1928
*Oct. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15.
1929
*Feb. 5.

IN THE MATTER OF A REFERENCE AS TO THE RELATIVE RIGHTS OF THE DOMINION AND PROVINCES IN RELATION TO THE PROPRIETARY INTEREST IN AND LEGISLATIVE CONTROL OVER WATERS WITH RESPECT TO NAVIGATION AND WATER-POWERS CREATED OR MADE AVAILABLE BY OR IN CONNECTION WITH WORKS FOR THE IMPROVEMENT OF NAVIGATION.

Constitutional law—Water-powers—Navigable river—Public right of navigation—Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property—Relative rights of the Dominion and provinces over water-power created by works done by the Dominion—Boundary waters—Interprovincial and provincial rivers—B.N.A. Act, ss. 91, 92, 102 to 126.

The questions referred to this court by the Governor General in Council were answered as follows: (1)

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

(1) *Reporter's Note.*—In view of the difficulties which the court found in dealing with the questions before it and of the impossibility of giving precise and categorical answers, it was thought best in order to avoid misleading as to what was decided, to put as a head-note the text of the formal judgment.

Question 1 (*a*). Where the bed of a navigable river is vested in the Crown in the right of the province, is the title subordinate to the public right of navigation?

Question 1 (*b*). If not, has the Dominion the legislative power to declare that such title is subordinate to such right?

Answer: The questions as framed postulate the existence of a public right of navigation in the rivers to which they refer, as well as their navigability.

The title to the bed of the river is subject to that public right, except in so far as, at the date of the Union, the Crown possessed by law or has since acquired, under Dominion legislation, a superior right to use or to grant the use of the waters of the river for other purposes, such for example, as mining, irrigation or industry.

Question 2. Where the bed of a navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, or change the flow over such bed (*a*) without the consent of the province; (*b*) without compensation?

Question 3. Has the Parliament of Canada the power, by appropriate legislative enactment, to authorize the Dominion Government to expropriate the lands of the Crown in the right of the province for the purposes of navigation with provision or without provision for compensation?

Answer: These questions cannot be answered categorically either in the affirmative or in the negative.

The conditions controlling the exercise of Dominion legislative powers for purposes embraced within the comprehensive phrase, "navigation purposes," depend in part upon the nature of the "purpose," in part upon the nature of the means proposed for accomplishing it, and in part upon the character of the particular power called into play. Reference is respectfully made to the observations in the accompanying reasons, as indicating the governing principles with as much definiteness as is safe or practicable.

Question 4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely "Canals with lands and water-power connected therewith."

Has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purpose of navigation?

Question 5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation?

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Answer: Whatever subjects are comprehended under the phrase "Water-Power" in the 1st item of the third schedule, by section 106 passed to the Dominion, there was left to the provinces neither proprietary interest in, nor beneficial ownership of such subjects; and under section 91 (1) legislative control over them is exclusively committed to the Dominion.

As to water-powers (and these of course, are not comprised within that item) "created or made available by reason of extensions, enlargements or replacements made by the Dominion since Confederation" or "by works for the improvement of navigation constructed * * * in whole or in part since Confederation," it is impossible to ascertain the respective powers or rights of the Dominion and the provinces in relation thereto, in the absence of a more precise statement as to the character of the works, as to the legislative authority under which the works were executed, and as to the circumstances pertinent to the question whether or not the conditions of such authority were duly observed.

Question 6 (*a*). Has the Dominion exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (1) the improvement of navigation in such waters, or (2) for the development of power, or (3) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

Question 6 (*b*). If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

Answer: The nature and extent of the respective powers, rights and interests of the Dominion and the provinces in, and in respect of such water-powers, would depend upon a variety of facts, including, *inter alia*, the terms of the Treaty, and the respective rights of the Dominion and the provinces in, and in relation to, the waters affected. In the absence of information as to such facts, it is impracticable to give an intelligible answer to the questions propounded.

Question 7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in inter-provincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

Answer: As to both "provincial rivers" and "interprovincial rivers," Parliament has jurisdiction in respect of such works, if they fall within the ambit of sec. 92 (10*a*). With reference to the expropriation of provincial

Crown lands "for the purposes of such works," the answer to the question would, to some extent, depend upon the particular purpose for which such lands were required. In answering this question, sec. 92 (10*c*) is not taken into account. Reference is respectfully made to what has been said upon that subject in the accompanying reasons.

Question 8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

Question 9. Has a province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

Answer: These two questions mutually overlap, and it is convenient to deal with them together. If there is no valid conflicting legislation by the Dominion under an overriding power—the power for example bestowed upon the Dominion by sec. 92 (10*a*)—the several provinces have the rights which are the subject of interrogatory number 9.

As to the first branch of the eighth question. The authority of the provinces to "control, regulate and use" such waters, in the circumstances mentioned, is subject to the condition that, in the exercise thereof, the provinces do not interfere in matters the control of which is reserved exclusively for the Dominion, and that all valid enactments of the Dominion, in relation to the navigation works, or in relation to navigable waters, be duly observed.

This condition is not necessarily identical with the condition expressed in the question by the words "so long as such control, regulation and use does not interfere with navigation." The question therefore, in the form in which it is put, cannot be answered in the affirmative; and, as the exercise of legislative jurisdiction, in the comprehensive terms of the question, might encroach upon the exclusive jurisdiction of the Dominion, the proper answer seems to be in the negative.

As to the second branch, considering the variety of meanings which might attach to the phrase "jointly control, regulate and use," no precise or useful answer is possible.

The answers to these questions, conformably to the views adverted to above, also proceed upon the assumption that the questions have no reference to any jurisdiction which might be acquired by the procedure laid down in sec. 92 (10c).

Question 10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the provinces in relation to such water-powers?

Answer: In view of what has already been stated in response to the 4th, 5th and 6th interrogatories, no answer to this question is called for.

1929

REFERENCE re WATERS AND WATER-POWERS.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act*, of certain questions for hearing and consideration as to the relative rights of the Dominion and Provinces in relation to the proprietary interest in and legislative control over waters with respect to navigation and water-powers created or made available by or in connection with works for the improvement of navigation.

The first Order in Council providing for the reference, dated 14th April, 1928 (P.C. 592), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 13th April, 1928, from the Minister of Justice, submitting that at the conference of representatives of the Dominion and Provincial Governments held at Ottawa in the month of November, 1927, the Premiers of certain of the Provinces questioned the right of the Dominion to water-powers created or made available by the erection of Dominion works for the improvement of navigation and asserted a right on the part of the Provinces to such water-powers within the limits of the Province.

