

In the Privy Council.

No. 38 of 1931.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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.*

CASE OF THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC.

1. This is an appeal from the Supreme Court of Canada, which, by a judgment delivered on the 7th October, 1930, answered questions referred to it by His Excellency the Governor-General in Council, for hearing and consideration, touching the respective powers under the British North America Act, 1867, of the Parliament and Government of Canada and the Legislatures of the Provinces in relation to the regulation and control of Aeronautics in Canada.

Record.
p. 184.
p. 186.

Record.
pp. 172-174.
pp. 10-40.
p. 176, l. 22.
pp. 7-9.
p. 194, l. 29.
14-15 Geo. V.
c. 65.

2. The Governor-General in Council on the 31st December, 1919, pursuant to the Air Board Act, 1919, issued detailed "Air Regulations" which as amended are printed in the Record. By the National Defence Act, 1922, the Minister of National Defence thereafter exercised the powers duties and functions of the Air Board. The Air Board Act, as so amended, is now the Aeronautics Act, chapter 3 of the Revised Statutes of Canada, 1927, but, by reproduction in the Revised Statutes, does not take effect as new law.

p. 3, l. 27.
p. 41 *et seq.*
p. 124.

3. On the 1st June, 1922, His Majesty on behalf of the British Empire ratified an international Convention relating to the regulation of Aerial Navigation made at Paris on the 13th October, 1919. By the 31st January 1928, twenty-four States had ratified the Convention of which only Canada, Chile and Uruguay are in North or South America.

p. 8, l. 12.
p. 7, l. 8.
p. 9, l. 7.
p. 9, l. 3.
p. 8, l. 17
et seq.

4. Section 4 of the Aeronautics Act (Revised Statutes of Canada, 1927, chapter 3) purports, subject to approval by the Governor in Council, to give to the Minister of National Defence a general power to regulate and control (with statutory force and under the sanction of penalties on summary conviction) flying over Canada and her territorial waters, including power to regulate the licensing of pilots, aircraft, aerodromes and commercial services; the conditions under which aircraft may be used for goods, mails and passengers or their carriage over any part of Canada; the prohibition (absolute or conditional) of flying over prescribed areas; aerial routes, and provisions for safe and proper flying.

5. The questions referred to, and the answers of, the Court are the following :—

p. 4.

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. 185, l. 37.

Answer. To question 1 as framed, the Court unanimously answers "No."

p. 4.

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 ?

p. 185, l. 38.

Answer. The answer of the majority of the Court (Anglin C.J., 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'."

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

Answer. The answer of the majority of the Court (Anglin C.J., ^{p. 185, l. 42.} Duff, Newcombe, Rinfret, Lamont and Cannon JJ.) is :—

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

10 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.

4. Has the Parliament of Canada legislative authority to sanction ^{p. 4.} 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

20 (c) The licensing, inspection and regulation of all aerodromes and air stations ?

Answer. The answers are to be ascertained from the individual ^{p. 186, l. 5.} opinions or reasons certified by the Judges.

6. The powers of the Parliament of Canada and of the Provincial Legislatures respectively are set out in sections 91, 92, 95 and 132 of the British North America Act, 1867, as follows :—

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

30 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,—

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2. The regulation of Trade and Commerce.

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5. Postal Service.

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7. Militia, Military and Naval Service, and Defence.

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9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

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13. Ferries between a Province and any British or foreign 10 country or between two Provinces.

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25. Naturalization and aliens.

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27. The Criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

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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.

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.

Exclusive Powers of Provincial Legislatures.

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 :— 30

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(5) The management and sale of the public lands belonging to the Province and of the timber and wood thereon.

* * * * *

(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 ;

Record.

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.

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(13) Property and civil rights in the Province.

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(16) Generally all matters of a merely local or private nature in the Province.

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Agriculture and Immigration.

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95. In each Province the legislature may make laws in relation to agriculture in the Province, and 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 agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the legislature of a Province relative to agriculture or 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.

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IX. MISCELLANEOUS PROVISIONS.

