

In the Privy Council.

CANADIAN  
LAW  
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No. 38 of 1931.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

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IN THE MATTER OF A REFERENCE AS TO THE RESPECTIVE LEGISLATIVE  
POWERS UNDER THE BRITISH NORTH AMERICA ACT, 1867, OF THE  
PARLIAMENT OF CANADA AND THE LEGISLATURES OF THE PROVINCES  
IN RELATION TO THE REGULATION AND CONTROL OF AERONAUTICS  
IN CANADA.

BETWEEN

THE ATTORNEY-GENERAL OF CANADA ... .. *Appellant*

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF  
ONTARIO, THE ATTORNEY-GENERAL OF THE  
PROVINCE OF QUEBEC AND THE ATTORNEY-  
GENERAL OF THE PROVINCE OF MANITOBA ... *Respondents.*

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CASE OF THE APPELLANT  
THE ATTORNEY-GENERAL OF CANADA.

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1. This is an appeal by special leave from the judgment of the Supreme Court of Canada, announced on the 7th October, 1930, answering questions referred to the said Court for hearing and consideration by Order of His Excellency the Governor General in Council dated 15th April, 1929, P.C. 267, pursuant to the provisions of section 55 of the Supreme Court Act, touching the respective legislative powers under the British North America Act, 1867, of the Parliament of Canada and of the legislatures of the Provinces in relation to the regulation and control of aeronautics in Canada.

RECORD.  
pp. 184-186.  
pp. 222-224.  
pp. 3-4.

2. The questions so referred were :—

10

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation" ? p. 4.

RECORD.

2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the British North America Act 1867?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the Aeronautics Act, chapter 3, Revised Statutes of Canada, 1927? 10

4. Has the Parliament of Canada Legislative authority to sanction the making and enforcement, in whole or in part of the regulations contained in the Air Regulations 1920, respecting—

- (a) The granting of certificates or licenses authorising persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licenses :
- (b) The regulation, identification, inspection, certification, and licensing of all aircraft, and
- (c) The licensing, inspection and regulation of all aerodromes and air stations? 20

p. 3.  
pp. 41-121. 3. During the sittings of the Peace Conference in Paris, at the close of the European War, a Convention relating to the Regulation of Aerial Navigation dated the 13th October, 1919, was drawn up by a Commission constituted in March, 1919, by the Supreme Council of the Peace Conference and signed by the representatives of the Allied and Associated Powers, including Canada.

pp. 122-124. 4. The said Convention was ratified by His Majesty on behalf of the British Empire on the 1st June, 1922, and is now in force between the British Empire and seventeen other States.

p. 138, l. 27.  
pp. 7-9. 5. With a view to making provision not only for the regulation of a service essentially important in itself, as touching closely the national life and interests but also for performing the obligations of Canada, as part of the British Empire, under the said Convention which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, Chapter 11 of the Statutes of Canada 1919 (1st Session) which with amendments thereto, is consolidated in the Revised Statutes of Canada, 1927, under the title of The Aeronautics Act, Chapter 3, of the said Revised Statutes of Canada. By these statutes and by the Air Regulations 1920 and amendments thereto made thereunder, provision is made for the regulation and control in a general and comprehensive way of aerial navigation within Canada and over the territorial waters thereof. 30 40

6. Section 4 of the Aeronautics Act, as amended, is in the following terms :— RECORD.

“ Subject to approval by the Governor in Council the Minister shall have power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular but not to restrict the generality of the foregoing terms of this section, he may, with the approval aforesaid, make regulations with respect to:— pp. 8-9.

- 10 (a) licensing pilots and other persons engaged in the navigation of aircraft and the suspension and revocation of such licenses ;
- (b) the registration, identification, inspection, certification and licensing of all aircraft ;
- (c) the licensing, inspection and regulation of all aerodromes and air stations ;
- (d) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever, and the licensing of any such services ;
- 20 (e) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory ;
- (f) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified ;
- (g) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft ;
- 30 (h) aerial routes, their use and control ;
- (i) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada, and
- (j) organization, discipline, efficiency and good government generally of the officers and men employed in the Air Force.”

