7, 1932

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

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 CANADIAN RADIO LEAGUE

1. The Canadian Radio League is an association with the chief aim of securing the operation of Canadian broadcasting as a national enterprise. It supports the Attorney-General of Canada in urging that the Parliament of Canada has exclusive jurisdiction to regulate radio communication, and that therefore the judgment of the majority of the Supreme Court in answering the first question in the Reference in the affirmative, should be affirmed.

2. Applying sections 91 and 92 of the B.N.A. Act to the subject of radio communication, it is submitted:—

10 (1) That the control of radio communication does not fall under section 92 but falls under the general words of section 91 conferring on Parliament power to legislate for the peace, order and good

government of Canada, because by reason of its very nature and the use to which it is put, radio communication is not a provincial matter, and because radio communication by reason of its character and importance attains a further significance which permits Parliament to assume exclusive control;

(2) That even if radio communication falls under a specific head of section 92, it falls within the power of Parliament under several specific heads of section 91, including particularly (2), The Regulation of Trade and Commerce, and (29), the excepted subjects mentioned in section 92 head 10a, because it is covered by the word "telegraph" and it is moreover "a work and undertaking connecting the provinces" or extending beyond the limits of a province;

(3) That the power conferred on Parliament under section 132 to implement a treaty is paramount, and it is also exclusive, because by its nature radio communication can only be effectively controlled and the obligations of Canada with respect thereto fulfilled by a single exclusive authority.

1.—RADIO COMMUNICATION DOES NOT FALL UNDER SECTION 92.

3. To succeed in the appeal, the Appellant must first establish that radio communication falls under one of the following heads of section 92:—

10. "Local Works and Undertakings" and not excepted by paragraph (a) of this head, or

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

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

It should be noted that all the enumerated heads of section 92 are qualified by the concluding words of section 91 which read:

"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."

Record p. 49, l. 17.

4. By reason of its nature radio communication does not come under any of these heads. The transmission of waves of energy by radio is effected at the speed of light at approximately 300,000,000 metres per second. These waves are of the same nature as light, only differing in frequency, and are as little capable of limitation. It is certainly impossible to restrict their effects to a single province. All the judges in the Supreme Court agreed on this (Anglin, C. J., Record, p. 28, l. 41; Newcombe J., Record, p. 31, l. 36; Lamont J., Record p. 36, l. 13; Rinfret J., Record, p. 39, l. 45; Smith J., Record, p. 51, l. 26). At the present time, a 5,000 watt station

Record p. 10, l. 8.

has an effective range in daylight of about 100 miles, while at night its range is increased to 1,000 miles, but it can interfere with a station using the same wave length 6,000 miles away. The range of a low-powered high frequency station is unlimited.

5. The Reference deals with control of radio communication to effect which requires that sending and receiving sets be in tune with each other. But the Appellant endeavoured to divide the operation of communicating by radio into three parts: first, a transmitting station and, secondly, a receiving station, which, it was argued, are obviously property situated in a province, and, thirdly, a communication between them which is the exercise of a civil right in a province. The claim to jurisdiction under section 92 by reason of the fact that the property, with which the subject of the claim is concerned, is locally situated in a province, has never been admitted by the courts because to do so would deny to Parliament control over every subject, e.g., banks and inter-provincial railroads, as being necessarily associated with property locally situated in a province. Here we are dealing with radio communication which, while the result of property, is not property but with an effect which is necessarily inter-provincial and therefore not the exercise of a civil right in a province (see Anglin, C.J., Newcombe J. and Smith J.) Record p. 28, l. 26; p. 35, l. 13; p. 52, l. 30.

6. The phrase "merely local or private Nature in the Province" in head 16 are the last words that could be chosen to describe radio communication which is necessarily neither local, nor private, nor in a province.

7. Radio does not fall under any of the heads of section 92 by reason of the use to which it is put. Perhaps a word should be said here of the organization of broadcasting in North America. At present, there are 96 channels available for broadcasting, of which Canada has the exclusive use of 6 and the shared use of 11. In the United States, there are approximately 600 stations using the channels available to it, while there are 67 stations licensed by the Dominion Government to use the channels available to Canada. It may be noted in passing that the 67 Canadian stations have a total power of 33,000 watts and a normal daylight range of some 270,000 square miles, while the United States stations reaching Canada have a power of 679,000 watts with a normal daylight range covering 700,000 square miles in Canada. The vast majority of all these stations are owned by private interests which make money out of selling time to advertisers. In order that advertisers may reach a larger market in both countries than they could do from a single station, advertisers buy time on a number of stations associated in a network. A programme is then performed before the microphone in, say, New York, and transmitted over telephone and telegraph wires to the broadcasting stations making up the network, which then broadcast the message received. Record p. 6, l. 26.

