IN THE MATTER OF A REFERENCE AS TO THE JURISDICTION OF PARLIAMENT TO REGULATE AND CONTROL RADIO COMMUNICATION.

1931
*May 6, 7.
*June 30.

Constitutional law—Radio communication—Dominion and provincial jurisdiction—B.N.A. Act, 1867, ss. 91, 92, 132.

In the existing state of radio science and in the light of the knowledge and use of the art as actually understood and worked, radio communication is subject to the legislative jurisdiction of the Dominion Parliament. Rinfret and Lamont JJ. dissenting.

Per Rinfret and Lamont JJ. dissenting.—The Dominion Parliament has not jurisdiction to legislate on the subject of radio communication *in every respect.* This subject falls within the primary legislative jurisdiction of the provinces either under no. 13 (property and civil rights) or under no. 10 (local works and undertakings) of section 92 of the B.N.A. Act, except in cases where the Dominion Parliament has superseding jurisdiction under some of the heads of section 91 and under section 132 (relating to treaties) of the B.N.A. Act.

REFERENCE by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The facts and questions, as stated in the Order in Council, are as follows:

The Committee of the Privy Council have had before them a report, dated 17th February, 1931, from the Minister of Justice, submitting that His Majesty's Government of the province of Quebec has questioned the jurisdiction of the Parliament of Canada to regulate and control radio communication and has submitted questions to the Court of King's Bench (in appeal) of the province, whether the Radiotelegraph Act (R.S.C., 1927, chapter 195) in whole or in part, is within the jurisdiction of the Dominion to enact and whether a certain legislative scheme projected by the said Government of the Province for the regulation and control of certain radio communication, is within the jurisdiction of the Legislature of the Province to enact.

The Minister apprehends that the Radiotelegraph Act and Regulations made thereunder were enacted by reason of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interest.

The Minister reports that on the 25th day of November, 1927, an international radiotelegraph convention was signed by the representatives of about eighty countries including the Dominion of Canada. The said convention was ratified by the Government of Canada and the instrument of ratification deposited pursuant to the convention at Washington on the 29th day of October, 1928. The convention went into effect on January 1, 1929. Legislation exists and is necessary to make provision for performing the obligations of Canada under the said convention.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

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The Minister further reports that a treaty which came into force on the 1st March, 1929, was effected by the exchange of notes between the United States, Canada, Cuba and Newfoundland relative to the division between the countries of channels of communication in that part of the spectrum represented by the range of frequencies from 1,500 kilocycles to 6,000 kilocycles.

The Minister further reports that negotiations have taken place between Canada and the United States with the object of dividing between the two countries the total number of channels (96) which exist in that part of the spectrum represented by frequencies of 550 kilocycles to 1,500 kilocycles, appropriated by the International Convention hereinbefore mentioned, to the service of broadcasting. No agreement has as yet been made, but at present Canada is making use of 17 channels of which 6 are being used exclusively by Canada and of which 11 are being used by both countries.

The Minister further reports that an informal arrangement was made in 1930 between Canada and the United States with reference to the use of radiotelegraphy by aircraft passing between the two countries.

The Minister further reports that on the 31st May, 1929, a treaty was entered into between the principal maritime nations of the world relating to the safety of life at sea. Provision was made for the compulsory fitting of wireless apparatus on board certain classes of vessels.

The Minister further reports that at the Imperial Conference 1930, a committee was set up to consider questions relating to imperial communications other than transport, which committee considered a scheme for the establishment of an empire broadcasting service and considered questions relating to the establishment of telephone and telegraph services for the broadcasting of weather maps.

In December, 1928, the Government appointed a royal commission on radio broadcasting to examine into the broadcasting situation in the Dominion of Canada and to make representations to the Government as to the future administration, management, control and financing thereof. On the 11th September, 1929, the said royal commission reported.

The Minister further reports that radio provides for various forms of communication which may be classified as follows:—

(*a*) Radiotelegraph, which provides for the transmission of intelligence on the Morse telegraphic code;

(*b*) Radiotelephone, which provides for the transmission of spoken word, music and sounds of all kinds;

(*c*) Facsimile, which provides for the transmission of photographs, pictures, printed matter, handwriting, etc., in such a manner that they are reproduced in like form at point of reception;

(*d*) Television, which provides for the transmission of pictures of moving objects.

The Minister further reports that radio is used in Canada for the following purposes:—

(*a*) Coast stations are established to provide radio facilities whereby any ship within 500 miles of the Canadian coast can establish instant contact with the shore. Constant watch, 24 hours a day and 365 days a year, is maintained at practically all of the stations. The coast stations consist of three chains, one extending from Vancouver to Prince Rupert on the Pacific coast, another from Port Arthur at the head of the Great Lakes to Newfoundland and Labrador, and the third from Port Churchill to the

eastern entrance to Hudson Straits. The 60 stations forming this system are owned by the Department of Marine. Of these, 41 are operated by the department itself while the remaining 19 are operated by the Canadian Marconi Company under contract. In addition a long distance station owned and operated by the Canadian Marconi Company is maintained at Louisburg, N.S., for communication with ships at long range. This station can maintain communication with ships at a distance of 2,000 miles.

(*b*) Direction finding stations to the number of 17 are owned and operated by the Department of Marine on the Atlantic coast. There are 4 on Hudson Bay and Strait and one on the West coast. These stations give bearings upon request to any ship.

(*c*) Radio beacons to the number of 17 are owned and operated by the Department of Marine. There are 9 on the East coast, 5 on the Great Lakes and 3 on the West coast. Any ship fitted with direction finding apparatus can take her own bearings from stations of this class which transmit signals automatically once every hour day or night and continuously during foggy weather.

(*d*) Radiotelephone stations to the number of 8 are owned and operated by the Department of Marine on the Pacific coast for communication with small craft and for life saving purposes.

(*e*) Special services including weather forecasts, storm warnings and time signals are also transmitted by the above mentioned stations for the benefit of ships at sea.

(*f*) Ship Stations. There are 319 ships of Canadian registry fitted with radio apparatus. The Radiotelegraph Act calls for the compulsory fitting of certain passenger vessels with such apparatus.

(*g*) Public commercial stations to the number of 46 are licensed, although 9 only are as yet established for operation. These are designed for handling paid traffic between fixed points. The principal ones in operation are those operated by the Canadian Marconi Company for communication with New York, England and Australia.

(*h*) Private commercial stations to the number of 131 are licensed. These are established for communication with isolated points not reached by telegraph or telephone.

(*i*) Experimental and amateur experimental stations to the number of 700 are licensed.

(*j*) The Department of National Defence maintains 104 stations and in addition operates 10 stations in the Northwest Territories on behalf of the Department of the Interior. It also operates 21 stations for airmail and forestry and has 20 aircraft fitted with radio.

(*k*) Broadcasting stations to the number of 67 physical stations are licensed in Canada having power rating from 50 to 5,000 watts. Owing to the limited number of frequencies or channels available for broadcasting in Canada (6 exclusive and 11 shared with the United States out of a total of 96 as explained above) 2 or 3 stations in the same centre may be required to share time and frequency. In assigning a channel to any station, the matter of geographical separation and power employed have to be considered. It is the practice, for example, not to assign the same frequency or channel to two 50 watt stations which are less than 200 miles apart or to two 500 watt stations which are less than 1,800 miles apart.

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(*l*) Receiving sets to the number of 472,531 were licensed by the Dominion in the nine months ending December 31, 1930.

The Minister further reports that the Department of Marine maintains a service to detect and investigate interference with reception throughout Canada. Furthermore inspectors are maintained throughout Canada to administer and enforce the Radiotelegraph Act and Regulations with regard to compulsory equipment of ships, the licensing of stations and the inspection of stations to see that they maintain the frequency or channel assigned to them in order that interference may not occur.

The Minister further reports that operators' certificates of proficiency issued by the Minister of Marine are, under reciprocal arrangement with Great Britain and the other dominions and colonies, accepted.

The Minister further reports that during the fiscal year 1929-30 the prosecution of 1,267 persons in various parts of Canada for operating receiving sets without licence was undertaken. In two cases, one at Regina and another at Summerside, where adverse decisions were rendered against the Department on the ground that the statute did not in terms apply to receiving sets, the decisions were appealed and the contention of the department upheld.

