7/1932

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE JURISDICTION OF PARLIAMENT TO REGULATE AND CONTROL RADIO COMMUNICATION

FACTUM OF THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC

The questions referred are:—

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of hertzian waves and including the right to determine the character, use and location of apparatus employed?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

The provinces were not consulted in any way with regard to the questions to be submitted to the Court in this matter and still less of course about the Order of the Administrator in Council submitting them, which is the first document in the Case at page 3.

This Order in Council is very long, five printed pages, and the Attorney General of Quebec submits that this is not a proper course for the submission of questions to the Supreme Court of Canada, for hearing and consideration, pursuant to the authority of section 55 of the Supreme Court Act (R. S. C., 1927, Chap. 195).

This section 55 provides that,—

"Important questions of law or fact touching

(*a*) the interpretation of the *British North America Acts;* or

(*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or

(*c*) the appellate jurisdiction as to educational matters, by the *British North America Act*, 1867, or by any other Act or law vested in the Governor in Council; or

(*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or

(*e*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council shall be conclusively deemed to be an important question.

It would seem therefore that the proper course would be for the Order in Council to state that on the recommendation of the Minister of Justice the above questions are referred to the Supreme Court of Canada.

It may be that the Court will disregard the lengthy preamble in the Order in Council but it appears in the Case submitted as the Order submitting the questions.

The Attorney General further submits that the questions, which do not refer to any legislation of the Dominion or provinces, are of too general a character to be satisfactorily answered by the Court and, at best, only with such qualifications and restrictions as to render their application well nigh impossible.

The Aeronautics Reference addressed questions, first, as to the authority of and necessity for Parliament to legislate for performing the obligations under the Convention relating to the Regulation of Aerial Navigation and, second, as to the legislative authority of Parliament to enact certain provisions of the Aeronautics Act.

However wide the scope of these questions they referred to the interpretation of a particular Treaty and a Statute of the Parliament.

In the present Reference we have nothing of the sort. The questions are not only entirely general but equivocal and ambiguous.

In the case of *Citizens Insurance Co.* v. *Parsons* (1881) 7 Appeal Cases, 96, the Privy Council referring to the subjects enumerated in sections 91 and 92 of the British North America Act, 1867, said:—

> "It is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers... In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

Radio communication, the subject matter of the present reference is new and presents difficulties. Happily it is not necessary to enter into any scientific particulars concerning it.

The legal aspect of the matter is more familiar. The remarkable new feature is that it deals with intangible transmissions such as neither telegraphs nor telephones are capable of since they require lines of communication which are physical works. It perhaps more nearly resembles the subject of aviation which was considered on the recent Reference by the Governor General in Council to the Supreme Court of Canada as to the respective legislative powers of the Parliament of Canada and the Legislatures of the Provinces in relation to the Regulation and Control of Aeronautics. This Reference is reported in the Supreme Court Reports, 1930, at p. 663. Reference to it will presently be made for useful considerations and illustrations.

The fact is that the Dominion has assumed control over all matters of radio communication concerning which the Radiotelegraph Act (Revised Statutes of Canada, 1927, Chapter 195) provides:

> Sec. 2 (*d*) "'Radiotelegraph' includes any wireless system for conveying electric signals or messages including radiotelephones".
>
> Sec. "6. No person shall establish any radiotelegraph station or install or work any radiotelegraph apparatus in any place in Canada or on board any ship registered in Canada except under and in accordance with a license granted in that behalf by the Minister."
>
> Sec. "9. No one shall be employed as a radiotelegraph operator at any coast or land station unless he is a British subject."
>
> .....

Section 12 provides penalties for establishing stations and apparatus illegally.

The Governor General in Council recently appointed a Commission charged,—

"To examine into the broadcasting situation in the Dominion of Canada and to make recommendations to the Government as to the future administration, management, control and financing thereof."

The Commission presided over by Mr. Aird reported on the 11th of September, 1929, to the Minister of Marine and Fisheries of Canada.

In the Appendix to its report (Appendix to Case, p. 199) it is said:—

"Full jurisdiction over the administration of all radio matters in the Dominion, including the licensing and control of broadcasting stations, is vested in the Minister by the Department of Marine and Fisheries and is exercised in accordance with the Radiotelegraph Act (Canada) and Regulations issued thereunder (R. S. Canada, 1927, Chapter 195)."

