

7,1932

CASE FOR THE

In the Privy Council.

No. 84 of 1931.



ON APPEAL FROM THE SUPREME COURT OF CANADA.

In the Matter of a Reference as to the Jurisdiction of Parliament to regulate and control Radio Communication.

BETWEEN

THE ATTORNEY-GENERAL OF QUEBEC - *Appellant*

AND

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THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL OF ONTARIO, THE ATTORNEY-GENERAL OF NEW BRUNSWICK, THE ATTORNEY-GENERAL OF MANITOBA, THE ATTORNEY-GENERAL OF SASKATCHEWAN, THE ATTORNEY-GENERAL OF ALBERTA and THE CANADIAN RADIO LEAGUE - - - *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 30th day of June, 1931, answered questions referred to it by His Excellency the Governor-General in Council, for hearing and consideration, pursuant to the authority of Section 55 of the Supreme Court Act (Revised Statutes of Canada 1927, Chapter 35), touching the jurisdiction of the Parliament of Canada to regulate and control radio communication. Record. p. 26.

2. The questions so referred were as follows :—

“ 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 ? ” p. 7, l. 25.

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

Record.
p. 27.

3. The answers of the Chief Justice and the other Judges of whom the Court was composed were as follows :—

“ The Chief Justice :

Question No. 1. In view of the present state of radio science as submitted. Yes.

Question No. 2. No answer.

Newcombe, J. :

Question No. 1. Should be answered in the affirmative.

Question No. 2. No answer.

Rinfret, J. :

Question No. 1. Construing it as meaning ‘ jurisdiction in every respect ’ the answer is in the negative. 10

Question No. 2. The answer should be ascertained from the reasons certified by the learned Judge.

Lamont, J. :

Question No. 1. Not exclusive jurisdiction.

Question No. 2. The jurisdiction of Parliament is limited as set out in the learned Judge’s reasons.

Smith, J. :

Question No. 1. Should be answered in the affirmative. 20

Question No. 2. No answer.”

pp. 26-53.

4. The judgment of the Court with the reasons for the answers of the Judges, which were thereunto annexed, are in the Record at pp. 26-53.

5. The powers of the Parliament of Canada and of the Provincial Legislatures respectively are set out in Sections 91, 92, 93 and 132 of the British North America Act, 1867, as follows :—

“ VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

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 30

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 :—

Record.

1. The Public Debt and Property.
2. The Regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
- 10 7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of *Canada*.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any *British* or Foreign Country or between two provinces.
- 20 14. Currency and coinage.
15. Banking, incorporation of Banks, and the issue of paper money.
16. Savings Banks.
17. Weights and measures.
18. Bills of Exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
- 30 23. Copyrights.
24. *Indians*, and lands reserved for the *Indians*.
25. Naturalization and aliens.

Record.

26. Marriage and divorce.

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

28. The establishment, maintenance and management of penitentiaries.

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. 10

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 :—

1. The amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor. 20

2. Direct taxation within the Province in order to the raising of a Revenue for provincial purposes.

3. The borrowing of money on the sole credit of the Province.

4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers.

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

6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province. 30

7. The establishment, maintenance, and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences 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 :—

Record.

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 :

10 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.

12. The solemnization of marriage in the Province.

13. Property and civil rights in the Province.

14. The administration of Justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

-20 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

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

Education.

93. In and for each Province the legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

-30 (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union :

(2) All the powers, privileges, and duties at the Union by law conferred and imposed in *Upper Canada* on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the Dissident schools of the Queen's Protestant and Roman Catholic subjects in *Quebec* :

Record.

(3) Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic Minority of the Queen's subjects in relation to education :

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of *Canada* may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section. 10

* * * * *

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." 20

6. The Reference was heard before the Supreme Court composed of Chief Justice Anglin and Justices Newcombe, Rinfret, Lamont and Smith on the 6th, 7th and 8th days of May, 1931, and the judgment or opinion of the Court was delivered on the 30th day of June, 1931.

p. 28.