7. Under the powers conferred by section 4 of the Aeronautics Act, the Minister made regulations, known as the Air Regulations, 1920, which were so framed as to give effect to the stipulations of the Convention. pp. 10-40.  
40 These regulations were duly approved by the Governor General in Council.

8. At a Conference at Ottawa between representatives of the Dominion Government and of the several Provincial Governments in November, 1927, pp. 3-4.  
a question was raised by the representatives of the Province of Quebec as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada,

RECORD. at all events in their application to flying operations carried on within a Province; and it was agreed that the question so raised was proper to be determined by the Supreme Court of Canada.

9. The British North America Act 1867 provides in secs. 91, 92, 95 and 132, as follows :—

“ 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—

1. The Public . . . Property
2. The Regulation of Trade and Commerce
3. The raising of money by any Mode or System of Taxation
4. . . . .
5. Postal Service
6. . . . .
7. Militia, Military and Naval Service, and Defence 20
8. . . . .
9. Beacons, Buoys and Lighthouses . . .
10. Navigation and Shipping
11. Quarantine and the Establishment and Maintenance of Marine Hospitals
12. . . . .
13. Ferries between a Province and any British or Foreign Country or between Two Provinces
14. . . . .
25. Naturalization and Aliens
26. . . . .
27. The criminal Law . . .
28. . . . .
29. Such classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. 30

And any Matter coming within any of the classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes
10. Local Works and Undertakings other than such as are of the following classes :—
  - a. Lines of Steam or other ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province :
  - b. Lines of Steam Ships between the Province and any British or Foreign Country :
  - c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects
13. Property and Civil Rights in the Province
14. The Administration of Justice in the Province . . .
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

95. In each Province the Legislature may make Laws in relation to . . . Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make laws in relation to . . . Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative . . . to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

RECORD.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.”

p. 185. 10. The argument upon the said questions was heard in the Supreme Court of Canada on the 10th and 11th April, 1930, by the full Court (composed of Anglin, C.J.C. and Duff, Newcombe, Rinfret, Lamont, Smith and Cannon, JJ.) and Counsel were heard on behalf of the several governments, parties to this Appeal. 10

pp. 185-186. 11. On the 7th October, 1930, the Court delivered judgment as follows :  
 “ To Question No. 1, as framed, the Court unanimously answers ‘ No.’

“ To Question No. 2 the answer of the majority of the Court (the Chief Justice, Duff, Rinfret, Lamont, Smith and Cannon, JJ.) is Construing the word ‘ generally ’ in the question as equivalent to ‘ in every respect ’ the answer is ‘ No.’ ”

“ To Question No. 3 the answer of the majority of the Court (the Chief Justice, Duff, Newcombe, Rinfret, Lamont and Cannon, JJ.) is 20

Construing the question as meaning, ‘ Is the section mentioned, as it stands, validly enacted ? ’ the answer is ‘ No ! ’

But, if the question requires the Court to consider the matters in the enumerated sub-heads of s. 4 of the Statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the Judges.”

“ As to Question No. 4, the answers are to be ascertained from the individual opinions or reasons certified by the Judges.”

12. Since the granting of special leave to appeal from the judgment pronounced by the Supreme Court of Canada herein, the Attorney-General of Canada has further considered the several questions and the answers thereto, with the reasons assigned therefor, given by the Supreme Court of Canada, and, in view of the scope of Questions 3 and 4 and the bearing thereon of section 132 of the British North America Act, the Attorney-General does not consider it to be desirable or necessary to press for a review on the present appeal of the answer given by the Supreme Court of Canada to Question 2. The argument on behalf of the Attorney-General of Canada on the present appeal and the terms of this case will, accordingly be confined to Questions 1, 3 and 4. 30

p. 125. 13. A Factum was filed in the Supreme Court of Canada on behalf of the Attorney-General of Canada and in it will be found a reasoned discussion of the various matters involved in the present appeal. It is not thought necessary or proper to set forth here the argumentative grounds upon which the case for the Attorney-General of Canada is vested but it will be convenient to set out shortly the views of the Judges of the Supreme Court 40

upon Questions 1, 3 and 4. Their reasons for judgment are set forth in the Record at pp. 186 to 221. Rinfret and Lamont JJ. concurred in the opinion of Duff J. and did not give separate reasons of their own. RECORD.

