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IN THE PRIVY COUNCIL.

Council Chamber, Whitehall, S.W.1,

Friday, 14th November, 1924.

Present:

VISCOUNT HALDANE,
LORD DUNEDIN,
LORD ATKINSON,
LORD WRENBURY and
LORD SALVESEN.

On Appeal from the Appellate Division of the

SUPREME COURT OF ONTARIO.

Between:

TORONTO ELECTRIC COMMISSIONERS Appellants

and

SNIDER AND OTHERS Respondents

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF ONTARIO Intervenants.

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
8, New Court, Carey Street, London, W.C.2. and Cherer & Co.,
2, New Court, Carey Street, London, W.C.2.).

Counsel for the Appellants and the Intervenant, The Attorney General of Ontario: MR. STUART BEVAN, K.C., MR. GEOFFREY LAWRENCE and MR. JOHN R. ROBINSON (of the Canadian Bar), instructed by Messrs. Blake & Redden.

Counsel for the Respondents: SIR JOHN SIMON, K.C. and MR. LEWIS DUNCAN (of the Canadian Bar), instructed by Messrs. Charles Russell & Co.

Counsel for the Intervenant, The Attorney General of Canada: MR. A. C. CLAUSON, K.C. and MR. JAMES WYLIE, instructed by Messrs. Charles Russell & Co.

F I R S T D A Y.

MR. STUART BEVAN: May it please your Lordships. I appear with my learned friends Mr. Geoffrey Lawrence and Mr. Robinson for the appellants, the plaintiffs in the action, the Toronto Electric Commissioners, and also for the Attorney General of Ontario. For the respondents, Snider, O'Donoghue and McGuigan, my learned friends Sir John Simon and Mr. Lewis Duncan appear, and for the Attorney General of Canada my learned friends Mr. Clauson and Mr. Wylie appear.

LORD DUNEDIN: Which side does the Attorney General of Ontario support?

MR. STUART BEVAN: The Attorney General of Ontario supports the Toronto Electric Commissioners.

My Lords, the question which arises upon the appeal is whether a Dominion statute, which is entitled "The Industrial Disputes Investigation Act", of 1907, is within the powers of the Parliament of Canada, having regard to the provisions of sections 91 and 92 of the British North America Act, and it raises, as all these cases do, questions of very great public importance.

VISCOUNT HALDANE: Can you tell us in a sentence, was it a statute

for the settlement of industrial disputes all over Canada?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: All disputes, or a limited class?

MR. STUART BEVAN: A limited class of industrial disputes. "Settlement" is not the word I should choose, if I may respectfully say so, when one looks at the provisions of the Act, because the Act provides for an investigation and the appointment of a Board of Commissioners, and for that Board to settle, if they can, by persuading the parties who come before it, to settle their differences, or, failing settlement, limits the power of the Board to publishing a recommendation and a statement of the matters in dispute.

VISCOUNT HALDANE: There is a well known Canadian Industrial Disputes Act, and I want to know whether it is this one. If it is, the Act of which we have heard, then there are some very remarkable powers conferred; for one thing, the parties are not allowed to go on with their dispute, and it is made a criminal offence, for which there is a punishment. Whether the Parliament of Canada can do that under section 91, which reserves criminal law to the Dominion, I do not know; there are very particular qualifications of that. Is this the General Industrial Disputes Act?

SIR JOHN SIMON: Yes, my Lord. It is the well known Lemieux Act. It has been the law now since 1907.

MR. STUART BEVAN: My Lords, the matter arises in this way. The appellants, the Toronto Electric Commissioners, are appointed under a statute to manage the municipal electric light, heating and power works of the City of Toronto, and, in the course of carrying out their duties, they necessarily employ a number of men.

VISCOUNT HALDANE: Can you tell us in a sentence what they do? Have they compulsory powers over the electricity of Toronto?

MR. STUART BEVAN: Yes, I will refer your Lordships to the Act. They act as the municipality; the municipality delegates the whole of its powers.

VISCOUNT HALDANE: What I want to know is this. Have they municipal

control over the electricity of Toronto in the sense that they can put down transmission cables, developing centres, provide distribution apparatus and enter houses? Have they in fact the full control of the electricity organisation of Toronto?

MR. STUART BEVAN: I have not the whole of the statute. The statute is printed in the Appendix, but the material sections only are set out. I am told, the Act can be referred to in its entirety if necessary, that they have all those powers which are indicated by your Lordship.

VISCOUNT HALDANE: That is to say, they can abrogate the civil rights in respect of electricity of the inhabitants of Toronto?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: I hope the statute is here. We always have to complain that the parties never see the points that will ultimately emerge, and, consequently, we are left without the statute.

MR. STUART BEVAN: So far as the statutes appear in the Appendix, there is nothing to indicate the contrary of what I assert, the position as indicated by your Lordship. Reference may be made to the statute, but the contrary has never been suggested in the Courts below.

VISCOUNT HALDANE: I hope the Acts are here. They may be in a book for anything I know, and it ought to be possible to have them for reference. We ought not to be left to the judgment of somebody in Canada who has put together what sections he thinks will be useful for our guidance. It is we who have to determine what it is necessary to refer to.

MR. STUART BEVAN: I will look into the matter, and the statutes shall be obtained. Perhaps it is sufficiently indicated by section 18 of the Revised Statutes of Ontario, 1914, Chapter 204, which is on page 36.

VISCOUNT HALDANE: That is the Electrical Act?