7. CHIEF JUSTICE ANGLIN pointed out in his Reasons that the subject-matter of question 1 was radio communication and in his opinion this question ought to be answered generally in the affirmative. His reason for so concluding was largely that of overwhelming convenience—under the circumstances amounting to necessity. He wished it to be clearly understood, however, that in dealing with this reference his answers applied only in the light of the present knowledge of Hertzian waves and radio. He considered that, while it was not to be expected that language explicitly covering radio communication should be found in the enumerations of section 91 of the British North America Act, 1867, every effort should be made to find a head capable of including the subject-matter of the Reference and that if this were found impossible it would be one of the subjects of residuary power under the Dominion's general jurisdiction. For certain purposes and within certain limitations certain specific heads in section 91 were broad enough to cover, in part at least, the subject of radio communication and in regard to these Dominion legislation was exclusive. 30 40

It seems to the learned Chief Justice that the excepted matters in enumeration 10 of section 92 over which by virtue of head 29 of section 91 the Dominion had jurisdiction and particularly the word "telegraph" afforded a sound basis for holding that radio communication was subject to the exclusive jurisdiction of the Dominion. None of the heads in section 92 were, in the opinion of the Chief Justice, broad enough to cover the subject-matter of radio communication. While no doubt in some aspects radio communication had to do with property and civil rights in the Province so had many other subjects which have been held to fall within some one of the enumerated heads of s. 91, and as to which the concluding paragraph of that section establishes the exclusiveness of Dominion legislative jurisdiction over them; radio communication in that respect did not differ from any of such other subjects. He also failed to find anything of a local or private nature in radio communication such as would exclude Dominion jurisdiction over it. Should radio science develop to such an extent that it became possible to control the effects of Hertzian waves and confine them within the limits of a Province, both as to their use and their interference, radio communication might become a local or private matter in the Province.

8. MR. JUSTICE NEWCOMBE interpreted the reference as meant to submit the questions in the light of the existing situation and the knowledge and use of the radio art as practically understood and worked and he proceeded upon the assumption that the broadcasting of a message in a Province made it receivable or capable of interfering with other messages outside the limits of a Province. He considered that the regulation of radio communication had a Dominion aspect or at least an overlapping relation capable of being worked as incidental or ancillary to certain specific subjects enumerated in section 91 (for example enumerations 2, 5, 7, 9, 10, 11 and 29) and he referred to the power of the Dominion under section 132 of the British North America Act in regard to the performance of treaty obligations. In his opinion the Dominion in addition to its authority in regard to treaty obligations and its enumerated subjects had a comprehensive power "in relation to all matters not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the Provinces." His view was that the subject in question did not have the prescribed limitation of locality. It was neither property and civil rights in the Province nor matters of a merely local or private nature in the Province because, upon the assumption involved in the case, the matter substantially extended beyond provincial limits.

40 In conclusion the learned Judge said: "The subject is one which undoubtedly relates to the peace, order and good government of Canada; and I am not satisfied, for any of the reasons which have been submitted, or which I have been able to discover, that it falls within any of the classes of subjects assigned exclusively to the legislatures of the Provinces."

Record.
p. 38.

9. MR. JUSTICE RINFRET considered that the primary jurisdiction in regard to radio communication belonged, as in the case of Aviation, to the Provinces. Both the transmitting apparatus and the receiving apparatus were "property" and had a local situs. Moreover, the persons operating them were exercising civil rights. The transmitting apparatus differed from the receiving apparatus in that the operation might produce effects outside the Province but he did not consider that this deprived the operation of its character as a civil right or caused the apparatus to lose its local character. Nor did the communication between the transmitting and the receiving apparatus come within the exceptions mentioned in enumeration 10 (a) of section 92 because only physical things having continuity were intended to be included in that enumeration. He pointed out that sound and light waves extend beyond the limits of a Province and that it was fair to regard the receiving apparatus as merely an amplification of the human hearing apparatus. He considered that subject to exceptions radio communication fell within the classes of subjects "Property and civil rights" and "local works and undertakings" that primarily these were within provincial jurisdiction and that, except in cases of national emergency, the Dominion had no right to interfere with this primary jurisdiction under the residuary clause of section 91. Dealing with the contention that only the Dominion could effectively control and regulate radio communication the learned Judge considered it a fallacy to contend that, because no single Province nor indeed all the Provinces acting together could deal with a subject-matter, the Dominion had jurisdiction. This contention had been dealt with in the *Board of Commerce case* [1922] A.C. 191 and the *Montreal Street Railway case* [1922] A.C. 333. With reference to the difficulty of preventing the inconvenience resulting from interferences the learned Judge expressed the view that interference from abroad could only be regulated by international treaties, in regard to which the Dominion had predominant jurisdiction, and that interference between Provinces was a matter for arrangement between the Provinces. For certain specific purposes the jurisdiction of the Dominion was not in dispute but the primary jurisdiction was in the Provinces. In any case the jurisdiction of the Dominion was not exclusive.