"The Minister observes that in the discussion which followed with regard to this claim and also with regard to the whole question of the division of legislative control over and proprietary interest in water-powers it was found impossible to reach any general agreement as between the Dominion and the Provinces, and in the result a request was made by the Premiers of Ontario and Quebec that the Dominion undertake to submit a case to the Supreme Court of Canada for hearing and consideration.

"In pursuance of this request, Your Excellency was pleased, by Order in Council of the 18th January, 1928, (P.C. 115), passed on the recommendation of the Minister of Justice, to refer certain questions to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act.

"The Minister states that the statistics show that the inland water-borne commerce of the Dominion has attained to great dimensions and with the growth and settlement of the country will involve large future expenditures

for improvements of the extensive waterways comprising the inland navigation of the Dominion.

"The Minister submits that owing to the great importance of the questions in controversy, it was considered advisable to consult with representatives of the Provinces with respect to the questions to be submitted, and such conference having been held it was deemed advisable to revise the said questions and to submit additional questions, viz., Nos. 8 and 9 hereinafter set out, at the request of representatives of the Province of Ontario.

"The Minister accordingly recommends that Order in Council of the 18th January, 1928 (P.C. 115) be rescinded, and that, pursuant to the powers in that behalf conferred by section 60 of the Supreme Court Act, Your Excellency may be pleased to refer to the Supreme Court of Canada for hearing and consideration the following questions:—

1. (*a*) Where the bed of a navigable river is vested in the Crown in the right of the Province, is the title subordinate to the public right of navigation?
   (*b*) If not, has the Dominion the legislative power to declare that such title is subordinate to such right?
2. Where the bed of a navigable river is vested in the Crown in the right of the Province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, change the flow over such bed (*a*) without the consent of the Province; (*b*) without compensation?
3. Has the Parliament of Canada the power, by appropriate legislative enactment to authorize the Dominion Government to expropriate the lands of the Crown in the right of the Province for the purposes of navigation with provision or without provision for compensation?
4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely, "Canals with lands and water-power conected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over

1929

REFERENCE *re* WATERS AND WATER-POWERS.

the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest or ownership or control?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works of the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest, ownership or control?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

(*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

(*c*) If neither the Dominion nor the Province has the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-

powers, what are their respective rights and interests in relation to such water-powers?

7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in interprovincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

9. Has a Province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

"The Committee concur in the foregoing and advise that Your Excellency may be pleased to refer the said questions to the Supreme Court of Canada for hearing and consideration, accordingly."

A second Order in Council, rearranging questions, dated 31st May, 1928 (P.C. 921), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 29th May, 1928, from the Minister of Justice, stating that by Order in Council dated 14th April, 1928 (P.C. 592), certain questions touching the rights of the Dominion and the Provinces, respectively, in relation to the proprietary interest in, and legislative control over, waters with respect to navigation and water-powers created or

1929

REFERENCE re WATERS AND WATER-POWERS.

made available by or in connection with works for the improvement of navigation, were referred to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act;

"The Minister observes that the said Court have suggested to counsel for the Attorney-General of Canada that it would be more convenient in considering and answering the questions if the concluding sentence of questions Nos. 4 and 5 and paragraph (*c*) of question No. 6 were transposed from their present position and consolidated in a new question, to be added as question No. 10.

"The Committee, on the recommendation of the Minister of Justice, advise that the questions set forth in Order in Council of the 14th April, 1928 (P.C. 592), be rearranged in accordance with the suggestion of the Supreme Court of Canada, and that the said questions, so rearranged, be as follows:—

1. (No change.)

2. (No change.)

3. (No change.)

4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province amongst others, shall be the property of Canada, namely, "Canals with lands and water-power connected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since

Confederation which is not required from time to time for the purposes of navigation?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

6. (*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

7. (No change.)

8. (No change.)

9. (No change.)

10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the Provinces in relation to such water-powers?

Pursuant to an order of the Court, notification of the hearing of the reference was sent to the Attorneys General of all the provinces and was published in the *Canada Gazette*. The Attorneys General of the Provinces of

1929

REFERENCE re WATERS AND WATER-POWERS.

Ontario, Quebec, British Columbia, Manitoba and Saskatchewan were represented by counsel at the hearing.

N. W. Rowell K.C., C. Laurendeau K.C., H. J. Symington K.C., C. P. Plaxton K.C., and *V. C. Macdonald* for the Attorney General of Canada.

W. N. Tilley K.C., S. Johnston, K.C., and *C. F. H. Carson* for the province of Ontario.

E. Lafleur K.C., C. Lanctot K.C., and *A. Geoffrion K.C.* for the province of Quebec.

E. B. Ryckman K.C., I. F. Strachan and *J. E. Lane* for the province of British Columbia.

F. H. Chrysler K.C. for the province of Manitoba.

H. Fisher K.C. for the province of Saskatchewan.

The judgment of the Court (1) was delivered by

DUFF J.—Certain interrogatories have been referred to us by the Governor General in Council concerning chiefly the distribution of public assets and legislative powers under the B.N.A. Act. They particularly relate to the scope of the legislative authority of the Dominion under certain of the enumerated heads of section 91, considered in connection with the authority of the provincial legislatures under section 92, and under the group of sections beginning with section 102 and ending with section 126, dealing with assets, revenue and sources of revenue. By the last mentioned group of sections, the assets, duties and revenues, including the sources of revenue over which the legislatures of the confederated provinces possessed the power of appropriation at the date of the Union, were distributed, and assigned in part to the control of the Dominion Parliament, and in part to that of the provincial legislatures. *Attorney-General of Ontario* v. Mercer (2). The sources of revenue assigned to the provinces as well as the revenues derived from them, and the revenues raised under the special powers conferred by the Act, were to remain vested in the Crown, as the Sovereign Head of the several provinces, but were to be "subject to the administration and control" of the

(1) *Reporter's Note.*—Mr. Justice Smith, while concurring with Duff J., wrote a separate judgment.