MR. STUART BEVAN: Yes, it is at page 36 of the Appendix. It is entitled: "An Act respecting the construction and operation of Works for supplying Public Utilities by Municipal Corporations

and Companies." Section 18, subsection (1) provides: "The corporation of every urban municipality may manufacture, procure, produce and supply for its own use and the use of the inhabitants of the municipality any public utility for any purpose for which the same may be used; and for such purposes may purchase, construct, improve, extend, maintain, and operate any works which may be deemed requisite, and may acquire any patent or other right for the manufacture or production of such public utility, and may also purchase, supply, sell or lease fittings, machines, apparatus, meters, or other things for any of such purposes."

VISCOUNT HALDANE: It is very convenient to have this, but I wish to say for general reference that when cases turn on statutes like this, they need not be printed, because we do not want to raise the cost, but if parties would send over King's Printers copies, so that they may be available, it would be much better. Fortunately we have this one here, but sometimes it is very embarrassing.

MR. STUART BEVAN: I will endeavour to obtain a copy and see whether any of the other provisions throw any light upon the position.

— What brings the parties to your Lordships is this. In June, 1923, two officers of the Canadian Electrical Trades Union, the Toronto Branch, applied for the appointment of a Board under the Industrial Disputes Act, alleging a dispute, I will refer your Lordships to the provisions of the Act in a moment, between the appellants and the branch of the Union with regard to wages and working conditions.

VISCOUNT HALDANE: Before you go to that, in 1923 two officers of a branch of the Union applied for the appointment of a Board?

MR. STUART BEVAN: Yes, a branch of the Canadian Electrical Trades Union. The Minister of Labout notified the appellants, the Commissioners, of this application.

VISCOUNT HALDANE: The Dominion Minister of Labour?

MR. STUART BEVAN: Yes, and asked the appellants to consent to the appointment of a Board. The appellants, taking the view that I am here today to submit to your Lordships, refused to give

their consent or to proceed in the matter. In July, 1923, the Board was established by the Minister, and, on the recommendation of the workmen, he appointed the respondent, Mr. O'Donoghue, a Member of the Board. I will tell your Lordships how the three Members came to be appointed. The appellants, consistently with their previous refusal to recognise the Board in any way, refused to recommend a Member, and, in the absence of any recommendation, the Minister appointed Mr. McGuigan, and those two, being appointed themselves, appointed Judge Snider the third Member and Chairman of the Board.

VISCOUNT HALDANE: I suppose you asked for an injunction against their acting?

MR. STUART BEVAN: Yes, we attended the first meeting of the Board and objected to their jurisdiction. We then issued a Writ and claimed a declaration that the respondent Board, these three respondents, were acting without lawful authority. An injunction was granted restraining the Board from exercising the powers under the Act, and Mr. Justice Orde, who granted the injunction, delivered a considered judgment, in which he upheld the claims made by the appellants.

SIR JOHN SIMON: That was an interlocutory injunction.

MR. STUART BEVAN: Yes, an injunction until the trial. In November, 1923, the action came on for trial before Mr. Justice Mowat, and he, taking a view differing from that expressed by Mr. Justice Orde granting the injunction, referred the action to a Divisional Court under a section of the Judicature Act. The matter then came before the Court, and Mr. Justice Hodgins dissenting, the Court held that the Act fell within the exclusive jurisdiction given to the Dominion Parliament under section 91 of the British North America Act.

LORD DUNEDIN: That is to say, they upheld Mr. Justice Mowat?

MR. STUART BEVAN: Yes., Mr. Justice Hodgins dissenting.

VISCOUNT HALDANE: Was there an appeal to the Supreme Court?

MR. STUART BEVAN: No, my Lord, the appeal from that Court is to

the Privy Council.

VISCOUNT HALDANE: It may be to the Privy Council.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: This raises an uneasy sense in my mind, which we may have to get rid of, and that is, that this puts the whole of the Lemieux Act into controversy.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: When was the Lemieux Act passed; it was a long time ago, was it not?

SIR JOHN SIMON: In 1907. Mr. Lemieux was Postmaster General.

LORD DUNEDIN: Has the Supreme Court ever given judgment on this Act in another case?

MR. STUART BEVAN: No, I think this is the first time that the position in regard to this Act has fallen to be determined.

VISCOUNT HALDANE: It is nearly inconceivable to me that in these hot trade disputes they should not have raised the constitutionality of the Lemieux Act.

MR. STUART BEVAN: What has happened is that the Act has been operated before, but it has always been done by consent. In this particular case, upon the application for a Board, the Minister of Labour approached the appellants, the Commissioners, and asked for their consent. That seems to have been the procedure that has always been followed, and consent in most cases has been given, but now the Commissioners and the Attorney General of Ontario desire to test the legal position, and to know what their rights are.

VISCOUNT HALDANE: Now you have told us very much the point in the case?

MR. STUART BEVAN: Yes, my Lord, but I am sorry to say the point in the case will involve a close examination of the Lemeiux Act, and also the examination of a good many authorities.

LORD DUNEDIN: I think it comes out pretty clearly that the statute under which you have your municipal powers has very little to do with it; you might be any company.

MR. STUART BEVAN: But for this: Your Lordship remembers the provi-

sions of section 92 of the British North America Act.

VISCOUNT HALDANE: It is an Ontario statute which incorporates you?

MR. STUART BEVAN: Yes, but the fact that we are a municipal authority is material in view of the provisions of section 92 of the British North America Act, which begins on page 1 of the Joint Appendix.