10. MR. JUSTICE LAMONT agreed with Mr. Justice Rinfret that the jurisdiction of the Dominion was not exclusive. Considering that the waves discharged from a transmitting station could not be confined within territorial limits the Provinces were not, in his opinion, in a position to regulate transmission and so far as transmission was concerned a very wide jurisdiction must be conceded to the Dominion especially as matters which must be regulated lie in the international field.

But the capturing of the electro-magnetic waves presented a different question. In the case of broadcasting the waves are not directed to an individual but are left to be captured by anyone who can do so and he was unable to see why the receiving apparatus could not properly be designated

as a "local work" within enumeration 10 of section 92 of the British North America Act. If not it would fall within enumeration 16—"Generally all matters of a local or private nature in the Province." The jurisdiction of the Province would, however, be subject to be overborne by competent legislation on the part of the Dominion Parliament, ancillary or incidental to any of the enumerated heads of section 91.

Record.

11. MR. JUSTICE SMITH considered that various services by radio communication would be rendered of little practical use if transmitting stations were not regulated. He did not consider that radio communication
10 fell within "Property and civil rights" or "matters of a merely local and private nature." He held that if all legislation having a general effect that would limit or affect in some way an individual's dominion over his property or acts had to be considered as dealing with property and civil rights in the Province within the meaning of clause 13 of s. 92 of the B.N.A. Act, then that clause would be all-embracing; and notwithstanding the general jurisdiction given to the Dominion Parliament in express terms by s. 91, the practical result would be that the Province would have general jurisdiction, limited only by the jurisdiction given to the Dominion in reference to the particular classes of subjects enumerated in s. 91.

p. 47.

20 He further stated that the Court was not here dealing with a transmitter or a receiver simply as pieces of property but with radio communication by means of these instruments and that the effect of that means of communication could not be confined within the limits of the province; that the provinces could not effectively deal with radio communication and so control it as to make that class of service available within the province to any degree of efficiency. The subject could only be dealt with effectively by the Dominion Parliament. The various international conferences, treaties and negotiations on the subject still in progress showed
30 that even the Parliament of Canada was unable of itself to exercise the control and regulation necessary to secure to the Canadian people the full benefit of this discovery; that while legislation by the Dominion Parliament affected the use that the resident of a Province might make of a piece of property that he owned, namely, a transmitter or a receiver, and might affect what is claimed to be a civil right to use such property within the Province, it was not legislation directly dealing with property and civil rights in the Province. It was legislation dealing with a subject not included in the classes of subjects expressly mentioned in s. 91 or s. 92, and, therefore, fell within the general jurisdiction as assigned to the Dominion Parliament.

40 12. The Attorney-General of Quebec concedes that with regard to the specific subjects of legislation assigned to the Dominion Parliament by s. 91 of the B. N. A. Act, the Dominion Parliament has the power by ancillary and necessarily incidental legislation to affect radio communication.

It is also conceded that under s. 132 of the Act the Parliament and Government of Canada have all the powers necessary or proper to implement treaties coming within the purview of that section.

Record.

13. But the Attorney-General of Quebec submits that, except in regard to these subjects, jurisdiction to regulate and control radio communication is conferred by s. 92 of the B. N. A. Act upon the Province exclusively.