It is submitted that *prima facie* the Provincial Government has complete and absolute authority over all radio matters within the province, at any rate that the burden of proof is on the Dominion to show on what it relies for its assumption of full jurisdiction over all radio matters in the Dominion.

The British North America Act provides:—

"**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,—

. . . . . .

"13. Property and Civil Rights in the Province."

. . . . . .

"16. Generally all Matters of a merely local or private Nature in the Province."

. . . . . .

"**109.** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick

in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

"**117.** The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

Although radio transmission through the air is without any physical apparatus such as telegraph wires it does require apparatus for the emission of the Hertzian waves and these are physical works situate on the land of the Province in which they are erected.

The remarks of Mr. Justice Duff in the Aviation Reference seem apposite where he says (p. 685):—

"The provincial jurisdiction under heads 10 to 16 (of sec. 92) extends through the air space above, as well as the soil below; and the control of the province over its own property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles. The employment of aircraft for the survey, exploration, inspection and patrolling in the management of the public domain, for police purposes, and in the interests of public health (head 7) is as strictly a provincial matter as the employment of any other local agency for such purposes. Primarily the matters embraced within the subject of aerial navigation fall within section 92."

The first article of the Convention relating to the regulation of Aerial Navigation of 13th October 1919 is:—

"The High contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory."

Section 92 (13) besides the subject of Property gives to the Provincial Legislatures exclusive power over Civil Rights.

The establishment of radio transmitting stations and the reception of their emissions unless prohibited by competent authority are civil rights of everyone of the public and the Provincial Legislature has the exclusive power over civil rights in the Province.

Radio communication is a novel utilisation of the forces of nature and even the scientific world will admit that their knowledge of it is limited. It behoves us therefore to advance any propositions con-

cerning it with hesitation. With all reserves however it is submitted that the Hertzian waves in essence and effect differ little from those by which ordinary sounds to which we are accustomed are propagated.

The emission of the Hertzian wave produces no effect appreciable by us without a corresponding apparatus for capturing the wave. This is in reality an extension of or aid to our sense of hearing as optical instruments are to our vision.

The open air like running water is common to all mankind and cannot be the subject of private property.

Then if a man by mechanical means such as ringing a bell, or playing a musical instrument, sets in motion in the air an ordinary sound wave or by emitting a Hertzian wave a sound susceptible by our hearing only by a suitable instrument, does this differ so far as his civil rights and liberties are concerned from throwing a stone into running water which may create a wave that will extend indefinitely. Any restriction of these, his natural rights, must be the subject of municipal law prohibiting specific acts.

An illustration of the extreme invasion of civil rights of the public is the prohibition against anyone capturing a sound wave in the air without a license from the Dominion Government.

Besides the *prima facie* rights of the Province above indicated the claims of the Provincial Government may be supported under other enumerations in section 92.

Thus the Provincial Legislature has exclusive powers over numbers,—

"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 Provinces 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.

"16. Generally all Matters of a merely local or private Nature in the Province."

And over Education as determined in section 93.

It may be suggested that the regulation of radio communication properly comes within No. 13 "Property and Civil Rights in the Province" or No. 16 "Generally all Matters of a merely local or private Nature in the Province."

In the Aviation Reference, S.C.R., 1930, at p. 718, Mr. Justice Cannon in his opinion says:—

"I would therefore say, with respect for those who believe that our constitution must be stretched to meet new conditions as they arise in the life of the people, that aviation was not foreseen nor considered when the enumeration of 91 was made, and that the words 'property and civil rights' in section 92, are wide enough to give power to the provinces of legislating, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion and conform to the new requirements of International Law since the sovereignty of each State over the air space above its territory has been proclaimed in 1919."

The possible rights of the Dominion to exercise the jurisdiction it is asserting must presumably be sought either in section 91 or section 132 of the British North America Act.

There is, as before remarked, nothing express in the enumeration of subjects in sections 91 and 92 distributing legislative power upon the subject now under consideration.

