laid down there positively it is that it is a very difficult thing to prove. That does not mean that you may dispense with proof.

MR. DUNCAN: I suggest, with respect, that I have discharged the onus.

Now may I turn to the evidence on that, because it is a question of evidence. Summarising my position it is this: Looked at in its true aspect, there you have legislation in relation to any of the provisions in section 92, although it may interfere with some of them, and, therefore, it falls within Dominion power, and, therefore, the Board is not called upon to decide whether it is under trade and commerce or Criminal Law.

LORD WRENBURY: I suppose you would say, assuming it is not within any one of the enumerated matters in section 91, if you are right in saying it is not within section 92 it does not matter?

VISCOUNT HALDANE: That is under peace, order and good government.

It makes a great difference to us under section 91. Then, if it comes at all under section 92, you can interfere, if it does come within the enumerated heads of section 91, but merely under peace, order and good government, then, if there is interference, it is not legal interference.

MR. DUNCAN: That is using the term "interfering".

VISCOUNT HALDANE: Well, *trenching*

MR. DUNCAN: If it is dealing with.

LORD ATKINSON: It has been decided over and over again that the Dominion cannot take advantage of peace, order and good government to legislate to take away any of the things enumerated in section 91.

MR. DUNCAN: I quite agree, my Lord.

LORD ATKINSON: And peace, order and good government may be used for another purpose, but that leaves untouched the contention that what is primarily local and provincial may swell into something that is national.

MR. DUNCAN: May I seek to develop that from the evidence?

LORD WRENBURY: That is the very language of the Act. It is in relation to matters not coming within section 92.

MR. DUNCAN: May I endeavour to satisfy your Lordships that this is a matter of national concern, although originally local and private? On the argument of inconvenience I say if it is extremely inconvenient to get cooperative action by the Provinces, then you can say that it is reasonably within the jurisdiction of the Dominion, because we assume that it is necessary to do something by collective action or in some way; it is necessary to do something throughout Canada. Once you get to that stage, ~~it~~ surely it falls within the Dominion, if it is of concern, not from a provincial point of view, but in each Province, by reason of national interest. The doctrine of cooperation would extraordinarily inconvenient. In the American federation they had what they considered the terrible example of the loose confederation

which preceded the American Union, in which the central Government could not act directly on each State citizen, but had to act directly on each State Government and ask them to do so-and-so. There were little States, semi-independent, under a loose sort of League of Nations arrangement.

LORD ATKINSON: Take the great Pittsburg Strike in the Carnegie Works. The Governor of the State refused to give the forces of the State to put it down, and ultimately the Federal Forces were used, but only on the pretence, or contrivance one might call it, that the strike impeded and delayed the Federal mails, and that was a federal concern, and, therefore, Federal troops might be legitimately used to get rid of the difficulty.

MR. DUNCAN: I am obliged to your Lordship for the illustration. May I apply it to this case and our country? If the decision of this Board is against the contention of the respondents, we can only by a device such as that use the Militia to quell a strike. There is no Militia of the Province. There is a Militia in every State of the United States. As this evidence shows in practical operation you must call on the Militia where a large strike develops. You call on them because the Police are not adequate. You cannot maintain a great mass of Police for a threatened or supposed contingency, and application is at once made to the Militia. I say here it would be a case of chopping up the jurisdiction in the most unfortunate way. If it is possible for your Lordships to decide either way, as I submit it is, that it is open, and you are not bound, there would be by that decision a most unfortunate cross-section of jurisdiction, because, in matters ^{of} legislative jurisdiction, the line runs between matters truly of national concern and those of local concern, and not a threefold division line between matters of national concern and matters of provincial concern, and another line athwart matters of national concern, within which third field only the combined Provinces, acting by their local legislatures in concert, can act. There is no such conception in the British North America Act.

LORD ATKINSON: There is no conception of the Provinces acting together.

MR. DUNCAN: That is the suggestion of cooperation.

LORD ATKINSON: They may if they like, but an arrangement such as that is not contemplated by the Act.