It is submitted that the transmitter and the receiver are two separate pieces of property. The former will frequently be part of realty while the latter will more generally be a chattel. There is no connection whatever between them, either physically or otherwise. They are almost invariably separately owned.

The transmitter creates a perturbation in what is hypothetically 10 called the ether. That perturbation once created is beyond man's control and travels in every direction for very great and varying distances.

There is no question as suggested in the judgments of controlling or regulating the transmission.

The receiver captures and transforms these travelling perturbations into the same sounds that produced them, choosing those that it wishes among those coming from all directions.

The receiver is obviously property in the Province; its operation is a civil right exercised in the Province. Being usually a chattel, it is not a local work or undertaking in any sense. 20

If not property and civil rights in the Province, it is a local or private matter in the Province.

Assuming the Dominion has control over the transmitter the control of the receiver is not essential to the control of the transmitter. It is therefore submitted that the jurisdiction over the receiver is exclusively provincial.

It is submitted that the transmitter is also property in the Province and its operation, as previously described, also constitutes the exercise of a civil right in the Province.

That the effect of this local perturbation by the operation of this 30 piece of property extends, by the unavoidable laws of nature, in every direction to great distances and beyond the limits of a Province or of the country, cannot prevent the matter from being property and civil rights in the Province.

If the exercise of a civil right in the Province produces effects out of the Province, the result is not that the Dominion has jurisdiction. Such result does not follow even if the property or right is in fact located or exercised in more than one Province, or in a Province and in a foreign country. The Province, jointly with the other Province or with the foreign country, will have to deal with the subject. Property and civil 40 rights involving two Provinces is not under Dominion jurisdiction but under the jurisdiction of the two Provinces. The same remark applies in the case of a Province and a foreign country. No property and civil rights is under Dominion jurisdiction and if this would be property and

civil rights if confined to a Province, it remains property and civil rights though it extends beyond its limits, and therefore is not, even in that case, within Dominion jurisdiction.

The transmitter will frequently be a local work within the meaning of s. 92, para. 10. It will be such a local work whenever two conditions exist; the first one is that it must be attached to real estate, otherwise it has no locus; the second one is that it must have a commercial character. It is suggested that the second condition results from the coupling of the words "local works" with the word "undertakings." When it is
 10 a local work in this restricted sense, it is not under Dominion control because it does not extend beyond the limits of a Province or connect the Province with another; the fact that its effects are felt beyond not being sufficient to satisfy that condition. Further it bears no analogy to the works and undertakings enumerated in sub-para. (a) of s. 92, para. 10. Therefore it does not come under sub-paragraphs (a) or (c).

14. The argument of overwhelming convenience amounting to necessity advanced by Anglin, C.J., is, it is submitted, unsound in law as the provincial jurisdictions do not depend on the views of the Courts on such a question of fact, whether the Courts have or not evidence before them to
 20 decide it. Further the inconvenience does not exist.

15. The main aspect of the problem is the international one. It cannot be dealt with effectively by the Dominion any more than by the Provinces. It can only be dealt with fully by treaty and by legislation implementing the treaty and this is an adequate remedy which is entirely in the hands of the Dominion.

Interprovincial confusion would be largely reduced by international agreements and at all events can be taken care of by joint action of the Provinces. The necessity of joint provincial action never deprives the Provinces of their jurisdiction.

30 The intraprovincial problem should be dealt with by each Province.

16. It is suggested that Anglin, C.J., is mistaken in applying to radio communication the rule that the Dominion jurisdiction prevails over provincial jurisdiction in respect of matters which are property and civil rights but are also specially mentioned in s. 91. Radio communication is not mentioned in s. 91 and the rule does not apply in such a case.

It is not the transmission that can be regulated but the emission or reception and at all events when the Province has jurisdiction over a piece of property or a work, its jurisdiction extends to the operation or use of that property or work.

40 **17.** It is submitted that the reference by Anglin, C.J., to telegraphs does not help. Broadcasting has no analogy with telegraphs. However the only telegraphs that are federal are those physically extending beyond the limits of a Province or connecting two or more Provinces.