The possibility of the following numbers in the enumeration in section 91 embracing it may be considered:—

2. The Regulation of Trade and Commerce.

5. Postal Service.

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

10. Navigation and Shipping.

25. Naturalization and Aliens.

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.

(92) 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.

It may at once be conceded that where any subject is under its exclusive legislative authority the Dominion Parliament has power to legislate by substantive and by ancillary and necessarily incidental legislation.

Perhaps it is hardly necessary to consider No 2 "The Regulation of Trade and Commerce". This has often been suggested as a foundation for Dominion legislation and as often denied. The general rule for the construction to be put upon this number in the section, is stated by the Privy Council in the case of *Citizens Insurance Co. v. Parsons*, 7 App. Cas., 96, as follows:

"The words 'regulation of trade and commerce', in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an

indication that regulation relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion Parliament.

.....

Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction."

See also the case of *Attorney General for Canada v. Attorney General of Alberta (The Insurance Reference)* (1916) 1 A.C., 588.

And in the case of *The Board of Commerce Act 1919, and The Combines and Fair Prices Act, 1919,* (1922) 1. A.C., 191, in which it was,—

"HELD, that the Acts were *ultra vires* the Dominion Legislature, since they interfered seriously with 'Property and Civil Rights in the Province', a subject reserved exclusively to the Provincial Legislatures by s. 92, head 2, of the British North America Act, 1867, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combination and hoarding subjects outside the heads of s. 92 and within the general power given by s. 91. The power of the Dominion Legislature to pass the Acts in question was not aided by s. 91, head 2 (trade and commerce), since they were not within the general power; nor by s. 91, head 27 (the criminal law), because the matter did not by its nature belong to the domain of criminal jurisprudence."

The recent decision of this Court in the case of Lawson v. Interior Tree Fruit & Vegetable Committee of Direction is based on the fact, which it finds, that the statute had attempted to regulate the marketing of products outside British Columbia and therefore dealt with interprovincial trade.

This decision can have no application here for there is no reason to suppose that any Provincial legislation on radio communication need extend beyond the limits of the particular Province.

In any case the power of the Dominion over "Trade and Commerce" could not cover Government or amateur radio communications in the Province and all other non-commercial broadcasting.

No. 29. "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces."

Sec. 92, No. 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."

At the hearing of the Aviation Reference there was much discussion of the bearing upon the subject matter of section 91 (29) embodying the exceptions in section 92 (10).

Assuming for the purpose of this argument that radio transmitters and radio receivers are local works and undertakings and fall under No. 10 of section 92 instead of No. 13 "Property and civil rights", it is submitted that the Dominion jurisdiction is not helped thereby.

Par. "a" and Par. "c" of section 92, No. 10, alone require to be considered.

The works and undertakings, in order to come under par. "a", must either connect the province with another province or extend beyond the limits of the province.

While the point may not be of very great importance, it may nevertheless be noted that if radio transmitting and receiving apparatuses come under section 29, No. 10, it is as works and not as undertakings.

The operation or management of any work is, in a sense, an undertaking, but it is obviously not in that sense that the word

undertaking is used in the statute. Everything coming under the paragraph is either a work or an undertaking but, cannot be both. Ontario vs Canada A.C. 1896, at p. 365. The word undertaking was inserted in the statute to cover such cases as lines of ships that are not local works.

It is significant that in paragraph "c" the word "undertakings" is omitted.

Bearing this in mind, it is suggested that the extension of the work contemplated in par. "a" must be a physical extension, an extension of the locus of the work.

The fact that certain effects would be produced by the work out of the province cannot make it extend beyond its limits within the meaning of the statute.

In the case of Manitoba vs Manitoba License Holders' Association (1902) A. C. 73 at p. 79, it is said:—

> "The controversy, therefore, seems to be narrowed to this one point: Is the subject of 'the Liquor Act' a matter 'of a merely local nature in the province' of Manitoba, and does the Liquor Act deal with it as such? The judgment of this Board in the case of *Attorney-General for Ontario v. Attorney-General for the Dominion* (1896) A. C. 348) has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held, further, that there might be circumstances (See Report to Her Majesty, May 9, 1896) in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, therefore, as it stands, and the Report to Her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are 'substantially of local or of private interest' in a province—matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however

carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

. . . . . .

Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the Province of Manitoba, and indirectly at least with business operations beyond the limits of the province."

The paper mill in Hull, whose fumes extend, when the wind blows from a certain direction, into Ontario, cannot be considered as a work extending beyond the limits of the province nor can a dike built at the head waters of a river in one province, when that river flows into another province, be considered a work extending beyond the limits of the province, because the natural flow of the river in its lower regions in the other province is affected.

What is true of the extension beyond the limits of the province is also true of the connection of the province with another province referred to in the same paragraph. The two expressions are obviously of the same character joined, as they are, together.

Otherwise, the Dominion could control a provincial work that produces some effects in other provinces, but could not control a similar work producing the same effects in a foreign country, another British Dominion or an unorganized territory of this Dominion.

It is obvious that the reference to connecting works it as between provinces and the reference to extensions is as respects foreign countries, other British Dominions and unorganized territories, but both have otherwise the same meaning.

This was held in the Aviation reference, 1930, S.C.R., p. 76, in the following words:

"The works and undertakings connecting a province with another province or extending beyond the limits of the province are 'physical things not services' as pointed out by Lord Atkinson in City of Montreal v. Montreal Street Railway (1912) A.C., 342."

It would be extraordinary if a Radio transmitter was federal or provincial according to whether it reaches receivers in another province or not, a fact depending on many and variable circumstances independant of the transmitter.

It may be suggested that if the work does not extend beyond the limits of the province or connect the province with another, the undertaking does.

The answers to that objection are implied in the remarks previously made.

In the first place, this must be considered, if coming at all, under No. 10 as a work not as an undertaking.

Where there is a federal work the jurisdiction of the Dominion extends by implication to the undertaking connected with that work and is not based as to that undertaking on the presence in the Statute of the word "undertaking".

Otherwise when the Dominion declares a work to be for the general advantage of Canada, as paragraph "c" does not refer to undertakings, it could not acquire jurisdiction over the undertaking connected with that work.

As previously stated the word "undertaking" was introduced in the Statute to take care of such matters as lines of ships where the undertaking as a locus but not work connected with it have any.

The example of the Hull mills and the regulating dam at the head waters of an interprovincial river and the words above quoted taken from the judgment on the Aviation Reference further meet that point.

At all events, as broadcasting by radio is in all directions, it cannot be said that the undertaking has any locality except the place where the transmitting station is.

It is also suggested that the words "works and undertakings" should receive a restricted construction throughout the whole of No. 10 of section 92.

There is no doubt it is submitted that the meaning of the words must be restricted by application of the rule "ejusdem generis" when used in paragraph "a".

It is submitted that they should also receive the same restrictive meaning when used in paragraph "c".

Taken in their broader sense these words would cover almost any physical product of human labor, including structures or excavations, which is attached with some degree of permanency to the soil

and almost every form of human activity the exercise of which is connected with a given place or area. If that was the meaning the invasion of the domain of property and civil rights allowed to the Dominion Parliament by paragraph "c" would be even greater than what would have taken place if the words "regulation of trade and commerce" had been given their natural meaning and the fact of that invasion was sufficient to induce the Privy Council to impose on the broad meaning of the latter words, very important restrictions some of which are somewhat artificial.

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Further if the restriction resulting from the application of the rule "ejusdem generis" which it is suggested must apply to paragraph "a" was not extended to paragraph "c" this absurd situation would arise that a work such as a hydraulic development dike and power house or a factory situated partly in one province and partly in the other could never be under Federal jurisdiction as not coming under either paragraph "a" or paragraph "c" while similar works entirely in one province could be brought under Dominion jurisdiction, under paragraph "c".

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Whether the same restriction should apply to the opening words of No. 10 is of no importance as if anything is not a local work or undertaking it is nevertheless provincial under items 13 or 16.

In fact, item No. 10 is obviously inserted not with the view of adding to provincial jurisdiction, as it does not do so, but with the view of adding to Dominion jurisdiction and it is the meaning of the two exceptions that is important and must govern.

