In the Privy Council.

No. 100 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Weekly Rest in Industrial Undertakings Act, being Chapter 14 of the Statutes of Canada, 1935; The Minimum Wages Act, being Chapter 44 of the Statutes of Canada, 1935, and The Limitation of Hours of Work Act, being Chapter 63 of the Statutes of Canada, 1935.

BETWEEN :

THE ATTORNEY GENERAL OF CANADA - - *Appellant*

AND

THE ATTORNEYS GENERAL OF THE PROVINCES OF ONTARIO, QUEBEC, NEW BRUNSWICK, BRITISH COLUMBIA, MANITOBA, ALBERTA and SASKATCHEWAN - - - - - - - - - - *Respondents.*

CASE OF THE APPELLANT THE ATTORNEY GENERAL OF CANADA.

RECORD.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 17th day of June, 1936, answering questions referred to the said Court for hearing and consideration by Order of His Excellency the Governor General in Council, dated the 5th day of November, 1935 (P.C. 3454), pursuant to the provisions of section 55 of the Supreme Court Act, touching the constitutional validity of The Weekly Rest in Industrial Undertakings Act; The Minimum Wages Act and The Limitation of Hours of Work Act, being, respectively, Chapters 14, 44 and 63 of the Statutes of Canada, 1935. p. 142, ll. 29–40, p. 143. p. 91, ll. 17–40, p. 92. pp. 1 and 2.

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p. 2, ll. 18–26. 2. The questions so referred were :

1. Is The Weekly Rest in Industrial Undertakings Act, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada ?

2. Is The Minimum Wages Act, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada ?

3. Is The Limitation of Hours of Work Act, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada ?

3. The full text of each of the three Acts referred to in the said questions will be found in the official prints thereof which are separate documents on this appeal and are attached hereto. These Acts were respectively passed, as appears from the recitals set out in the preamble of each of them, and as p. 1, ll. 13–16. the Order of Reference in terms recites, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations p. 2, ll. 1–9. assumed by Canada under the provisions of the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919 (official prints whereof are filed on this appeal as separate documents), and to which Canada, as part of the British Empire, was a signator, and also under certain draft conventions p. 146. concerning (*a*) the application of the weekly rest in industrial undertakings; p. 153. (*b*) the creation of minimum wage-fixing machinery and (*c*) the limitation of p. 161. hours of work in industrial undertakings, respectively adopted by the International Labour Conference in accordance with the relevant Articles of the said Treaty.

p. 39, ll. 15–40. 4. The said Treaty of Peace was ratified by Germany on the one hand and by three of the Principal Allied and Associated Powers on the other p. 40, ll. 1–10. hand, including His Majesty, and came into force on the date of the Proces Verbal of the deposit of such ratifications pursuant to Art. 440, namely, pp. 27–38. the 10th January, 1920. The Treaty was so ratified by His Majesty the King only after it had received the separate approval of the Dominion Parliaments, and when, such approval having been obtained, the several Dominion Governments had by Order in Council advised His Majesty to p. 39, ll. 1–13. ratify on their behalf. The approval of the Senate and House of Commons of Canada was signified by Resolutions dated the 4th and 11th September, p. 38, ll. 4–25. 1919. Thereupon, by Order of His Excellency the Governor General in Council, dated 12th September, 1919, His Majesty was advised to approve, accept, confirm and ratify the said Treaty of Peace for and in respect of the Dominion of Canada.

p. 144, ll. 10–33, p. 145, ll. 1–10. 5. By the Treaties of Peace Act, 1919, cap. 30 of the Statutes of Canada, 1919 (2nd Session), the Governor in Council was empowered to make such appointments, establish such offices, make such Orders in Council, and do such things as appeared to him to be necessary for carrying out the said Treaty, and for giving effect to any of its provisions.

6. In virtue of the terms of Art. 1 of Part I of the said Treaty of Peace, embodying the Covenant of the League of Nations, and of the annex to the said Part, Canada, as part of the British Empire and as a signatory of the said Treaty, became one of the original members of the League of Nations; and in virtue of Art. 387 in the Labour Part (Part XIII) of the said Treaty, became an original member of the International Labour Organization. RECORD.