LORD DUNEDIN: Does that really make much difference, because there is a provision which says that where the field is traversed by both, the Dominion gets the best of it.

MR. STUART BEVAN: Yes. My case here is that the field is not encroached upon in any way by the provisions of section 91, which set out the powers of the Dominion.

LORD DUNEDIN: That I quite understand. It is a propos of my question that it would be the same if it was anybody else. Your point is the defect in their title, and not the prevailing equities in your own?

MR. STUART BEVAN: I have to show it is within section 92, because, if it is not within section 92, it may well be contended that it comes within the power of the Dominion Parliament to make laws for the peace, order and good government of Canada.

VISCOUNT HALDANE: Let me ask you about the injunction. Was it an injunction to prevent you locking out your workmen?

MR. STUART BEVAN: No, it was an injunction to prevent the Board from proceeding to deal with the matter which has been submitted to them under the provisions of the statute.

LORD DUNEDIN: Stopping the arbitration, if you call it an arbitration?

MR. STUART BEVAN: Yes, and that would automatically enable me to conduct my business in the way I had conducted it before, and did not maintain the status quo which would have had to be maintained if the Board was properly constituted.

VISCOUNT HALDANE: If the Board was set up you were precluded from locking out your workmen?

MR. STUART BEVAN: Yes, it would have maintained the status quo, until the recommendation of the Board was published.

VISCOUNT HALDANE: Your civil right to lock out your workmen would

have gone?

MR. STUART BEVAN: Yes, this statute not only deals with matters of strikes, but other matters. My submission is going to be that there is no overlapping here, and I rely upon the exclusive power of the provincial legislation granted in respect of heâd 8 "Municipal Institutions in the Province", 10 "Local Works and Undertakings other than such as are of the following Classes", we need not trouble with the exceptions, and, most important of all, 13.

VISCOUNT HALDANE: I suppose the Dominion could, under its exclusive control of criminal law, have made it a crime for a municipal institution to act in a certain way.

MR. STUART BEVAN: With regard to that, I should have to refer your Lordship to certain decisions of this Board, which show that a distinction has to be drawn between the class of case, where dealing with the criminal law is the primary object of the legislature, and the other class of case where it is only incidental to some other object to be obtained by the legislation.

VISCOUNT HALDANE: We know those cases well. I am taking a case, where genuinely altering the criminal law, the Dominion said: In future the law is to be that such and such a thing is a crime.

MR. STUART BEVAN: I should not like to commit myself to answering that without knowing the precise nature of the legislation, but, speaking generally, if it were a plain straight-forward attempt (I am not using the expression "straight-forward" in any offensive sense) to extend the provisions of the criminal law, I should say that was a matter for the Dominion Parliament.

LORD DUNEDIN: There is a case in which I gave the judgment of the Board, a very long time ago, with regard to railway legislation.

MR. STUART BEVAN: I had that case in mind when I gave your Lordship that answer. It is the case of the Grand Trunk Railway Company of Canada v. The Attorney General of Canada, reported in 1907 Appeal Cases, at page 65.

LORD DUNEDIN: I think that comes to the simple question: Is

this criminal legislation?

MR. STUART BEVAN: Yes. The head-note in that case is this: "Held, that the Dominion Parliament is competent to enact section 1 of Canadian statute 4 Edward 7th, Chapter 31, which prohibits 'contracting out' on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants. That section is intra vires the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, section 92, sub-section 13, are the subject of provincial legislation." What my Lord Dunedin says, in delivering the judgment of the Board, is this: "The true question in the present case does not seem to turn upon the question whether this law deals with a civil right -- which may be conceded -- but whether this law is truly ancillary to railway legislation. It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature -- which is admitted -- it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation."

LORD DUNEDIN: This is the real point; I am going on the older cases. I say the older cases "seem to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." That is laying down what had been laid down by Lord Macnaghten and others before me. "Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right -- which may be conceded -- but whether this law is truly ancillary to railway legislation."

VISCOUNT HALDANE: I remember there was a case since that one, in whic

the question was whether a municipality could clean out ditches of a railway company, and it was held that they could not.

SIR JOHN SIMON: That is the case of the Canadian Pacific Railway Company v. the Corporation of the Parish of Notre Dame de Bonsecours, reported in 1899 Appeal Cases, at page 367.

MR. STUART BEVAN: The head-note is: "By the true construction of British North America Act, 1867, section 91, subsection 29, and section 92, subsection 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorised works." Lord Watson, delivering the judgment of the Board, says: "It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorised works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec."

VISCOUNT HALDANE: The municipality could interfere if the structure of the railway was not affected?

MR. STUART BEWVAN: Yes.

VISCOUNT HALDANE: There is a judgment of Lord Atkinson in a Montreal case.

MR. STUART BEVAN: That is in 1912 Appeal Cases.

SIR JOHN SIMON: It is the through traffic case.

MR. STUART BEVAN: It is applying those principles on which I am going to contend I am entitled to succeed on this appeal.

In order that the necessary materials may be

before your Lordships I shall have to read, in some detail, the Act itself, and I think the most convenient thing for me to do will be to read it at once, in order that your Lordships may appreciate what the position is. The whole of the Act is set out in the Appendix.

LORD ATKINSON: Will you call attention to any coercive power which they have?

MR. STUART BEVAN: Yes, that is what I propose to do. The Lemieux Act of 1907, 6 & 7 Edward 7th, Chapter 20, is set out at page 11 of the Joint Appendix.