30 In that view, the nature of the enumerated examples must be carefully considered. They are all as stated in the Montreal Street Railway and Aviation judgments physical things not services; they extend from a given point to another given point and are used as means of communication between human beings between those points.

It is useless to discuss more fully the effect of this suggested restriction on the Dominion powers except for the fact that telegraphs are mentioned.

40 It will be suggested that radios are analogous to telegraphs and therefore while they do not come under paragraph "a" as there is no extension beyond the limits of the province or connection between two or more provinces nevertheless they can be declared works for the general advantage of Canada.

It is suggested in answer, that the telegraphs referred to in the British North America Act of 1867, were continuous physical things and the wireless telegraph cannot be said to be analogous to tele-

graphs with wires which physically connect provinces together or extend beyond the limits of the provinces.

Further, even if a wireless telegraph can be considered as analogous to a telegraph with wire, it is suggested that there is no analogy between radio and telegraph with wires. Analogy with wireless telegraphs would not be sufficient if 92.10 "a" is intended to refer expressly only to telegraphs with wires. However it is submitted that even that analogy does not exist.

It is true that the scientific principle working in both is the same but the constitution does not apply to abstract science and the practical effects of each are essentially different.

The wireless telegraph is used to send a message from one given point to another fulfilling exactly the same function as the telegraph with wires. That occasionally an outsider may pick up a message is a mere incident, not intended and even not desired.

The transmitting and receiving stations are co-related so that there is in a sense a line between them.

They are always equipped with reverse directions, both stations being transmitters and receivers, so that messages may go in both directions. They differ from the ordinary telegraph only in that there is no wire.

In the case of the radio, there is a transmitting station that is independent of any receiving station that broadcasts in every possible direction for the benefit of any receiving apparatus, the existence of which may not even be known to the transmittor and which, if properly attuned, near enough and powerful enough, may at will, receive or shut off the emissions.

Another restriction to the very broad meaning of the words "Works and Undertakings" that may be suggested is that the word "Undertaking" implies some commerciality or speculation. It cannot be said that a religious mission is an undertaking or that the Postal Service by the Dominion is an undertaking. If that is the case, it is suggested that the word "Works" being intimately connected with the word "Undertakings", should be of the same character and therefore also involve an element of speculaton or commerciality. A church would not be a work.

Applying this restriction, all radios operated by amateurs, by governments or otherwise than for profit, would escape paragraph 10.

Moving radios as on ships or trains could not of course be local works.

Receiving apparatuses could not either be brought under No. 10.

That the power of the Dominion Parliament cannot be put under the General Powers in the first paragraph of section 91 would seem certain.

In the judgment in *Toronto Electric Commissioners v. Snider* (1925) A.C., at p. 412, it is said:—

> "It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen*, (7 App. Cas., 829) as having established the general principal that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order, and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and Power Co. v. Manitoba Free Press* (1923) (A.C., 695) are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* (7 App. Cas., 829) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen* that the evil of intemperance at that time amounted in Canda to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case (1922) (1 A.C., 191) that the evil of profiteering could not have been so invoked, for Provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell v. The Queen* (7 App. Cas., 829) as more than a decision of this

order upon facts considered to have been established at its date rather than upon general law."

In the Board of Commerce case here referred to it was pointed out that the Board of Commerce Act 1919 and the Combines and Fair Prices Act 1919, were not enacted to meet special conditions in war time. It was passed in 1919 after peace had been declared and it was not confined to any temporary purpose but was to continue without limit of time and to apply throughout Canada.

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This is equally true for radio communication, and there are no special circumstances which would create an interest which might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92 and is not covered by them.

Even to the present day many matters enumerated in section 92 are of importance exceeding that of radio communication.

20 In the Aviation Reference, Mr. Justice Duff in his opinion says (P. 685):

"The argument that because the Dominion has authority to legislate in relation to this subject, in several, it may be many, aspects, it therefore has authority to appropriate the whole subject to itself, is one which in various forms has been often advanced; and always rejected. It really amounts to this, that it would have been simpler and more convenient if the subject had in terms been committed to the exclusive jurisdiction of the Dominion Parliament.....