(2) (1883) 8 App. Cas. 767, at pp. 774 to 779.

legislatures of those provinces. *St. Catherines Milling and Lumber Company* v. *The Queen* (1), and *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (2). By the same series of sections, provision was made for the assumption by Canada of the burden of the public debts of the several provinces, within limits designated by the Act for each province, and for the payment, by the Dominion, according to a prescribed scale, of an annual grant to each of the provinces; which grants were to be " in full settlement of all future demands on Canada." By section 91, the Dominion was given power to raise money, by any mode or system of taxation, and by section 92, each of the provinces was given the power to raise a revenue for provincial purposes by direct taxation, and by means of licenses.

It has never been suggested that either the Dominion alone or a province alone is entitled to alter the terms of this arrangement for the distribution of assets, liabilities and sources of revenue.

In the *Ontario Mining Co.* v. *Seybold* (3), the Judicial Committee of the Privy Council had to consider whether the Dominion Parliament, without the concurrence of Ontario, in the exercise of its legislative authority over Indians and lands reserved for Indians, could, after the surrender of the Indian title by the North West Anglo Treaty of 31st October, 1873, for the purposes of an Indian reserve, for which provision was made by that treaty, set out and appropriate portions of the land surrendered as reserves for the use of the Indians. Their Lordships negatived any such power in express terms (page 82), and held that such an appropriation could only be effected by the joint action of the two governments; a conclusion in which the Dominion and Ontario had, by legislative agreement, already concurred. Their Lordships declared (page 79) that the right of disposing of Crown lands

> can only be exercised by the Crown under the advise of the Ministers of the Dominion or the province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

(1) (1888) 14 App. Cas. 46, at p. 57.
(2) [1892] A.C. 437, at pp. 443, 444.
(3) [1903] A.C. 73.

1929

REFERENCE re WATERS AND WATER-POWERS.

Duff J.

This decision of 1902 proceeded upon the principle of earlier judgments delivered in 1898, in the first *Fisheries* case, *Atty. Gen. for Canada* v. *Atty. Gen. for Ontario* (1), and in the *St. Catherine Milling and Lumber Company's* case (2) already mentioned, which was decided in 1888. In the first *Fisheries case* (1), their Lordships had to pass upon the validity of an enactment of the Parliament of Canada (R.S.C., c. 95, s. 4) empowering the Governor in Council to grant fishery leases. Their Lordships decided that "in so far as" it empowered

> the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it.

The legislative authority in respect to "Fisheries," conferred upon the Dominion Parliament by section 91, does not, it was held, involve the power to deal with the property of a province as if the administration of that property had been entrusted by the B.N.A. Act, to the control of the Dominion Parliament; for, as Lord Herschell, who delivered the judgment of the Board, said, such a ruling would enable the Dominion to

> transfer to itself property which had by the B.N.A. Act been left to the provinces and not vested in it. (p. 713).

The effect of the decisions seems to be, that neither the Dominion nor a province can take possession of a source of revenue which has been assigned to the other, and as a source of revenue, appropriate it to itself, nor, as owner, transfer it to another.

This, of course, is not to say that the Dominion in exercising its legislative authority under section 91, may not legislate in such a way as to affect the proprietary rights of a province. It is plain that in consequence of legislation on the subject, for example, of Fisheries, the provinces may be very greatly restricted in the exercise of their proprietary rights; but so long as the Dominion legislation truly concerns the subject of "Fisheries," as that subject is envisaged by section 91, such legislation has the force of law, however harmful, or even foolish, it may appear to be. Within the limits of the subject matters assigned to it, the authority of the Dominion is supreme, and no court of justice has jurisdiction to take cognizance of any complaint that such authority has been abused.

(1) [1898] A.C. 700. (2) 14 App. Cas. 46.

The extent to which the provincial legislatures may be restricted in, or excluded from, the control of provincial property by the enactment of Dominion laws operative under section 91 cannot be defined in the abstract. That depends primarily upon the character of the particular authority which the Dominion is exercising. On the present Reference, the discussion has been largely concerned with the legislative authority of the Dominion Parliament in relation to the permanent occupation of Provincial Crown lands, and the permanent diversion and alteration of the flow of rivers and streams in derogation of the rights of a province, as proprietor of the beds of such rivers and streams, for purposes which have been compendiously styled, in the interrogatories, "navigation purposes."

Before proceeding to a consideration of some of the points debated, it is necessary to notice the distinction, now well settled, between those matters, which, according to the true construction of the words designating the subject or subjects falling under a "specially enumerated" head of s. 91, are strictly and necessarily within the limits of those subjects, so that legislation in relation to such matters, by a province, is in no circumstances competent; and other matters, which, though not necessarily or strictly falling within such subjects, may be dealt with by Dominion legislation under some power arising by implication, because such implied power is requisite to enable the Dominion fully to perform the legislative functions devolving upon it in relation to the designated subject or subjects. With regard to such last mentioned matters, provincial legislation, dealing with them in their provincial aspects, may be competent and operative, until superseded or overborne by some valid enactment passed by the Dominion, having relation to their Dominion aspects.

There is one subject in relation to which it has been expressly held that the exclusive authority of the Dominion, within the strict limits traced by the language of s. 91 involves the power to legislate for the taking and using of provincial Crown lands for the purposes for which the authority was bestowed. In legislating for railways extending beyond provincial limits, it has been held, that it is of the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course, without

1929

REFERENCE re WATERS AND WATER-POWERS.

Duff J.

regard to the ownership of the lands through which it may pass (*Attorney General for Quebec* v. *Nipissing Central Ry. Co.* (1)) "railway legislation, strictly so called" (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, *inter alia* (*Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2)), regulations for the construction, the repair and the alteration of the railway and for its management. In the circumstances of this country, a provincial right of interdiction upon the occupation of provincial Crown property lying upon the route of the railway is incompatible with either a plenary or an exclusive Dominion authority over the construction or working of such railways; and this would have been even more strikingly evident, in 1867. On the other hand, the authority granted by section 91, head 4, "Indians and lands reserved for Indians," while it enables the Dominion to legislate fully and exclusively, upon matters falling strictly within the subject "Indians," including, *inter alia,* the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown land for the purposes of an Indian reserve, without the consent of the province, (*Seybold's* case (3)).

So also under head 12 of section 91, which invests the Dominion with jurisdiction to make laws in relation to all matters pertaining to the subjects, "Seacoast and Inland Fisheries," it has been decided that the Dominion has no right to authorize, for the purposes of fishing in waters where there is a public right of fishing, the affixing of fishing apparatus to the *solum,* where that is the property of a province. The exclusive power to license such use of the *solum* is, according to this decision, committed to the province. *Atty. Gen. for Quebec* v. *Atty. Gen. of Canada* (4).