7. The three Draft Conventions referred to in paragraph 3 above represent, pro tanto, the detailed working out of a policy to which Canada as a signatory of the Treaty of Peace, and as a member of the International Labour Organization constituted under Part XIII of the said Treaty, had already assented in general terms and pledged itself to endeavour to secure and maintain.

Art. 23 of the Treaty of Peace provides, in part :—

> " Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League :
>
> (*a*) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations."

The principles and methods agreed upon by the members of the League for the fulfilment of the obligation assumed by them in general terms under Art. 23 (*a*) are formally outlined in the provisions of the Constitution of the International Labour Organization.

The Constitution of the Organization, embodied in Part XIII of the said Treaty, is prefaced by a preamble which recites that universal peace " can be established only if it is based upon social justice "; that " conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled," and that " an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week . . . and the provision of an adequate living wage," amongst other specified reforms.

Section II of the Constitution (consisting solely of Art. 427 known as the Labour Charter) carries a stage further the declaration of the general policy of the Organization. In this Article, the High Contracting Parties (for which term may now be read the Members of the Organization) declare, in part, as follows :—

> " The High Contracting Parties, recognizing that the well-being, physical, moral and intellectual of industrial wage-earners is of supreme international importance, have framed, in order to

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further this great end, the permanent machinery provided for in Section 1 and associated with that of the League of Nations.

" They recognize that differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do, that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.

" Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance:—

First.—The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce.

. . . . .

Third.—The payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country.

Fourth.—The adoption of an eight hours day or a forty-eight hours week as the standard to be aimed at where it has not already been attained.

Fifth.—The adoption of a weekly rest of at least twenty-four hours, which should include Sunday wherever practicable.

. . . . .

" Without claiming that these methods and principles are either complete or final, the High Contracting Parties are of opinion that they are well fitted to guide the policy of the League of Nations; and that, if adopted by the industrial communities who are members of the League, and safeguarded in practice by an adequate system of such inspection, they will confer lasting benefits upon the wage-earners of the world."

8. The General Conference of the International Labour Organization adopted the draft Conventions limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week at its first session (1919) the draft Convention concerning the application of the weekly rest in industrial undertakings at its third session (1921) and the draft Convention concerning the creation of minimum wage fixing machinery at its eleventh session (1928).

pp. 161–168.
pp. 146–149.
pp. 153–156.

Two ratifications of each of the said Conventions having been registered and notification of such registration given to the other members of the International Labour Organization, including Canada, by the Secretary-General of the League of Nations, the said Conventions came into force

in accordance with the respective provisions thereof on the following dates, respectively: RECORD.

The Hours of Work (Industry) Convention on the 13th June, 1921; p. 169.

The Weekly Rest (Industry) Convention on the 19th June, 1923; and p. 149, ll. 16–38. p. 150, ll. 1–26.

The Minimum Wage-Fixing Machinery Convention on the 14th June, 1929. pp. 157–158.

9. Resolutions declaring it to be " expedient that Parliament do approve of " each of the said Conventions were passed by the Senate and House of Commons of Canada. Thereupon His Excellency the Governor General by Orders in Council dated March 1st, 1935, P.C. 543 and P.C. 544, and April 12th, 1935, P.C. 934, ordered, on behalf of Canada, that the said Conventions " be confirmed and approved " and that " formal communication " of such confirmation and approval " be made to the Secretary-General of the League of Nations." The formal instrument of ratification by Canada of each of the said Conventions was, accordingly, deposited with the Secretary-General of the League of Nations and proces-verbaux dated March 21st, 1935, and April 25th, 1935, formally evidencing the deposit of such instruments of ratification, were duly executed by the Acting Legal Adviser of the Secretariat of the League of Nations.

p. 150, ll. 30–38. p. 159, ll. 1–11. p. 170, ll. 1–12. p. 151. p. 170, ll. 13–42. p. 159, ll. 13–39. pp. 152, 160 and 171. p. 153, ll. 1–27. p. 161, ll. 1–25. p. 172.