The Minister further reports that the revenue collected for licence fees in the fiscal year 1929-30 was $449,010.40 and for 1930-31 (9 months) the revenue was $479,488.20.

The Minister further reports that, as the use of Hertzian waves for transmission and reception of communications is a development of recent years, he has had prepared by Mr. J. W. Bain, radio engineer, Department of Marine, a memorandum of explanation of the principles underlying radio communication, which memorandum is annexed hereto.

The Minister recommends, in view of the fact that the jurisdiction of Parliament has been questioned, that the opinion of the highest judicial authority in Canada be obtained with the least possible delay and that, with this in view, the following questions be referred to the Supreme Court of Canada for hearing and consideration pursuant to the authority of section 55 of the Supreme Court Act:—

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 Committee concur in the foregoing, and advise that the said questions be referred to the Supreme Court of Canada for hearing and consideration, accordingly.

W. N. Tilley K.C. and *J. L. St. Jacques K.C.*, for the Attorney-General of Canada.

Charles Lanctôt K.C. and *Aimé Geoffrion K.C.* for the Attorney-General of Quebec.

Joseph Sedgwick for the Attorney-General for Ontario.

F. H. Chrysler K.C. for the Attorneys-General for Manitoba and Saskatchewan.

R. B. Hanson K.C. for the Attorney-General for New Brunswick.

Brooke Claxton for the Canadian Radio League.

ANGLIN C.J.C.—The Governor General in Council, under the authority of section 55 of the *Supreme Court Act,* has referred to this court the following questions:

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?

Personally I should have preferred to withhold judgment on the present reference until the determination by the Privy Council of the Aviation Reference now pending before it on appeal from this court, especially in view of the insistence by counsel representing the province of Quebec that light would be thrown on the issues involved in the present reference by that decision. The majority of my colleagues, however, take the view that the public interest demands that judgment should be given during the present term, in order that the Government may be in a position to obtain the views of the Privy Council on the questions involved in this reference in time to enable it to bring down legislation at the next session of the Dominion Parliament. I somewhat reluctantly defer to that view.

I have had the advantage of reading the carefully prepared opinions of my colleagues.

Dealing with the first question, the most important thing to observe would seem to be its subject matter. It does not concern the rights of property in the instruments used for communication, their ownership, or civil rights in regard to them, but has to do entirely with the effects produced by them. In other words, it is " radio communication " that is dealt with by this question, rather than the instruments employed in making it, which are alluded to merely incidentally.

After giving the matter such consideration as time and circumstances have permitted, I am of the opinion that question no. 1 should be answered generally in the affirmative. My reason for so concluding is largely that overwhelming convenience—under the circumstances amount-

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ing to necessity—dictates that answer. In dealing with this reference, however, I desire it to be clearly understood that I do so solely in the light of the present knowledge of Hertzian waves and radio and upon the facts disclosed in the record. I fully accept the following paragraph from the judgment of my brother Newcombe:

> I interpret the reference as meant to submit the questions for consideration in the light of the existing situation and the knowledge and use of the art, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only within the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control.

Without entering into any lengthy discussion of the constitutional issues involved, it seems to be certain that Hertzian waves and radio were not only unknown to, but undreamt of by, the framers of the *British North America Act*. It is, therefore, not to be expected that language should be found in that Act explicitly covering the subject matter of the present reference. On the other hand, if the Act is to be viewed, as recently suggested by their Lordships of the Privy Council in *Edwards* v. *Attorney-General of Canada* (1).

> as a living tree, capable of growth and expansion within its natural limits,

and if it

> should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words,

and bearing in mind that

> we are concerned with the interpretation of an Imperial Act, but an Imperial Act creating a constitution for a new country,

every effort should be made to find in the B.N.A. Act some head of legislative jurisdiction capable of including the subject matter of this reference. If, however, it should be found impossible to assign that subject matter to any specifically enumerated head of legislative jurisdiction, either in section 91 or in section 92 of the B.N.A. Act, it would seem to be one of the subjects of residuary power

(1) [1930] A.C. 124.

under the general jurisdiction conferred on the Dominion by the opening paragraph of section 91.

It is also obvious that, for certain purposes and within certain limitations, there are several specific heads of legislative jurisdiction in section 91 broad enough to cover, in part at least, the subject of radio communication and that, in so far as the subject matter falls within those several heads, Dominion legislative jurisdiction as to it is exclusive. I refer to

5. Postal Service.
7. Militia, Military and Naval Service, and Defence.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping, (and)
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.

It seems to me that, under this last head, which really brings the exceptions set out in subsection 10 of section 92 into section 91, as distinctive heads of Dominion legislative jurisdiction (*City of Toronto* v. *Bell Telephone Co.* (1)), more particularly under the word "telegraphs" in clause (*a*) thereof, giving to that word a reasonably broad construction of which it is susceptible (*ibid* and *Attorney-General* v. *Edison Telegraphs of London* (2)—we find a sound basis for holding that "radio communication" is subject to the exclusive legislative jurisdiction of the Dominion Parliament.

Reading through the various subsections of section 92, no one of them do I find broad enough to cover the subject matter of radio communication. The two subsections of section 92 relied on by counsel for the provinces were nos. 13 and 16. No doubt, in some aspects, radio communication has to do with "property and civil rights in the province"; but so have many other subjects which have been held to fall within some one of the enumerated heads of section 91, and as to which the concluding paragraph of that section establishes the exclusiveness of Dominion legislative jurisdiction over them. (*The Fisheries Case* (3); *Toronto Electric Commissioners* v. *Snider* (4)). Radio communication in this respect does not differ from any of such other subjects.

(1) [1905] A.C. 52, at 57.
(2) (1880) 50 L.J. C.L. 145.
(3) [1898] A.C. 700, at 715.
(4) [1925] A.C. 396, at 406.

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Bearing in mind what Lord Watson said in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1), that legislation by the Dominion

> in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

and that it is not competent to the Dominion to make laws

> in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion.

I fail to find anything of a "local or private" nature in radio communication such as would exclude Dominion jurisdiction over it. I agree with Mr. Justice Newcombe that

> "radio communication," in the state of the science and development which it has attained, is not, substantially or otherwise, a local or private matter in the province.

Of course, it may some day become so, should radio science develop to such an extent that it will be possible so to control the effects of Hertzian waves, that those effects may be confined within the limits of a province, both as to their use and interference by them.

Subject to such possible further scientific development, I am, for the foregoing reasons, of the opinion that question no. 1 should be presently answered in the affirmative. It is, therefore, unnecessary to answer question no. 2, which is based on the assumption of a negative answer to no. 1.

My formal answers to the questions are,

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

Question no. 2. No answer.

NEWCOMBE J.—My trouble with this case is to know the facts. Although the narrative of the order of reference and the printed statement of principles were not at the hearing seriously disputed, one is apt to suspect that the knowledge of the art of radio, which we have derived from the submissions and what was said in the course of argument, is still incomplete and, perhaps, in some particulars, not free from error; that some accepted theories are still experimental or tentative, and that there may be possibilities

(1) [1896] A.C. 348, at 360.

of development and use, not only in the Dominion but also in a provincial field, which have not yet been fully ascertained or tested.

A difficulty also arises from the fact that the questions propounded do not apply themselves to actual legislation, but seek generally the definition of Dominion authority to "regulate and control radio communication," in, perhaps, its widest sense.

In these conditions, it is expedient to proceed with great care and certainty, or caution, and, in affirming or denying a legislative power, wisely to say nothing which may be construed to express or imply an intention to extend a ruling upon the assumed or hypothetical case submitted to a state of actual facts that may prove to be materially different, and which, though at present no more than imaginary, may yet be realized.

I interpret the reference as meant to submit the questions for consideration in the light of the existing situation and the knowledge and use of the art, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I must proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only in the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control.