MR. DUNCAN: No.

LORD ATKINSON: There is nothing to prevent it.

MR DUNCAN: No, if they wanted to, but presumably they do so because it is of national concern, but has not reached the point of emergency; it is something of national concern, but not emergency such as a war, or famine, or plague, but it is of national gravity and concern calling for action by each of the Provinces. Turning to Mr. Gunn's evidence at page 31 he says that he is an official of the Toronto Branch of the Canadian Electrical Trades Union; the Union had branches in every Province, and the Toronto Branch had jurisdiction over various cities in Ontario; all cities and towns covered by the Central Ontario System of the Ontario Hydro Electric Commission. The Ontario Hydro Electric Commission is a Government Commission which was appointed after the Government bought or expropriated all the Private Companies which distribute electricity from the Niagara Falls, and as your Lordships I am sure are quite aware from cases that have come before you, there is a monopoly of the supply and distribution of electricity in the Province of Ontario, all in the Hydro Electric System.

VISCOUNT HALDANE: Take Toronto itself. Are there any generating establishments except those of the Hydro Electric Commission?

MR DUNCAN: No, there is only one very small concern which only supplies itself.

VISCOUNT HALDANE: There is no absolute monopoly.

MR DUNCAN: There is for all practical purposes because it is only one Company.

VISCOUNT HALDANE: They supply electricity exclusively.

MR DUNCAN: Yes.

VISCOUNT HALDANE: The Provincial Government does it?

MR DUNCAN: Yes. The Province has passed an Act permitting the City of Toronto to do it for the City.

LORD ATKINSON: The Provinces outside the City of Ontario has nationalised the electric distribution.

MR DUNCAN: Yes, for all practical purposes.

LORD DUNEDIN: Is that for the supply of electric current, or does

it go further and ^{apply to} supply all electrical appliances.

MR DUNCAN: It is only the supply of electrical current. When I ~~xxx~~ say it is nationalised I do not mean to say that a private citizen or Company may not start up his own concern for his own use.

VISCOUNT HALDANE: He may get an oil engine and buy a dynamo.

MR DUNCAN: Yes, but practically all our electricity comes from the Niagara Falls.

VISCOUNT HALDANE: Light as well as power?

MR DUNCAN: Yes. What was done was to buy up these Companies and create the Ontario Hydro Electric Commission which controls the distribution of electricity throughout the Province. Many monopolists have done the same thing in their own sphere. There were little distribution Companies in the various cities, and they have created commissions which have taken them over, and the distribution in Toronto, as far as this case is concerned is first from Niagara Falls under the Provincial Commission, and then throughout Toronto by these Plaintiffs, and they are monopolists in the distribution of electricity, and any strike if it was effective would at once stop all the distribution of electricity in Toronto.

LORD WRENBURY: The first evidence is the Defendant's evidence. Did the Plaintiff call any evidence?

MR DUNCAN: Not originally.

LORD DUNEDIN: They put in their documentary evidence?

MR DUNCAN: Yes, my Lord. My learned friend Mr. Stuart Bevan corrects what might be a misapprehension. It is not illegal for anybody else to supply electricity, but in fact it would not be commercially possible, because of the low rates of the Ontario Commission which supplies at cost. As far as these Plaintiffs are concerned, they are the monopolists in the supply of electricity in Toronto, and if a strike was effective or had been effective here, it would at once have cut off all the electricity in the City of Toronto, and it would have stopped ~~xxx~~

every manufacturing concern that depends on it. The evidence shows that the machinery concerns, and there are many of them in Toronto, which are dependent on electricity, and 85 to 90 per cent of all the concerns, that is to say, only about 10 to 15 per cent have their own steam plants, and they depend on steam power, but there are processes of manufacture in Toronto which depend absolutely on electricity.

VISCOUNT HALDANE: It would be interesting to hear how many cents per unit is the average charge?

MR ROBINSON: It is 2 cents a unit up to the first 10,000 units.