10. The Acts in question, passed to discharge the obligations of Canada thus undertaken, came into force on the following dates, respectively, The Weekly Rest in Industrial Undertakings Act on July 4th, 1935; The Minimum Wages Act on June 28th, 1935, except as to Section 4 (1) and Section 5 which do not come into force until proclaimed by the Governor in Council; The Limitation of Hours of Work Act on October 5th, 1935.

11. The British North America Act, 1867, provides in sections 91, 92 and 132 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,—

. . . . .

2. The Regulation of Trade and Commerce.

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

. . . . .

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And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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 :—

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

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

. . . . .

132. 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."

p. 92, ll. 7–22. 12. On the hearing of argument on January 23rd, 24th, 27th, 29th, 30th and 31st, 1936, before Duff, C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin, JJ. counsel were heard on behalf of the Attorney General of Canada as well as on behalf of the Attorneys General of Ontario, Quebec, New Brunswick, Manitoba, British Columbia, Alberta, and Saskatchewan.

13. On the 17th June, 1936, as aforementioned, the Court delivered judgment answering the questions referred to the Court as follows :—

p. 92, ll. 31–35. " The Chief Justice, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that (except as to Section 6 of the Minimum Wages Act) the statutes are *intra vires ;* Mr. Justice Rinfret, Mr. Justice Cannon and Mr. Justice Crocket are of the opinion that the Statutes are *ultra vires.*"

pp. 93–142. 14. The reasons for judgment delivered by the Chief Justice were concurred in by Mr. Justice Davis and Mr. Justice Kerwin; and Mr. Justice Rinfret, Mr. Justice Cannon and Mr. Justice Crocket delivered separate reasons for judgment.

pp. 93–114. p. 115, ll. 1–9. 15. In stating the reasons of himself and Davis and Kerwin, JJ. for their answers to the questions referred to the Court, the learned Chief Justice said that from two main considerations the conclusion followed that legislative authority in respect of international agreements was, as regards Canada, vested exclusively in the Parliament of Canada.

First, by virtue of Section 132 of the British North America Act, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada or any one of the Provinces of Canada, by force of a treaty between the British Empire and a foreign country, was committed to the Parliament and Government of Canada.

This jurisidiction of the Dominion the Privy Council held in the *Aeronautics* Case and the *Radio* Case (both reported in 1932 Appeal Cases) was exclusive ; and consequently, under the British North America Act, the provinces had no power and never had power to legislate for the purpose of giving effect to an international agreement : that, as a subject of legislation, was excluded from the jurisdiction envisaged by Section 92.

Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada had acquired the status of an international unit, that is to say, she had been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements might take various forms. They might take the form of treaties, in the strict sense, between heads of state to which His Majesty the King was formally a party. They might take, inter alia, the form of agreements between governments, in which His Majesty did not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it was now settled that, as regards Canada, it was the Canadian Government acting on its own responsibility to the Parliament of Canada which dealt with the matter. If the International contract was in the form of a treaty between heads of states, His Majesty acted, as regards Canada, on the advice of his Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions was under the control of Parliament. Parliament had full power by legislation to determine the conditions under which international agreements might be entered into and to provide for giving effect to them. That this authority was exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governor of the Provinces did not in any manner represent His Majesty in external affairs, and that the provincial governments were not concerned with such affairs : the effect of the two decisions reported in 1932 Appeal Cases was that in all these matters the authority of Parliament was not merely paramount, but exclusive.

The learned Chief Justice then proceeded to consider two cardinal questions raised by the contentions of the Provinces. The first of these had two branches. One branch was the contention that the subject matters of the stipulations in the international agreements in question were exclusively domestic and not at all of international concern. As to this, the learned Chief Justice said the language of section 132 was unqualified and that that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject matter of the statutes in question,

RECORD. were not within the scope of that prerogative. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters were regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation.

The second branch of the first of the cardinal questions referred to was the contention that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) did not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces in the absence of any international obligation respecting them. The learned Chief Justice gave two reasons for holding this view to be not tenable. First, section 132 related, *inter alia*, to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. The section obviously contemplated the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary to attach to it the force of law. In such case, the Parliament and Government of Canada appeared to be endowed with the necessary legislative and executive powers. Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice did not accord with this view. Statutes giving effect to the international Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) were instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a statute of the Province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney General for British Columbia* v. *Attorney General for Canada* (1924) A.C. 203. The jurisdiction of Parliament to enforce international obligations under agreements which were not strictly " treaties " within section 132 was co-ordinate with the jurisdiction under this last-named section.