Now, the power of the Dominion to regulate or control is denied, upon two grounds, by the province of Quebec and other provinces which have associated themselves with the argument of Quebec; they say that the exercise of the power, as broadly suggested by the first question, would offend against the provincial enumeration of "Property and Civil Rights in the Province"; and, secondly, or, perhaps, alternatively, that it would be obnoxious to the concluding paragraph of section 92, "Generally all Matters of a merely local or private Nature in the Province." Ex-

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ceptions are, however, conceded, and these may be introduced no better than by a quotation from Lord Herschell's great judgment in the first *Fisheries Case* (1), where, referring to section 91, he said

> The earlier part of this section read in connection with the words beginning "and for greater certainty," appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91, is not within the legislative competence of the provincial legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the *British North America Act*.

Now, referring to the text of section 91 for the enumerations that may, for present purposes, be invoked, it is enacted by the concluding words of the section that

> 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.

And it is, I would think, not doubtful that the regulation of radio communication has a Dominion aspect, or at least an overlapping relation, capable of being worked as incidental or ancillary, with respect to some of the subjects specially enumerated in section 91; for example: "2. The Regulation of Trade and Commerce; 5. Postal Service; 7. Military and Naval Service and Defence; 9. Beacons, Buoys, Lighthouses and Sable Island; 10. Navigation and Shipping; 11. Quarantine and the Establishment and Maintenance of Marine Hospitals, and 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." Most obviously in this

(1) [1898] A.C. 700, at 715.

true as applied to the three enumerations that are concerned with the safety of ships and navigation. It follows that a provincial legislature could not sanction or uphold any sort of radio communication which would interfere or conflict with competent Dominion regulations, enacted with relation to these enumerated subjects. It is expressly, and most justly, conceded by the factum of the Attorney-General of Quebec that

> Where any subject is under its exclusive legislative authority the Dominion Parliament has power to regulate by substantive and by ancillary and necessary incidental legislation.

Also, by section 132, which has been judicially considered in other cases,

> 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.

There is the International Radiotelegraph Convention, "Done at Washington, 27th November, 1927," between the Governments therein mentioned, including Canada, Great Britain and the United States of America, and ratified on behalf of Canada, 12th June, 1928; also an agreement between Canada, the United States, Newfoundland and Cuba, relative to the assignment of "frequencies" on the North American continent, effective as from 1st March, 1929. These and other international agreements or regulations, to which Canada adheres, are printed in the appendix of the case; and, in so far as they answer the description of the last quoted section, the Parliament and Government of Canada have, by the express enactment, all powers necessary or proper for performing the obligations of Canada, or of any province thereof, arising thereunder.

But, while Mr. Geoffrion concedes that interference internationally may be avoided under the powers conferred by section 132, he suggests that, if it be necessary to provide against interprovincial interference, the objects should be attained by arrangement between the provinces, and he refers to *City of Montreal* v. *Montreal Street Railway* (1). That case is mentioned in the recent *Aviation Case* (2); and it is distinguishable upon all the points debated with relation to the questions now submitted. I refer to it here by way of reminder that, as shewn by Lord Atkin-

(1) [1912] A.C. 333.
(2) [1930] S.C.R. 663 at 702.

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son's remark at the foot of page 345, the power of Parliament to acquire jurisdiction by the exercise of its authority to make a declaration under paragraph (*c*) of the 10th enumeration of section 92, was not without a persuasive influence in the result which His Lordship reached; and I think all are agreed that paragraph (*c*) has no application to the radio powers which are now in difference.

But while the Dominion has at least the authority to regulate and control radio activities, and to provide against confusion or interference, as affecting its own enumerated subjects, and for the performance of treaty obligations, it also has the comprehensive power involved in the declaration of its authority

> 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;

and Quebec, in effect, contends that the classes so excepted include "radio communication," within the meaning of the first question submitted. As to this, the provincial case seems to depend upon the interpretation of the two provincial powers which I have quoted; and my view is that the subject in question has not the prescribed limitation of locality. It is said that "radio communication," as explained by the reference, is a matter of "Property and Civil Rights in the Province," or of a "merely local or private Nature in the Province"; and this I deny, because, upon the assumptions involved in the case, the matter substantially extends beyond provincial limits.

The words "Matters of a merely local or private Nature" are also used in the last paragraph of section 91, and Lord Watson interpreted them as meant to include and correctly to describe all the matters enumerated in the heads of section 92 as being, from a provincial point of view, of a local or private nature. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); and, on the next two pages of the same case His Lordship said, referring to the general authority of Parliament under the introductory enactments of section 91,

> But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to en-

(1) [1896] A.C. 348, at 359.

croach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power of the Parliament of Canada in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

And, as I interpret the case submitted, "radio communication," in the state of the science and development which it has attained, is not, substantially or otherwise, a local or private matter in a province. In the course of discussion an attempt was made to distinguish between the transmission of a message and the reception of it; and it was said that the receiving instrument is property in a province, and that a message is received in a province when the instrument, being there, is adapted and worked for that purpose. But the question is directed, not to rights of property in goods or chattels situate within a province, but to "radio communication"—an effect which is not local, but interprovincial. There must be two parties to a communication; there may be many more; and, if the sender be in a foreign country, or in a province or territory of Canada, and the receiver be within another province, it is impossible, as I see it, to declare that the communication, is local, either to the transmitting or to the receiving province.

As usual, in cases where the validity of provincial legislation is attacked as engaged with a subject matter not local, the *Manitoba Liquor* case (1), is cited in support of the power. The passages are at pages 77-80 of Lord McNaghten's judgment, and the meaning is relieved of some obscurity when the reasons are considered. Manifestly, His Lordship's conclusion depends upon the text of the par-

(1) [1902] A.C. 73.

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ticular Act and he quoted and emphasized the recital and the 119th section by which there is introduced a legislative declaration that the object is to suppress the liquor traffic in Manitoba by prohibiting provincial transactions, and that, while the act is intended to prohibit transactions in liquor which take place wholly within the province, except as otherwise specially provided, and to restrict the consumption of liquor within the limits of the province,

it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly.

That section, his Lordship said, was as much part of the Act as any other section contained in it, and must have its full effect in exempting from the operation of the Act the transactions which came within its terms. Their Lordships were not satisfied that the legislature of Manitoba had transgressed the limits of its jurisdiction in passing the *Liquor Act*. But provincial legislation for the regulation and control of radio communication is a much more expansive matter and cannot, upon present information, be constructed in a manner to qualify as relating to matters of a local or private nature in the province.

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.

For these reasons I certify to the Governor in Council, for his information, my opinion that the first question submitted should be answered in the affirmative; and, of course, in view of that conclusion, I am not required to answer the second question.

RINFRET J.—En donnant son opinion sur les questions déférées au sujet de la loi autorisant le contrôle de l'aéronautique (1), mon collègue, Monsieur le Juge Duff, avec qui j'ai concouru, commence son jugement par l'exposé suivant:

The view presented by the Solicitor General of the questions raised by the interrogatories, which it is our duty to answer, was based primarily

(1) [1930] S.C.R. 663, at 684.

upon the proposition that the Dominion possesses authority to legislate upon the subject of aeronautics, in every respect, and that this authority is exclusive, or, at all events, overrides any law of a province.

This proposition is supported upon a variety of grounds. It is contended that, in their very nature, the matters embraced within that subject cannot be local, in the provincial sense, and that accordingly the subject is beyond the ambit of section 92; that, in the alternative, it falls within one of the enumerated heads of section 91, no. 10 Navigation and Shipping; that, as a sort of further alternative, so many aspects and incidents of the subject fall within various enumerated heads of section 91, such as the regulation of trade and commerce, undertakings extending beyond the limits of a province, customs, aliens, beacons and lighthouses, postal service, defence, ferries, or under immigration (s. 95), that the subject must as a whole be treated as within Dominion jurisdiction, that being, it is argued, the only interpretation under which the undoubted authority of the Dominion over the various aspects of the subject can be effectively exercised. Still again, it is said, the authority of the Dominion under section 132, to legislate for the performance of its obligations under the Convention relating to Aerial Navigation, 1919, extends over the whole field.

En substituant la radiocommunication à l'aviation, et en retranchant la mention relative au paragraphe 10 de l'article 91 de l'*Acte de l'Amérique Britannique du Nord* concernant " Navigation and Shipping", nous avons dans le passage cité un exact résumé de l'argumentation qui a été faite de la part du procureur général du Canada dans l'affaire qui nous est actuellement soumise.

