Privy Council Appeal No. 84 *of* 1931.

In the matter of a reference as to the jurisdiction of Parliament to regulate and control radio communication.

The Attorney-General of Quebec - - - - - *Appellant*

v.

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

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH FEBRUARY, 1932.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* VISCOUNT DUNEDIN.]

This is an appeal from a judgment of the Supreme Court of Canada, answering 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. 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 ?
>
> 2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited ? "

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.

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.

Question No. 2. No answer."

The learned Chief Justice and Rinfret J. expressed their regret that at the time of delivering judgment they had not had the advantage of knowing what was the conclusion reached by this Board on the question referred as to aviation. It is however unnecessary to speculate as to what would have been the result had the learned Judges known as we know now that the judgment of this Board (*Attorney-General of Canada* v. *Attorney-General of Ontario*, delivered on the 22nd October, 1931 ; not yet reported) settled that the regulation of aviation was a matter for the Dominion. It would certainly only have confirmed the majority in their opinions. And as to the minority, though it is true that reference is made in their opinions to the fact that as the case then stood aviation had been decided not to fall within the exclusive jurisdiction of the Dominion, yet had they known the eventual judgment it is doubtful whether that fact would have altered their opinion. For this must at once be admitted ; the leading consideration in the judgment of the Board was that the subject fell within the provisions of section 132 of the British North America Act, which is as follows :

> " 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."

And it is said with truth that, while as regards aviation there was a treaty, the Convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the Convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side. Counsel for the Province felt this and sought to avoid any general deduction

by admitting that many of the things provided by the Convention and the regulations thereof fell within various special heads of section 91. For example, provisions as to beacon signals he would refer to article 10 of section 91—Navigation and Shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words the argument of the Province comes to this: Go through all the stipulations of the Convention and each one you can pick out which fairly falls within one of the enumerated heads of section 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of heading 13 of section 92—Property and Civil Rights, or heading 16—Matters of a merely local or private nature in the Province. Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the Convention. In a question with foreign powers the persons who might infringe some of the stipulations in the Convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought-of in 1867. It is the outcome of the gradual development of the position of Canada *vis-a-vis* to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not therefore to be expected that such a matter should be dealt with in explicit words in either section 91 or section 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by section 132. Being therefore not mentioned explicitly in either section 91 or section 92, such legislation falls within the general words at the opening of section 91 which assign to the Government of the Dominion the power 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." In fine, though agreeing that the Convention was not such a treaty as is defined in section 132, their Lordships think that it comes to the same thing. On the 11th August, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the Convention with general regulations appended being signed at Washington on the 25th November, 1927, by the representatives of all the powers who had taken part in the conference and this Convention was ratified by the Canadian Government on the 12th July, 1928. The result is in their Lordships' opinion clear. It is Canada as a whole which is

amenable to the other powers for the proper carrying out of the Convention: and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

At the same time, while this view is destructive of the view urged by the Province as to how the observance of the International Convention should be secured, it does not they say dispose of the whole of the question. They say it does not touch the consideration of interprovincial broadcasting. Now, much the same might have been said as to aeronautics. It is quite possible to fly without going outside the Province, yet that was not thought to disturb the general view, and once you come to the conclusion that the Convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the aviation case which might be literally transcribed to this. The idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the Convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject. The same might at least very easily be said on this subject, but even supposing that it were possible to draw a rigid line between interprovincial and Dominion broadcasting, there is something more to be said. It will be found that the argument for the Provinces really depends on a complete difference being established between the operations of the transmitting and the receiving instruments. The Province admits that an improper use of a transmitting instrument could by invasion of a wavelength not assigned by international agreement to Canada bring into effect a breach of a clause of the Convention. But it says this view does not apply to the operation of a receiving instrument. Now it is true that a dislocation of a receiving instrument will not in usual cases operate a disturbance beyond a comparatively limited circular area: although their Lordships understand that a receiving instrument could be so manipulated as to make its area of disturbance much larger than what is usually thought of. But the question does not end with the consideration of the Convention. Their Lordships draw special attention to the provisions of heading 10 of section 92. These provisions as has been explained in several judgments of the Board have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of section 91 and the exception runs that the works or undertakings are to be 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.

Now does broadcasting fall within the excepted matters ? Their Lordships are of opinion that it does, falling in (*a*) within both the words " telegraphs " and the general words " undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the Convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other. Their Lordships cannot but think that much of the argument depends on an unwarranted deduction taken from a sentence to be found in the judgment delivered by Lord Atkinson in the case of *The City of Montreal* v. *Montreal Street Railway* [1912] A.C. 333 at page 342. His Lordship after saying " the matters thus transferred are . . . ," quotes the sections (*a*) (*b*) and (*c*) and then adds " These works are physical things not services." Mignault J. in the aviation case assumed that this sentence applied not only to (*c*) which deals with " works " only, but also to (*a*) and (*b*), and this view has obviously influenced the conclusions of the minority in this case. Now in the first case their Lordships see no reason why the word " works " should not be referred to the same word standing alone in (*c*) and not be extended to (*a*) where it is conjoined with " undertaking," and to (*b*) where it is not used at all. But if their Lordships' surmise as to the view of the Board as expressed by Lord Atkinson is wrong, then they are not bound by and would not agree with the widened proposition. In the wider sense it was in no way necessary for the judgment in the case. What was being dealt with was a street railway which in itself formed no part of a through system and only became so by the legislation which was impugned. " Undertaking " is not a physical thing but is an arrangement under which of course physical things are used. Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking " connecting the Province with other Provinces and extending beyond the limits of the Province." But further, as already said, they think broadcasting falls within the description of " telegraphs." No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals

or words of any kind. But the original meaning of the word " Telegraph " as given in the Oxford Dictionary is :

> " An apparatus for transmitting messages to a distance, usually by signs of some kind."

Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. Further, the strict reading of the word " telegraph," making it identical with the ordinary use of it, has already been given up in *Corporation of the City of Toronto* v. *Bell Telephone Company of Canada* [1905] A.C. 52. There are several words of Lord Macnaghten in delivering the judgment of the Board in that case which *mutatis mutandis* might well be applied to the argument of the Province here.

> " It was argued," says he (p. 59) " that the Company was formed to carry on and was carrying on two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the Company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorised by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."

Now it is true that that case was dealing with an established system, while the question here is as to the scope of legislation. But none the less the argument for the appellants there was that the legislation under which the system had been established was *ultra vires*. Consequently the words of Lord Macnaghten do carry a lesson as to the futility of trying to split what really is one undertaking into two.

As their Lordships' views are based on what may be called the pre-eminent claims of section 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley, namely whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within " Property and Civil Rights," or within " Matters of a merely local or private nature."

Upon the whole matter therefore their Lordships have no hesitation in holding that the judgment of the majority of the Supreme Court was right and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. No costs will be awarded, this being a question to be decided between the Dominion and the Provinces.

Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency.

In the Privy Council.

THE ATTORNEY-GENERAL OF QUEBEC

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

(*Radio Reference*)

DELIVERED BY VISCOUNT DUNEDIN.

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