General.

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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.

7. The argument was heard on the 10th and 11th April, 1930, and considered answers were given by the Court on the 7th October, 1930. The case is reported in (1930) Supreme Court Reports at page 663. p. 185, l. 20.
p. 184, l. 12.

8. The Chief Justice, agreeing with Mr. Justice Newcombe, Mr. Justice Smith and Mr. Justice Cannon, held that the Convention of the 13th October, 1919, is a treaty between the Empire and foreign countries within the meaning pp. 186-191.
p. 187, l. 28.

- Record. of section 132 of the British North America Act, and that intra-provincial aviation is, *prima facie*, a matter of provincial legislative jurisdiction within section 92, heading 13 of the Act. The first question is based on section 132, but omits significant phrases and by the word "exclusive" introduces an idea unwarranted by the section and if the question is to be answered in the affirmative, "paramount" must be substituted for "exclusive." Question No. 2 is not directed to the legislative control over aircraft in connection with matters assigned by section 91 to the Dominion but to jurisdiction under section 132 which should be liberally interpreted to include all necessary or proper powers for achieving the purposes defined. The control of aeronautics in no sense comes within the subject of "Navigation and shipping" (section 91, heading 10). Although Dominion legislation to control aeronautics ante-dated the International Convention, the 1927 Act so far as it implements the conventional obligations may probably be upheld under section 132, the Parliament and Government of Canada having paramount though not exclusive jurisdiction to legislate for the performance of all treaty obligations. Question No. 3 should be answered in the negative. It was not intended to involve the Court in a minute examination of each regulation under section 4. Legislative jurisdiction over intra-provincial flying *prima facie* belongs to the Provinces and Dominion legislation is only valid if justified as within or necessarily incidental to an enumerated head under section 91, or by such Dominion-wide importance that provincial legislative jurisdiction is ousted, or under section 132. An international or inter-provincial line of aircraft may be an "undertaking" within heading 10 (a) of section 92 and the construction, maintenance and operation of flying machines may be "works" within heading 10 (b).
- pp. 191-201. **9. Mr. Justice Duff**, in whose judgment Mr. Justice Rinfret and Mr. Justice Lamont concurred, examined the grounds for the proposition that the Dominion possesses exclusive or over-riding authority to legislate upon the subject of aeronautics in every respect. "Navigation and shipping" does not embrace aeronautics, which are a provincial matter within section 92. Provincial control over property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles, and aircraft may be used as a local agency for many strictly provincial purposes. Dominion authority over several or many aspects of the subject does not give authority to appropriate the whole, and, to test the Dominion contention under section 132, the Aeronautics Act and regulations must be considered in relation to the Conventional undertakings. It is not competent for the Dominion to exercise or authorise the Minister to exercise such a comprehensive control as section 4 of the Act confers. Section 4 was not passed in execution of any power under section 132 and is invalid to-day to the same extent as in 1919. Such sweeping authority as sub-paragraphs (a), (b) and (c) of section 4 give could be derived from no section of the British North America Act other than section 132, under which the powers can be validly exercised only in the performance of and for the purpose of performing the obligations of Canada under the Convention. The provisions for the licensing of personnel cannot be so justified, nor could the provisions for the registration
- p. 188, l. 38.
- p. 189, l. 29.
- p. 189, l. 43.
- p. 190, l. 1.
- p. 190, l. 22.
- p. 190, l. 43.
- p. 191, l. 6.
- p. 193, l. 33.
- p. 193, l. 38.
- p. 194, l. 1.
- p. 194, l. 11.
- p. 194, l. 25.
- p. 194, l. 38.
- p. 195, ll. 9-33.
- p. 195, ll. 34-46.