MR DUNCAN: May I refer your Lordships first to the evidence on page 127. These three witnesses from three of the principal manufacturing concerns in Canada all appeared on subpoena, not that they were reluctant to come.

LORD ATKINSON: I think all this evidence would make an unanswerable case for having an Act for itself.

MR DUNCAN: Yes, but the point is the effect outside Toronto.

"You are from the Massey Harris Company". They manufacture farm implements which are used throughout Canada, and there is ~~was~~ also a great foreign trade in Argentina, Russia, and Australia. "Is your plant dependent upon electric power, and if so, to what extent? (A) About 90 per cent. (Q) What would be the effect on your business by the interruption of the supply of electric power? (A) Practically all of the plant would have to be closed down immediately. (Q) What effect would that have on the actual manufacturing processes?(A) Naturally, it would put the manufacturing processes out of business. The whole plant, with the exception of two departments, is entirely motorised - speaking of the Toronto works -- including all of the elevators, and any shut off of power, as sometimes occurs, puts the plant out of business". He is speaking of elevators. They have many large buildings, and a machine commences on the first floor; it is assembled and it proceeds down the floor, passing one workman after another, and at the end of the floor it is put on a life ^{or} an elevator, and goes up to the next

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floor, and it is a continuous process; it never stops. "Have you a foreign trade? (A) Yes. (Q) Would a shut off of electric power in any way interfere with your foreign trade? (A) Naturally. (Q) In what way?(A) It would naturally shut off all manufacturing and practically all shipping, our warehouses being four and five storeys high. (Q) Yes? (A) And the effect in a good many cases would be, where we have the tonnage contracted for, to miss the shipping connections, and consequently the foreign markets and seasons. (Q) What about the effect in Canada? (Mr. Kidner) Is this witness an expert? You have already called three. (His Lordship) This witness is called to show that the abstention of buyers from purchasing Massey Harris machinery would be a national calamity. (Mr. Duncan) What is the extent of your business in Canada?(A) What do you mean by that? (Q) Do you ship into other provinces of Canada? (A) Yes, into all provinces. (Q) And might a disturbance such as the shutting off of the electric power have the same effect? (A) Yes. (Q) What effect would that have on your employees?(A) Naturally, they would be out of employment". Followed of course by disturbance, a possibility of riots, the congregation of large numbers of men out of employment and so forth.

Now I will turn to the evidence of Mr. Coffey on the next page.

LORD SALVESEN: These are the familiar results of all strikes under modern conditions. Their ~~facts~~^{effects} are not confined to the particular industry in which the strike occurs. It necessarily spreads to a great many others which are dependent upon them.

MR DUNCAN: Yes, it is economic throughout the State, and not economic in a Province.

LORD SALVESEN: Specially when you are dealing with a source of power. We had the same thing with the coal here. If you stop coal mining you stop other industries.

MR DUNCAN: I am obliged to your Lordships for the illustration. If you went back to the days of the Heptarchy here, and were unfortunately placed under a system of federalism under which England was divided into four provinces, and a strike of some works took place in Wales and that spread, and it was likely to spread to the transport workers in other parts, would the matter be of national or Provincial concern?

LORD SALVESEN: Primarily it is of Provincial concern, but it may also be of national concern.

MR DUNCAN: Is not the question my friends have to ask: Can we point to strikes and say in advance, this cannot be of national concern. Can they support the proposition that strikes are so seldom of national concern that the onus^{is} on the Dominion only to deal with strikes which the Dominion must prove to each Province are of national concern before it can act.

VISCOUNT HALDANE: It would probably be much more convenient to have the Lemieux Act operative all over Canada. I am disposed to agree with you there, but one has to take into account Provincial susceptibilities.

MR DUNCAN: One can see that from Provincial legislation; none of it is operative.

VISCOUNT HALDANE: That may be for many reasons. We have nothing to do with that here.

LORD DUNEDIN: Perhaps this is not a fair question. Do you think the reason that the Provincial people have left this legislation alone has been that they do not like it, or because they think the thing has been so effectively done by the Dominion legislative that they need not touch it?