The second of the cardinal questions requiring determination concerned the construction and effect of Article 405 of the Treaty of Versailles. The learned Chief Justice observed that the procedure which had been followed in connection with the draft Conventions in question (putting aside the provisions of Article 405) was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure was, however, questioned on the ground that under the special provisions of Article 405, and especially those of paragraphs 5 and 7 of the Article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 must be read together and, reading them together, it would appear, the Chief Justice said, that

the " competence " postulated was the " competence " to enact legislation or to take other " action " contemplated by the Article. The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, " to make effective the provisions of the convention " were both treaty obligations; and the authority or authorities competent to take legislative action where legislative action might be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it was provided that the draft conventions should be brought. It followed from what had been said that this treaty obligation was an obligation within section 132 and, consequently, the authority to make the convention effective exclusively rested in the Parliament and Government of Canada and, therefore, that the Parliament of Canada was, at least, one of the authorities before which the convention must be brought under the terms of Article 405. The question whether the provincial legislatures were also competent authorities within the contemplation of paragraph 5 would appear to be necessarily determined by the consideration that they were constrained by the decisions of the Judicial Committee of the Privy Council (reported in 1932 Appeal Cases), already referred to, to hold that the authority of Parliament in this matter was exclusive and that the provincial legislatures were not competent to legislate for giving effect to the provisions of any international convention. Strictly, however important as this question of the " competence " of the Provincial Legislatures in the sense of Article 405 was, it was unnecessary to decide it for the purposes of this reference as would appear from what immediately followed.

The Governor General in Council was designated by the Treaties of Peace Act, 1919, enacted under the authority of section 132, to take all such measures as might seem to him to be necessary for the purpose of carrying out the Treaties of Peace and for giving effect to the terms of such Treaties. He it was therefore, upon whom devolved the duty of performing the obligation of Canada under Article 405 to bring the draft conventions before the authority or authorities possessing " competence " under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared by the statutes now under examination that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament had, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of Article 405. That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the

RECORD. provisions of the conventions. The answers to the three interrogatories addressed to the Court was, therefore, the statutes being *intra vires* in each case, in the negative.

16. The reasons for judgment delivered by Rinfret, J. were in summary as follows :—

p. 115, ll. 10–46. pp. 116–122. (*a*) It was evident that the subject matter of the legislation was not criminal law.

p. 123, ll. 1–25. (*b*) The reasons delivered by the Chief Justice in the reference concerning the Natural Products Marketing Act established conclusively that the legislation could not be supported as an exercise of the general power of Parliament under section 91 to make laws for the peace, order and good government of Canada or of its exclusive legislative authority in relation to the regulation of trade and commerce.

(*c*) The conventions which were made the basis of the legislation in question were not treaties within the meaning of section 132 of the British North America Act more particularly as the word was understood at the time of the adoption of the Act by the Imperial Parliament. Moreover, they were not treaties between the Empire and foreign countries in respect of which " obligations of Canada or of any province thereof as part of the British Empire towards foreign countries " might have arisen. Consequently, section 132 in terms did not apply to these Conventions. The learned judge considered the opinion given by the Supreme Court of Canada *In the matter of Legislative Jurisdiction over Hours of Labour* (1925) S.C.R. 505, from which he quoted extracts, to be binding upon the Court except in so far as it might have been superseded by subsequent pronouncements of the Privy Council in the *Reference concerning Aeronautics* (1932) A.C. 54 and *Radio Communication* (1932) A.C. 304. He found it impossible to distinguish between The Limitation of Hours of Work Act, which was the subject matter of the reference of 1925 to the Supreme Court of Canada, and the Weekly Rest in Industrial Undertakings Act or The Minimum Wages Act.