14. The Judges respectively dealt with Questions 1, 3 and 4 in the manner indicated below.

#### QUESTION No. 1.

ANGLIN, C.J.C.

The learned Chief Justice stated that he shared the view of his brothers Newcombe, Smith and Cannon, JJ. that the Convention was a "treaty  
10 between the Empire and foreign countries," within the meaning of section 132 of the British North America Act, and that intra-provincial aviation was, *prima facie*, a matter of provincial legislative jurisdiction within the purview of section 92 (13) of the British North America Act. But upon the question of how far, and under what circumstances, Dominion legislative power superseded that of the provinces in regard to aviation, the learned Chief Justice agreed with the opinion of Smith J. that the power of Parliament under that section, though not "exclusive," was "paramount," and that the circumstances of the present case, as disclosed in the record, justified its exercise regardless of any provincial legislation, existing, or  
20 proposed, or possible. The learned Chief Justice after remarking that the word "exclusive" appeared to him to introduce an idea quite foreign to section 132, added that he agreed with the view of Smith J. that, if the question were to be answered in the affirmative the word "paramount" must be substituted for "exclusive." p. 187, l. 30.

DUFF, J.

The learned Judge (whose opinion was concurred in by Rinfret and Lamont, JJ.) although he answered this question in the negative, presumably on account of the terms in which it was framed, said that the Dominion had full authority under section 132 to give effect to the rules embodied  
30 in the Convention and to take effective measures for the enforcement of them and that it was now settled, that provincial legislation repugnant to valid legislation of the Dominion under section 132 is thereby superseded. p. 200, l. 33.

NEWCOMBE, J.

The learned Judge expressed the opinion that the language of section 132  
40 does not require, or suggest, that a province should thereby suffer a diminution of its powers except to admit capacity on the part of the Dominion, which, in relation to provincial obligations, is in his view no more than concurrent so long as these are not performed by the province. While agreeing that pending provincial non-performance, power is, by section 132, conferred upon the Parliament and Government of Canada, he felt unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. p. 202.

RECORD.       Apropos of the interpretation of section 132 of the British North America Act, 1867, the learned Judge, however, said:

p. 204.       “Dominion powers derived under section 132 should, I think, be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorised to exercise these powers for performing its treaty obligations, and equally so, for performing those of a province; and this is true, irrespective of the question as to where the power would have resided if section 132 had not been enacted.”

SMITH, J. 10

pp. 209-210   The learned Judge said that in his opinion, the answer to Question 1  
-211.       was determined by the Decision in *Attorney General of British Columbia v. Attorney General of Canada* (1924 A.C. 203). He dismissed as being inconsistent with this decision the argument advanced on behalf of the provinces, that where there was a stipulation in a treaty that something should be done that the provinces had jurisdiction to do, it was only on failure of the provinces to discharge the provincial obligations that the Dominion had jurisdiction to intervene.

It followed, in his opinion, that the Dominion Parliament had paramount jurisdiction to legislate for the performance of all treaty obligations, and that, while a province might effectively legislate for that purpose in regard to any matter falling within section 92 of the British North America Act while the field was unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, would, when enacted, supersede that of the provinces about such matters. The answer to the first question, therefore, substituting the word “paramount” for the word “exclusive” was in the affirmative. 20

CANNON, J.

p. 221.       The learned Judge said:—

“I would answer the first question, as drafted in the negative. 30  
The Parliament and Government of Canada may have paramount, though not exclusive legislative and executive authority for performing the obligations of Canada, or any province thereof, under the Convention, but have not yet found it necessary or proper to exercise such legislative power.”