Again, there is judicial sanction for the view that the authority given to the Dominion under s. 91 (10), "Navigation and shipping," does not, in its essence, include the power to authorize the permanent occupation of provin-

(1) [1926] A.C. 715.
(2) [1899] A.C. 367, at p. 372.
(3) [1903] A.C. 73.
(4) [1921] 1 A.C. 401, at pp. 428, 431, 432.

cial lands for harbour works, or to vest the bed of a river belonging to a province in a Board of Harbour Commissioners for harbour purposes; that such a power, if it exists, is in the nature of an ancillary power, and can only be exercised upon the condition of paying compensation to the province. *City of Montreal* v. *Harbour Commissioners of Montreal* (1); *Reference re s. 189, Railway Act* (2); *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3).

Counsel for the Dominion claim, under section 91, a much more sweeping jurisdiction. Legislative authority, under the enumerated heads of that section, being plenary, carries with it, it is argued, in virtue of that authority, the widest discretion touching the means to be employed for the advancement of any legislative scheme or purpose within the purview of any such enumerated head. To the extent to which it is considered advisable to do so, in order to proceed effectually in pursuit of its objects, Parliament, it is said, is clothed with the power to legislate, for affecting such proprietary rights, and indeed, where it is conceived to be necessary, for the transfer of such rights to the Dominion, or to others. In support of this view, the initial words of section 91 are invoked.

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 subjects next hereinafter enumerated.

From these words, coupled with the concluding paragraph of s. 91, the deduction is drawn that in construing and giving effect to the language of section 91, defining the powers of Parliament, you may disregard the provisions of the Act, already discussed, by which certain assets and sources of revenue are exclusively vested in the control of the provincial legislatures; in the sense that you may treat the rights of the provinces under those sections as upon the same plane as the proprietary rights of private individuals.

It was argued that, to deny to the Dominion Parliament an unrestricted discretion in disposing of provincial property for purposes within the enumerated heads of s. 91 is equivalent to denying the plenary character of the Do-

(1) [1926] A.C. 299, at pp. 312, 313.

(2) [1926] S.C.R. 163, at pp. 175, 176.

(3) [1926] A.C. 715.

1929

REFERENCE re WATERS AND WATER-POWERS.

Duff J.

minion legislative authority; that the provincial contention in the opposite sense has no other basis than the possibility that legislative powers of the Dominion, as interpreted by the Dominion, in argument, might be abused to the injury of the provinces; a consideration inadmissible in a court of law.

There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole. It was recognized at an early stage in the judicial elucidation of the Act that any other principle of construction might have the effect of frustrating the intention of its authors who

> could not have intended that the powers assigned exclusively to the provincial legislatures should be absorbed in those given to the Dominion Parliament.

The Citizens Ins. Co. of Canada v. *Parsons* (1); *Great West Saddlery Co.* v. *The King* (2); *Atty. Gen. for Ontario* v. *Reciprocal Insurers* (3). The argument presented on behalf of the Dominion hardly does justice to this principle. The authority of the Dominion Parliament in relation to railways under section 92-10 (*a*) is a plenary authority, which *prima facie* would enable the Dominion to legislate fully in respect of such enterprises as the Intercolonial Railway, and the railway stipulated for in the Terms of Union with British Columbia. But it could hardly be argued, as the Dominion contention, carried to its logical conclusion, seemed to suggest, that the arrangement embodied in the B.N.A. Act as to the Intercolonial Railway, might, as to date of completion, for example, be amended at will by the Dominion in exercise of its authority to legislate in respect of interprovincial railways. Similar observations might be made with regard to the terms of Union with Prince Edward Island, dealing with steamboat services. Then there are the provisions in sections 102-126 and the corresponding stipulations contained in the Terms of Union with British Columbia and with Prince Edward Island, touching the apportionment of the burden of the debts of the provinces.

(1) (1881) 7 App. Cas. 96, at p. 108.
(2) [1921] 2 A.C. 91, at pp. 100, 101.
(3) [1924] A.C. 328, at pp. 340, 341.

The Dominion has, under section 91 (1), complete authority to legislate on the subject of the public debt, but it could hardly be contended that this authority would enable the Dominion to legislate in such a manner as to prejudice its obligations so constituted.

Then it seems proper to call attention to s. 91 (3) of the Act, and to contrast the unrestricted language of that head with section 125.

It is perhaps not superfluous to observe that the provisions of the Order in Council, setting forth the terms of the agreement, in pursuance of which British Columbia entered the Union, in so far as they concern the subjects of revenue and assets, were treated by the Judicial Committee of the Privy Council in the *Precious Metals* case, *The Atty. Gen. of British Columbia* v. *The Atty. Gen. of Canada* (1), as constituting a modification of the provisions of the principal statute, in sections 102-126, dealing with the same subjects, and as having, in virtue of s. 146 of the B.N.A. Act, precisely the same force as those provisions.

The view cannot be accepted that, by the enactments of s. 91, the Dominion, in execution of its legislative powers under that section, is empowered to rewrite the terms of the agreements under which British Columbia and Prince Edward Island entered the Union; and that being so, it cannot be maintained that it is competent to the Dominion in exercise of such powers to legislate in disregard of the provisions of sections 102-126.

In considering the effect of the phrase "notwithstanding anything in this Act" one must not overlook the fact that it is only the "exclusive authority" of the Dominion under the enumerated heads of s. 91 which is accorded the primacy intended to be declared by those words. In themselves they have not the effect of giving pre-eminence to the incidental or ancillary power; which are not strictly exclusive. As already observed, in recent pronouncements touching the appropriation of Provincial Crown property in professed exercise of such powers, support is given to the view that, if such appropriation be permissible in exercise of them, then the payment of compensation may be a condition of that exercise; and there appears to be, it may be added, no decision, and, except in the observations in the

(1) (1888) 14 App. Cas. 295.

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Duff J.

judgments referred to, no dictum, giving any support to the view that in virtue of an ancillary or incidental power the Dominion Parliament is entitled to authorize the permanent occupation of Provincial Crown property.