(*d*) In regard to the decisions of the Privy Council in the *Aeronautics* and *Radio References*, it seemed to the learned judge that these decisions were not authorities upon the question of wherein lies, as between the Parliament of Canada and the Legislatures of the Provinces, the powers necessary or proper for performing the obligations of Canada or of any province thereof arising out of conventions adopted by the International Labour Conference. Whether treaty or convention, the questions under consideration in the *Aeronautics* and the *Radio References* were concerned with the validity of legislation enacted for the purpose of performing obligations arising as a result of international agreements already made and the validity whereof was not disputed. The learned Judge said he made a very great distinction between the power to create an international obligation and the power to perform it when once it had been created. On the point of where lies the power to create an international obligation, the only decision so far was

the judgment of the Supreme Court of Canada on the reference *In the matter of Legislative Jurisdiction over Hours of Labour*, supra. He failed to find anything in the subsequent judgments of the Privy Council superseding what was said unanimously by the Supreme Court on that subject. As a consequence, it must follow that the obligation of Canada respecting these two Conventions was simply to bring them before the authority within whose competence the matter lies for the enactment of legislation or other action, or, in the premises, before the legislatures of the provinces, except for the provisions of those draft Conventions in relation to servants of the Dominion Government, or in relation to those parts of Canada which were not within the boundaries of a province.

(*e*) While it was, no doubt, perfectly true that " overwhelming convenience—under the circumstances amounting to necessity " (Anglin, C.J.C. in the *Radio Reference* (1931) S.C.R. at pp. 545–546) dictated the answers that the performance of obligations, both federal and provincial, arising out of international agreements must be left exclusively to the jurisdiction of the Dominion Parliament, he failed to see the same necessity with regard to the power to create these foreign obligations. When once they had been undertaken Canada was in honour bound to perform them; but there was no necessity, nor even obligation to undertake them. If the effect of the undertaking was that a subject of legislation within the exclusive jurisdiction of a province would thereby be transferred from that jurisdiction to the jurisdiction of the Dominion Parliament, he considered it to be within the clear spirit of the British North America Act that the obligation should not be created or entered into before the provinces had given their consent thereto. In the particular case, it was his view that such was the effect of the judgment of the Supreme Court of Canada in the Reference of 1925. Such, it seemed to him, was the interpretation which had been put by the Court upon the pertinent clause of Article 405 of the Treaty of Peace.

(*f*) Property and Civil Rights in the Province were ascribed to the exclusive jurisdiction of the Legislature in each province. A civil right did not change its nature just because it became the subject matter of a convention with foreign states. It continued to be the same civil right and he could not see where the Dominion Parliament in the British North America Act found the power to appropriate it for the purpose of dealing with it internationally without having previously secured the consent of the provinces. The three Acts in question dealt with matters which were fundamentally of the competence of the legislatures in each province.

(*g*) The treaty-making power was the prerogative of the Crown. In ordinary practice it was exercised on the recommendation of the Crown's advisers. In Canada, the practice had grown gradually to enter into international conventions through the medium of the Governor in Council. It did appear, the learned Judge said, that it would be directly against the intendment of the British North America Act that the King or the Governor General should enter into an international agreement dealing with matters

RECORD.

exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament were prohibited by the Constitution from assuming jurisdiction over these matters.

(*h*) It followed, for these reasons, in his opinion, that the draft conventions upon which was based the legislation in question, had not been properly and competently ratified, that they could not be so ratified without the consent of the legislature in each province, both by force of the British North America Act and upon the proper interpretation of Article 405 of the Treaty of Versailles, and for that reason the Acts were ultra vires of the Parliament of Canada.

p. 123, ll. 26–45, pp. 124–129, p. 130, ll. 1–39.

17. The reasons for judgment delivered by Cannon, J. were in summary as follows :—

(*a*) He stressed the federal nature of the constitution conferred by the British North America Act as denied to the Dominion Parliament any authority to obliterate the autonomy of the provinces and to convert the Dominion of Canada into a central government exercising uncontrolled police power in every province.

