

1905

*May 2, 3.

*May 15.

IN RE INTERNATIONAL AND INTERPROVINCIAL
FERRIES.IN THE MATTER OF THE VALIDITY OF CHAP-
TER 97 OF REVISED STATUTES OF CANADA
AND AMENDMENTS THERETO.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

*Constitutional law—Interprovincial and international ferries—Establishment
or creation—License—Franchise—Exclusive right—Powers of Parlia-
ment—R. S. C. c. 97 - 51 V., c. 23 (d).*Ch. 97 R. S. C. "An Act respecting ferries," as amended by 51 Vic., ch.
23 is *intra vires* of the Parliament of Canada.The Parliament of Canada has authority to, or to authorize the Governor
General in Council to, establish or create ferries between a province
and any British or foreign country or between two provinces.The Governor General in Council, if authorized by Parliament, may confer,
by license or otherwise, an exclusive right to any such ferry.SPECIAL CASE referred by the Governor general in
Council to the Supreme Court of Canada for hearing
and consideration.

The following is the case so submitted :

*Extract from a report of the honourable the Privy Coun-
cil, approved by the Governor General on the 28th
December, 1904.*On a memorandum dated 16th December, 1904, from
the Minister of Justice recommending that pursuant
to the Supreme and Exchequer Courts Act, as amended
by the Act passed in the 54th and 55th years of the reign
of Her late Majesty, Queen Victoria, Chaptered 25,
intituled "An Act to amend Chapter 135 of the
Revised Statutes, intituled 'An Act respecting the
Supreme and Exchequer Courts'", the following ques-*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard,
Davies, and Nesbitt JJ.

tions be referred to the Supreme Court of Canada for hearing and consideration, viz:—

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1. (a) Is Chapter 97 of the Revised Statutes of Canada intituled "An Act respecting Ferries," as amended by the Act passed in the 51st year of the reign of Her late Majesty Queen Victoria, Chapter 23, intituled "An Act to amend the Revised Statutes of Canada, chapter 97, respecting Ferries," *intra vires* of the Parliament of Canada?

(b) If the said Act, as so amended, is *intra vires* in part only, which sections or provisions thereof are *ultra vires* or to what extent is the said Act *ultra vires*?

2. (a) Has the Parliament of Canada authority to establish or create or authorize the Governor General in Council to establish or create ferries between a province and any British or foreign country, or between two provinces? and

(b) Is it competent to the Governor General in Council, if thereunto authorized by the Parliament of Canada, to grant or confer by way of license or otherwise an exclusive right to any such ferry?

The Committee submit the same for approval.

(Sgd) JOHN J. MCGEE,

Clerk of the Privy Council.

Newcombe K.C. Deputy Minister of Justice, appeared for the Dominion of Canada.

Blackstock K.C. for the Province of Ontario.

A factum was filed on behalf of the Province of Quebec but no counsel was present to represent that province.

Blackstock K.C. is heard. The right to grant a franchise—an incorporeal hereditament, is one of the prerogatives of the Crown, one of the *jura regalia*.

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Newton v. Cubitt (1); *Anderson v. Jellet* (2); *Perry v. Clergue* (3).

As one of the *jura regalia* the right in question passed to the provinces under sec. 109 B. N. A. Act, 1867. *Attorney General for Ontario v. Mercer* (4).

Newcombe K.C. is heard for the Dominion. Parliament is given exclusive legislative jurisdiction over ferries between a province and any British or foreign country, or between two provinces. These are the ferries dealt with in the legislation in question.

A provincial legislature could not control a ferry outside of the province. The right must necessarily be with parliament.

Section 109 of the British North America Act only refers to royalties connected with "lands, mines and minerals," and not to the prerogative rights in question here.

THE CHIEF JUSTICE.—These questions should, in my opinion, be answered in the affirmative. The policy of the British North America Act is to leave all international or interprovincial undertakings within the federal power. And that, it is evident, must necessarily be so as to ferries. Taking for instance a ferry on the Ottawa River between Ontario and Quebec, neither Ontario nor Quebec has the right to effectually grant a license for a ferry abutting on the opposite shore over which it has no jurisdiction. And if the provinces have not that right the federal parliament must have it. Such a ferry was not situate, and the right to it did not arise, either in Ontario or in Quebec at the time of the Union, and consequently sec. 109 of British North America Act has no appli-

(1) 12 C. B. N. S. 32; 13 C. B. N. S. 864. (2) 9 Can. S. C. R. 1, at p. 11.