8. The operation of sending a wave through a telephone or telegraph wire to be broadcast and the configuration of the wave that passes along the wire are identical with the operation and wave that are used in releas-

ing a message into the air. The one purpose of the wire is to restrict the wave within the wire. Inter-provincial telegraphs as objects mentioned in head 10 of section 92 are under federal control, and telephones have been held to be included in this head (Toronto Corporation v. Bell Telephone Company (1905) A.C. 652). While coming over the wire and therefore only perceptible to the person for whom the message is intended, the operation is clearly subject to federal control. Once it is released by broadcasting, the sound becomes available to anyone whose receiving set can pick it up—and the Appellant must argue that it would then become subject to provincial authority. The wave, while confined to a wire and physically capable of being restricted to a single province, is federal. Is it to be provincial when it is released and becomes incapable of control?

9. Radio's uses in life saving and direction finding have come to be regarded as essential. In order that they may be continuously available, it is necessary that there be in each country a central authority capable of instant action to close down any station that is interfering with another station. An illustration of this necessity may be taken from the experience of the Government of Canada, when, for instance the S.S. "Aorangi", eleven hundred miles out from Vancouver en route for Sydney, Australia, was interfered with and blanketed by a station using its wave. The Aorangi at once notified government coastal stations and they telegraphed Ottawa, which was able to ascertain that the interference came from a station near Winnipeg which had slipped up in its frequency from 6150 to 6190 kilocycles. That station was closed down by a federal employee in less than half an hour from the time when the complaint was received. Frequently, in order to permit of distress traffic being received, it has been found necessary to close down all stations operating on adjacent channels. These instances show the absolute necessity of central and unified control, not only in the allocation of wave lengths, but in the day-to-day operation of broadcasting and receiving stations. The required instant control could not be secured by co-operation of provincial authorities, and it is fundamental that a province cannot legislate extra-provincially.

10. The decisions of the B.N.A. Act have expressly recognized the possibility "that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance" (In re The Board of Commerce Act (1922) 1 A.C. 191, by Viscount Haldane at p. 200) and "some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing beetween what is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense

as to bring it within the jurisdiction of the Parliament of Canada" (Lord Watson at p. 361 of the Local Prohibition Case (1896) A.C. 348).

11. Even if it were possible to confine the effect of radio to a single province, radio would still come within the test of the two cases cited. On a message being broadcast, it is instantaneously capable of being heard in every part of Canada within range of the sending set, yet probably one-half the Canadian receiving sets cannot hear a Canadian station in daylight, while they can hear an American station. The peculiar situation of Canada thus creates with respect to this most powerful instrument for the development of public opinion a continuous condition of national emergency. It is as important for a nation to-day to have broadcasting control and power as it is to have a defence force. In the Australian case of Carbines v. Powell (1925) 36 C.L.R. 88 at p. 93, Isaacs, C.J. said:— Appendix pp. 180, 186

"the central feature, the nucleus of the Act, is that it is intended to secure to the Commonwealth the exclusive right of transmitting and receiving wireless messages. Obviously, in the present state of science, this is vital to the security of the country."

12. Anyone can acquire the necessary apparatus with which to hear any message. Thus, a federal dispatch, press report or private message can be picked up by anyone. Under federal control, persons having such apparatus are traced and either shut up or licensed and sworn to secrecy. A province could not secure this protection outside its boundary. There is the same paramount necessity for exclusive federal control as there is to protect mail.

13. The importance attached to radio communication by all nations is shown by the fact that 89 countries have agreed to the International Convention of 1927. The report of the Aird Commission shows that in 1929, of 26 countries listed, only three had radio in private hands in a manner similar to the United States and in these three, as in every country in the world, radio is under national control. In every federation—Australia, Germany, Switzerland and the United States—it is under the federal authority. The reason is that without such control a condition of chaos would ensue which would prevent the use of radio. This is held in all the American cases:— Appendix p. 191

"It is apparent from the description of radio broadcasting which has been given heretofore that, if its benefits are to be enjoyed by all, it must be subjected to national regulation." (U.S. v. Am. Bond & Mtge. Co. (1928) 31 Fed. (2nd) 448 at p. 454).