D'autre part, les procureurs généraux des provinces, pour réclamer la juridiction en faveur des gouvernements qu'ils représentaient, dans cette cause de l'aviation comme dans la présente, se sont surtout appuyés sur le paragraphe 13 (" property and civil rights in the province ") et sur le paragraphe 10 (" local works and undertakings ") de l'article 92 de l'Acte constitutionnel.

Il en est résulté, entre la cause de l'aviation et la présente cause de la radiocommunication, une très grande analogie, au moins dans la manière dont la question nous a été présentée. On peut donc regretter que nous soyons appelés à nous prononcer sur les questions qui nous sont actuellement soumises avant d'avoir eu l'avantage de connaître la décision finale du Conseil Privé dans l'affaire de l'aviation, car il me paraît évident que cette décision nous aurait apporté une aide considérable dans la solution du problème que nous avons maintenant à trancher.

De même que dans la référence sur l'aviation, il nous faut ici adapter une loi constitutionnelle datant de 1867 à

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un sujet qui non seulement n'avait aucune existence, mais dont on ne soupçonnait même pas la possibilité à cette époque. Il est exact de dire cependant que l'*Acte de l'Amérique Britannique du Nord* " is always speaking " et que ses dispositions doivent recevoir un sens de plus en plus étendu, au fur et à mesure que les inventions scientifiques et les développements de la vie nationale exigent de nouvelles solutions constitutionnelles (1).

A la question nouvelle soulevée par la découverte de l'aviation, cette cour a répondu que la juridiction primordiale appartenait aux provinces. Il me semble qu'il existe à l'égard de cette question nouvelle qui est maintenant soulevée par l'invention de la radio des raisons encore plus fortes pour décider dans le même sens.

La radiocommunication, telle qu'elle est connue et telle que la science nous la présente jusqu'à date, consiste dans un appareil émetteur, des ondes radioélectriques (que le dossier appelle " Hertzian waves ") circulant dans l'éther, et un appareil récepteur.

En soi, l'appareil émetteur et l'appareil récepteur sont des objets de propriété " d'une nature locale " situés dans la province, au sens de l'article 92.

Qu'on les envisage comme objets de propriété purs et simples, ou comme des travaux couverts par le paragraphe 10 de l'article 92, ils tombent de prime abord sous la juridiction provinciale.

En plus, la personne qui opère un appareil émetteur ou la personne qui opère un récepteur, exerce un droit civil dans la province; et l'une ou l'autre opération, prise isolément, est indiscutablement matière à contrôle provincial.

De ce point de vue, il existe sans doute une différence entre l'opération de l'appareil récepteur et l'opération de l'appareil émetteur. Alors que la réception ne peut d'aucune façon être envisagée comme étant autrement que d'une nature purement locale, il est exact de dire que, suivant les données actuelles de la science, l'émission ne peut pas être circonscrite dans un rayon précis et les ondes qui sont mises en mouvement par l'appareil émetteur se propagent dans toutes les directions, sans qu'on puisse les limiter aux frontières d'un territoire.

(1) [1930] A.C. 124.

Je ne crois pas cependant que cette dernière particularité enlève à l'opération de l'appareil émetteur son caractère de droit civil dans la province, suivant la portée qu'il faut donner au paragraphe 13 de l'article 92. Un droit civil ne perd pas sa nature de droit civil contrôlable par la province simplement parce qu'il peut produire des effets au delà de la province. Un contrat passé dans une province produit des résultats en dehors de cette province, sans que pour cela il soit soustrait à l'autorité provinciale. Une firme, à Montréal, qui fait avec un voyageur de commerce un contrat de louage de ses services, verra sa responsabilité engagée vis-à-vis d'une personne à Vancouver, dans la Colombie-Britannique, par l'acte de ce voyageur de commerce, et cette responsabilité résultant du contrat d'abord fait à Montréal continuera d'être régie par la loi provinciale.

Pour prendre un exemple encore plus frappant, un journal publié à Toronto et dont la circulation est répandue dans tout le Dominion ne cessera pas pour cela d'être de la part de ses propriétaires l'exercice d'un droit de propriété et d'un droit civil dans la province d'Ontario et d'être subordonné à la législation de la province.

Supposons encore une fanfare qui jouerait un concert dans une province, sur les bords de la frontière. Elle ne tomberait pas sous le contrôle fédéral parce que les sons de sa musique seraient entendus dans une autre province.

On pourrait donner ainsi des exemples presque à l'infini.

Si maintenant l'on traite l'appareil émetteur ou l'appareil récepteur comme des "travaux... d'une nature locale", je ne crois pas qu'on puisse prétendre que, par le seul fait que ces travaux ont une répercussion au delà des frontières d'une province, ils perdent leur caractère local.

Je suppose un phare qui serait érigé sur le territoire d'une province mais suffisamment près de la frontière pour que ses feux et sa lumière soient projetés sur le territoire d'une autre province. Il me semble que l'on ne pourrait en conclure que ce phare cesse d'être un ouvrage d'une nature locale au sens du paragraphe 10 de l'article 92.

J'écarte donc la prétention qui voudrait que par cela seul qu'un droit civil ou un ouvrage local produit des effets en dehors d'une province, il acquiert *ipso facto* un caractère qui a pour effet de le soustraire à la juridiction provinciale.

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Mais on objecte que le sujet dont il s'agit n'est pas l'appareil émetteur ou l'appareil récepteur en soi, que la véritable question est la communication qui s'établit entre les deux appareils et que, comme il est impossible de restreindre cette communication aux limites d'une province, il en résulte qu'elle tombe dans le domaine fédéral.

Sur ce point, on invoque les sous-paragraphes du paragraphe 10 de l'article 92 qui sont des exceptions et qui, en vertu du paragraphe 29 de l'article 91, doivent être envisagés comme faisant partie des catégories de sujets réservés au pouvoir législatif fédéral.

Il y a là trois sous-paragraphes: (*a*), (*b*) et (*c*). (*b*) s'occupe des lignes de bateaux à vapeur entre les provinces et les pays dépendant de l'Empire britannique ou tout autre pays étranger. Il n'a donc rien à voir avec la question actuelle. (*c*) traite des travaux qui, bien qu'entièrement situés dans la province, sont déclarés par le parlement du Canada être pour l'avantage général du Canada ou pour l'avantage de deux ou d'un plus grand nombre de provinces. Il ne s'agit pas d'une déclaration de ce genre dans la question qui nous est soumise.

Reste le sous-paragraphe (*a*). Il s'applique à " 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 ".

L'interprétation souveraine qui doit nous guider dans la portée qu'il faut donner à ce sous-paragraphe a été donnée par le Conseil Privé dans la cause de *Montreal* v. *Montreal Street Railway* (1). Il y est dit, en référant aux travaux dont il s'agit dans ce sous-paragraphe: " These works are physical things, not services." Or, la distinction fondamentale entre la radiocommunication et la communication par télégraphe, téléphone ou autres travaux du même genre auxquels s'applique le sous-paragraphe (*a*) du paragraphe 10 est précisément que la radiocommunication peut être un " service ", mais elle n'est pas un " physical thing ".

En outre, il n'existe pas de connexion physique entre l'appareil émetteur et l'appareil récepteur, comme le fil qui, dans le télégraphe et le téléphone, relie l'endroit d'où sont émis les sons ou les signaux à l'endroit où ils sont reçus.

(1) [1912] A.C. 333.

A la rigueur, une ligne de radiocommunication établie par une firme commerciale pour le service du public partant d'une ou de plusieurs stations d'émission fixes qu'elle possèderait dans une province et qui transmettrait des messages de toutes natures à l'aide des ondes hertziennes à des stations de réception fixes, dont la firme serait également propriétaire, et qui seraient situées dans d'autres provinces, constitueraient un " undertaking " tombant sous la juridiction fédérale. Il semblerait cependant que, dans ce cas, le pouvoir fédéral procèderait non pas du sous-paragraphe (*a*) du paragraphe 10 de l'article 92, mais du paragraphe 2 de l'article 91 concernant " The regulation of trade and commerce ".

Nous avons eu tout dernièrement un exemple de l'application de ce principe de juridiction dans l'arrêt de cette cour Re: *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1).