MR DUNCAN: I suggest a third reason which is this, that they consider it is within Dominion jurisdiction.

LORD DUNEDIN: That would be my second branch.

MR DUNCAN: I thought your Lordship meant effective in its operation?

LORD DUNEDIN: You have told us a great many of the Provinces have not touched the thing at all. One of them had an Act and then

let it be repealed. The one reason might be that the Province did not like the legislation, but the other might be that they were so satisfied with the operation of the Lemieux Act that they could not do anything more.

MR DUNCAN: I would adhere to the last suggestion if I could guess.

VISCOUNT HALDANE: You must not shut out Provincial rights even though the Province think a Dominion law would be better.

MR DUNCAN: Your Lordship will remember that in 1871 the Dominion Parliament passed a Trade Union Act which removed the criminal taint from trade unions, and it also removed the civil bar to ^{recovery} ~~recovery~~. That Act was passed by Sir John Macdonald after a strike which is referred to in this evidence; it took place in Toronto ~~xxx~~ among the printers on the "Globe" newspaper, which is a very powerful newspaper of liberal leanings. The printers went on strike, and they were indicted for criminal conspiracy, and they were arrested. ^S Sir John Macdonald who was an ^{acute} ~~acute~~ Conservative said: We will pass a Trade Union Act, and he did in practically the same words, which dealt with criminal law and civil rights. No province has ever passed a Trade Union Act or ever touched the matter covered by that section of the Trade Union Act.

LORD ATKINSON: Was that a Dominion Act?

MR DUNCAN: Yes.

LORD ATKINSON: In those days Sir John Macdonald thought the Dominion had power~~x~~ to pass all sorts of Acts.

MR DUNCAN: Because he was close to the Quebec Resolutions.

VISCOUNT HALDANE: I wonder they have not brought up more of the Acts of that time to review before this Board.

MR DUNCAN: In Russell v. The Queen the Board did take his view, and even Lord Watson in the McCarthy case did not go to the length of giving a judgment upsetting Russell v. The Queen, although I do not say that has not been done by several subsequent judgments of the Board.

LORD ATKINSON: Some of his other judgments make it plain that

he would have liked to do so.

MR DUNCAN : Yes.

Now I come to the evidence of Mr. Coffey which is very short at page 129. He is the Factory Manager of the Gutta Percha Rubber Co. Ltd, who manufacture great quantities of ~~g~~gloves and all sort of rubber goods, tyres for motorcars, and so forth.

VISCOUNT HALDANE: I have read all this evidence, and I may say I agree with it. As I have said from the point of view of convenience there is a great deal to be said in favour of what you say.

MR DUNCAN: It is only directed to the suggestion in the case in 1896 Appeal Cases that matters of local and private interest can attain Dominion proportions. I wish to demonstrate that from the evidence.

2 LORD ATKINSON: If the supply of electricity in Toronto goes the products of manufacture may go, but there is nothing to prevent Toronto itself getting an Act, and as far as the manufacturers are concerned bringing about exactly the same result.

MR DUNCAN : May I apply the interference rule to that, but looking at it from the point of view of Dominion jurisdiction. We have trade and commerce. The regulation of that is within the exclusive jurisdiction of the Dominion, whatever that may mean, but the regulation of trade and commerce falls under Dominion jurisdiction. Any provincial act or abstention which really prejudiced or interfered with trade and commerce in its uninterrupted flow would be an interference with that, and if the interference is outside would be ultra vires. Supposing in Ontario we had a Communist Government, who said We will do away with strikes, not for a political purpose directly, but to interfere with trade and commerce, and bring the Dominion to its knees, is not that interference?

VISCOUNT HALDANE: When you get such a case you will come before us, and we will say what we have to say, but we have not got

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it yet.