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"Section 4 of the Aeronautics Act confers upon the Minister a single, indivisible authority to regulate and control aerial navigation in Canada. What I have just said will indicate my reasons for the conclusion that it is not competent for the Dominion to exercise or authorize the Minister to exercise such a comprehensive control over that subject....."

There remain for consideration the special powers of the Parliament and Government of Canada under section 132 of the British North America Act, which reads:—

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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."

This section to have any application so as to vest in the Dominion the power to legislate on matters which are primarily of provincial competence requires that there be a treaty within the meaning of the section, that a province has omitted to pass legislation to implement the treaty with respect to subjects that fall within its jurisdiction, and that the legislation be subsequent to the treaty.

Legislation of course could not be "proper or necessary" if the Province had implemented the treaty or if, in point of time, the treaty was subsequent to the legislation.

In the Aviation Reference Mr. Justice Duff, referring to section 4 of the Aeronautics Act, which gave an unrestricted power of regulation and control to the minister, said at p. 686:—

> "The section was originally enacted before the Convention came into effect and could not therefore be treated as passed in execution of any power under section 132. As reproduced in the Revised Statutes, 1927, it does not take effect as the re-enactment of a new law, and to the extent to which it was invalid in 1919, it is invalid to-day."

And Mr. Justice Newcombe said at pp. 696, 697:

> "...it is contended, on behalf of the Attorney General of Canada, that the convention relating to the regulation of aerial navigation is a treaty within the meaning of s. 132 of the *British North America Act, 1867*, and that the powers possessed by the Parliament and Government of Canada under that section are exclusive of any like powers which might, in its absence, have belonged to the provinces.
>
> It is not denied, and no reason has been suggested to doubt, that the convention is a treaty; but the language of s. 132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by s. 132; and, while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its

obligations. If that had been the intention, I think it would have been expressed. For example, to put a simple case, which perhaps conceivably may be imagined, if a province were bound by treaty between the Empire and a foreign country to pay a sum of money borrowed on the sole credit of the province, and if the province, by direction of its legislature, were in due course to cause the money to be paid, I do not doubt that the obligation would thereby lawfully and constitutionally be discharged, even without any action on the part of the Parliament or Government of Canada."

The questions do not make enquiry into the validity of any legislation by the Parliament but generally if the Parliament of Canada has jurisdiction to regulate and control radio communication.

The history of the Acts which it has passed and the treaties which have been made on the subject matter of the Reference may be briefly stated.

The Radiotelegraph Act originated in the year 1905 with the Statute 4-5 Edward VII, c. 49.

This Statute is printed in the Appendix to Case at p. 207.

In the Revised Statutes of Canada, 1906, this Act was consolidated with the Telegraphs Act as The Telegraphs Act, Chapter 126, of which part IV deals with "Wireless Telegraphy".

Part IV is printed in the Appendix to Case at p. 209.

On the 5th of July, 1912, the International Radiotelegraph Convention of London was signed by the Plenipotentiaries of a number of countries including Great Britain and the Dominion of Canada.

It provided (Art. 22) that the Convention should come into operation on the 1st of July, 1913, and (Art. 23) that it should be ratified with as little delay as possible.

The Convention was ratified by His Britannic Majesty in respect of Canada June 2nd, 1913, that is prior to the passing of the Statute of Canada, the Radiotelegraph Act, 3-4 Geo. V, c. 43, (1913).

This Convention is printed in the Appendix to Case at p. 212.

The Radiotelegraph Act 3-4 Geo. V, c. 43, which was passed on the 6th of June, 1913, provided section 2 (a) that "Minister" means the Minister of Naval Service.

Section 14 repealed Part IV of the Telegraphs Act.

This Act (3-4 Geo. V, c. 43) is in the Appendix to Case at p.

The Regulations issued under the Radiotelegraph Act, revised to 1st June, 1927, profess to be,—

By the Governor in Council in accordance with section 10 of the Radiotelegraph Act, Chapter 43, Statutes 1913,

And by the Minister of Marine and Fisheries in accordance with section 11 of the same Statute.

The Regulations are printed in the Appendix to Case at p. 8.

The International Radiotelegraph Convention of Washington, 1927, to which Canada was a party, was signed on the 25th of November, 1927. It was ratified by the Canadian Government, October 29th, 1928.