#### QUESTIONS Nos. 3 AND 4.

ANGLIN, C.J.C.

p. 190.       The learned Chief Justice said that dealing with section 4 of the Aeronautics Act as giving to the Minister single and complete control over aerial navigation throughout Canada and the territorial waters of Canada in all respects he would answer Question No. 3 in the negative. 40

He stated that legislative jurisdiction over interprovincial flying *prima facie* belonged to the provinces and it was only where legislation



by the Dominion could be justified either as falling directly within an enumerated head under section 91 or as necessarily incidental to such a head, or in so far as the subject of aeronautics could be said to be of such Dominion-wide importance that provincial legislative jurisdiction over it might be regarded as ousted or because it fell within the purview of section 132 that such Dominion legislation could be held valid.

RECORD.

He added that in so far as the questions submitted were directed to the legislative capacity of the Dominion Parliament he was not satisfied that the establishment and maintenance of a line of aircraft covering  
 10 an international or interprovincial route was not an "undertaking" within the meaning of subsection 10a of section 92 of the British North America Act. He stated, moreover, that it was possible that although lines of air transportation were not physical works, the construction, maintenance and operation of flying machines might be regarded as "works" within the meaning of clause (c) of subsection 10 of section 92.

With regard to Question No. 4 the learned Chief Justice agreed with the views thereon expressed by Smith, J.

DUFF, J.

The learned Judge stated with regard to question No. 3 that he was  
 20 unable to agree that "Navigation and Shipping" (being No. 10 of the enumerated heads of section 91 of the British North America Act) would "according to common understanding of men," embrace the subject of aeronautics, nor could he agree that aerial navigation as a subject for legislation was outside the purview of section 92 of the British North America Act as not comprising matters which are provincial within the contemplation of that section. p. 193.

He stated that the provincial jurisdiction under heads 10 to 16 extended through the air space above as well as the soil below; and that the control of the province over its own property was as extensive in the case of  
 30 aerodromes and aircraft as in the case of garages and automobiles. He gave instances where in his view the employment of aircraft would be a strictly provincial matter.

He further stated that the argument that because the Dominion had authority to legislate in relation to this subject in several aspects it, therefore, had authority to appropriate the whole subject to itself was one which in various forms had been often advanced and always rejected.

As for section 132, the provisions of the Aeronautics Act and the regulations thereunder must be considered in relation to the undertaking embodied in the Convention for the purpose of testing the Dominion  
 40 contention. Section 4 of the Aeronautics Act, he stated, conferred upon the Minister a single indivisible authority to regulate and control aerial navigation in Canada, and he was of opinion that it was not competent for the Dominion to exercise or authorise the Minister to exercise such a comprehensive control over that subject.

RECORD.

The learned Judge then proceeded to consider with reference to the obligations undertaken by the Dominion under the Convention the various paragraphs lettered (*a*) to (*i*) of subsection 4 of the Aeronautics Act and the various related regulations contained in Air Regulations 1920. His conclusions upon the whole subject are set out in the summary of his answers to this question as follows :—

pp. 191-192.

“ Reading section 4, as I think it ought to be read, as conferring a single indivisible authority to regulate and control, in every respect, aerial navigation over Canada, with an enumeration by way of illustration of particular matters falling within this authority, the answer to Question 3 is in the negative. 10

“ Assuming on the other hand, as some of my brethren think, that the question requires us to consider the matters mentioned in the enumerated sub-heads as severable fields for the operation of the power, and the section as comprising distinct enactments, in relation to each of these severable matters, enacted in view of the Convention relating to aerial navigation, 1919, the answer to Question 3 is partly in the negative and partly in the affirmative.

“ In relation to the matters mentioned in sub-paragraphs (*a*), (*h*) and (*i*), such enactments are valid.

“ In relation to the matters within sub-paragraph (*b*) such enactments would be valid in respect of ‘ identification ’ and ‘ inspection ’ and in other respects invalid. 20

“ In relation to the matters within sub-paragraph (*c*) such enactments would be valid as respects ‘ inspection ’ and in other respects invalid.