Il est juste toutefois de faire remarquer que même l'attribution de la juridiction fédérale sur une entreprise commerciale, comme celle dont nous venons de parler, reliant deux ou plusieurs provinces, laisserait quand même intacte la juridiction provinciale sur des entreprises du même genre établies entre des stations fixes exclusivement à l'intérieur d'une province, et surtout sur tous les appareils opérés par des amateurs ou par des gouvernements locaux, ou de toute autre façon qui ne serait pas pour des fins de profit.

Mais tous les cas mentionnés au sous-paragraphe (*a*) du paragraphe 10 sont des cas où il s'agit d'une connexion physique continue dans les travaux ou l'entreprise (sauf peut-être les lignes de bateaux à vapeur ou autres bâtiments, avec lesquels la radiocommunication n'a aucune espèce d'analogie) et d'un " physical thing " tout entier sous le même contrôle, sinon de propriété, au moins d'opération. La plus récente décision sur ce point se trouve dans l'arrêt du Conseil Privé dans la cause de *Luscar Collieries* v. *McDonald* (2), où Lord Warrington of Clyffe, qui a prononcé le jugement, revient à deux reprises sur le caractère de continuité de la voie de chemin de fer dont il s'agissait dans cette cause et dit (p. 932):

A part of a continuous system of railways operated together by the Canadian National Railways Company and connecting the province of

(1) [1931] S.C.R. 357. (2) [1927] A.C. 925.

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Alberta with other provinces of the Dominion; (puis p. 933): There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the province of Alberta.

Ces expressions semblent bien marquer que, pour tomber sous l'effet du sous-paragraphe (*a*) du paragraphe 10, il faut le double caractère de continuité dans le " physical thing " et de propriété, de contrôle, ou, au moins, d'opération par la même personne ou la même compagnie, sans quoi l'on ne se trouve plus en présence d'un seul " undertaking ", mais l'on a plusieurs " undertakings " distincts.

Ces deux caractères manquent à la radiocommunication, dont la nature habituelle et la plus ordinaire est de procéder d'un appareil émetteur qui appartient à un propriétaire vers des appareils récepteurs qui appartiennent à d'autres propriétaires complètement indépendants, sans aucune espèce de relations avec le propriétaire de l'appareil émetteur, et que ce dernier ne connaît même pas. Du point de vue légal, il est difficile de voir la distinction qu'on peut faire entre la radiocommunication opérée dans ces conditions et la transmission des sons de toute autre façon (comme, par exemple, par la fanfare dont nous parlions tout à l'heure) d'une province à l'autre. Et il est assez juste, sous ce rapport, d'assimiler l'appareil récepteur à une simple amplification de l'appareil auditif humain, puisque sa fonction n'est rien autre chose que de rendre perceptibles à l'oreille des sons ou des signaux transmis à travers l'éther par la propagation de vagues intangibles.

De toutes façons, par conséquent, et sauf les exceptions que j'ai mentionnées au cours de ce jugement jusqu'ici, le sujet de la radiocommunication me paraît tomber essentiellement dans la catégorie des sujets de " Property and civil rights in the province " ou de " Local works and undertakings ", tels que prévus au paragraphe 10 de l'article 92.

Dans ces conditions, la juridiction primordiale réside donc dans les provinces, et cette juridiction ne peut être entamée qu'en autant que l'on peut trouver dans l'article 91 des sujets de juridiction fédérale qui donneraient, dans les limites de leur application particulière, le pouvoir d'empiéter sur cette juridiction provinciale primordiale.

En effet, dès qu'un sujet tombe sous le contrôle provincial en vertu de l'une des clauses de l'article 92, il ne peut être transféré au domaine fédéral qu'à la condition de tom-

ber expressément sous l'une des clauses de l'article 91; et il est absolument fallacieux de prétendre que, sauf dans un cas de " national emergency ", le Dominion pourrait s'emparer de ce contrôle en vertu de la clause résiduaire et sous prétexte que l'autorité provinciale n'a pas l'ampleur voulue pour contrôler effectivement le sujet qui est attribué à sa juridiction.

Pour mieux exprimer ma pensée, je me permettrai de citer sur ce point un passage du jugement de notre collègue, Monsieur le juge Duff, dans la cause de *The King* v. *Eastern Terminal Elevator Company* (1):

> The other fallacy is (the two are, perhaps, different forms of the same error) that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case* (2), and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case* (3), where it was pointed out that in a system involving a division of powers such as that set up by the *British North America Act*, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

Cela m'amène à examiner de plus près la véritable base sur laquelle, de la part du procureur général du Canada, on a voulu placer l'argumentation en faveur de la juridiction fédérale.

L'on nous a dit que, à cause de sa nature même, la radiocommunication échappait au domaine provincial et qu'elle ne pouvait être contrôlée d'une façon efficace que par le pouvoir fédéral, parce qu'elle exige un contrôle central et unique.

A mon humble avis, c'est là porter la discussion exactement sur le terrain dont parle Monsieur le juge Duff dans le passage que je viens de citer, et c'est nous ramener, une fois de plus, à cet argument si souvent offert et autant de fois rejeté par les tribunaux que, parce qu'il serait plus avantageux de concentrer toute la législation sur un sujet entre les mains du pouvoir central, c'est-à-dire, en l'espèce, du pouvoir fédéral, il en résulte que le fédéral devrait avoir juridiction. Il n'y a pas le moindre doute que s'il existait

(1) [1925] S.C.R. 434, at 448. (2) [1922] 1 A.C. 191.
(3) [1912] A.C. 333.

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un seul parlement, tous ces conflits de juridiction seraient évités. Mais cet argument de "convenience" ou de "inconvenience" ne saurait évidemment constituer une règle d'interprétation. La constitution du Canada a créé une union fédérale en distribuant les pouvoirs législatifs entre un parlement central et des parlements provinciaux. C'est uniquement par l'interprétation du texte de cette constitution que l'on doit être guidé lorsqu'il s'agit d'attribuer un sujet à l'une ou l'autre juridiction. La question de savoir s'il serait plus avantageux que les choses fussent autrement ne saurait entrer en ligne de compte et, à tout événement, ne saurait trouver place devant une cour de justice. Le principe que, par suite du fait qu'une législation fédérale serait pour le plus grand avantage du Canada, ou rencontrerait d'une façon plus efficace les exigences de la situation, il en résulterait que le pouvoir central a la compétence pour l'adopter a reçu son coup de grâce dans le jugement de *Toronto Electric Commissioners* v. *Snider* (1).

L'autre point soulevé de la part du procureur général du Canada, et l'on peut dire sans doute le pivot de son argumentation, c'est que, dans l'état actuel de la science de la radio, il est absolument impossible d'empêcher les inconvénients résultant des interférences, et que, à moins d'une législation uniforme ayant pour but de répartir ce que j'appellerai les bandes de communication ("channels of communication"), il se produira une telle confusion que tous les bénéfices de la radiodiffusion seront absolument annihilés. On en conclut que cela nécessite le contrôle unique du parlement fédéral.

De la part des provinces, on a nié le danger de cette interférence et on a assuré, à tout événement, qu'il y avait exagération dans la prétention émise par le Dominion. En la prenant pour acquise, je ne vois pas comment ce fait peut venir modifier la question de juridiction.

Si j'ai bien compris le développement de cet argument, le brouillage peut avoir lieu à la source, c'est-à-dire au poste émetteur, ou au moment de la réception. De toutes manières, c'est le récepteur qui est empêché de recevoir utilement la radiocommunication. Si l'interférence provient d'une cause locale située dans la même province que

(1) [1925] A.C. 396, 412.

l'appareil récepteur, la province qui a juridiction sur l'appareil récepteur peut également adopter la législation nécessaire pour empêcher cette interférence. Si la difficulté provient d'une répartition des " channels " entre les provinces, il m'est impossible de voir pourquoi la solution ne pourrait pas être trouvée dans une entente entre les provinces, ainsi qu'il est suggéré par le Conseil Privé dans la cause de *City of Montreal* v. *Montreal Street Railway* (1).