It provided (Art. 23) that the Convention should go into effect on the 1st of January 1929 and (Art. 24) that the Convention shoul be ratified with the least practicable delay.

This Convention is printed in the Appendix to Case at p. 80.

The Revised Statutes of Canada, 1927, in which the Radiotelegraph Act is Chapter 195, with some re-arrangement, is the same as 3-4 Geo. V, Chapter 43, except that by the interpretation section 2 "Minister" means the Minister of Marine and Fisheries.

This Statute is printed in the Appendix to Case at p. 3.

It is of course apparent that the Statute of 1905 (4-5 Edward VII, c. 49) was not passed by virtue of any authority that could be asserted under section 132 of the British North America Act for there was no treaty on the subject until years afterwards.

Nevertheless the Dominion professedly took entire control of wireless telegraphy; no person could establish any wireless telegraph station or install or work any apparatus for wireless telegraphy except under a license by the Minister and on its terms and conditions.

The Convention of London 1912 deals only with wireless telegraphy in connection with Shipping. Articles 8 and 9, which by article 15 have a wider scope, are unimportant for consideration here.

It is admitted that the Dominion Parliament had power to legislate in its widest construction over shipping.

The Statute 3-4 Geo. V, c. 43 is only an amplification of 4-5 Edward VII, c. 49 with its initial vice of assuming an absolute right of control for which there was no warrant. The provision in section 3 of both Acts establishing such control is identical except that in the later Act the word "radiotelegraph" is substituted for "wireless telegraphy".

The Statute empowering (section 10 (*b*)) the Governor in Council to make such regulations as may be necessary to carry out and make effective the terms of any international Convention in connection with radio communication goes beyond anything which could be warranted by section 132 of the British North America Act, which limits the powers of the Parliament and Government of Canada to such as are necessary or proper for performing the obligations of Canada or of any Province thereof under treaties and could not be delegated by a general blanket authority for all or any future treaties that might be entered into.

The scope of the Washington Convention is declared in Article 2 (Appendix to Case, p. 81) as follows:—

> "Sec. 1. The contracting Governments undertake to apply the provisions of the present Convention in all radio communication stations established, or operated by the contracting Governments, and open to the international service of public correspondence. They undertake also to apply these provisions to the special services governed by the Regulations annexed to the present Convention.
>
> "Sec. 2. They undertake, in addition, to adopt or to propose to their respective legislatures the measures necessary to impose the observance of the provisions of the present Convention and the Regulations annexed thereto upon individual persons and private enterprises authorized to establish and operate radio communication stations for international service, whether or not the stations are open to public correspondance.
>
> "Sec. 3. The contracting Governments recognize the right of two contracting Governments to organize radioelectric communications, between themselves, subject to the sole condition that they conform to all provisions of the present Convention and the Regulations annexed thereto."

The special services referred to are defined in Article 1 of the Regulations (Appendix to Case, p. 90).

The scope of the Convention appears to be confined to radio communication stations in the International Service.

The term "international service" is defined in Article 1 (Appendix to Case, p. 81) as follows:

> "The term "international service" means a radiocommunication service between a station in one country and a station in another country, or between a land station and a mobile station which is outside the limits of the country in which the land station is situated, or between two or more mobile stations on or over the high seas. An internal or national radiocommunication service which is capable of causing interference with other service outside the limits of the country in which it operates is considered as an international service from the point of view of interference;"

Except from the point of view of interference with other services outside the limits of the country in which it operates, the Convention does not attempt to regulate or control "an internal or national radiocommunication service".

Article 10 (Appendix to Case, p. 84) under the heading "Conditions to be observed by stations—Interference" provides:—

> "1. .....
>
> 2. All stations, whatever their object may be, must, so far as possible, be established and operated in such manner as not to interfere with the radioelectric communications or services of other contracting Governments and of individual persons or private enterprises authorized by those contracting Governments to conduct a public radiocommunication service."

The provision against "Interference" appears in the Regulations which are a part of the Convention as Article 11 (Appendix to Case, p. 105) and (inter alia) provides:

> "2. Tests and adjustments in any station must be made in such a way as not to interfere with the service of other stations engaged in authorized correspondence. The test and adjustment signals must be of such a kind that no confusion can be produced with a signal, abbreviation, etc., of special meaning defined by the Regulations.