Record.

18. Alternatively, it is submitted that the Province has many powers which require for their proper exercise the control of radio transmission.

If jurisdiction over radio-telegraphy is given the Dominion as a residuary power, it follows that the Province can legislate on the subject as an incident to all the jurisdictions it possesses under s. 92 and the Dominion jurisdiction is not exclusive.

19. The Attorney-General of Quebec does not conceive that he is called upon, in view of the way the questions are drafted, to discuss the validity of the Dominion Radio-telegraph Act now in force (Revised Statutes of Canada, 1927, Chapter 195) but in view particularly of s. 6 and s. 4, para. d, of that Act, if the Province is right in its above-mentioned submissions, the invalidity of the Statute follows as it purports to assume complete control of the matter as respects transmitters at least by requiring a licence in all cases and authorising the Minister to prescribe by regulation the conditions and restrictions of these licences. 10

20. The Attorney-General of Quebec does not either conceive that the existing treaties on the subject of radio communication, which are binding on Canada, need be discussed. This Board is not called upon by the questions to indicate to the Dominion Government what Statutes may be passed to implement such treaties nor to say if any and what parts of the existing Radio-telegraph Act can be supported as valid legislation under s. 132 of the British North America Act. At all events the Act, as a whole, by assuming control of all the subject, goes too far and was not passed with a view of implementing any treaty nor could it be severed and held good in part and bad in part. 20

21. The Attorney-General of Quebec submits that the first question should be answered in the negative and the second question should not be answered as being too vague, except possibly to this extent that the Dominion Parliament has incidental jurisdiction in case of necessity over radio communication in connection with the exercise of its enumerated powers under s. 91 and also the jurisdiction provided for in s. 132 of the British North America Act, for the following among other 30

REASONS.

- (1) BECAUSE the transmitting and the receiving instruments are separate things and require separate consideration ;
- (2) BECAUSE the operation of both is a matter of property and civil rights in the Province ;
- (3) BECAUSE, alternatively, they are matters of a local or private nature in the Province ;

- 10
- (4) BECAUSE neither is a local work or undertaking within the meaning of the British North America Act, 1867, s. 92, sub-s. 10, paragraphs (a) and (c) ;
- (5) BECAUSE neither extends beyond the limits of a Province or connects the Province with another ;
- (6) BECAUSE the subject is not among the enumerated powers in s. 91 ;
- (7) BECAUSE coming under sub-sections 13 or 16 of s. 92, it does not come under the residuary powers of the Dominion ;
- (8) BECAUSE radio transmission and reception apparatus do not constitute a telegraph within the meaning of the word as used in s. 92, sub-s. 10 ;
- (9) BECAUSE if a telegraph, it does not extend beyond the limits of a Province or connect the Province with another ;
- (10) BECAUSE the suggested overwhelming convenience amounting to necessity does not exist in fact ;
- 20
- (11) BECAUSE it would not be a reason for depriving the Provinces of a jurisdiction which they otherwise possess ;
- (12) BECAUSE the question is not one of regulating the transmission but of regulating either the transmitting apparatus or the receiving apparatus ;
- (13) BECAUSE, in the alternative, and if the subject comes under the residuary power of the Dominion, the Province can, when it is needed for the proper exercise of any of its enumerated powers, legislate incidentally concerning radio communication as in the case of education, provincial public lands, administration of justice, etc. ;
- 30
- (14) FOR the reasons given by the dissenting judges of the Supreme Court of Canada.

CHARLES LANCTOT.

AIMÉ GEOFFRION.

D. N. PRITT.

In the Privy Council.

No 84 of 1931.

*On Appeal from the Supreme Court of
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CANADA, THE ATTORNEY-
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ATTORNEY-GENERAL OF NEW
BRUNSWICK, THE ATTORNEY-
GENERAL OF MANITOBA, THE
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SASKATCHEWAN, THE
ATTORNEY-GENERAL OF
ALBERTA and THE CANADIAN
RADIO LEAGUE - - - - - *Respondents.*

CASE

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

BLAKE & REDDEN,

17 Victoria Street, S.W.1.