The task of reconciling the various sections of the Act is one of great difficulty. You must give full effect to the exclusive powers of the Dominion under section 91; yet in ascertaining the scope of those powers you must have regard to the other provisions of the Act. The character of the exclusive power may be such, on the true construction of section 91, as to involve the right to take, or to give to others, possession of Provincial Crown property, for the purpose of executing the power. The decisions already cited seem to show that such a conclusion must be founded on solid, not to say demonstrative, considerations; but, where the right is unmistakably involved in the authority given, then, of course, to that right effect must be given. But although the Dominion may, by legislation enacted in exercise of its exclusive powers relating to railways and canals, authorize the construction through the property of a province of a railway or canal, to which its jurisdiction extends, this does not involve the right to appropriate the whole beneficial interest of the site of the work (including the minerals, for example), for the purpose of making it available as an asset or source of revenue for the benefit of the Dominion or of the Dominion's grantees, where that site is vested in His Majesty and is, by the B.N.A. Act, subject to the administration and control of the Provincial legislature.

Apart from the fact that such legislation would not be legislation exclusively competent to the Dominion, it would transcend the ambit of Dominion authority touching railways or canals, which was not intended to enable the Dominion to take possession of sources of revenue assigned to the provinces, and by assuming the administration of them, to appropriate to itself a field of jurisdiction belonging exclusively to the provinces. Similar considerations apply to the exploitation and disposition of water-powers appropriated by the Dominion in exercise of its legislative authority in relation to canals. Assuming such an appropriation by the Dominion to be competent without payment of compensation, the Dominion could not constitutionally assume the administration or control of water-powers so acquired for purposes not connected with the canal.

We must, as best we can, reconcile the control by the provinces of their own assets as assets, with the exercise by the Dominion of its exclusive powers for the purposes which those powers were intended to subserve. This can only be accomplished by recognizing that the proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91. On the other hand, in giving effect to the provisions of the British North America Act, we must rigorously adhere to the radical distinction between these two classes of enactment: legislation in execution of the Dominion's legislative powers under section 91, which may, in greater or less degree, according to the circumstances and the nature of the power, affect the proprietary rights of the provinces, and even exclude them from any effective control of their property; and, in contradistinction, legislation conceived with the purpose of intervening in the control and disposition of provincial assets, in a manner, which, under the enactments of that Act touching the distribution of assets, revenues and liabilities, is exclusively competent to the provinces.

Before proceeding to an examination of the interrogatories submitted, a few words of comment are required upon a point of more or less general application.

During the argument there was much discussion touching the effect of s. 92 (10c). In the construction and application of that enactment, questions must emerge of far-reaching significance and importance. But such questions do not appear to be presented by the interrogatories before us. True, it cannot admit of much doubt that, as regards many of the kinds of works within the scope of them, the Dominion might acquire legislative jurisdiction by following the procedure prescribed by s. 92 (10c); but the interrogatories, which are expressed in general terms, are naturally read as concerning a jurisdiction given directly by the *British North America Act* itself, rather than mediately through the instrumentality of declarations by the Parliament of Canada under s. 92 (10c). Questions 2 and 3 illustrate this. At bar, the discussion of this sub-head 92 (10c) was chiefly directed to an investigation of its bearing upon the answer to interrogatory no. 7. But it does

1929

REFERENCE re WATERS AND WATER-POWERS.

Duff J.

not appear that this interrogatory ought to be read as requiring an opinion upon the points discussed.

The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction—exclusive jurisdiction—in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

Had the intention been to address to us interrogatories touching the conditions under which this abnormal responsibility may devolve upon Parliament, it seems probable that such intention would have been explicitly manifested.

The language of the 7th interrogatory does not suggest an intention to elicit a response concerning a hypothetical jurisdiction, which may never come into existence; but rather concerning the extent and conditions of an existing jurisdiction, arising directly and immediately from the enactments of the Act itself.

The 2nd and 3rd questions are broadly expressed. "Navigation purposes" is a sweeping phrase. It has been employed to denote not only regulation and control of ships and shipping, but the control of navigable waters in the interests of shipping, including the improvement of navigability, the execution of works for facilitating navigation, the provision of such aids to navigation as beacons, buoys, and lighthouses; the establishment of harbours and harbour works, such as those considered in the *Montreal Harbour* case (1), which included an embankment and railway on

(1) [1926] A.C. 299.

the shore of the harbour, quays, a dry-dock, and a ship-repairing plant. And it was argued on behalf of the Dominion that "navigation and shipping" within the intendment of s. 91 (10), would embrace all such matters as those just mentioned, as well as the construction, maintenance and operation of canals and incidental works, and generally all matters relating to transport by water.

It is, at least, doubtful whether the exclusive jurisdiction contemplated by item 10, s. 91, extends to many of the matters, which are above indicated as falling within the scope of the phrase "navigation purposes," when that phrase is given an interpretation so wide as that which counsel for the Dominion ascribe to it. By the 9th head of the same section, exclusive jurisdiction is entrusted to the Dominion in respect of matters falling within the subjects described by the words "beacons, buoys and lighthouses," and, under no. 13 in respect of matters included within the subject "Ferries" between a province and other countries or between two provinces. Exclusive jurisdiction with regard to canals, and to other works of like character, extending beyond the limits of a province, is confided to the Dominion under s. 92 (10a); and by sub-heads (*a*) and (*b*) of s. 92 (10) the subjects of that exclusive jurisdiction comprise all matters falling within the descriptions "Lines of steam or other ships connecting the province with any other or others of the provinces," and "Lines of steamships between the province and any British or foreign country." Further, there is much to be said for the view that, subject to the power bestowed upon the Dominion by sub-head (*c*) of s. 92 (10) exclusive authority is committed to the provinces with respect to canals and other similar works (which, according to the contention of the Dominion, would fall within the tenor of the phrase "navigation purposes"), when such works are wholly situated within a province. It is not necessary to decide the point, but it is, at all events, quite open to argument that sub-heads (*a*) and (*b*) are intended to define exceptions to the principal clause of head 10, s. 92; and that, consequently, "works and undertakings," under the principal clause, include works and undertakings of the nature of those specified in these sub-heads so long as they are wholly within the boundaries of a province.

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Duff J.