"Without such national regulation of radio, a condition of chaos in the air would follow, and this peculiar public utility, which possesses such incalculable value for the social, economical, and political welfare of the people and for the service of the government, would become practically useless." (Gen. El. Co. v. Federal Radio Commission (1929) 31 Fed. (2nd) 630 at p. 633; see also

City of N.Y. v. Fed. Rad. Com. (1929) 36 Fed. (2nd) 111; Saltzman et al v. Fed. Rad. Com. (1931) 46 Fed. (2nd) 612; Station W.B.T. Inc. v. Poulnot et al (1931) 46 Fed. (2nd) 671; KFKB Broadcasting Ass'n. v. Fed. Rad. Com. (1931) 47 Fed. (2nd) 670; White v. Fed. Rad. Com. (1928) 29 Fed. (2nd) 113).

14. In argument before the Supreme Court, counsel for the Appellant said that the framers of the constitution did not visualize that such an arrangement as the control of radio would be made by other than the contract of the provinces. The Fathers of Confederation never contemplated radio but it may safely be presumed that either they would have mentioned radio in section 91 or section 92 head 10a, or still more likely, that they would not have mentioned radio at all in confidence that it was covered by the general words of section 91 (see H. A. Smith, The Residue of Power in Canada (1926) 4 Can. Bar Rev. 432; F. R. Scott, The Development of Canadian Federalism, (1931) Proceedings of the Canadian Political Science Association, Vol. 3, p. 231; Confederation Debates, pp. 30, 32, 33, 41, 42, (Sir John A. Macdonald); ibid. p. 60 (Sir George E. Cartier); ibid. p. 70 (Sir Alex. Galt); ibid. p. 145 (McGee); ibid. p. 176 (Olivier); ibid. pp. 502, 506 (Dunkin, citing London Times); Pope, Confed'n Doc. p. 59 et seq. (Macdonald, Brown and others); Hansard, Vol. 185, coll. 563, 566 (Lord Carnarvon); ibid. col. 1168 (Adderley). After quoting from many of the speeches just cited, Professor Smith (loc. cit.) sums up at p. 438:—

"Upon reading the debates as a whole two points strike the attention. In the first place, no speaker, whether an advocate or an opponent of confederation, seems to have doubted that the Dominion was endowed with a general power to pass all legislation that it might deem to be for the general interest of Canada. Broadly speaking, the distinction between section 91 and section 92 was the distinction between those things that were of general and those that were of merely local importance. The true balance of the constitution is to be found in the opposition between the words "laws for the peace, order, and good government of Canada", in section 91, and the concluding words of section 92—"Generally, all matters of a merely local or private nature in the Province." The detailed enumerations were really intended to be explanatory of these two main principles, subject to the proviso that nothing specifically mentioned in section 91 should be deemed to be of a local or private nature. No speaker in any of the debates even suggested that the words "property and civil rights" were to be treated as a kind of residuary clause covering the whole field of civil law, apart from the specific instances enumerated in section 91. The true meaning of these words is undoubtedly that laid down in Russell v. The Queen in 1882 (7 A.C. 829 at 839).

The second point that will strike the student of these debates is that nobody even thought of the modern idea that the words "peace,

order, and good government" were intended to provide a kind of reserve power to be used only in the event of war, pestilence, or similar national calamities. So far as I am aware, this doctrine begins with the judgment in "Re the Board of Commerce Act" ((1922) 1 A.C. 191.)"

15. The test applied by Anglin, C. J., Newcombe J. and Smith J. in the Supreme Court: Is the matter substantially a local or private matter in a province, or is it "unquestionably of Canadian interest and importance"? is stamped with the authority of Lord Watson in the Local Prohibition Case (1896) A.C. 348 at p. 360 and coincides with the views we have cited.

2.—RADIO COMES UNDER SPECIFIC HEADS OF SECTION 91.

16. The Appellant must admit that radio is subject to federal control in the several aspects covered by any of the appropriate heads of section 91 but it will no doubt contest the application of head 2, the Regulation of Trade and Commerce. Lord Atkin's dictum in the Proprietory Articles Trade Association v. Attorney-General of Canada (1930) 2 D.L.R. 1 at p. 11 clears away any doubt that trade and commerce was to be regarded as a separate head of section 91, sufficient in itself to give the Dominion exclusive jurisdicton.