“ In relation to the matters within sub-paragraph (*d*) such enactments would be valid as respects the subject the carriage of mails, in other respects invalid.

“ In relation to the matters within sub-paragraph (*e*) such enactments would be valid in so far as concerns ‘ the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada, or within the limits of the territorial waters of Canada ’; and in so far as concerns the second part, ‘ the conditions under which goods, mails and passengers . . . may be transported over any part of such territory,’ such enactments would, in relation to the subject the transport of mails, be valid, but in relation to other matters, invalid. 30

“ In relation to the matters within sub-paragraphs (*f*), (*g*) and (*j*) the enactments would be valid.” 40

With regard to Question No. 4 the learned Judge’s summary of his answer to this question is as follows :—

p. 192.

“ Treating this question on the assumption that it requires us to consider whether the regulations referred to, or any of them (and, if so, which), are susceptible of legislative sanction under

section 132 (in view of the Convention of 1919) or under any other power vested in the Dominion Parliament, the answers are as follows :—

RECORD.

“ Sub-paragraph (a).

“ The regulations which deal specifically with the subjects mentioned in this paragraph are those numbered 33 to 38.

10 “ Regulation 33 would be valid in so far as it relates to flying outside Canada; but invalid in so far as it relates to Commercial aircraft generally. Regulations 34 to 38, inclusive, are subsidiary regulations and would be valid if associated with a valid principal regulation.

“ Regulations 116 and 118 are also subsidiary regulations as to which the answer is the same.

“ Sub-paragraph (b).

“ Regulations 3, 4, 124 (2) and 10 would be invalid. Regulations 5 and 6 would be valid. Regulations 7, 8, 9, 11, 15, 16 and 17 are subsidiary regulations which would be valid if associated with a valid principal regulation. Subsections 1 and 3 of regulation 12 would be valid, and subsection 2 of that regulation invalid.

20 “ Sub-paragraph (c).

“ Regulations 18 to 32 deal specifically and substantively with the licensing, inspection, and in some respects with the regulation, of air harbours. The principal provisions are regulations 18, 19, 22, 23 and 24. These regulations would be invalid. Regulations 21 and 26 are subsidiary regulations, which would be valid if attached to a valid principal regulation. Regulations 25 and 29 to 32, inclusive, would be valid. Regulation 27 (1), dealing with inspection of air harbours and construction buildings would be valid. Subsection 2 of regulation 27 would be invalid. Regulation 28 would be invalid.”

30 NEWCOMBE, J.

The learned Judge also rejected the argument that the subject matter of either of these questions is “ Navigation and Shipping,” within the 10th enumeration of section 91 of the British North America Act, 1867. p. 205.

If it were desirable to have uniformity of regulations over the licensing, inspection, etc., of air traffic an inference might be drawn from the judgment of the Privy Council in *The City of Montreal v. Montreal Street Railway* (1912, A.C.) 333 (at page 346) that the object should be attained by co-operation between the Dominion and local authorities.

40 It could not, he stated, be successfully denied that the Dominion had maintained and operated aircraft as part of its military or naval services, or for customs, postal or other Dominion services and might regulate their use for these purposes; and, as well, might prohibit or regulate their use commercially for exporting or importing goods out of or into Canada, or for the carriage of passengers to and from Canada, or, he suggested, interprovincially. In respect of these and other services as to which the

RECORD. Dominion derived its powers from the enumerations of section 91 or exercised general powers not belonging to provincial subjects the regulations in section 4 of the Aeronautics Act appeared to be competent to Parliament, but, on the other hand, he thought that there were uses for aircraft which appertained exclusively to "property and civil rights in the province" in relation to "matters of a merely private, or local nature in the province." and, as to these, some of the regulations in question could not be applied without entering a field exclusively reserved for provincial authority.

He added that the same might be said with regard to the Air Regulations 1920, respecting the matters specified in Question 4. 10

SMITH, J.

p. 213. With regard to Question No. 3, the learned Judge was of opinion that "Navigation and Shipping" as used in section 91 of the British North America Act referred only to the navigation and shipping plying on or in water.