(3) 5 Ont. L. R. 357.

(4) 8 App. Cas. 767 at p. 778.

cation. And if sec. 109 does not apply, sec. 102 does, and the revenues from these licenses belong to the federal authority, under whose legislative control they have been specially put by the British North America Act, for greater certainty. The *Fisheries Case* (1) is clearly distinguishable. There were no proprietary rights at the union in ferries between the two provinces vested in either one or the other of these two provinces.

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No provincial legislature could incorporate a company to run a ferry between the two provinces, and no provincial government could itself be granted by its legislature the power to run an exclusive ferry between two provinces. The Dominion Parliament alone could do it, and fix the price of the license to the company upon such additional terms and conditions as it saw fit to enact.

SEDGEWICK and GIROUARD JJ. concurred in the opinion of Mr. Justice Nesbitt.

NESBITT J.—The question referred to this court is as follows :

1. (a) Is Chapter 97 of the Revised Statutes of Canada intituled "An Act respecting Ferries", as amended by the Act passed in the 51st year of the reign of Her late Majesty Queen Victoria, Chapter 23, intituled "An Act to amend the Revised Statutes of Canada, chapter 97, respecting Ferries", *intra vires* of the Parliament of Canada?

(b) If the said Act, as so amended, is *intra vires* in part only, which sections or provisions thereof are *ultra vires* or to what extent is the said Act *ultra vires*?

2. (a) Has the Parliament of Canada authority to establish or create or authorise the Governor General in Council to establish or create ferries between a province and any British or foreign country, or between two provinces and

(1) 26 Can. S. C. R. 444.

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(b) Is it competent to the Governor General in Council, if thereunto authorised by the Parliament of Canada, to grant or convey by way of license or otherwise an exclusive right to any such ferry?

The doubt has arisen owing to a decision of Mr. Justice Street in a case of *Perry v. Clergue* (1), in which that learned judge held that a ferry was an incorporeal hereditament the title to which remained in the Province under section 109 of the British North America Act and that the power conferred by section 91, s.s. 13, was merely a power of regulation of the ferry when created by the Provincial authority similar to the power which the Dominion has relative to fisheries.

On the 3rd July, 1797, the statute 37 George III, chapter 10 (in the Revised Statutes of Upper Canada) was passed intituled "An Act for the Regulation of Ferries". This statute authorised the justices of the peace in quarter sessions to make such rules and regulations for the governance of ferries and also for the regulation of tolls as might be thought proper and penalties were imposed for any overcharge and so forth.

In 1853 a statute was passed by the Parliament of Canada, 16 Victoria, chapter 212, intituled "An Act to regulate Ferries beyond the local limits of the Municipalities in Lower Canada."

This statute repealed previous statutes and provided that

from and after the time when the Act shall come into force no person shall act as a ferryman, etc. or shall convey or cause to be conveyed by any one in his service any person across any river, stream, lake or water within Lower Canada and not wholly within the local limits of any municipality thereof without having received a license under the hand of the Governor of the Province", etc.

1) 5 Ont. L. R. 357.

Powers were conferred upon the Governor in Council to make and from time to time to repeal or alter regulations for establishing the extent and limit of all such ferries ; for defining the manner in which the conditions including any duty or sum to be paid for the license under which and the period for which licenses shall be granted in respect of all such ferries ; for fixing tolls and so forth. Section 7 of this statute provided that all moneys arising out of such ferry licenses and out of penalties incurred in regard to the same or otherwise under this Act should form part of consolidated revenue fund.

In 1855 the Province of Canada passed a statute, 18 Victoria, chapter 100, intituled "Lower Canada Municipal and Road Act, 1855". This statute by section 42 dealt with the ferries. It provided that ferries, in cases where both sides of the river or water to be crossed lie within the same local municipality, should be under the control of the municipal council.