of aircraft nor for their certification and licensing. Neither does the performance of any Conventional obligation require the enactment of subparagraph (c) and regulations thereunder. The Dominion could exercise large powers of regulation under section 132, and could also exercise authority over air mails, aircraft entering Canada, and the Air Force. But section 4 is too wide in respect of the carriage of goods and passengers, the control of routes, and provisions for safe and proper flying. Section 4, subparagraph (f) and regulation 33 are valid, but the dispensing power of regulation 133 shows that the regulations are not made in exercise of Conventional obligations, which are not within the discretion of each State. Regulations 10 and 28 have no relation to anything in the Convention and under no section of the British North America Act other than 132 are they susceptible of valid sanction. The principal clause of section 4 does not come within the excepting clauses of heading 10 of section 92 nor within heading 2 of section 91 and no opinion need be expressed on the argument on these points. There is no danger of conflicting flying rules as provincial legislation would be superseded by valid Dominion legislation.

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10. Mr. Justice Newcombe held the Convention to be a treaty, but provincial powers should not suffer a diminution except to admit concurrent Dominion capacity when provincial obligations are not performed by the province. Question No. 2 is obscure; the Court ought not to define treaty obligations, and there were difficulties in hearing parties who ought to be heard. Dominion powers under section 132 include all powers necessary or proper for achieving the purposes defined, but the difficulties of ascertaining and interpreting the Conventional obligations would justify a representation against the advisability of answering question No. 2. The subject matter of neither Question No. 3 nor 4 is "navigation and shipping." The air superincumbent upon private lands is included in the ownership. Navigation at least in tidal waters is a public right but rights of way for flying must be derived from or against the owners of the property traversed. The legislative power appertains to property and civil rights in the province. Immunity from actions for trespass or nuisance, as in the Imperial Air Navigation Act, 1920, would be conferred by provincial legislatures. Uniformity of regulation can be secured by co-operation. The Dominion may operate aircraft under various headings of section 91 and may prohibit or regulate their use for the carriage of goods or passengers into or out of Canada or inter-provincially. Parts of section 4 and the regulations invade the exclusive provincial field.

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11. Mr. Justice Smith thought the answer to Question No. 1 was determined by the decision of *Attorney-General of British Columbia v. The Attorney-General of Canada*, reported in [1924] Appeal Cases at page 203, which shows that the Dominion has paramount jurisdiction to legislate for the performance of all treaty obligations. The answer, therefore, substituting "paramount" for "exclusive," is in the affirmative. Question No. 2 taking the words "regulation and control of aeronautics generally within

Record.
p.196, ll.1-17.
p. 196, ll. 18-27.
p.196, l. 36—
p. 198, l. 13.
p. 198, ll. 14-18.
p. 198, ll. 18-34.
p. 198, ll. 35-44.
p.198, l. 45—
p. 199, l. 11.
p.199, l. 12—
p. 200, l. 8.

p. 200, ll. 9-27.

p. 200, ll. 29-40.

pp. 201-208.
p. 202, ll. 7-33.

p.202, l. 34—
p. 204, l. 3.

p.204, l. 4—
p. 205, l. 11.

p. 205, l.27—
p. 206, l. 30.

p. 206, l. 13.

p. 206, ll. 31-46.
p. 207, l. 1—
p. 208, l. 27.

pp. 208-214.
p.209, l.14—
p. 211, l. 2.

p. 211, l. 3.
et seq.

Record. Canada" as meaning unlimited regulations and control of aeronautics within Canada, must be answered in the negative. The learned Judge rejected the contention on behalf of the Provinces that the International Convention applied only to aircraft operated internationally, observing that, while in some respects the Convention purported to deal only with international flying, in others it dealt with, and imposed obligations with respect to, the flying of all aircraft within any of the contracting countries. The learned Judge then proceeded to consider various provisions of the Convention and of the annexes thereto which, in his opinion, imposed upon Canada as a party to the Convention obligations necessarily requiring for their performance the enactment of regulations with respect to the flying of all aircraft within Canada. The Parliament of Canada has admitted jurisdiction over flying in connection with certain headings of section 91 but not over the whole subject as "navigation and shipping." Question No. 3, however, relates to present legislative authority and section 132 can be invoked although the Act was passed long before the treaty came into effect. But section 4 goes beyond the powers conferred by section 132 and purports to assume unlimited regulation and control of aeronautics. A great part of section 4 is valid. Question 4 (a) and (b) should be answered in the affirmative and also (c) as to all aerodromes and air-stations described in the Convention and as to others as far as necessary to prevent confusion in regard to the matters within the Convention.