SIR JOHN SIMON: We have, if it is more convenient, some separate copies, though I think probably your Lordships will find it is quite convenient to have it in the book.

VISCOUNT HALDANE: I should like to have a separate copy.

SIR JOHN SIMON: Might I correct one misapprehension? My learned friend, Mr. Stuart Bevan, said, in answer to a question by Lord Dunedin, that ever since 1907 the Lemieux Act had always been worked by consent, and that, therefore, no ~~action~~ question had ever been raised. That is not quite so; there is a case in the Canadian Reports, where it was decided by the Court of Appeal of Quebec, in the face of challenge, that the Act was good. I am not saying that it binds anybody except the provincial Court, but, in fact, it has been challenged.

MR. STUART BEVAN: I am sorry I have not found that decision.

SIR JOHN SIMON: It is in 44 Quebec Supreme Court Reports, at page 350. The case is the Montreal Street Railway Company v. The Board of Conciliation and Investigation; it was with reference to this Act.

MR. STUART BEVAN: Probably the correct statement would be that it has never been applied to the case of a municipality, save by consent.

SIR JOHN SIMON: I do not know how that may be. I am only saying, if the impression was that nobody has ever litigated this in Canada, that is not so.

MR. STUART BEVAN: In a municipality.

SIR JOHN SIMON: This happens to be the Montreal Street Railway.

MR. STUART BEVAN: That is not necessarily a municipality.

SIR JOHN SIMON: No, but it is a provincial enterprise.

VISCOUNT HALDANE: Will you tell me what is the relation of the Act at page 4 to the Lemieux Act?

MR. STUART BEVAN: It is an independent Act. There were no proceedings under this Act. I do not know why it has been included. I will refer to it. It seems to deal with railways chiefly. Then you come to trade disputes on page 5, section 3.

VISCOUNT HALDANE: There are powers.

MR. STUART BEVAN: Yes, I had better deal with it as a matter of history, though it does not appear to me to be directly relevant to this matter.

VISCOUNT HALDANE: We cannot tell whether it is relevant or not. I should like to know what its relation to the Lemieux Act is.

MR. STUART BEVAn: The Lemieux Act does not repeal it, and, so far as I know, there is no reference to the Act of 1906 in the Lemieux Act. I think that the eariler statute applies only to railways, except by the consent of employers and employees, when the provisions of the Act with regard to railway disputes may be invoked by the employers and workmen. Your Lordships will find that on page 4, section 2 (h), at the bottom of the page: "'Conciliation board' means any body constituted for the purpose of settling disputes between employers other than any railway employer and workmen by conciliation or arbitration, or any association or body authorised by an agreement in writing made between employers other than railway employers and workmen to deal with such disputes." I think, outside the relations of railways and railway employees, the Act has no application to where the parties by agreement refer an industrial dispute to a conciliation Board.

VISCOUNT HALDANE: Railways appear to be in a special position?

MR STUART BEVAN: Yes. That is provided for by section 13, on page 7.

"Whenever a difference exists between any railway employer and railway employees, and it appears to the Minister that the parties thereto are unable satisfactorily to adjust the same, and that by reason of such difference remaining unadjusted a railway lockout or strike has been or is likely to be caused, or the regular and safe transportation of mails, passengers or freight has been or may be interrupted, or the safety of any person employed on a railway train or car has been or is likely to be endangered, the Minister may, either on the application of any party to the difference, or on the application of the corporation of any municipality directly affected by the difference, or of his own motion, cause inquiry to be made into the same and the cause thereof, and, for that purpose, may, under his hand and seal of office, establish a committee of conciliation, mediation and investigation to be composed of three persons to be named, one by the railway employer, and one by the railway employees, parties to the difference, and the third by the two so named, or by the parties to the difference in case they can agree. (2) The Minister shall in writing notify each party to name a member of the committee stating in such notice a time, not being later than five days after the receipt of such notice, within which this is to be done. (3) If either party within such time or any extension thereof that the Minister, on cause shown, may grant, refuses or fails to name a member of the committee, the Minister or the lieutenant governor in council, as the case may be, as hereinafter provided, may appoint one in the place of the party so refusing or in default, and if the members of the committee so chosen fail to elect a third member, the Minister, or the lieutenant governor in council, as the case may be, may make such selection." Then section 14: "It shall be the duty of the committee to endeavour by conciliation and mediation to assist in bringing about an amicable settlement of the difference to the satisfaction of both parties, and to report its proceedings to the Minister." Then section 15: "In case ~~of~~ the conciliation

committee is unable to effect an amicable settlement by conciliation or mediation the Minister may refer the difference to arbitration." Then there are provisions for the appointment of a Board of Arbitration, and by section 23, on page 91 powers are given to the Board. "For the purpose of such inquiry, the board shall have all the power of summoning before it any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation, if they are person entitled to affirm in civil matters, and produce such documents and things as the board deems requisite to the full investigation of the matters into which it is enquiring, and shall have the same powers to enforce the attendance of witnesses, and to compel them to give evidence as is vested in any court of record in civil cases; but no such witness shall be compelled to answer", and so forth. Then section 25 deals with books: "The summons shall be in such form as the Minister shall prescribe, and may require such person to produce before the board any books, papers, or other documents in his possession or under his control, in any way relating to the proceedings."

LORD ATKINSON: Section 23 gives them great powers.

MR. STUART BEVAN: Yes.

LORD ATKINSON: The powers of a Court of Justice?