Mais il semble admis que l'interférence peut tout autant provenir d'une source extérieure non seulement à l'une des provinces, mais d'une source extérieure au pays lui-même. Je déduirais même de l'exposé scientifique qui est au dossier et de l'argumentation qui a été faite devant nous que la principale, pour ne pas dire l'unique, difficulté de toute la situation vient des Etats-Unis, pays voisin, et de l'exploitation du nombre considérable de postes émetteurs qui se trouvent dans ce pays. Or, l'on ne peut éviter de faire remarquer que s'il en est ainsi, ce n'est pas par une législation fédérale qu'on empêchera cette interférence. Le parlement du Canada sera tout aussi impuissant que n'importe quel parlement des provinces pour légiférer sur une situation de ce genre. Aucune loi du Canada ne pourrait empêcher les postes émetteurs des Etats-Unis de causer dans notre pays, ou dans chacune des provinces, toutes les interférences que la science prévoit.

La réponse à l'argument du Dominion serait donc:

1° Ce n'est pas parce qu'une personne située ailleurs dans le Dominion vient causer dans une province une interférence avec l'exercice d'un droit civil dans cette province que le Dominion acquerra de ce fait une juridiction sur ce droit civil. Cette interférence constitue un conflit entre deux droits civils. Un conflit de ce genre n'a pas pour résultat de soustraire les droits civils à la juridiction provinciale et de les transférer au domaine fédéral.

2° Si la source de l'interférence est située dans le pays, bien que dans une autre province, la véritable manière pour les provinces de régler le conflit entre les droits civils qui sont respectivement de leur domaine, est par une entente entre les provinces. Le Dominion n'acquiert aucune juridiction comme conséquence d'un conflit de ce genre.

(1) [1912] A.C. 333.

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3° Si la source est située en dehors du pays, le Dominion, par sa propre législation, est tout aussi impuissant que n'importe laquelle des provinces pour y mettre fin; et la seule ressource en pareil cas: c'est le traité avec le ou les pays voisins.

Au point de vue pratique, je crois bien que, en donnant à l'objection fédérale la plus ample portée que l'on puisse lui attribuer, la vraie question qui résulte du danger de l'interférence est en réalité une question internationale. Or, du moment qu'on en arrive à cette conclusion, la difficulté de juridiction ne se présente plus. Une question internationale ne peut se régler que par un traité; et, dans ce domaine, le parlement fédéral a toute la latitude nécessaire. L'article 132 de l'*Acte de l'Amérique Britannique du Nord* établit ses pouvoirs en pareil cas; et, dans le jugement que cette cour a rendu sur la question d'aviation (1), nous avons défini les droits du parlement fédéral en matière de traités, tant dans leur adoption que dans leur exécution, de façon à ce qu'il n'y ait pas lieu d'y revenir, sujet naturellement à ce que pourra dire le Conseil Privé sur cette question.

Dans la cause actuelle, il est résulté de l'argumentation de part et d'autre que l'étendue des pouvoirs du parlement fédéral, agissant en vertu de l'article 132 de l'acte constitutionnel, ne faisait pas l'objet de la moindre discussion. Il suffit peut-être de faire remarquer, par conséquent, que c'est là, en définitive, que le parlement fédéral va trouver le remède à la principale difficulté qui semble le préoccuper à l'heure qu'il est, c'est-à-dire cette question d'interférence. Elle ne peut se régler que par traité; et, en matière de traités, les pouvoirs fédéraux sont probablement illimités.

Et tout ce que je viens de dire au sujet de l'interférence provenant de l'étranger s'applique avec autant de force, au Canada, à la règlementation de la radiodiffusion et de la radiocommunication venant de l'étranger. Là encore, c'est une question de traité; et sur ce point le fédéral est souverain.

Mais, si l'on se borne au domaine national, mon opinion est que, pour les raisons que j'ai exposées, la base de la

(1) [1930] S.C.R. 663.

juridiction en matière de radiocommunication est primordialement entre les mains des provinces.

Il reste évidemment que, nonobstant cette juridiction provinciale primordiale, le parlement fédéral conserve la juridiction prépondérante chaque fois qu'il s'agit d'un des sujets qui lui sont expressément attribués par l'article 91. Cela est admis dans le factum qui nous a été soumis de la part de la province de Québec:

> It may be at once conceded that where any subject is under its exclusive legislative authority the Dominion Parliament has power to legislate by substantive and by ancillary and necessarily incidental legislation.

Cela comprendrait, au moins, les sujets suivants:

1° " The regulation of Trade and Commerce ", dans les limites qui ont été assignées à ce sujet dans les arrêts de *Citizens Insurance Company* v. *Parsons* (1); *The Insurance Reference* (2); *The Board of Commerce Act, 1919,* et *The Combines and Fair Prices Act, 1919* (3);

2° " Postal service ";

3° " Militia, Military and Naval Service, and Defence ";

4° " Beacons, buoys, lighthouses and Sable Island ";

5° " Navigation and Shipping ";

6° " Sea coast and inland fisheries ";

7° Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la loi constitutionnelle aux législatures des provinces, conformément au paragraphe 29 de l'article 91, dans les limites que j'ai expliquées au cours de ce jugement.

Ce que j'ai dit jusqu'ici me dispenserait de traiter plus amplement de la juridiction provinciale. Je crois cependant devoir ajouter que même si, contrairement à la conclusion à laquelle j'en arrive, le sujet de la radiocommunication appartient primordialement au domaine fédéral, l'on ne pourrait quand même dire que son contrôle est absolu, ou, pour employer une expression que nous avons adoptée lors de la référence sur l'aviation, que ce contrôle existe " in every respect ".

Il me paraît certain que pour la réparation des dommages moraux et matériels qui pourraient être causés par la radiocommunication, pour la responsabilité civile en matière de radiodiffusion, il y aura lieu de recourir aux règles du droit

(1) (1881) 7 App. Cas. 96. (2) [1916] 1 A.C. 588.
(3) [1922] 1 A.C. 191.

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civil, et, par conséquent, à la législation provinciale. Les droits des propriétaires de postes émetteurs, ou les droits des propriétaires d'appareils de réception devront quand même être régis par le droit civil. En plus, il y a, entre les divers émetteurs, ou entre les émetteurs et les compositeurs, écrivains, auteurs de tous genres, orateurs, conférenciers, artistes ou exécutants, fournisseurs d'information, annonceurs, toutes les personnes désireuses de transmettre des communications ou de faire de la réclame, des rapports éventuels de droit privé, civil ou commercial qui devront trouver leur solution dans le droit commun des provinces et dans la législation provinciale. (Voir Revue Juridique internationale de la radio-électricité, 1930, n° 24, p. 234.)

Enfin, toujours si le sujet de la radiodiffusion appartient de prime abord à la juridiction fédérale, je ne vois pas bien comment on pourrait empêcher les provinces d'exercer leur pouvoir de taxation directe en vertu du paragraphe 2 de l'article 92, et leur pouvoir de licence dans le but de prélever un revenu pour des objets provinciaux, locaux ou municipaux, en vertu du paragraphe 9 de l'article 92.

Comme conséquence de ce qui précède, je réponds comme suit aux questions qui nous ont été soumises:

J'interprète la première question comme impliquant de la part du gouvernement du Canada une juridiction absolue et sous tous les rapports; et ma réponse est dans la négative.

Quant à la seconde question, les différents aspects sous lesquels, à mon avis, le parlement du Canada a juridiction en matière de radiocommunication sont exposés en détail dans le présent jugement.

LAMONT J.—In this case I agree with my brother Rinfret that the jurisdiction of the Dominion Parliament over the subject of radio communication is not exclusive, although, in some particulars, a very large measure of control admittedly belongs to it.

When we consider the nature of radio communication and the fact that once the electro-magnetic waves are discharged from the transmitting stations they cannot be confined within the boundaries of a province, or even the limits of a country, it is evident that a provincial legislature, whose jurisdiction is only province wide, is not in a posi-

tion to control the transmission of these waves, yet, without some control, radio communication would be impossible. So far, therefore, as the transmission of the waves is concerned, a very wide jurisdiction must, in the present state of the art, be conceded to the Dominion Parliament. It belongs to Parliament because the more important matters which must be regulated and controlled lie in the international field where control can only be assured by treaty, convention or agreement between nations.