It provided by subsection 3 that the moneys arising from any licenses for a ferry should if the ferry be under the control of a local municipality, belong to such municipality and if it be under the control of the county council they should belong one moiety to each of the local municipalities between which the ferry lies and such moneys should be applied to road purposes.

Sub-sec. (4) provided that ferries in cases where both sides of the river or water to be crossed did not lie within the same county should continue to be regulated and governed as they then were.

In 1857 a statute was passed by the Parliament of Canada, 20 Victoria, chapter 7, intituled "An Act to amend the laws regulating ferries so as to encourage

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the employment of steamboats and ferryboats in Upper Canada."

The preamble recites that "whereas it is necessary and expedient to afford greater inducements than now by law exist for the purpose of establishing steam ferries in Upper Canada, and it is necessary to amend the law regulating ferries."

It then provides that a license to have a steam ferry between two municipalities may be granted to municipalities in Upper Canada by the Governor—a condition being imposed that the craft to be used for the purpose of such ferry shall be propelled by steam.

A provision was made permitting the municipalities to sublet the ferries for such price and upon such terms and at such conditions as to rates of ferriage, etc., as the municipalities might see fit, but providing that in so subletting the said municipality or municipalities should not in any way contravene the terms of the license from the Crown.

Section 5 of this statute deals with ferries on the provincial frontier, and it provides :

And as in order to encourage the establishment of good ferries for the accommodation of commerce on the line of the provincial frontier, it is essential to place the control and management of the same in the municipalities immediately interested, no license in future shall be granted to any person or body corporate beyond the limits of the province, but such license in all cases shall be granted to the municipalities within the limits of which such ferry exists.

These statutes related only to Upper Canada. At the time of confederation the Consolidated Statutes of Upper Canada of 1859 were in force. The first section of chapter 46 of these statutes related to ferries on the frontier line of Upper Canada and was a consolidation of the two statutes, 20 Victoria hereinbefore referred to, and 22 Victoria, ch. 41.

The provisions of this statute other than the first and second sections clearly apply to ferries other than

ferries on the frontier line of Upper Canada. The Confederation Act was then passed which by section 91 conferred upon the Parliament of Canada authority to legislate in regard to ferries between a province and any British or foreign country or between two provinces.

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Sec. 91, subsec. 10, as to navigation and shipping.

Sec. 91, subsec. 13, ferries between a province and any British or foreign country or between two provinces.

Sec. 92, subsec. 10, as to 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, lines of steamships between the provinces and any British or foreign country.

At this time the right to issue a license for a ferry was in no sense the same as the title to land.

Upon the grant of a license for a ferry, or if a ferry were obtained by prescription in the hands of the licensees, the interest therein might be treated as in the nature of an incorporeal hereditament, but the right to grant (while vested in the Crown) was controlled by the legislature. It was a grant or license under the Great Seal.

It would appear that the Crown had abandoned certain prerogative rights leaving them to the control of the legislature, such as granting of charters, and that the exercise of such a power by the Crown, certainly in the colonies, might be treated as obsolete, and therefore when the subject of fines was mentioned it covered the power or authority to create the ferry which only when created became a species of property. It seems singular that apparently the provinces could not create a company to operate a ferry between provinces or a province and a foreign territory and yet

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could create the ferry itself, and it seems to me reasonably clear that the creation of such a company with such powers is not within the enumerated provincial powers.

I think it is obvious, having regard to the whole scheme of confederation, that the intention of the British North America Act was to place within the sole control of the Dominion Parliament all rights affecting navigation between the Dominion and any foreign country and as well the right to legislate as to grants of a ferry between the Dominion and a foreign country.

The Legislature of Ontario have so dealt with the subject.

The earliest consolidation of the statutes of Ontario is by the Revised Statutes of Ontario passed in 1877. In the appendix A to these statutes there is a list of the Acts contained in the Consolidated Statutes for Canada and Upper Canada published in 1859 "shewing to what extent those which are of a public general nature and within the legislative authority of the Legislature of Ontario remain in force and how they have been dealt with in the revision of the statutes."

On page 2301 of this volume, chapter 46 of the Consolidated Statutes of Upper Canada, 1859, is referred to and this statute is consolidated except section 1. This sec. 1 deals with frontier ferries, and the same appendix, on the same page, shews that the subject matter of frontier ferries has been dealt with by the Dominion by 33 Victoria, chapter 35.