MR. STUART BEVAN: Yes, but, so far as I can see, there are no powers given in this Act to secure that the status quo remains unaltered during the hearing of the matter before the Conciliation Board, nor are there any penalties imposed upon the parties if they fail to attend or to give the assistance which the Board requires, but this, by its terms, relates, except in the case of consent, only to disputes between railway companies, and their employees. The Lemieux Act of 1907 is of a very different character. It affects a very large number of persons, companies and corporations; it makes the reference to the Board of Conciliation compulsory; it does not call for the consent of either party, and the various sections I am going to refer to in a moment constitute, in my

submission, a very great and serious interference with property and civil rights in the province. It is at page 11 of the Appendix. It is entitled: "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities." The interpretation section is section 2: "'Minister' means the Minister of Labour." This shows the interpretation of the Act. "'Employer' means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways, whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works; (d) 'employee' means any person employed by an employer to do any skilled or unskilled manual or clerical work for hire or reward in any industry to which this Act applies; (e) 'dispute' or 'industrial dispute' means any dispute or difference between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes all matters relating to: (1) the wages allowance or other remuneration of employees, or the price paid or to be paid in respect of employment; (2) the hours of employment, sex, age, qualification or status of employees, and the mode, terms and conditions of employment; (3) the employment of children or any person or persons or class of persons, or the dismissal of or refusal to employ any particular person or persons or class of persons; (4) claims on the part of an employer or any employee as to whether and, if so, under what circumstances, preference of employment should or should not be given to one class over another of persons being or not being members of labour or other organisations, British subjects or aliends; (5) materials

supplied and alleged to be bad, unfit or unsuitable, or damage alleged to have been done to work; (6) any established custom or usage, either generally or in the particular district affected; (7) the interpretation of any agreement or a clause thereof." So that your Lordships see the widest field is given to disputes, and in the case of subsection (7), which is a rather remarkable case, the position is this, that, if there is a dispute between an employer, as defined by the Act, employing ten or more persons in a particular public service utility, and one or more of his employees, as to the meaning of a clause in the agreement of service, as to whether the employee may be dismissed at seven days or fourteen days notice, the whole matter may be referred to the Conciliation Board, if this statute is intra vires the Dominion Parliament, and the position is to be held up, the employer, in the case I have put, being compelled to continue to employ the man, although upon the plain construction of the agreement of employment he was entitled to dismiss him at a week's notice. That is only one instance of the invasion of civil rights. The other subsections from 1 to 6 as well, in my submission, constitute a similar interference with property and civil rights. Then there are definitions of lockout and strike. I do not think I need trouble your Lordships with that. Then there is: "Constitution of Boards." Section 5: "Wherever any dispute exists between an employer and any of his employees" -- that will be a dispute under (e) on page 12 -- "and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation, to which Board the dispute may be referred under the provisions of this Act." Then there is a proviso with regard to railway companies, which is not material. Then section 7: "Every Board shall consist of three members who shall be appointed by the Minister." Section 8 deals with the appointment of the Members of the Board, the procedure there laid down being followed, or endeavoured to be followed, in the present

case, as I have told your Lordships. Then, by section 9, as soon as the Board, when it has been appointed, the Registrar shall notify both the parties. Sections 15 to 20 are sections dealing with the procedure for the reference of disputes. Then section 16 is important, because it shows that the operation of the Act is not confined to cases of disputes between masters and men, where the men are Members of Trade Unions. "The application and the declaration accompanying it" -- that is the application for the appointment of a Board -- "(1) if made by an employer, an incorporated company or corporation, shall be signed by some one of its duly authorised managers or other principle executive officers; (2) if made by an employer other than an incorporated company or corporation, shall be signed by the employer himself in case he is an individual, or a majority of the partners or members in case of a partnership firm or association; (3) if made by employees members of a trade union, shall be signed by two of its officers duly authorised by a majority to vote of the members of the union, or by a vote taken by ballot of the members of the union present at a meeting called on not less than three days' notice for the purpose of discussing the question; (4) if made by employees some or all of whom are not members of a trade union, shall be signed by two of their number duly authorised by a majority vote taken by ballot of the employees present at a meeting called on not less than three days' notice for the purpose of discussing the question." I ought to have asked your Lordships to look at section 6, on page 13, which shows that when an application is made for the appointment of a Board of Conciliation, the Minister, if satisfied that the provisions of the Act apply, must appoint a Board. "Whenever, under this Act, an application is made in due form for the appointment of a Board of Conciliation and Investigation, and such application does not relate to a dispute which is the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act, the Minister, whose decision for such purpose shall be final, shall, within

fifteen days from the date at which the application is received, establish such Board under his hand and seal of office, if satisfied that the provisions of this Act apply." Section 20, subsection (3), shows, as subsections (3) and (4) of section 16 show, that the operation of the Act is not confined to trade union disputes. Then section 21: "Any dispute may be referred to a Board by Application in that behalf made in due form by any party theretop provided that no dispute shall be the subject of reference to a Board under this Act in any case in which the employees by affected by the dispute are fewer than ten." Then section 23: "In every case where a dispute is duly referred to a Board it shall be the duty of the Board to endeavour to bring about a settlement of the dispute, and to this end the Board shall, in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits thereof and the right settlement thereof. In the course of such inquiry the Board may make all such suggestions and do all such things as it deems right and proper for inducing the parties to come to a fair and amicable settlement of the dispute, and may adjourn the proceedings for any period the Board thinks reasonable to allow the parties to agree upon terms of settlement." During all that time, as will hereinafter appear, the <u>status quo</u> has to be maintained. Section 24: "If a settlement of the dispute is arrived at by the parties during the course of its reference to the Board, a memorandum of the settlement shall be drawn up by the Board and signed by the parties, and shall, if the parties so agree, be binding as if made a recommendation by the Board, under section 62 of this Act". Then section 25 deals with the case of a settlement not being arrived at, notwithstanding a long adjournment for the purpose of giving an opportunity to the parties to come to terms. "If a settlement of the dispute is not arrived at during the course of its reference to the Board, the Board shall make a full report thereon to the Minister, which report shall set forth the various proceedings and steps taken by the Board for the purpose of fully