As indicating the matters over which those who have been dealing with radio communication in a practical way have felt the necessity for control, reference may be made to the International Radiotelegraph Convention at Washington, in November, 1927, and also to the agreement between Canada, the United States, Newfoundland, Cuba, et al. (effective since March 1, 1929), relating to the assignment of frequencies on the North American Continent. All parties to these agreements recognize that until the development of the art progresses to the stage where radio interference can be eliminated, special administrative arrangements are necessary to minimize this interference and promote standardization. To this end the contracting governments have agreed that all transmitting stations will, so far as possible, be established and operated in such manner as not to interfere with radio electric communication of other contracting governments, or persons authorized by them to conduct a public radio service; that no transmission station will be established or worked by an individual without a special licence issued by the government of the country to which the station is subject; that they will propose legislative measures to prevent the unauthorized transmission and reception of correspondence of a private nature, or the divulgence of messages received; and, further, that they will take necessary measures to connect the International Radio Service with the general communication system of each country.

The matters covered by these agreements shew the extent of the field in which control can only be secured by agreements between the nations. As to these matters jurisdiction lies with the Dominion Parliament under section 132 of the B.N.A. Act, 1867, which reads as follows:—

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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.

Besides the transmission of electro-magnetic waves there are other matters in respect of which jurisdiction to regulate and control must exist in some authority. These are, for example, the capturing of these waves and the delivery of the messages they contain. These, to my mind, present a very different question from the transmission of the waves into space. According to Mr. Bain's report, which is printed with the case, the receiving apparatus performs two functions: it receives the transmitted wave, and converts it into an understandable signal. When electro-magnetic waves are thrown into space from one or more transmitting stations, they pass, by virtue of their potentially expanding force, not only over every parcel of land in the province in which the transmitter is situate, but over land far beyond the province. In the case of broadcasting they are not directed to any particular individual, but are left to be captured by anyone who can capture them. Where an owner of land in a province erects on his property a receiving antenna and to it attaches an apparatus which selects a given wave and delivers the message impressed upon it as an understandable signal to those who are within the limits of its varrying power, I am unable to see why the receiving apparatus cannot properly be designated a "local work" under no. 10 of s. 92. The services it performs, first in capturing the wave and then in extracting and delivering its message, are all performed within the province and, therefore, localized. In my opinion such localized service and such an instrumentality constitute a "local work." If it is not a local work within no. 10 of s. 92, I should consider that it would then fall within no. 16 " Generally all Matters of a merely local or private Nature in the Province." *Prima facie,* therefore, legislation upon these subjects would come within the jurisdiction assigned to the provincial legislatures by s. 92.

The jurisdiction of the province, however, is subject to being overborne by competent legislation on the part of the Dominion Parliament, ancillary or incidental, to any of the enumerated heads of s. 91.

I would, therefore, answer the questions 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?

Answer: Not exclusive jurisdiction.

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

Answer: The jurisdiction of Parliament is limited as set out above.

SMITH J.—There are submitted, for the hearing and consideration of the court, pursuant to the authority of s. 55 of *The Supreme Court Act*, the following questions:—

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?

It becomes necessary in the first place to consider the nature of radio communication, how it is brought about, the extent of its effects, its usefulness to the inhabitants of the country at large, and the manner in which that usefulness may be made available.

The principles underlying radio communication are set out in an article compiled by J. W. Bain, radio engineer of the Marine Department, and printed in the case. This document is inserted for the convenience of the court, and it is stated that its accuracy may be verified by reference to the various standard textbooks on the subject. Its general accuracy was, I think, not controverted, and I therefore resort to this document for a brief general description of how radio communication is effected.

An alternating current is one which periodically changes direction in its circuit. For a certain time it flows in one direction, with varying strength, and then reverses and flows for an equal time in the opposite direction. The time in fractions of a second which elapses between two successive maximum values of current in the same direction is

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called a period or cycle, and the number of such periods or cycles per second is called the "frequency" of the alternating current. The maximum value to which the current rises in each half cycle is called the "amplitude" of the current. A high frequency alternating current is one of which the frequency is reckoned in tens of thousands.

By the use of alternate electric current in a transmitting apparatus, magnetic and electric fields are created, which expand and contract with the varying strength of the current, the energy being continually sent out into the surrounding medium and returned to the wire to be sent out again with a reversal of direction as the current increases from zero to maximum in one direction, and then decreases to zero, to increase again to a maximum in the opposite direction. If the frequency is very high, all the energy cannot return to the wire after each half-cycle, and it remains in space, to be pushed further out by the next expansion of the field; and the energy so pushed out at each successive cycle forms an electro-magnetic wave, which is radiated out from the radio antenna.

It is formed of two fields, a magnetic and an electric field at right angles to each other and to the direction of propagation, varying in intensity in step with one another and at the frequency of the current which gave rise to them, and travelling through space at the speed of light, that is: three hundred million metres per second. This figure of three hundred million, when divided by the frequency in cycles per second, gives the wave length in metres, and, conversely, when divided by the wave length, gives the frequency.

Part of the energy is radiated in a direction parallel to the surface of the earth, and forms what is known as the direct or ground wave. Another part is radiated upwards into space, and there exists in the upper part of the atmosphere a conducting layer of electrified particles which possesses the property of reflecting radio waves back to earth, making them available, to a certain extent, for radio communication.

The electro-magnetic waves here referred to are energy waves sent out into surrounding space in the manner indicated, and are the means by which radio communication is carried on. This communication involves not only the

production and radiation of electro-magnetic waves, but also their reception by suitable apparatus, which intercepts these waves by means of a receiving antenna. The passage of the waves across this antenna produces in it a voltage. The receiving apparatus, which is coupled to this antenna, must be capable of so amplifying the small voltage generated in the receiving antenna as to deliver at the output end a signal of suitable strength. Owing to the great number of electro-magnetic fields, due to the waves issuing from a corresponding number of transmitting stations engaged in the various services of radio communication, the receiving apparatus must also be able to discriminate between all these waves and select the desired one.

The fundamental method of arranging the receiving apparatus so as to select the desired wave is by tuning it to the frequency of the wave so desired. It follows that if more than one wave of the same or nearly the same frequency are coming to the receiving apparatus, one would interfere with the reception of the others and destroy the efficiency of all. In order to prevent this result, it is necessary that stations sending out these waves within certain distances of each other be limited to the use of frequencies sufficiently separated to avoid such interference.

By International Convention, frequencies from 550 kilocycles to 1,500 kilocycles have been appropriated to the service of broadcasting, and this band of 950 kilocycles is divided into 96 channels, giving approximately a width of 10 kilocycles to each channel, deemed necessary to prevent a transmitting station operating on one of these channels from interfering with the station operating on an adjoining channel. The electro-magnetic waves sent out from a transmitting station ordinarily travel through space in all directions, and the distances at which they can be picked up by a receiver, and at which they may cause interference with other transmitting stations, vary with the electric power and the frequency used.

In "Elements of Radio Communication," by John H. Morecroft, page 98, there is a table shewing the variation according to power. It is there stated that a fifty-watt station will give good service at ten miles, poor service at 100 miles, and interference at 600 miles; a five hundred-watt station will give good service at 30 miles, poor ser-

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vice at 300 miles, and interference at 1,800 miles; and a five thousand-watt station will give good service at 100 miles, poor service at 1,000 miles, and interference at 6,000 miles. At page 76 of the same book it is stated that if frequency is increased, keeping the current constant, more and more energy is radiated until, when the frequency is a million or more, the radiated power may be detected at great distances; and that, for a given current, the power radiated from a given circuit varies as the square of its frequency.

It is scarcely necessary to give in detail the extent and importance of the service now rendered to the whole people of this and other countries by radio communication. The broadcasting service is the one most familiar to the masses of the people, and is useful to them as a means of enjoyment, of information and of education. The vast importance to the Dominion as a whole of the coast stations established throughout Canada, and the services that they render to shipping over great distances, as set out in the case, need not be enlarged upon. Of scarcely less importance to the people of all sections of the Dominion is the service by radio communication, which scatters everywhere daily the news of the world and the happenings of the various localities, in which people everywhere are interested; and the service which enables people everywhere to carry on expeditiously business affairs.