In 1892 the Municipal Act was passed by the Parliament of Ontario, 55 Victoria, chapter 42; section 287 of this statute enacts that "a council may grant exclusive privileges in any ferry which may be vested in a corporation represented by such council other than a ferry between a province of the Dominion of

Canada and any British or foreign country or between two Provinces of the Dominion," and further provisions were enacted by the same statute by section 495 subsec. (4).

On the doctrine of Parliamentary interpretation, which I have dealt with fully in the *Canadian Pacific Railway Branch Line Case* (1) just decided by this court, this legislation coupled with the Dominion legislation would go far towards answering the question in favour of the Dominion jurisdiction.

Is it however correct to say that the powers under section 91 are limited in scope to mere regulation?

The distribution of legislative power in Canada is substantially provided for by ss. 91 and 92 of the British North America Act. Section 92 deals with the exclusive powers of Provincial Legislatures.

Section 91 provides

that 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 class 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 anything in this Act the exclusive legislative authority of Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ;—

and at the end of the section it is provided :

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.

This expression, peace, order and good government, seems to be drawn from the proclamation of the 7th

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October, 1763, following the Treaty of Paris. That recited :

We have thought fit to publish and declare by this our Proclamation that we have in the Letters Patent by which such Governments are constituted given our Governors, etc., power to summon and call General Assemblies.

The proclamation then proceeds to confer power on the governors, with the consent of the council and the representatives of the people so to be summoned as aforesaid, to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies and of the people and inhabitants thereof as near as may be agreeable to the laws of England.

When the Provinces of Upper and Lower Canada were re-united the imperial statute, 3 & 4 Victoria, chapter 35, (1840,) was enacted providing for the re-union of these two provinces and also for the government of Canada and power was conferred on the Legislative Council and Assembly of Canada to make laws for the peace, welfare and good government of Canada.

Prior to confederation, in the old provinces of Quebec and in the provinces of Upper and Lower Canada, and subsequently, after the re-union, in the Province of Canada, under the powers conferred, hereinbefore referred to, laws were passed relating to railways and other works and it was taken for granted that the powers conferred in the language quoted above conferred the right to legislate in favour of railways and other corporations conferring upon them the power of expropriation in furtherance of the objects of the corporations.

Under section 91 of the British North America Act railways connecting the province with any other of the provinces are dealt with and the same statutory powers in regard to expropriation and otherwise have been conferred by the Dominion Parliament without question. In fact it would be impossible to deal with

the provisions of section 91 unless it were held that the Dominion Parliament has, incident to the creation of corporations within their jurisdiction, a jurisdiction to pass provisions for expropriation of property, etc., in order to enable them to carry out their corporate objects. This seems to be recognized by the Privy Council in various cases, such as *Tennant v. Union Bank* (1); *Colonial Building Society v. Attorney General of Quebec* (2); *Cushing v. Dupuy* (3); *Dobie v. The Temporalities Board* (4); and other cases.

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It was argued that the *Fisheries Case* (5); the *Mercer Case* (6) and the *British Columbia Mines Case* (7) compelled the view to be taken that ferries were *jura regalia* and provincial property.

In the *Fisheries Case* (5), the question arose as to the title to the beds of the waters in question. It was held by the Privy Council that (exclusive of harbours) the bed of the lakes and the bed of the rivers, whether navigable or not, formed part of the lands of the provinces and did not pass to the Dominion. One question there raised was whether under subsec. 12 of sec. 91, which conferred upon the Dominion power to legislate in respect of sea coasts and inland fisheries, the title to the fish in waters owned by the province passed to the Dominion. The point involved in the fisheries case was—conceding the land to be vested in the province—is the property in the fish in the waters covering such lands taken away from the province and vested in the Dominion under the general words used in subsec. 12 of sec. 91? And the Privy Council held that it was not.

In the *Fisheries Case* (5) the question was not merely as affecting the lands covered by waters, the fee of

(1) [1894] A. C. 31.

(2) 9 App. Cas. 157.

(3) 5 App. Cas. 409.