and carefully ascertaining all the facts and circumstances, and shall also set forth such fact, and circumstances, and its findings therefrom, including the cause of the dispute and the Board's recommendation for the settlement of the dispute according to the merits and substantial justice of the case." That, as I read the Act, is as far as the Board can carry the matter. The other powers over the parties to the reference I shall refer to in a moment; they are to be found in later sections of the Act. But the usefulness of the Board as a mediator or investigator begins and ends with the recommendation. It has no power to do anything more than set out the facts and findings with regard to the dispute and to make a recommendation for the settlement of the dispute. Then section 26: "The Board's recommendation shall deal with each item of the dispute and shall state in plain terms, and avoiding as far as possible all technicalities, what in the Board's opinion ought or ought not to be done by the respective parties concerned. Wherever it appears to the Board expedient so to do, its recommendation shall also state the period during which the proposed settlement should continue in force, and the date from which it should commence."

LORD ATKINSON: Section 30 is important.

MR. STUART BEVAN: Yes, I am coming to section 30. Section 28 provides for the publication of the Report. One of the learned Judges describes the only action which is open to the Board under this statute as being a sedative action, and, if I may adopt that phrase, it would seem to correctly describe it; it cannot cure the trouble, but it can apply a sedative. "For the purpose of its enquiry the Board shall have all the powers of summoning before it and enforcing the attendance of witnesses, of administering oaths, and of requiring witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such books, papers or other documents or things as the Board deems requisite to the full investigation of the matters into which it is enquiring, as is vested in any court

of record in civil cases." That is very much the same ~~position~~ provision, if not identical, with the provision in the Act of 1906, section 23 I think it is in identical terms, but the Lemieux Act goes a great deal further than the earlier one, as your Lordships will see in a moment. Section 31: "The summons shall be in the prescribed form, and may require any person to produce before the Board any books, papers or other documents or things in his possession or under his control in any way relating to the proceedings." Then section 32: "All books, papers and other documents or things produced before the Board, whether voluntarily or in pursuance to summons, may be inspected by the Board, and also by such parties as the Board allows; but the information obtained therefrom shall not, except in so far as the Board deems it expedient be made public, and such parts of the books, papers or other documents as in the opinion of the Board do not relate to the matter at issue may be sealed up." Section 33: "Any party to the proceedings shall be competent and may be compelled to give evidence as a witness." Then section 30, subsection (2): "Any member of the Board may administer an oath, and the Board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not."

LORD DUNEDIN: It seems to turn on the particularity of these provisions which set up the Board. In order that it may pursue its investigations they give it very ample powers analogous to those of a Court of Law to call people before them to find out the truth, and so on.

MR. STUART BEVAN: When I proceed to read later sections of the Act your Lordships will see it has powers which no Court of Law has. Then section 33: "Any party to the proceedings shall be competent and may be compelled to give evidence as a witness." Then section 36: "If any person who has been duly served with such summons and to whom at the same time payment or tender has been made of his reasonable travelling expenses according to the aforesaid

scale, fails to duly attend or to duly produce any book, paper or other document or thing as required by his summons , he shall be guilty of an offence and liable to a penalty not exceeding one hundred dollars, unless he shows that there was good and sufficient cause for such failure." Section 37: "If, in any proceedings before the Board, any person wilfully insults any Member of the Board or wilfully interrupts the proceedings, or without good cause refuses to give evidence, or is guilty in any other manner of any wilful contempt ~~x~~ in the face of the Board, any officer of the Board or any constable may take the person offending into custody and remove him from the precincts of the Board, to be detained in custody until the rising of the Board, and the person so offending shall be liable to a penalty not exceeding one hundred dollars."

LORD ATKINSON: Section 38 is an important one.

MR. STUART BEVAN: Yes, it is very important. "The Board, or any member thereof, and, on being authorised in writing by the Board, any other person" -- there is no limitation as to what the class of persons is to be; anybody who in the pleasure of the Board may be authorised -- "may, without any other warrant than this Act, at any time, enter any building, mine, mine workings, ship, vessel, factory, workshop, place or premises of any kind, wherein, or in respect of which, any industry is carried on or any work is being or has been done or commenced, or any matter or thing is taking place or has taken place, which has been made the subject of a reference to the Board, and inspect and view any work, material, machinery, appliance, or article therein, and interrogate any persons in or upon any such building, mine, mine workings, ship, vessel, factory, workshop, place or premises as aforesaid, in respect of or in relation to any matter or thing hereinbefore mentioned, any any person who hinders or obstructs the Board or any such person authorised as aforesaid, in the exercise of any power conferred by this section, shall be builty of an offence and be liable to a penalty not exceeding one hundred dollars."

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In my submission, that is a very wide invasion of "civil rights".

LORD ATKINSON: Any person obstructing him is made liable to a fine, he shall be guilty of an offence.