(*b*) The only direct legislative authority expressly given to the Government and Parliament of Canada concerning foreign affairs was found in section 132 of the British North America Act and was limited to the performance of the obligations of Canada or of any province thereof arising under treaties between the Empire as a whole and a foreign country. The Imperial Parliament saw to it that Imperial interests would be protected by federal legislation. But to pass legislation—affecting the Provinces—to ratify a treaty or agreement by Canada alone—under an evolution which came to pass since Confederation—with a foreign power, previous consultations between the federal and provincial self-governing parts of our Confederation seemed to him logical and the only way to preserve peace, order and good government in Canada and save the very roots of the tree to which our constitution had been compared.

(*c*) Any legislation by the Dominion Parliament attempting to legislate uniformly for the whole of Canada on any subject exclusively retained by the Provinces and within the natural and obvious meaning of section 92 must, in his opinion, be prima facie, considered as *ultra vires* of the Dominion. The additions by some decisions to the powers of the Dominion in emergency cases must be applied, if at all, with the greatest caution. If any changes were required to face new situations or to cope with the increased importance of Canada as a nation, they might be secured by an amendment to the Act, but neither the Supreme Court of Canada nor the Privy Council should be called upon to legislate in the matter by treating the constitution as a growing tree confided to their care. They had nothing to do with the growth or with the making of the law in constitutional matters. The Imperial Parliament alone could change what they enacted or add to it.

(*d*) The Labour Conventions, upon which were based the three Acts in question, did not, in the learned Judge's opinion, fall under section 132;

they were not even contemplated as feasible in 1867 when the British North America Act was passed. The decisions of the Privy Council in regard to *Radio* and *Aeronautics* must be considered as *arrets d'espèce* and confined to the subject matters both of which had necessarily interprovincial and international aspects. But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the Provinces as purely local and private matters of property and civil rights. Therefore, in the words of section 405 of the Treaty of Versailles, Canada as a federal state, had only a " power to enter into convention on labour matters *subject to limitations* " and the draft conventions should have been treated as a " recommendation only ". In these cases, it did not appear that either the recommendations or the draft Conventions were submitted to the Provinces, *i.e.*, the " authorities within whose competence the matter lies for the enactment of legislation or other action." To his mind, this was fatal to the validity of the ratification of those labour conventions by the Federal authorities.

(*e*) It was not admissible that the Parliament or Government of Canada could appropriate the powers, exclusively reserved to the Provinces, by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries or by invoking some clauses of the Treaty of Versailles. If such interferences with Provincial rights by way of international agreements were admitted as *intra vires* of the central government, they might as well say that they had in Canada a confederation in name, but a legislative union in fact.

(*f*) These were not references to an international tribunal; they were not called upon to determine, in the absence of foreign powers, what effect such a ratification by the Canadian government might have in the international field. But Canada was not an independent sovereign state, and the Parliament of Canada was not a Parliament of unlimited authority. These were some of the reasons why foreign powers, when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, could in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the Provinces their competency to deal exclusively with the enumerated subjects of Section 92.

18. The reasons for judgment delivered by Crocket, J. were in summary as follows :

(*a*) It could not be doubted that all these statutes, no matter from what point of view they were considered, embodied legislation which was directly aimed at the regulation and control of contracts of employment, private as well as public, in every Province of the Dominion, and thus dealt in a very real and radical sense with civil rights in all the Provinces of Canada alike. p. 130, ll. 40–45, pp. 131–141, p. 142, ll. 1–26.

(*b*) In his opinion none of the draft Conventions fell within the terms of Section 132 of the British North America Act. The powers granted

RECORD. by this section were strictly limited to the performance of obligations towards foreign countries arising under treaties between the Empire and such foreign countries and did not embrace obligations arising under any form of convention or agreement entered into by the Government of Canada with the Government of any other country within the Empire, or with the Government of any foreign country, other than a treaty in the true sense of the term.

(*c*) To his mind there was nothing which the judgment of the Judicial Committee in the *Radio* case had more decisively settled than this: That if the Government of Canada by its own plenipotentiaries entered into an international convention with the Government of any other country, whether British or foreign, section 132 could not be relied upon as empowering the Parliament of Canada to enact legislation for the carrying out of any obligation arising under such a convention, and that, if such legislative power existed at all, it must be found, either under the enumerated heads of section 91 or the introductory words of that section, the so-called residuary clause.