He stated that in his view Question No. 3 related to the present legislative authority of the Dominion Parliament, including legislative authority under the various headings in section 91 of the British North America Act and under section 132 by virtue of the Treaty.

Interpreting the question in this way it followed that Parliament had 20 authority to enact the provisions of section 3 of the Aeronautics Act in relation to the matters set out in section 91 of the British North America Act, and so far as necessary and proper within the meaning of section 132 of that Act for carrying out the provisions of the treaty.

He continued :

p. 213, l. 41.

"Section 4 however, goes beyond this, and purports to assume unlimited regulation and control of aeronautics in Canada.

"It is difficult, therefore, to answer categorically Question 3, but, interpreting the question as indicated, it follows from what has been said that, as to a great part of the provisions of section 4, the 30 answer is 'yes.' Clause (d) refers not only to the carrying of mails, but to the carrying of goods and passengers, and the operation of any commercial service whatsoever, and jurisdiction as to these matters, independently of the Convention, would depend on whether or not they are of such a nature as to amount to Regulation of Trade and Commerce as set out in section 91 of the British North America Act. The same remarks would apply to transport of goods and passengers over part of the territories of Canada, as set out in Clause (e)."

p. 214.

With regard to Question No. 4 the learned Judge said— 40

"Question 4 (a) and (b) should be answered in the affirmative.

"Question 4 (c) should be answered in the affirmative as to all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air

stations referred to in the Convention or in reading ground markings made in pursuance of the Convention.” RECORD.

CANNON, J.

The learned Judge held :

pp. 219-220

1st. That aviation is not a subject enumerated in section 91 or in subsection 10 of section 92. The works and undertakings connecting a province with another province or extending beyond the limits of the province are “ physical things, not services.”

10 2nd. That nothing was before the Court showing conclusively that aviation is unquestionably a matter of national interest and importance and that it does not trench on any of the subjects enumerated in section 92 or that it has attained such dimensions as to affect the whole body politic of the Dominion.

20 3rd. . . . That the legislation in question is not necessarily incidental to effective legislation by Parliament upon a subject of legislation expressly enumerated in section 91, amongst others “ navigation and shipping, militia, military and naval service and defence, regulation of trade and commerce,” that such legislation might be required in case of war, in time of extraordinary peril to the national life of the Dominion, but the Act was not passed for such an emergency, and could not be justified as an exception to the exclusive right of the provinces to legislate concerning property and civil rights.

4th. That the legislation, so far as property and civil rights are concerned, does not touch a domain where provincial and Dominion legislation may overlap. The ownership of the air space is *prima facie* a subject within the exclusive jurisdiction of the provinces; and they alone can impose restrictions to the rights of the owners of land and to those of the owners of aircraft.

30 He therefore answered Question 3 in the negative.

Question 4 as framed he answered in the negative under sections 91 and 92 of the British North America Act; but, under 132, he referred to his answers to Questions 1 and 2.

15. It is submitted on behalf of the Attorney General of Canada that the judgment of the Supreme Court of Canada in answer to Questions 1, 3 and 4 is wrong and ought to be reversed, and the said questions answered severally in the affirmative for the reasons stated in the Factum filed on the Attorney General’s behalf in the Supreme Court of Canada, and for the following among other

40

## REASONS

1. The Parliament of Canada exercises complete and exclusive sovereignty over the air space above the territory of the Dominion of Canada in relation to all matters coming

within its legislative powers under the provisions of the British North America Act, 1867.