MR STUART BEVAN: Yes. There is nothing to prevent any other person appointed by the Board being a person who carries on business similar to that, the subject matter of the enquiry, and upon such person presenting himself to his competitors' premises he can make himself master of the position.

LORD ATKINSON: He can examine his x rival's books ?

MR STUART BEVAN: Yes. Then section 56, page 23: "Strikes and Lockouts prior to and pending a Reference to a Board illegal". Then: "It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike: Provided also that, except where the parties have entered into an agreement under Section 62 of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under Section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act".

Then section 57: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in every case where a dispute has been referred to a Board, until the dispute has been finally dealt with by the Board, neither

of the parties nor the employees affected shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute; but if, in the opinion of the Board, either party uses this or any other provisions of this Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board so reports to the Minister, such party shall be guilty of an offence, and liable to the same penalties as are imposed for a violation of the next preceding section". Now, my Lords, that position legislated for in that section 57 would apply to such a case as this.

LORD DUNEDIN: The word "preceding" must be "succeeding", surely ?

MR STUART BEVAN: Yes, I think it must. Then section 58: "Any employer declaring or causing a lockout contrary to the provisions of this Act shall be liable to a fine of not less than one hundred dollars, nor more than one thousand dollars for each day or part of a day that such lockout exists". It is quite true that those sections deal with numerous matters like lockout and strikes, but section 57 also deals with the question of a dispute between master and servant as to the interpretation of an agreement of employment, that comes under section 2, sub-section 7, the interpretation section, where the construction of the particular clause in the agreement would affect it. *10.*

SIR JOHN SIMON: I think "preceding" is right in the section your Lordship refers to, you go back to the preceding section; if it is the breach of that section the penalty for which is to be found in the succeeding section.

LORD DUNEDIN: Where are the penalties ?

SIR JOHN SIMON: They are found in section 58, and if you want to see what it is that is being violated, it is the violation of the next preceding section. It is a double reference.

MR STUART BEVAN: Yes, the penalty in section 58 is the penalty for the violation of the proceedings in 56 and 57.

SIR JOHN SIMON: It is section 56.

LORD DUNEDIN: It is curious language. You do not talk of the "next preceding"; "next preceding" is not English.

LORD WRENBURY: You say "last preceding".

MR STUART BEVAN: Yes. Then section 59 deals with the employee who goes on strike: "Any employee who goes on strike contrary to the provisions of this Act shall be liable to a fine of not less than ten dollars nor more than fifty dollars, for each day or part of a day that such employee is on strike". It deals with the civil rights both of employers and employees, and prevents the employer dealing with his labour as he has the civil right in law to do.

Then section 60: "Any person who incites, encourages or aids in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this Act, shall be guilty of an offence and liable to a fine of not less than fifty dollars nor more than one thousand dollars".

Then section 61: "The procedure for enforcing penalties imposed or authorised to be imposed by this Act shall be that prescribed by Part XV of The Criminal Code relating to summary convictions".

Then there are "Special Provisions", and section 62 provides: "Either party to a dispute which may be referred under this Act to a Board may agree in writing, at any time before or after the Board has made its report and recommendation, to be bound by the recommendation of the Board in the same manner as parties are bound upon an award made pursuant to a reference to arbitration on the order of a court of record; every agreement

so to be bound made by one party shall be forwarded to the Registrar who shall communicate it to the other party, and if the other party agrees in like manner to be bound by the recommendation of the Board, then the recommendation shall be made a rule of the said court on the application of either party and shall be enforceable in like manner". That calls for consent of course.

The section 63: "In the event of a dispute arising in any industry or trade other than such as may be included under the provisions of this Act, and such dispute threatens to result in a lockout or strike, or has actually resulted in a lockout or strike, either of the parties may agree in writing to allow such dispute to be referred to a Board of Conciliation and Investigation, to be constituted under the provisions of this Act". Really the Special Provisions relate to arbitration by consent.

VISCOUNT HALDANE: Having consented, the property and civil rights may be materially affected.

MR STUART BEVAN: Because they have consented.

VISCOUNT HALDANE: Because they consented to the whole of the Act as applicable.

MR STUART BEVAN: I suppose anybody may forego his civil rights by agreement ?

VISCOUNT HALDANE: I am not sure, if you are in Canada and it is something in a Province; it may be that it is for the Provincial Legislature alone to enforce the consequences.

MR STUART BEVAN: Yes. I was not looking at it from that aspect; I am obliged to your Lordship. Then section 64, which is headed "Miscellaneous". "No Court of the Dominion of Canada, or of any province or territory thereof, shall have power or jurisdiction to recognize or enforce, or to receive in evidence any report of a Board, or any testimony or proceedings before a Board, as against any person or for any purpose, except in the case of the prosecution of such person for perjury".

Then section 67: "In case of prosecutions under this Act,

whether a conviction is or is not obtained, it shall be the duty of the clerk of the court before which any such prosecution takes place to briefly report the particulars of such prosecution to the Registrar within thirty days after it has been determined".

Then section 68 provides for regulations by the Governor in Council: "The Governor in Council may make regulations as to the time within which anything hereby authorized shall be done, and also to any other matter or thing which appears to him necessary or advisable to the effectual working of the several provisions of this Act". Then it deals with the publication of those regulations.

Those are the material section of the Act, and the contention of the Appellants is that under section 92 of the British North America Act of 1867, the statute, the Industrial Disputes Act, infringes upon the exclusive powers of the Provincial Legislatures set out in section 92.

VISCOUNT HALDANE: Do the succeeding Acts of 1910, 1918, and 1920 carry the matter any further ?