17. Radio is not a particular business or trade and cannot be confined in a single province and the words of Sir Montague Smith in Citizens' Insurance Co. v. Parsons (1881) 7 A.C. 96 at p. 113 that this head "does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province" do not apply. The control of radio communication deals with a new system of experience affecting trade and commerce generally. We hear of radio being used to-day for broadcasting news, entertainment, advertising and stock market and commodity transactions, for sending messages and steering ships and aeroplanes by wireless, for sending facsimile by telephoto and images by television. The fact that effective measures may soon have to be taken to prevent the dumping of radio advertising into Canada demonstrates that even broadcasting comes under the head of Trade and Commerce. Then, too, the report of the Committee on Empire broadcasting of the Imperial Conference of 1930 said:— Record p. 5, l. 7.

"it (an Empire broadcasting service) should also tend to stimulate trade and commerce within the Commonwealth." Appendix p. 177

18. Radio comes strictly within the test of Citizens Ins. Co. v. Parsons where it was said at p. 133:—

"The words 'regulation of trade and commerce' . . . will include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that would include general regulation of trade

affecting the whole Dominion."

The control of radio is of "direct, substantial and immediate concern to the receiving Province as well as to the (sending) Province" and meets the test of Duff J. in Lawson v. Interior Tree Fruit and Veg. Committee (1931) S.C.R. 357 at p. 364 and 2 D.L.R. 193 at p. 200.

19. It is interesting to note that article 1, section 8, clause 3 of the Constitution of the United States which reads:—

> "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes"

has been repeatedly held to cover the regulation of radio communication, and the power of Congress to exercise exclusive legislative control over radio communication is derived solely from this clause (Tech. Radio Lab. v. Fed. Rad. Com. (1931) 36 Fed. (2nd) 111 and all the American cases above cited.)

20. The remaining head of section 91 to be discussed is head 29 which brings within the federal sphere the cases covered by section 92 head 10a. This reads as follows:—

> "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;"

21. Radio communication is covered by the word "telegraph" in paragraph a. "Telegraph" was first used in the concluding ten years of the eighteenth century to describe instruments for sending messages at a distance and had nothing whatever to do with either wires or electricity. In Duncan's Life of Nelson published in 1806, it is said at p. 297:—

> "Lord Nelson conveyed the following sentence by telegraph, to the fleet . . . "

Even to-day the New English Dictionary defines "telegraph" as "an apparatus for transmitting messages to a distance, usually by signs of some kind", and this general use is still kept up in referring to the cricket score board or railway and naval semaphores as telegraphs. A system of interprovincial heliograph or semaphore signalling would clearly appear to come under this head as a telegraph. The New English Dictionary even defines an electric or magnetic telegraph as "also, an apparatus for wireless telegraphy." The Persons case (Edwards v. A.G. of Can. (1930) A.C. 124) is good authority that the B.N.A. Act is to be interpreted as a living document and that the meaning of the words used in the B.N.A. Act is not necessarily to be restricted to the meaning given to the words at the time. The case of A.G. v. Edison Telephone Co. of London, Ltd. (1880)

6 Q.B.D. 244 is peculiarly in point.

22. Again, radio communication concerns works and undertakings connecting one province to another, or extending beyond the limits of a province. "It is obvious that a continuous or physical connection is not contemplated in some of the classes mentioned; for example, steamship lines, or a wireless telegraphy system" (Clement, p. 748), and it is the potential and not the actual exercise of power which determines its character as a work or undertaking connecting one province with another (Clement, p. 747; Toronto Corporation v. Bell Telephone Co. (1905) A.C. 52 at p. 58). Applying the ejusdem generis rule, the only thing in common between ships, railways, canals and telegraphs is that they are inter-provincial means of transportation or communication. Radio communication is just as real, tangible, physical, continuous and effective a means of communication as is the telegraph or ferry.

3.—POWER UNDER SECTION 132 IS PARAMOUNT AND EXCLUSIVE

23. The International Convention of 1927 is a treaty between all the members of the British Empire, including Canada, and almost every country in the world. It is a treaty covered by section 132, and Parliament has power to pass the laws necessary to carry out the obligations assumed under the treaty. The nature of radio makes it essential that if chaos is not to result, radio shall be continuously and completely regulated by each nation exercising exclusive and paramount authority in co-operation with other nations having similar authority. Otherwise, the control would not be effective to fulfil the Dominion's obligations under the Convention.

REASONS.

The Canadian Radio League submits that the first question should be answered in the affirmative for the reasons stated in the case of the Attorney-General of Canada.

BROOKE CLAXTON.

In the Privy Council.

No. 84 of 1931.

AN 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

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 Canadian Radio League.

DEHN & LAUDERDALE,
85, LONDON WALL, E.C. 2,
Solicitors for the Canadian Radio League.