He held that there was no obligation under the Treaty of Versailles for the performance of which the Parliament of Canada was empowered within the terms of Section 132 to enact legislation and said the obligation arose directly from a so-called international convention, purporting to have been ratified by Canada as a separate and distinct Government.

(*d*) As regards the residuary clause of Section 91, this provision could only be invoked where the real subject matter of the legislation did not fall within the classes of subjects which were exclusively assigned to the Provinces by Section 92. To meet this difficulty it was argued that hours of work and the standard of wages and living had attained such importance as subjects of legislation in Canada as to affect the body politic of the Dominion as a whole and thus to justify the Parliament of Canada in dealing with them in that aspect as matters demanding the intervention of Dominion legislation "for the peace, order and good government of Canada." No doubt there had been pronouncements in the Privy Council which lent much colour to this argument, but he did not think that they could properly be interpreted as going to such a length as was now contended for. He felt that he could add nothing to what the learned Chief Justice had said in regard to this argument in dealing with the reference on the Natural Products Marketing Act.

(*e*) The observations of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896) A.C. 348 (which the learned Judge quoted) seemed to him to present a conclusive answer to the argument in reference to the so-called double aspect principle. He added it might be that in the event of the peace, order and good government of Canada as a whole being so menaced by some outstanding national peril as to render the intervention of the Dominion Parliament necessary as the only adequate means of meeting such an emergency, the Courts would not shrink from holding that such an emergency constituted a subject matter of legislation which was quite outside the purview of Section 92 but apart from such

considerations, he questioned very much if there had been any really conclusive judicial recognition of the double aspect principle relied upon. He entirely concurred in the opinion of the learned Chief Justice that there was nothing in the judgment in the *Aeronautics* Case of 1931 to indicate that the Lords of the Privy Council intended to detract from the judicial authority of the decisions in the *Combines* Case and *Snider's* Case, and that they were bound by those decisions, as well as the decision in the *Fort Francis* case, to hold that the legislation now in question, considered apart from the question of the performance of obligations arising out of binding international conventions, as distinguished from treaties proper within the meaning of Section 132, could not be supported as legislation enacted for the peace, order and good government of Canada under the introductory clause of Section 91.

(*f*) The learned Judge then proceeded to consider the further question whether the ratification by the Government of Canada of the draft International Labour Conventions could itself have the effect of vesting in the Parliament of Canada legislative jurisdiction which otherwise it would not possess under the British North America Act. He did not think that either the decision in the *Aeronautics* Case or the decision in the *Radio* Case (each of which he proceeded to examine and distinguish) could properly be said to have laid down the principle that, once the Government of Canada had concluded a convention with the Government of any other country, whether within or without the British Empire, that fact itself operated to exclude the subject matter of the convention from Section 92. He suggested that the basis of these decisions was the holding of the Privy Council that the subject matter of the function in each case fell in any important aspects under one or more of the enumerated heads of Section 92. He agreed with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affected the Dominion as a whole or any of the Provinces separately, but he did not think that this fact could be relied on as altering in any way the provisions of the British North America Act as regards the distribution of legislative power as between the Dominion Parliament and the Provincial Legislatures. Whether such a matter was one which fell under the terms of either Section 91 or Section 92 or of Section 132, must depend upon the real intendment of the British North America Act itself. There was but one test for determining application or non-application of the residuary power to any given subject matter, viz. : did the matter come within any of the classes of subjects, which the Act had assigned exclusively to the Legislatures of the Provinces ?

(*g*) The legislation embodied in these three statutes was admittedly legislation which the Parliament of Canada would never have ventured to enact but for the draft conventions of the International Labour Organization of the League of Nations. These conventions were admittedly conventions to which the Government of Canada were in no manner bound to assent to or formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935,

RECORD. when the Government of Canada chose to approve them, several years after the expiration of the period fixed by Article 405 of the Treaty of Versailles for their submission " to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." He thought the language was clearly mandatory and that the ratification of the conventions, upon which the three statutes purported to be founded, was null and void under the terms of said Article 405. It was, however, to the provisions of the British North America Act, not to the terms of the Treaty of Versailles, that they must look for the answers to the questions submitted to them on this reference concerning the constitutionality of these three statutes. In his opinion they were all wholly ultra vires of the Parliament of Canada.