If the subjects included under head 10, s. 91, embrace those falling within head 13, as well as "beacons, buoys, lighthouses" designated in head 9, and "works and undertakings" connected with "navigation and shipping" and within the field of sub-heads (*a*) and (*b*) of s. 92 (10), then, to borrow the phrase used by Lord Haldane speaking for the Privy Council in *John Deere Plow Co.* v. *Wharton* (1), the enactment in no. 13 and the designation of "beacons, buoys, lighthouses" in item 9 and of the subjects, as well, connected with navigation and shipping in sub-heads (*a*) and (*b*) of s. 92 (10) are nugatory; on the other hand, if the principle be applied which has controlled the operation of the second head of s. 91 "Regulation of Trade and Commerce" (*Toronto Electric Commissioners* v. *Snider* (2)), and of head 13 of s. 92, "Property and Civil Rights," as respects matters connected with the subject (head 11), "Incorporations and Companies" (*John Deere Plow Co.* v. *Wharton* (3)), then the matters explicitly dealt with in heads 9 and 13 of s. 91 and 10a and 10b of s. 92, which ordinarily might be embraced within the general language of no. 10 of s. 91, must be treated as outside the scope of that head.

Nevertheless, it has been said that the language of ss. 91 and 92

> and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this Board after the Australian Commonwealth Act in a recent case *Attorney General for Commonwealth* v. *Colonial Refining Co.* (4), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty as to general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms over-lapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out an interpretation of these provisions to practice and to judicial decision. *John Deere Plow Co.* v. *Wharton* (5).

It is notorious that for many years, probably ever since the formation of the Union, the Dominion Parliament and

(1) [1915] A.C. 3 30, at p. 339, 340.
(2) [1925] A.C. 396.
(3) [1915] A.C. 330.
(4) [1914] A.C. 254.
(5) [1915] A.C. 330, at p. 338.

Government have assumed, and acted on the assumption, that the authority derived from head no. 10 of s. 91 was sufficient to enable Parliament to legislate, in respect of most, if not all, the classes of matters it is now contended fall within the scope of the phrase "navigation purposes"; and in support of that view it may be noticed that the majority of the members of this court took the view in *Booth* v. *Lowery* (1), that river improvements, consisting of storage dams and basins, intended to improve the navigability of the river Ottawa and one of its tributaries, were subject to the legislative control of the Dominion under that head. Further, as already observed, the recent pronouncements in the judgments in the Privy Council and this court in the three cases cited above, beginning with the *Montreal Harbour* case (2), give countenance to the view that the Dominion may have an implied authority incidental or ancillary to its exclusive authority under head 10 of s. 91, to legislate in respect of some of the purposes intended to be described as "navigation purposes" in these two questions; although the judgment in the *Montreal Harbour* case (2) seems to say that the exercise of this ancillary or incidental authority is, or may be, conditioned upon the payment of compensation.

The principle of the decision in *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3) would apply to the authority given by 92 (10a) in respect to canals extending beyond a province, which must, for reasons similar to those governing the scope of the authority given by the same sub-head in relation to railways, be held to include the power to determine the route of the canal and make effectual provision for the construction and operation of it on the route determined. Such powers are of the essence of the exclusive authority vested in the Dominion in relation to railways and canals. Obviously, therefore, the 2nd and 3rd questions cannot be answered in the negative. Answers in that sense might convey the impression that the authority of the Dominion, in relation to such a purpose as the construction of a canal, would not in any circumstances involve the power to make use of Provincial Crown property without the consent of the province.

(1) (1916) 54 Can. S.C.R. 421. (2) [1926] A.C. 299.
(3) [1926] A.C. 715.

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Duff J.

On the other hand, it is impossible to affirm, in respect of every "navigation purpose," within the purport of these questions that the authority in relation thereto, whether derived from s. 92 (10) and s. 91 (29) or from one of the other heads of s. 91—whether within the exclusive sphere of the Dominion Parliament, or only referable to its incidental or ancillary powers—invests the Dominion with the right to override by its legislation the proprietary rights of the provinces.

There is no general formula for deciding whether or not, in respect of any such given purpose, the nature of the Dominion authority imports the existence of such a right. That can only be determined after an examination of the nature of the purpose, the character of the power invoked and the character of the means proposed to be employed in order to effectuate the purpose.

The word "expropriate" in the 3rd question, moreover, would seem to include the act of transferring compulsorily to the Dominion itself, or to the others, the absolute beneficial title of the Crown to lands committed to the control of the provincial legislatures. As already explained, that is an authority which the Dominion did not expressly receive under any of the relevant clauses of s. 91.

Question 4. This interrogatory is also general in form. Moreover, the works, which are the subject of it, although indicated by a general phrase, are existing works. The facts affecting each of them are capable of ascertainment. These facts are not before us; yet a categorical answer to the question would involve an expression of opinion as to powers and rights of the provinces in respect of each of them. Such an opinion could, of course, only proceed upon some general legal rule necessarily governing every case to which the interrogatory, as framed, applies. We have nothing before us to show whether in any given case the water-power has been acquired through private treaty from a provincial government, or from a subject, or, if it has been appropriated without the consent of the owner, or under what authority the officials of the Dominion have acted or professed to act, whether, for example, the Dominion has legislated under the authority of s. 91 (10), or under the authority of s. 92 (10a) or, after the necessary declaration, under s. 92 (10c). Nor have we the facts necessary to enable us to judge whether any authority to

take the particular water-power in question did, in point of law, exist, in the circumstances in which it was taken; or, if so, whether the conditions of such authority were duly fulfilled.

Question 5. This, once more, is a general question embracing a group of concrete cases in respect of which the facts are capable of ascertainment. We have before us neither the relevant physical facts nor the character of the authority under which the construction of the particular works involved in the inquiry purported to proceed. For the reasons indicated in discussing the 4th question, it is not practicable to give a general answer to this question.

Question 6. Broadly speaking, the Dominion has under s. 132 full authority to legislate for the execution of obligations imposed upon Canada, or upon a province, in virtue of an Imperial Treaty. But the rights and jurisdiction of the Dominion and of a province, respectively, in relation to water-powers, created or made available by joint works, such as those referred to in this question, could only be determined after disclosure of the facts touching the terms of the Treaty, and the nature of the works, as well as the rights of the Dominion and of the province, in respect of the waters to be affected by the execution of the treaty.

For the reasons above stated, the assumption of jurisdiction under s. 92 (10c) is not discussed.

As to works constructed either in "provincial" or in "inter-provincial" rivers, the Dominion would appear to have jurisdiction respecting such works, if, within the meaning of s. 92 (10a) they extend beyond the boundaries of one of the provinces or connect two provinces. It does not seem practicable to lay down any general test for determining the application of s. 92 (10a), other than that furnished by the language of the enactment itself.