2. Aerial navigation, by reason of the extreme mobility of aircraft, is in its character and scope national, and its regulation, being, therefore, a matter, not merely of a local or private nature in each province, but of unquestionable national interest and importance, is competent to Parliament under the initial words of section 91, as being concerned with the peace, order and good government of Canada in relation to matters not coming within the classes of subjects assigned exclusively to the 10 Legislatures of the provinces.
3. There is a public right of air navigation of the navigable air space over the whole of Canada and over part of it, and, the right being a right of the public in general and in no way special to the inhabitants of any province, the power to regulate it is beyond the competence of any provincial legislature and is vested in the Parliament of Canada.
4. The indispensable necessity, in the interests of public safety and of aeronautical progress, of uniform standards and rules with respect to the air-worthiness of aircraft, and competency of 20 pilots, and the rules as to passing, crossing, signalling, landing, etc., renders control by a central single authority essential.
5. The general terms, in which the enumerated legislative powers of the Parliament of Canada under section 91 of the British North America Act, 1867, are expressed, ought to be construed, in a broad sense, as always speaking, and as being, therefore, apt to embrace within the scope of such powers all such new developments and new conditions as those terms, on a reasonable interpretation and consistently with the objects and purposes for which the powers were conferred, can fairly be 30 held to extend to and embrace.
6. "Navigation and shipping," as descriptive of an exclusive legislative power conferred upon the Parliament of Canada by head 10, section 91 of the British North America Act, 1867, are popular words of wide import, and "navigation," in its natural and popular sense, is apt to embrace, and may, consistently with common usage, the context, and the spirit and intent of the constitution, be interpreted as embracing, within its scope, the navigation of the air.
7. Aerial navigation, although a new development presumably not 40 contemplated by the framers of the British North America Act, 1867, is an art or science of the same nature, involving the application of the same scientific principles and methods, the same instruments, the use of the same navigational aids,

the observance of analogous rules, and a closely corresponding dependence of the craft engaged in it upon harbour and port facilities, as the art or science of navigating vessels over the seas and other waters; and its regulation is, therefore, a matter relating to the same subject matter as "navigation and shipping," and to which that legislative power is, in its nature, applicable.

- 10 8. It is within the competence of the Parliament of Canada, in virtue of its exclusive legislative authority in relation to "defence" to establish and enforce, in the interests of national security and defence, uniform standards and rules with respect to aircraft, and flying equipment and facilities owned by Canadian nationals, and the qualifications of the personnel employed for the operation of such aircraft.
- 20 9. The regulation of aerial navigation in respect of certain operations and services, carried on as well intra- as extra- and inter-provincially, appertains to the exclusive legislative powers conferred upon Parliament—*e.g.*, the regulation of trade and commerce; postal service militia, military and naval service, and defence; beacons, buoys, lighthouses; and works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; and the Dominion cannot exert complete and effective control over such operations and services or foster and protect them, without asserting jurisdiction over the whole field of aerial navigation. The legislation in question and the regulations made thereunder, if not in their entirety substantively embraced by the enumerated legislative powers of the Parliament, are necessarily incidental or reasonably necessary to effective legislation under such enumerated powers.
- 30 10. The Parliament of Canada has exclusive and paramount legislative authority to enact the legislation in question for the performance of the obligations assumed by Canada under the convention relating to the regulation of aerial navigation.

WILFRID GREENE.

C. P. PLAXTON.

In the Privy Council.

No. 38 of 1931.

ON APPEAL  
FROM THE SUPREME COURT OF  
CANADA.

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IN THE MATTER of a Reference as to the  
Respective Legislative Powers under the British  
North America Act, 1867, of the Parliament of  
Canada and the Legislatures of the Provinces  
in relation to the Regulation and Control of  
Aeronautics in Canada.

BETWEEN

THE ATTORNEY-GENERAL OF CANADA

*(Appellant)*

AND

THE ATTORNEY-GENERAL OF THE PRO-  
VINCE OF ONTARIO, THE ATTORNEY-  
GENERAL OF THE PROVINCE OF  
QUEBEC AND THE ATTORNEY-GENERAL  
OF THE PROVINCE OF MANITOBA

*(Respondents).*

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CASE OF THE APPELLANT  
THE ATTORNEY-GENERAL OF CANADA.

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CHARLES RUSSELL & CO.,

37, Norfolk Street,

Strand, W.C. 2,

*Solicitors for the Appellant, the  
Attorney-General of Canada.*