MR DUNCAN: Your Lordship has been putting to me most inconvenient examples which I have had to answer on the spur of the moment. May I go on ~~xxxx~~ with Mr. Coffey's evidence: "What would happen if the supply was interfered with? (A) If the supply was cut off we would be shut down; we have no spare sets at all, and would be entirely dependent upon the continuity of service power. (Q) Have you any foreign trade? (A) We have. (Q) ~~xxxx~~ What would be the effect on that trade? (A) It would all depend upon the duration of the shut down. (Q) Will you explain? (A) We have warehouses with stocks of goods^m and if the duration of the shut down of electric power was of sufficient length to deplete these stocks, or if we were making up specials for shipment for export orders, it would interfere with the despatch of the goods".

LORD DUNEDIN: Hitherto what you have really said only comes to this. I do not mean by saying "only" that I want to minimise it, but it comes to this: We have big businesses; the stoppage of electricity would stop the businesses, and the result would be that the products of our businesses, which go far ~~and~~ beyond our own province, would be stopped and that would be an hindrance to other parts of Canada which take our products. That is one class of thing. I do not know that you have any illustration of the class of thing which Lord Salvesen spoke to, of which the best illustration would be if you stop coal production you stop the steel and iron works which might be in another Province I do not know whether you have those. I wanted to know if you have anything coming in another class of category. There may be other categories than those two. I do not see that there is much use in examining a set of witnesses. One is quite prepared to take it that there are many businesses in Toronto which if stopped would have their products stopped, and other people outside the boundaries of the Province would suffer. That is a very simple proposition.

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MR DUNCAN: What else have you?

LORD SALVESEN: Possibly a great many people might fall out of employment in addition to those who were striking.

MR DUNCAN: Yes.

LORD ATKINSON: Could not they generate electricity for themselves

MR DUNCAN: They could not.

LORD ATKINSON: Why not?

MR DUNCAN: Because the businesses are all prepared for electric power. All the steam plants has been taken out.

LORD ATKINSON: Could not they bring electricity into Toronto with an Act of Parliament?

~~MR~~ MR DUNCAN: In time that could be done. This is on the basis of something sudden, interfering at once with the supply, and one could not wait for an Act of the Ontario Legislature^{use}.

LORD ATKINSON: You may put it that as the generation of power by water is monopolised you would have to set up another system, and I suppose the only other systems of generation could be coal or oil. Practically as far as I know up to the present time they have never managed anything with the tides, so that really water, oil and the coal are the other only practical methods of generating electricity on a large scale.

MR DUNCAN: Yes, my Lord. With regard to Lord Salvesen's question as to other interferences, the evidence shows that Toronto is a great producing and purchasing centre. The products of Toronto, and they are extraordinarily numerous, large and important, go either as completely manufactured or ⁱⁿ a semi-manufactured state to other provinces in Canada, and are there either used for the necessities of life or are further manufactured. So that it would affect other Provinces, and further, turning to the consuming portion, ~~and~~ Toronto has a enormous pay roll, and a strike of this key industry would throw out of employment hundreds of thousands of men at once and would deprive Toronto of great purchasing power, and that would affect people in other parts of the country. There is not only the

purchasing power, but let me turn to the manufacturers. There is evidence from one of the great meat people, Gunns Ltd, who buy hogs and cattle from all over the Dominion. They bring them to Toronto, slaughter them, and put them in cold storage, export them and send them to other parts of Canada. General Gunn says in his evidence that a strike would stop their processes, and that would have an effect on the farming community throughout the whole of Canada. From the point of view of Dominion trade, it is of such importance, I submit, that it falls within Dominion jurisdiction under the principle in the case in 1896 Appeal Cases.

May I refer your Lordships very shortly to the statistics which are always dry. They begin at page 232 to page 235. On page 232 they are manufactured products only. It gives the value of the products for the years 1917, 1918, 1919, and 1920. In 1917 the amount was 456, million dollars per annum; in 1920 588 million dollars per annum; that is for Toronto. Then for the whole of Canada it was 3 billion dollars, and Toronto was 50 per cent of the total. The maritime Provinces that is the three Provinces, were 244 million dollars less than Toronto itself with the one city not of Ontario. The prairie provinces are less than Toronto, and all the Provinces west of Ontario right to the Pacific Coast 406 million dollars, about equal to Toronto.