(4) 7 App. Cas. 136.

(5) 26 Can. S. C. R. 444; [1898] A. C. 700.

(6) 8 App. Cas. 767.

(7) 14 App. Cas. 295.

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which was in the provinces, but also lands owned by private parties obtained by grants theretofore made to them.

Dealing with the subject the Privy Council determined that in regard to sea coasts and inland fisheries the power conferred upon the Dominion Parliament was merely to regulate but that the property did not vest in them, and that while the Dominion Parliament had exclusive power to make regulations for the control of the fisheries and power to issue licenses to fish on payment of a fee, that did not carry with it a right to grant *an exclusive license to fish in the waters belonging to the province or a private individual.*

The next case urged upon our attention was *Attorney General of Ontario v. Mercer* (1).

That case was merely dealing with the one question—whether under section 109 of The British North America Act escheats of lands belonged to the Crown represented by the Dominion, or the Crown represented by the province. The contention on the part of the Dominion was that the word “royalties” must be construed merely in a limited sense as applying to mines and minerals or royalties in the ordinary sense reserved in a grant of mineral rights and that the word royalties should not in any way be applied as referable to lands.

The question submitted was whether the Government of Canada or that of Ontario was entitled to lands situate in the Province of Ontario and escheated to the Crown for want of heirs; page 768.

In dealing with the case the Lord Chancellor (Earl of Selborne) at page 771 states the question to be determined is whether lands in the Province of Ontario escheated, etc. His Lordship then proceeds to deal

(1) 8 App. Cas. 767.

with the title to lands and deals with escheats as if it were a species of reversion.

At page 774 he states :

If there had been nothing in the Act leading to a contrary conclusion their Lordships might have found it difficult to hold that the word "revenues" in this section (referring to section 102) did not include territorial as well as other revenues.

At page 775 the Lord Chancellor states :

Their Lordships for the reasons above stated assume the burden of proving that escheats subsequent to the union are within the sources of revenue excepted and reserved to the provinces, to rest upon the provinces. But if all ordinary territorial revenues arising within the provinces are so excepted and reserved it is not *a priori* probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been unless by accident and oversight transferred to the Dominion.

On page 778 the Lord Chancellor states :

It appears however to their Lordships to be a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought therefore to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals. Even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ*. The general subject of the whole section is of a high political nature. It is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate or arise.

On page 779 the Lord Chancellor says :

Their Lordships are not called upon to decide whether the word "royalties" in section 109 of the British North America Act of 1867 extends to other royal rights besides those connected with lands, mines and minerals. The question is whether it ought to be restrained to rights connected with mines and minerals only to the exclusion of royalties such as escheats in respect of lands,

and they were of opinion that under the word "royalties" were included all ordinary territorial revenues.

Substantially the same views were expressed in the later case of *Atty. Gen. of British Columbia v. Atty. Gen. of Canada* (1).

I do not find any court has laid down the rule that a mere right to create something, a mere authority to bring into being a corporate entity or privilege or any-

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thing of that character for which a fee could be charged is a "royalty" within section 109, but I would rather place such a right under sections 12 and 108 than under 109.

It seems to me therefore that the authority to create a ferry of the character in question is vested in the Dominion and exercisable under sections 12 and 91 of the British North America Act.

The argument of Mr. Blackstock in favour of the exclusive right of the Provincial Governments to license international and interprovincial ferries was rested entirely upon the enlarged construction he gave to the word royalties in the 109th section of the British North America Act. I have already referred to the construction which ought to be given to this word "royalties," but I would add that if Mr. Blackstock's argument prevailed the practical result would be that the several provinces would determine when and where and to whom and for what consideration international and interprovincial ferries should be granted, and the sole task and power of the Dominion Parliament to legislate on the subject would be confined to the determination of the size of the ferry boats, the proper amount of steam they could use, the number of passengers and life preservers they could and should carry and other like useful if humble powers. I cannot believe that these are the objects which the Imperial Parliament alone had in view when conferring exclusive legislative jurisdiction upon the Dominion Parliament on such an important and imperial question as international ferries.

I would therefore answer the question submitted:

1. (a) Yes.
(b) Covered by first answer.
2. (a) Yes.
(b) Yes.