19. The Attorney-General of Canada submits that the answers to the three questions referred to the Supreme Court of Canada given by Rinfret, Cannon and Crocket, JJ. are wrong, and that the answers given to the said questions by the Chief Justice, and concurred in by Davis and Kerwin, JJ. are right and that each of the said questions should be answered, without qualification, in the negative for the reasons set out in the judgment of the learned Chief Justice, and also for the reasons set out in the Factum filed on behalf of the Attorney-General of Canada in the Supreme Court of Canada and for the following among other

REASONS

1. Because the prerogative of making treaties with foreign States is enjoyed solely by His Majesty and is exercised on the advice of his responsible ministers.
2. Because, under the existing conventions and usages of the constitutional law and practice of the British Commonwealth of Nations, the prerogative of His Majesty in relation to the making of treaties in respect of Canada is exercised solely on the advice of His Majesty's Canadian Ministers.
3. Because the exercise of the treaty-making power by His Majesty in respect of Canada does not involve any invasion of provincial legislative jurisdiction, which has always been subject to the exercise of such power; and the only effect of the responsibility for advising His Majesty in such matters has been transferred from his Ministers at Westminster to his Ministers at Ottawa.
4. Because the Labour Conventions in question are within the scope of the treaty-making power.
5. Because Labour Conventions adopted pursuant to the provisions of the Treaty of Versailles, when brought into force by ratification, become binding international agreements.

6. Because the Parliament of Canada is, under the terms of Article 405 of the Treaty of Peace, the competent authority to consent to ratification of the Labour Conventions and to perform the obligations in respect of Canada thereunder.

7. Because Canada is not a federal state, the power of which to enter into conventions on labour matters is subject to limitations within the meaning of paragraph 9 of Article 405 of the said Treaty of Peace.

8. Because, irrespective of the interpretation of Article 405 of the Treaty of Peace, His Majesty, advised in such manner as Canada's constitution requires, effectively ratified the said labour conventions and thereby assumed obligations vis-a-vis other countries which the Government and Parliament of Canada were alone constitutionally competent to perform.

9. Because each of the said Acts was competently enacted by the Parliament of Canada in the exercise of its exclusive legislative power under section 132 of the British North America Act, 1867.

10. Because if the power to perform the obligations of Canada arising under the Treaty of Peace and the Labour Conventions in question is not conferred by Section 132 of the British North America Act, 1867, such power is conferred by the introductory words of section 91 empowering the Parliament of Canada to make laws for the peace, order and good government of Canada.

11. Because each of the said Acts is a law relating to the peace, order and good government of Canada and is, therefore, within the scope of the residuary legislative power of the Parliament of Canada.

12. Because the subject matter of each of the said Acts has become not merely of national but of international concern and importance, and has attained such dimensions as to affect the body politic of the Dominion.

13. Because the power to regulate trade and commerce may be invoked in support and in aid of the validity of the legislation, in that the design and effect of such legislation is to equalize in an international as well as an interprovincial way the fundamental conditions of production and thereby to foster the foreign as well as the internal trade and commerce of Canada along fair competitive lines.

N. W. ROWELL.
L. S. ST. LAURENT.
C. P. PLAXTON.

In the Privy Council.

No. 100 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Weekly Rest in Industrial Undertakings Act, being Chapter 14 of the Statutes of Canada, 1935; The Minimum Wages Act, being Chapter 44 of the Statutes of Canada, 1935, and The Limitation of Hours of Work Act, being Chapter 63 of the Statutes of Canada, 1935.

BETWEEN

THE ATTORNEY GENERAL OF CANADA

Appellant

AND

THE ATTORNEYS GENERAL OF THE PROVINCES OF ONTARIO, QUEBEC, NEW BRUNSWICK, BRITISH COLUMBIA, MANITOBA, ALBERTA and SASKATCHEWAN

Respondents.

CASE OF THE APPELLANT THE ATTORNEY GENERAL OF CANADA.

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