As to that branch of the interrogatory which relates to the taking of provincial lands and property for "the purpose of such works," works being described as "works wholly for power purposes," it does not seem possible to give any useful answer. "Acquisition by expropriation" points to the taking absolutely of the property "required." Reasons have been adduced suggesting that this is not permissible. And, moreover, it is not practicable, in the ab-

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Duff J.

sence of some more specific description of the nature of the purpose, to state whether, "for the purposes of such works," assuming the works themselves to be within the control of the Dominion, the proprietary rights of the province may be overborne or, if so, on what conditions, if any.

Question 8. The second branch of this question is too vaguely expressed to permit of any answer not equally vague and indefinite. As to the first branch, it seems unnecessary to say that a province would be exceeding its powers if it attempted to intervene in matters committed exclusively to Dominion control, by attempting, for example, to interfere with the structure or management of a work withdrawn entirely from provincial jurisdiction, such as a work authorized by the Dominion by legislation in execution of its powers under s. 92 (10a). A province is, moreover, bound, of course, in dealing with rivers in respect of which it has powers of control, to observe any regulation validly enacted by the Dominion in relation to navigation works or in exercise of its authority over navigable waters.

It would not be a sufficient recognition of the jurisdiction of the Dominion to affirm that, in the circumstances mentioned in the question, a province is entitled to regulate and control the waters of the river so long as navigation is not interfered with. The obligation of the province in such circumstances is much more definite and precise, as has just been stated. The exercise of jurisdiction by a province, in a manner permitted by the terms of the question, might constitute a substantial encroachment upon the exclusive authority of the Dominion.

As to question 9, it was not seriously disputed that, under the conditions mentioned, the provinces have the rights which are the subject of the question. This, of course, is on the assumption that there is no conflicting legislation by the Dominion under an over riding power, a power, for example, conferred by the combined operation of section 91 (29) and 92 (10a).

Sufficient has been said to call attention to the difficulty, indeed the impracticability, of giving precise and categorical answers to some of the questions submitted. As regards most of them, the limit of practicability seems to be reached,

when the principles to which reference must be made for the determination of particular cases have been indicated. The authority of the Governor in Council to submit these questions under the statute, and the validity of the statute itself are no longer open to question; and it is the duty of the judges of this court to endeavour, to the utmost of their powers, to return to His Excellency answers as precise and as useful as the questions admit of. Nevertheless the Privy Council has recognized, more than once, that, in the exercise of the statutory authority, interrogatories may through inadvertence be presented, to which it is not possible to give accurate or exhaustive answers, or indeed any answers which are not so encumbered by qualifications and reservations as to deprive them of all practical value. In *Attorney General for British Columbia* v. *Attorney General for Canada* (1), Lord Haldane said:

> under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question (*sic*) of future litigants be prejudiced by the court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.

Again in *John Deere Plow Co.* v. *Wharton* (2), Lord Haldane, speaking for the Judicial Committee used these words:

> The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.

And, in the same judgment, at pp. 341 and 342, speaking with reference to the answers given by the judges of this court to certain questions submitted by the Governor in Council:

> In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada.

(1) [1914] A.C. 153, at p. 162.

(2) [1915] A.C. 330, at pp. 338 and 339.

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Duff J.

Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various subheads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to.

In *Attorney General for Ontario* v. *Attorney General for Canada* (1), the Lord Chancellor, Lord Loreburn, pointed out that when such considerations as these come properly into operation, it is permissible for the judges of this court to make any necessary representations to the Governor in Council, by calling attention to them in their answers.

It is important, also, since the opinions evoked by such questions, " are of course," as Lord Loreburn states in the same passage, " only advisory, and will have no more effect than opinions of the law officers," to observe that, when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed.

SMITH J.—I concur with my brother Duff, but I think it may be of advantage to refer to certain circumstances which will indicate more precisely some of the difficulties that stand in the way of giving complete and definite answers to a number of the questions.

It is common knowledge that negotiations have been going on for some time between the Government of the Dominion and the Government of the United States in connection with a proposed scheme for improving navigation on the St. Lawrence river so as to provide passage for large vessels of 25 or 30 foot draft from the ocean to the head of the Great Lakes. A Joint International Commission of Canadian and United States engineers was formed

(1) [1912] A.C. 571, at p. 589.

to investigate and report on this project, and a report by this Commission has been made, setting out plans for such improvements. The Canadian members of the Commission were appointed by the Dominion Government, by Order in Council and the Board acted on instructions agreed to by the two governments by an exchange of notes. The part of international waters where large water powers would be involved in carrying out the scheme proposed is the St. Lawrence river where its centre line forms the boundary between the United States and the province of Ontario from the westerly boundary of the province of Quebec on the south shore, westerly some 48 miles to a point beyond the head of the Galop Rapids at Cardinal. In this part of the river there is a succession of rapids, namely, the Galop at Cardinal, the Rapide Plat at Morrisburg, a small rapid at Farran's Point, and finally, the Long Sault, which is much greater than any of the others, having a drop of about 42 feet. Along the Canadian shore at each of these rapids there is a canal owned by the Dominion Government.

Two alternative schemes for providing the deep waterway are set out in the report of the Commission. It is sufficient for my purpose to refer to one of these. It provides for a dam across the whole river, extending from the Cornwall Canal, on the Canadian main shore, to the head of Barnhart's Island, which is United States territory, and then from the foot of this island to the United States main shore, by which the water level at this latter point would be raised to nearly the level of the river at the head of the swift water above the Galop Rapids, thus wiping out all the rapids, and making the whole of the river where the series of rapids occurs navigable for large vessels. This would provide a water head at the dam of about 85 feet, and make available there water-power of over 2,000,000 horse-power, by passing the flow of the river through water wheels, instead of allowing it to waste over the dam. Navigation from the level above the dam to the level below would be by a side canal, and locks connecting these two levels.