From what has been said above, and what further appears in the case, it is evident that all these services by radio communication would be rendered of little practical use to anybody if there were not regulation somewhere by which transmitting stations would be prevented from interfering with each other.

By the questions submitted, we are asked to determine whether or not the Dominion Parliament, under the *British North America Act*, is vested with the general power of dealing with the subject.

Section 91 of the *British North America Act* is as follows:

> 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 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,—

Then follows a list of 29 classes of subjects.

Section 92 reads as follows:—

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,—

Then follow 10 enumerated classes of subjects, among which are:

13. Property and Civil Rights in the Province.

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

Many disputes have arisen as to the respective jurisdiction of the Dominion and the provinces by virtue of these sections, resulting in many appeals to the Privy Council, in which the construction to be put upon them has been authoritatively laid down. Lord Watson, in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), makes the following statement:—

These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

Viscount Haldane, in *Toronto Electric Commissioners* v. *Snider* (2), states the result of what has been laid down in previous decisions, as follows:

The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

Radio communication is, of course, not specifically mentioned in either of these sections, unless the word "Telegraphs" in s. 92-10 (*a*) includes it. It is, however, contended, on behalf of the provinces, that it falls within the

(1) [1896] A.C. 348, at 360. (2) [1925] A.C. 396, at 406.

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class of subjects in s. 92 (13), "Property and Civil Rights in the Provinces," or no. 16, "Generally all matters of a merely local or private nature in the Provinces."

It is, of course, conceded on behalf of the provinces that if general jurisdiction is vested in the provinces by virtue of these clauses, that jurisdiction is still subject to any Dominion legislation properly enacted in reference to the classes of subjects specifically assigned to the Dominion Parliament under s. 91 and for the performing of the obligations of Canada or of any province thereof arising under treaties, pursuant to s. 132 of the *British North America Act*.

Dealing firstly with class no. 16, is it possible, having in view the nature and effect of radio communication, as described, to say that, when carried on in a province, it is a matter of a merely local or private nature in the province? When a transmitter sends out into space these electro-magnetic waves, they are projected in all directions for the great distances referred to, and it is not possible for the transmitter to confine them within the bounds of a province. As already pointed out, a transmitter of only fifty-watt power—the power of an ordinary house lamp—will radiate these waves in all directions around it for a distance of 600 miles with sufficient energy at that distance to disturb and interfere with any radio communication passing through that field on the same or nearly the same channel or frequency.

Mr. Lanctôt, in his argument, pointed out that by the Beam system electro-magnetic waves can in a large measure be prevented from radiating in any but a given direction. This is accomplished by fencing the transmitter behind and at each side by certain apparatus, which results in limiting largely radiation of waves in these directions, with a consequent diminution of power and distance in those directions, and, apparently, increased power and distance in the remaining direction. He stated that it was possible that these waves so projected in one direction might travel around the world, and in that way come back to the starting point. If his general argument is sound, then every resident of the province of Quebec, and of every other province, has a right at will to send out waves of this or any other character, on any or all channels or fre-

quencies, without limitation or control, unless the province in which the sender resides sees fit by legislation to establish control. The result, if the practice were resorted to to any considerable extent by the residents of the various provinces, would be, as has been pointed out, to destroy the usefulness of radio communication, not only throughout all the provinces, but far beyond the bounds of the Dominion. This, Mr. Lanctôt argues, is a matter of a merely local or private nature in the province. I am of opinion that it is not a matter of that nature, and that radio communication does not fall within the class of subjects mentioned in this clause 16.

Is it, then, within the class of subjects described in clause 13, "Property and Civil Rights in the Province?" It is difficult to conceive of any legislation having a general effect that would not limit or affect in some way an individual's dominion over his property or over his actions; and if we are to hold that all legislation having this effect deals with property and civil rights in the province, within the meaning of clause 13, then that clause is all-embracing; and notwithstanding the general jurisdiction given to the Dominion Parliament in express terms by s. 91, the practical result would be that, by virtue of this clause 13 of s. 92, the province has general jurisdiction, limited only by the jurisdiction given to the Dominion in reference to the particular classes of subjects enumerated in s. 91.

Counsel for the provinces disclaimed any intention of arguing for any such extended interpretation of clause 13, and conceded that legislation merely affecting property and civil rights in the province would not necessarily be legislation in connection with that class of subjects. The argument is that a transmitting set and a receiving set are both pieces of property, and that the resident of a province has a right to use such property within the province, and that any legislation by the Dominion that presumes to control or limit his right to such user is legislation in respect of property and civil rights in the province. We are not, however, here dealing with a transmitter or a receiver simply as pieces of property, but are dealing with radio communication by means of these instruments; and it is shewn that the effects of that means of communication cannot be confined within the limits of the province.

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It is clear that the provinces cannot, by legislation under clause 13, 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. No one province can prevent the entrance of these electro-magnetic waves from another province, or in any way eliminate the interference coming from outside the province. The subject can only be dealt with effectively by the Dominion Parliament. The various International conferences and treaties that have been entered into, to which Great Britain and Canada are parties, for the regulation and control of radio communication, in order to make it available and useful to people of all these countries, and the negotiations on the subject still in progress, shew that even the Parliament of Canada is unable of itself to exercise the control and regulation necessary to secure to the Canadian people the full benefits of this recently discovered and marvellous means of communication.

A good deal has been said as to the importance, to provincial governments, of radio communication for maintaining easy connection with the large areas within their bounds, sparsely inhabited or uninhabited, but containing natural resources of great value, such as timber, requiring supervision, that is greatly facilitated by radio service. This, however, contributes little to the argument, because the object and effect of Dominion legislation on the subject is not to deprive provincial governments and residents of the provinces of radio service, but to secure it to them in a degree of efficiency otherwise unobtainable, by preventing disturbance from bringing about a condition of chaos that the provincial legislatures themselves have not jurisdiction to prevent.

Legislation by the Dominion Parliament on the subject no doubt affects the use that the resident of a province may make of a piece of property that he owns, namely, a transmitter or a receiver, and may affect what is claimed to be a civil right to use such property within the province, but it is not legislation directly dealing with property and civil rights in the province. It is legislation, in my opinion, dealing with a subject not included in the classes of subjects expressly mentioned in s. 91 or s. 92, which

therefore falls within the general jurisdiction assigned to the Dominion Parliament by s. 91.

In view of what has just been stated, it becomes unnecessary to discuss the jurisdiction that may be conferred on the Dominion Parliament in reference to radio communication by s. 92-10 (*a*). It has been held that the word " Telegraphs " in that subsection includes telephones, though telephones were not invented until several years after the passage of the *British North America Act*. *Attorney-General* v. *Edison Telephone Company* (1). If this case is authority for holding that radio communications are telegrams, then the jurisdiction over that subject vested in the Dominion Parliament by virtue of this clause (*a*) may amount, practically, to general, or almost general, jurisdiction, because radio communication connecting a province with any other or others of the provinces, or extending beyond the limits of the province, could not be carried on with any degree of efficiency without controlling the disturbance that would otherwise arise from radio communication within the various provinces.

I am of opinion that question no. 1 should be answered in the affirmative.

It therefore becomes unnecessary to answer question no. 2.

The official judgment of the court is as follows:

ANGLIN C.J.C.—Q. 1. In view of the present state of radio science as submitted, Yes.

Q. 2. No answer.

NEWCOMBE J.—Q. 1 should be answered in the affirmative.

Q. 2. No answer.

RINFRET J.—Q. 1. Construing it as meaning jurisdiction in every respect, the answer is in the negative.

Q. 2. The answer should be ascertained from the reasons certified by the learned judge.

LAMONT J.—Q. 1. Not exclusive jurisdiction.

Q. 2. The jurisdiction of Parliament is limited, as set out in the learned judge's reasons.

(1) (1880) L.R. 6 Q.B.D. 244.

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SMITH J.—Q. 1. Should be answered in the affirmative. Q. 2. No answer.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *E. Bayly.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctôt.*

Solicitor for the Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of New Brunswick: *John B. M. Baxter.*

Solicitor for the Attorney-General of Saskatchewan: *M. A. MacPherson.*

Solicitor for the Canadian Radio League: *Brooke Claxton.*