12. Mr. Justice Cannon answered the first question in the negative. The Parliament and Government of Canada 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 exercised such legislative power. As regards Question No. 2, refusal or neglect by the Provinces to honour a signature of the Dominion to a treaty may justify Dominion legislation under section 132. But the section has not been applied. Moreover, if "generally" means "in every respect" the answer is in the negative. As regards Questions Nos. 3 and 4, after stating the tests to be applied, the learned Judge held: 1st, that aviation was not a subject enumerated in section 91 or in subsection 10 of section 92; 2nd, nothing before the Court shows conclusively that it 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; 3rd, this legislation 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." Such legislation might be required in case of war, in time of extraordinary peril to the national life of the Dominion, but this Act was not passed for such an emergency, and it cannot be justified as an exception to the exclusive right of the provinces to legislate concerning property and civil rights; 4th, this 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. Question No. 4 should be answered in the negative under sections 91 and 92 ; but under section 132 the principles discussed in answering Questions Nos. 1 and 2 apply. Record.
p. 220, l. 29.

13. The Attorney-General of Quebec submits that the subject of aeronautics comes within the subjects of "Property and Civil Rights" (heading 13 in section 92 of the British North America Act), and further that the subject comes within heading 16 of the same section : "Generally all matters of a merely local or private nature in the Province." It is also submitted that the subject of aerial navigation does not fall under any of the enumerated heads of section 91 of the British North America Act, and particularly is not included in the subjects of "Navigation and Shipping" (heading 10).

14. It is conceded on behalf of the Province that the Parliament of Canada in the exercise of its special powers under section 91 can affect the subject of aerial navigation, as it can affect any other Provincial subject, but it is submitted that it is impossible on the present appeal to give any indication of what the Parliament can validly do in that respect. It is further conceded that under section 132 of the British North America Act the Parliament and Government of Canada have all powers necessary or proper for performing the obligations of a Province under a treaty between the British Empire and a foreign country if the Province fails to perform its obligations, but it is submitted that there is at the present time no legislation passed by the Parliament for the purpose and that it is impossible on the present appeal to indicate what sort of legislation could be passed. The present Aeronautics Act (except for an amendment, immaterial to this point, made in 1922) took effect from the 6th June, 1919, and if then invalid, the Attorney-General of Quebec submits that the Act cannot, by the happening of a subsequent event, automatically acquire validity. p. 172, l. 18.

15. The Attorney-General of Quebec is satisfied with the answers of the Supreme Court of Canada which he submits are correct and should be affirmed for the following, amongst other :

REASONS.

1. Because flying involves an interference with rights of ownership and is therefore *prima facie* within the exclusive legislative authority of the provincial legislature over property and civil rights in the province.
2. Because flying within the boundaries of a province is a matter of a merely local and private nature in the province.

3. Because aircraft may be and are used for purposes incidental to other matters exclusively assigned to the Legislature of the Province such as the detection of forest fires on public lands and the administration of justice.
4. Because flying is not a matter of navigation and shipping nor is flying (except incidentally) within any enumerated heading of matters assigned by section 91 of the British North America Act to the Parliament of Canada.
5. Because the Dominion legislation over aeronautics was not passed in an emergency nor for the purpose of carrying ¹⁰ out treaty obligations, and therefore cannot be justified as an exercise of the general powers of the Parliament of Canada or of its powers under section 132.
6. Because legislation by the Parliament of Canada under section 132 of the British North America Act is only necessary or proper in matters trenching on provincial rights if the province fails or refuses to pass legislation for performing treaty obligations in respect of such matters.
7. For the other reasons given in the judgment of the Supreme ²⁰ Court of Canada.

JOHN SIMON.

CHARLES LANCTOT.

AIME GEOFFRION.

FRANK GAHAN.



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