The international negotiations referred to and the questions that arise as to the respective powers and rights of the Dominion and the province of Ontario in reference to these proposed works and the water-power that would be made

1929
v.
REFERENCE re WATERS AND WATER-POWERS.
Smith J.

available by their construction have given rise to this reference. The questions, of course, are not confined to these particular waters, but it is particularly as to these waters that there is immediate need for clearing up the difficult questions that the proposed works give rise to, because the continuance of the negotiations awaits the result of this reference, as has been officially stated. Question 1 (*a*) is limited to " where the bed of a navigable river is vested in the Crown in right of the province," and it may be noted in passing that a question may be raised as to whether the bed of these rapids is in the province or the Dominion. Under the British North America Act, the canal and canal lands became the property of the Dominion, so that the Dominion became riparian owner of the lands bordering on the stream opposite these rapids for nearly their whole length. It has been held by the Ontario Court of Appeal that the common law presumption that the riparian proprietor owns to the middle of the bed applies in Ontario, and although the Ontario Legislature promptly nullified the effect of that decision by an Act (1 Geo. V, c. 6) declaring that the presumption shall be the other way, as to grants, both before and after the passing of the Act, that Act could not affect the Dominion title, if it had any. It may be, as intimated in later Ontario decisions, that the presumption would not in any case apply to the St. Lawrence river. I am merely pointing out the possibility of the question being raised in a higher court. We have, of course, nothing to do with it here.

Much more complicated questions than this, however, arise, and in order to indicate their character it is necessary to look at the geography of the river. It will be sufficient to consider the situation at the Long Sault Rapids. At their head, the river is divided into two channels by Long Sault Island, which is United States territory. Much the larger volume of water passes down the international channel between this island and the Canadian shore, the bulk of it at this point being in Canadian territory. About two miles below the head of the rapids is a Canadian island near the Canadian shore, known as Sheik's Island, the head of which is nearly opposite the foot of Long Sault Island. Below the foot of Long Sault Island is the head of Barnhart's Island, already referred to as United States territory.

The main body of water of the Long Sault Rapids coming down the international channel crosses southerly through the channel between the foot of Long Sault Island and the head of Barnhart's Island, and joins with the waters of the United States South Sault Channel, together comprising about 96 per cent of all the water of the river, which continues in one stream down the channel between Barnhart's Island and the United States main shore, entirely in United States territory, for nearly four miles to the foot of Barnhart's Island, which is about the foot of the rapids, where, as stated, the proposed dam is to be built.

The fall in these rapids to the foot of Long Sault Island is some 12½ feet, and the rest of the total fall of about 42 feet, where, as stated, about 96 per cent of all the water runs, is entirely in the United States. Assuming that the province owns the bed at these rapids to the boundary at the middle of the stream, and that the course of the water is about as I have stated it, and that ownership of the bed gives some right of property in the power that may be made available from water running over this sloping bed, it would be a difficult matter to define the respective rights of the province and the Dominion in the water-power, even on an agreed upon statement of the facts. We have here, however, no statement of facts at all in the record in reference to the situation I have outlined, and it would probably have been impossible to get an agreed upon statement of facts in reference to it. There is a treaty with the United States dealing with the apportionment of water-power of international streams, but it may be that the province of Ontario would have to rely entirely on its own right, independently of this treaty, and that its claim to power would be limited to what the province could develop from these waters by its own unaided powers, situated as these rapids are. It is difficult to see how the province could develop any water-power from these rapids solely by virtue of its own rights and powers. To develop power from a rapid, the practical method employed is to transform the flow from down a slope into a perpendicular fall. This may be done by diverting the flow at or above the head of the slope into an artificial channel on the land, which would carry the flow below the foot of the rapids at about the level above the head, and there discharge it through water-wheels to the lower level. The other

1929

REFERENCE *re* WATERS AND WATER-POWERS.

Smith J.

method would be by a dam at the foot to raise the level at the upper side of the dam to the level above the head of the rapids, thus providing a perpendicular fall from the upper side of the dam to the lower. If the province were to divert a large part of the water of the international channel referred to, it would be obliged to return it in such a way as to permit it to flow into the entirely United States channel to the extent that it flows there naturally; otherwise the United States would have the same cause to complain that Canada has to complain of the Chicago diversion. The water would therefore have to be returned so that nearly all of it would flow through its natural channel between Long Sault Island and Barnhart's Island, and could only be brought there by bringing it across the Cornwall Canal. Once diverted into an artificial channel on the Canadian shore, the water could not be returned to the river without crossing the canal till carried below its foot at Cornwall, 12 miles down, which would be a complete and permanent diversion from its natural course through the United States channel. To make any diversion to the Canadian shore at the head would, moreover, require a dam in the natural channel to turn the water from that channel to the artificial one, and such a dam would close the navigation of the natural channel, which is now used daily, in the summer months, for a line of large passenger steamers. To get a head of water opposite the foot of Long Sault Island would require a dam from that island to Sheik's Island, which would again completely stop navigation, and of course would require co-operation on the part of the United States and assent of the Dominion Government under the *Navigable Waters Protection Act*. Sheik's Island, too, is part of the Indian Reservation, rented and administered by the Dominion Government for the Indians.

It would appear, therefore, that water-power from these rapids could only be developed by Ontario with the co-operation of the United States and the Dominion Government, and that whatever right the province might have to power might, at most, be a part of what could be developed from the 12½-foot fall to the foot of Long Sault Island. The four per cent flow in Canadian territory north of Barnhart's Island would be too small for practical development.

There may be a still further limitation to the right of the province as owner of the bed, because the ordinary development of water-power requires the use of not only the bed, but also of the bank. Here the Dominion Government, as stated, is riparian proprietor of the bank opposite these rapids, and as such would have rights that would put in question the rights of the province to develop water-power by virtue of ownership of the bed only. The situation at this point, as I have outlined it, does not, of course, appear in the record. We might, perhaps, take judicial notice of some of the facts, and might gather others from statutory enactments. A glance at a map of the locality, and particularly at the maps annexed to the report referred to, would show the geographical situation and flow of the main body of water in the river, but we would still fall short of such a full knowledge of facts as would be necessary for the basis of a decision. I have gone beyond the record, not to obtain material as a basis for answering the questions, but merely to emphasize what my brother Duff has said as to the impracticability of giving full and definite answers to all the questions that would have general application, regardless of particular circumstances capable of proof but not established or admitted in the record.

What I have said in reference to the Long Sault Rapids would apply in some, but not all, respects to the other rapids. There are probably localities throughout Canada where the situation would be entirely different, so that the difficulty of giving general answers to a number of the questions applicable to every possible variation of facts and circumstances becomes, I think, apparent.

Questions referred answered accordingly.

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

Solicitors for the Attorney General of Ontario: *Tilley, Johnston, Thomson & Parmenter.*

Solicitor for the Attorney General of Quebec: *Charles Lanctot.*

Solicitor for the Attorney General of British Columbia: *William D. Carter.*