"3. Any station making emissions for tests, adjustments, or experiences must transmit its call sign at short intervals during the course of these emissions."

Again provision against interference is made in Article 14 of the Convention (Appendix to Case, p. 85), which reads:

"The contracting Governments reserve for themselves and for the private enterprises duly authorized by them to that effect the right to make special arrangements on matters of service which do not concern the Governments in general. These arrangements, however, must remain within the limits of the Convention and the Regulations annexed thereto so far as concerns the interference which their operation might be capable of producing with the services of other countries."

Article 13 of the Convention (Appendix to Case, p. 84) provides:

"1. The provisions of the present Convention are completed by:

(1) general Regulations which have the same validity and come into force at the same time as the Convention;

. . . . . ."

The Regulations are mainly concerned with the mobile, i. e. Ship Service.

Article 1 of the Convention (Appendix to Case, p. 81) has these definitions:

"the term 'mobile station' means a station capable of moving which ordinarily does move;"

"the term 'land station' means a station, other than a mobile station, used for radiocommunication with mobile stations;"

"the term 'mobile service' means the radiocommunication service effected between mobile stations and land stations, and between mobile stations themselves;"

It may be suggested that by agreement between the Dominion and the Provinces legislation might be passed by the Parliament of Canada which would not interfere with Provincial rights and a uniform Statute be enacted by the Provinces which together would satisfy all the obligations of Canada under the Convention.

The three other documents besides the Washington Convention which are referred to in the Order in Council referring the questions are:

1. What is called in the Order in Council a treaty effected by the exchange of notes between the United States, Canada, Cuba and Newfoundland. In the Index to the Appendix to Case it is called "North American Treaty".

The document itself (Appendix to Case, p. 141) is headed:

> "An Agreement between Canada, United States, Newfoundland, Cuba and Other North American Nations relative to the Assignment of Frequencies on the North American Continent."

Which are the other North American Nations does not appear. The notes exchanged are printed in the Appendix to Case, pp. 147-152.

This is obviously no treaty between the Empire and Foreign Countries.

It starts with the recital that "until technical development "progresses to the stage where radio interference can be eliminated, "it is agreed that special administrative arrangements are essential "in order to promote standardization and to minimize radio inter-"ference."

The Agreement is a mere matter of temporary convenience to continue until January 1, 1932, and thereafter until denounced.

2. The Informal Arrangement between Canada and the United States *re:* Aircraft does not call for much notice.

As appears from the two letters exchanged between the Under Secretary of State and the United States *Chargé d'Affaires* at Ottawa (Appendix to Case, p. 152) by which it was effected, the Governments accepted the recommendations of an Aviation Radio Conference, held in April, 1930.

The opening paragraph of the recommendations is:

> "The Conference recommends that: the two governments study these principles and attempt to apply them to their respective systems, and that by correspondence and future conferences these principles be further developed and closer co-ordination obtained."

3. The International Convention for the Safety of Life at Sea.

Apparently only portions of this Convention are printed in the Appendix to Case beginning p. 155.

According to the terms set out it is not yet in force and will not be until at least five ratifications have been deposited.

There is no information as to the present position of the treaty.

If radio communication should be held to be in the main within section 92, there would not be as a result an obstacle to a treaty with foreign countries being entered into to regulate international communications. The Migratory Birds Convention, which concerns a subject admittedly of provincial competence, is an illuminating example on the point.

The Attorney General of Quebec therefore respectfully submits that the answers to the questions should be:—

To Question 1.

If by question 1 is meant, Has the Parliament of Canada general exclusive legislative power to regulate and control radio communication? the answer is in the negative.

To Question 2.

It is impossible to answer this question fully. To what extent the jurisdiction of Parliament is limited must depend upon the circumstances of the particular cases in which it is to be exercised. Broadly speaking it is limited to and in connection with the subjects enumerated in section 91 over which it has exclusive legislative power and to those occasions on which it is clothed with particular and complementary powers under section 132.

CHARLES LANCTOT,

AIMÉ GEOFFRION.