VISCOUNT HALDANE: Of course you must remember that although agriculture is beginning to use electricity it has not done it in Canada to a very large extent.

MR DUNCAN: Yes, but this is electricity supplied to the firms by the Commission.

LORD SALVESEN: It comes to this, if you had a local Act in Ontario you could not ~~enforce~~ enforce it directly by means of the Militia whereas this general Act can be enforced by the Government by means of the Militia. The difficulty is not avoided by having an Act which provides for a means of enforcing a thing. You might find a thing disobeyed and you would be back on the

Militia.

MR DUNCAN: Yes.

LORD SALVESEN: This is probably a most useful Act as a preventative of strikes by prolonging the time of consideration.

MR DUNCAN: That is all it does.

LORD SALVESEN: You could pass that part of it anyhow.

MR DUNCAN: That is attacked by my learned friends. They say

this interferes with a civil right.

MR VISCOUNT HAIDANE: ~~So~~ Labour takes an exception to it.

MR DUNCAN: Labour I think accepts those provisions of the Act

as being desirable in the interests of Canada. The other

statistics are all of a similar kind. On page 234 are shown

different kinds of establishments in Toronto.

LORD ATKINSON: I suppose we have evidence as to what is being

done in other Provinces.

MR DUNCAN: The situation is the same throughout Canada, Toronto

and Montreal being the two nerve centres in manufacture.

VISCOUNT HALDANE: In Alberta and Saskatchewan they do not use electricity to the same extent as in Ontario?

MR. DUNCAN: No. I suggest that your Lordships might take judicial cognizance of the industrial conditions throughout the Dominion. A strike of any serious nature in any one Province has effects far beyond the Province, and I submit that you must look at the Dominion as an economic whole; that the conception economically is one nation; the others are only political divisions, and that economic trade and commerce falls to the regulation of the Dominion, and the Dominion has power to preserve what it has power to regulate.

VISCOUNT HALDANE: Is there much more in this evidence? It is all consistent with what you say.

MR. DUNCAN: There is some most important evidence of Mr. Murdoch and Lieutenant Colonel Orde.

LORD DUNEDIN: On what point?

MR. DUNCAN: Lieutenant Colonel Orde says that at the time this application was made for the appointment of the Board there was a strike in Nova Scotia, and all the available Militia from as far west as Winnipeg had been drafted to the scene of trouble.

LORD SALVESEN: The difficulty would have been the same if they had refused to obey the Order of the Board?

MR. DUNCAN: It is put therefor this purpose, to show that as industrial conditions now are in Canada with the present organisation of labour the subject matter is one which can only be dealt with properly by one Government which controls the Militia and must watch the outbreak of strikes or the threatened outbreak of strikes in every part of the country, and must, if necessary, be able to so dispose its troops as to deal with the matter.

VISCOUNT HALDANE: You seem to suggest that they had an ^{adequate} force of Militia, because they could only deal with one strike.

MR. DUNCAN: The fact that the Militia was not in sufficient numbers shows that at the time when this application was made the ~~situation~~ ^{situation} ~~was~~ ^{was} critical and very serious. We did not have enough Militia to cope with the situation. That shows there was something

very similar to what happened at Winnipeg, though I do not suggest it was Winnipeg over again, but something very critical. The Minister himself said that the situation was that he was receiving protests from other Provinces. There was an application just afterwards for the appointment of a Board at Montreal. There it was not a municipal distribution, but a company which was distributing electricity.

LORD DUNEDIN: Does not that argument come to this: The central Government is the only body that possesses the coercive forces which may be necessary to deal with the lawlessness which may result from strikes, and, therefore, it is very necessary for the Central Government to keep off strikes as much as it can? If it is allowed to have an Act of its own like this it does its best all over the country; if it is not then it cannot do anything of itself, and it is at the mercy of what you call cooperative action. Is that the argument?

