Privy Council Appeal No. 100 *of* 1936

The Attorney-General of Canada - - - - - *Appellant*

v.

The Attorney-General of Ontario and others - - *Respondents*

In the matter of a Reference as to whether The Weekly Rest in Industrial Undertakings Act; The Minimum Wages Act and The Limitation of Hours of Work Act of the Statutes of Canada, 1935, *are* ultra vires *of the Parliament of Canada.*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1937.

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT (Master of the Rolls).
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

This is one of a series of cases brought before this Board on appeal from the Supreme Court of Canada on references by the Governor-General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, both because of the exceptional importance of the issues involved, and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the International Labour Organisation of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of 28th June, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted

under the legislative powers given to the Dominion Parliament by the B.N.A. Act, 1867. It was argued for the Dominion that the legislation could be justified either (1) under section 132 of the B.N.A. Act as being legislation "necessary or proper for performing the obligations of Canada or any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries" or (2) under the general powers, sometimes called the residuary powers, given by section 91 to the Dominion Parliament 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.

The Provinces contended:—

As to (1)—

(*a*) That the obligations, if any, of Canada under the labour conventions did not arise under a treaty or treaties made between the Empire and foreign countries: and that therefore section 132 did not apply.

(*b*) That the Canadian Government had no executive authority to make any such treaty as was alleged.

(*c*) That the obligations said to have been incurred and the legislative powers sought to be exercised by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2) that if the Dominion had to rely only upon the powers given by section 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the legislatures of the Provinces, viz. property and civil rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII, Labour: to the procedure prescribed by it for bringing into existence labour conventions: and to the procedure adopted in Canada in respect thereto. The Treaty of Peace signed at Versailles on 28th June, 1919, was made between the Allied and Associated Powers of the one part and Germany of the other part. The British Empire was described as one of the Principal Allied and Associated Powers, and the High Contracting Party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with Part I of the covenant of the League of Nations by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the covenant were to be the original members of the League of Nations

The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations of course entered into not between members of the League but between the high contracting parties, i.e., for the British Empire His Majesty the King. Part XIII entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and such a peace can only be established if it is based on social justice and that social justice requires the improvement of conditions of labour throughout the world provides that the high contracting parties agree to the establishment of a permanent organisation for the promotion of the desired objects and that the original and future members of the League of Nations shall be the members of this organisation. The organisation is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains articles 405 and 407:—

"ARTICLE 405.

"(1) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (*a*) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (*b*) of a draft international convention for ratification by the Members.

"(2) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

"(3) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

"(4) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention, to each of the Members.

"(5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

"(6) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

"(7) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of

the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

" (8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

" (9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

" (10) The above Article shall be interpreted in accordance with the following principle:—

" In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned.

" ARTICLE 407.

" If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organisation to agree to such convention among themselves.

" Any convention so agreed to shall be communicated by the Government concerned to the Secretary-General of the League of Nations, who shall register it."

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present: and that at the stage of adoption it has no binding effect on the members: nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. " Ratification," therefore, as used in paragraph 7 of Article 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. " Consent to " or " accession to " would perhaps better describe the transaction which involves the creation for the first time of any obligation under the convention.

In accordance with the provisions of Part XIII draft conventions were adopted by general conferences of the International Labour Organisation as follows:—

29th October—29th November, 1919, Conference.

Draft Convention limiting the Hours of Work in Industrial Undertakings.

25th October—19th November, 1921, Conference.

Draft Convention concerning the Application of the Weekly Rest in Industrial Undertakings.

30th May—16th June, 1928, Conference.

Draft Convention concerning the creation of Minimum Wage Fixing Machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates, viz. 1st July, 1921, and 1st January, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on 1st March, 1935, Weekly Rest on 1st March, 1935, and Minimum Wages on 12th April, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of Commons of Canada approving them. The ratification was approved by order of the Governor-General in Council, was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennett, and was duly communicated to the Secretary-General of the League of Nations. The statutes which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, "Hours of Work" on 5th July, 1935, to come into force three months after assent; "Weekly Rest," on 4th April, 1935, to come into force three months after assent; "Minimum Wage," on 28th July, 1935, to come into force, so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened. In 1925 the Governor-General in Council referred to the Supreme Court questions as to the obligations of Canada under the provisions of Part XIII of the Treaty of Versailles and as to whether the legislatures of the Provinces were the authorities within whose competence the subject matter of the conventions lay. The answers to the reference, which are to be found in 1925 S.C.R. 505, were that the legislatures of the Provinces were the competent authorities to deal with the subject matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province: and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject matter before the legislature of his Province, and to bring the matter before the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarised earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the

Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the legislature to make them law if it so chooses. But in a State where the legislature does not possess absolute authority: in a federal State where legislative authority is limited by a constitutional document: or is divided up between different legislatures in accordance with the classes of subject matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible: but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures.

Reverting again to the original analysis of the contentions of the parties it will be seen that the Provincial contention 1 (*b*) relates only to the formation of the treaty obligation while 1 (*c*) has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation these questions do not arise. And as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions 1 (*b*) and (*c*), which in that event become immaterial.

Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada, was now vested in the Governor-General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in Article 405 of the Treaty of Versailles and as to the effect of the time limits expressed both in Article 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them.

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was section 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case [1932] A.C. 304, and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case, that it was not contemplated in 1867 that the Dominion would possess treaty making powers; it is impossible to strain the section so as to cover the uncontemplated event. A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion of their own volition, acceded to the conventions, a *novus actus* not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on section 132 and their Lordships are in full agreement with them.

If, therefore, section 132 is out of the way the validity of the legislation can only depend upon sections 91 and 92. Now it had to be admitted that normally this legislation

came within the classes of subjects by section 92 assigned exclusively to the legislatures of the Provinces, viz. property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How then can the legislation be within the legislative powers given by section 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in section 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case and the *Radio* case constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions. The *Aeronautics* case [1932] A.C. 54, concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132 therefore clearly applied: and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the *Radio* case (*supra*) appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in section 92 or even within the enumerated classes in section 91. Part of the subject matter of the convention, namely broadcasting, might come under an enumerated class but if so it was under a heading "Inter-provincial Telegraphs," expressly excluded from section 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of sections 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the B.N.A. Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for

themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in section 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by section 91 and existed *ab origine*. In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But the validity of the legislation under the general words of section 91 was sought to be established not in relation to the treaty making power alone, but also as being concerned with matters of such general importance as to have "attained such dimensions as to affect the body politic," and to have "ceased to be merely local or personal and to have become matters of national concern." It is interesting to notice how often the words used by Lord Watson in *A.G. for Ontario* v. *A.G. for Canada* [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by section 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act, beginning

at p. 65 of the record in that case and dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice naturally from his point of view excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce* case [1922] 1 A.C. 191), "some extraordinary peril to the material life of Canada," "highly exceptional," "epidemic of pestilence" (*Sniders* case [1925] A.C. 396), to show how far the present case is from the conditions which may override the normal distinction of powers in sections 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court was equally divided and therefore the formal judgment could only state the opinions of the three Judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

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