MR. DUNCAN: Yes.

LORD WRENBURY: A strike of transport workers may starve the country, and it is the duty of the Dominion to save the country from starvation. In the case of a strike the only Militia at the disposal of the Authorities is the Dominion forces?

MR. DUNCAN: That is the idea. I do not think my friend can drive me into this. He says: Under the Lemieux Act you may have a strike of ten people in a village. That could not possibly be a Dominion concern.

VISCOUNT HALDANE: That is Police.

MR. DUNCAN: I say if a strike is of national concern you have ~~the~~ to take hold of every industry. You cannot say in such and such industries there is no danger of a general strike.

LORD DUNEDIN: Your answer is that the greater includes the less?

VISCOUNT HALDANE: As you know, all over this country there is intense feeling against the military ^{part} being called in, and one result of that is that the Police have been very much strengthened and made more mobile, and nearly always Police are quite sufficient. I

have known them not to be sufficient when I was at the War Office, but it was very rare. Probably if the Militia were needed in a supreme emergency the Dominion would send them, without any Act.

MR. DUNCAN: Yes, your Lordship has touched on a matter of great moment which is involved in this case.

LORD ATKINSON: Would not the Dominion be bound to keep order?

VISCOUNT HALDANE: In the United States, Federal Troops were called out by the State Governor. The Federal Government was, of course, willing to send them. They got a summons from the State Governor: Come to my aid; or from the sheriff, I think it was.

MR. DUNCAN: On the question of Police, Police is a subject not mentioned in either section 91 or section 92.

VISCOUNT HALDANE: But it is plainly under section 92.

MR. DUNCAN: Would your Lordships hold that there is authority to creat Dominion Police to go into the Provinces?

VISCOUNT HALDANE: I do not know. They might have a sort of implied Police power, like the Federal Government in the United States.

MR. DUNCAN: Would it be an implied power? Must not we ^{find} ~~found~~ our power expressed in the constitution?

VISCOUNT HALDANE: That has not been so in the United States. I refer you to the decision in Harrington v. The State of Georgia, which is reported in 62 United States Reports, and also the authorities connected with Willoughby on the Constitution of the United States. I think you will find there are Police powers, both State and Federal.

MR. DUNCAN: May I give your Lordships the references to three American cases on the regulation of trade and commerce?

VISCOUNT HALDANE: What do you want them for?

MR. DUNCAN: To indicate that even under the much less simple regulation clauses in the United States Constitution there is power to deal in the national interest with matters which affect trade and commerce.

VISCOUNT HALDANE: There is trade and commerce under the trade and commerce article in the Constitution, and there is also Police

power.

MR. DUNCAN: I suggest only following from these three cases which I wish to cite.

VISCOUNT HALDANE: No, following from the constitution.

MR. DUNCAN: As first interpreted by these three cases.

VISCOUNT HALDANE: You need not cite authority for that.

LORD ATKINSON: I cannot understand why the Government cannot insist on maintaining order. A Government that does not maintain order is no Government at all; it is chaos.

VISCOUNT HALDANE: If the Province wanted the Dominion to assist it and the Dominion was willing, there is no doubt the Dominion could rightly use the Militia for that purpose?

MR. DUNCAN: Yes, my Lord.

LORD ATKINSON: That would be peace, order and good government.

VISCOUNT HALDANE: I think the evidence is all summed up in the statement that this is very convenient.

MR. DUNCAN: It is vital.

VISCOUNT HALDANE: I said convenient.

(Adjourned to Monday morning next at 10.30.)

IN THE PRIVY COUNCIL.

On Appeal from the Appellate Div.
of the SUPREME COURT OF ONTARIO

Between:

TORONTO ELECTRIC COMMISSIONERS.

and

SNIDER & OTHERS.

and

THE ATTORNEY GENERAL OF CANADA &
THE ATTORNEY GENERAL OF ONTARIO.

FOURTH DAY.

Friday, 21st November, 1924.

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