MR STUART BEVAN: No, I do not think so.

VISCOUNT HALDANE: Now we have got the point, just let us see what the provisions of the new Act do.

SIR JOHN SIMON: May I make one qualification; I would ask my friend to read the amending statute on page 29. This particular amendment is the amendment of 1919-1920. My friend Mr Clauson suggests that we also want page 25. On page 25, section 2 amends sub-paragraph (b) of paragraph 2 of section 15, and then my friend might also read on page 29, section 16; it is only that my Lords may have all the materials.

MR STUART BEVAN: First of all Sir John asks me to read on page 25, the amendment of 1910; paragraph 2 says: "Sub-paragraph (b) of paragraph 2 of section 15" --we may just look at that, that is on page 15 and it says the application for the appointment of a Board shall be accompanied by "(a) a Statement", then"(b) A

statutory declaration setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board of Conciliation and Investigation under the Act, to the best of the knowledge and belief of the declarant, a lockout or strike, as the case may be, will be declared,and that the necessary authority to declare such lockout or strike has been obtained". That is amended by substituting, at page 25, sub-section 2: "(b) A statutory declaration setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarant a lockout or strike will be declared, and (except where the application is made by an employer in consequence of an intended change in wages or hours proposed by the said employer) that the necessary authority to declare such lockout or strike has been obtained; or, where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorised to carry on negotiations in disputes between employers and employees and so recognised by the employer, a statutory declaration by the chairman or president and by the secretary of such committee setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarants a strike will be declared, that the dispute has been the subject of negotiations between the committee and the employer, that all efforts to obtain a satisfactory settlement have failed, and that there is no reasonable hope of securing a settlement by further negotiations". There is an important amendment my learned friend Mr Lawrence points out in 1918, on page 26, section 1. "The following paragraph is inserted".

LORD ATKINSON: On page 26, paragraph 3 is a matter of importance.

MR STUART BEVAN: I am obliged, I ought to read that;"Paragraph (3) of section 16 of the said Act is amended by adding at the end

thereof the following: 'or, where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorised to carry on negotiations in disputes between employers and employees,and so recognised by the employer, may be signed by the chairman or president and by the secretary of the said committee'". So that the Act recognises two classes of dispute, one which is confined to employees in one province, and one which extends to employees outside that province in other provinces,which is directly relevant to the matter in hand.

Then my friend asked me to read on page 29. Before I do that, may I read page 26, the amendment of 1918, section 1: "The following paragraph is inserted immediately after paragraph (d) of section two of The Industrial Disputes Investigation Act,1907 :- '(dd) A lockout or strike shall not,nor, where application for a Board is made within thirty days after the dismissal, shall any dismissal, cause any employee to cease to be an employee, or an employer to cease to be an employer, within the meaning and for the purpose of this Act".

LORD DUNEDIN: What does all this come to ? That all this is a matter of material interference with civil rights I do not think there is any doubt, but that does not solve the question; the whole question is whether the Dominion Legislature has not a right to do what it has done in respect of its powers, and it is perfectly well-settled that it is no answer to say: But civil rights are affected.

MR STUART BEVAN: No.

VISCOUNT HALDANE: Of course, it is very difficult. The power to legislate for peace, order and good government is in section 91, and property and civil rights is in section 92, but, on the other hand, the enumeration in section 91 is paramount and prevails, and when you come to this enumeration you find regulations of trade and commerce, and that has been so attenuated by decisions of this Board that it is very difficult to rely on it.

MR STUART BEVAN: The Respondents, of course, contend here that this is within trade and commerce; I contest that; I say it is within no provision of section 91, but it comes within at least three of the matters exclusively preserved to the Provincial Legislature by section 92.

LORD DUNEDIN: I see that in the Quebec judgment, which is on the point, of course it does not bind us, the Court or the Judge puts it as mere criminal legislation. He says it is obviously within the power of the Dominion Parliament to say that a strike or a lockout is an illegal thing; if you can say that, may not you also say: We will make certain provisions for trying to prevent these things being brought about ?

VISCOUNT HALDANE: Unfortunately for that view, we have more than once decided on this Board that the power over the criminal which is given exclusively to the Dominion under section 91, does not enable it to trench on property and civil rights by merely using that ~~right~~ road. If you have something substantial, then you can make any amendment of criminal law giving effect to it, but you cannot usurp power under section 92 under the title of criminal law.

MR STUART BEVAN: I had those decisions in mind, and in due course I propose to remind your Lordships of them. The judgment in the Quebec Reports, which I have not seen, I am sorry to say, must be looked at in the light of the decisions of this Board

LORD DUNEDIN: In the John Deere Plow case, I think we decided that where the Dominion exercises power of incorporating a Company to trade generally in Canada, it can give it a power which cannot be interfered with under the name of property and civil rights. It is worth looking at. It is in 1915 Appeal Cases.

MR STUART BEVAN: Yes, I will refer to it in 1915 Appeal Cases, at page 330.

VISCOUNT HALDANE: That was a Canadian Company, not a provincial Company, and the province attempted to curtail ~~them~~ its powers and so on. We said to some extent they could but they could not substantially.

MR STUART BEVAN: I am going to refer to it, and perhaps it would be convenient that I should do so now.

VISCOUNT HALDANE: I think it will be more convenient to take it in its order.

SIR JOHN SIMON: It has been discussed since.

VISCOUNT HALDANE: Yes, in the Board of Commerce case.

MR STUART BEVAN: I will read the headnote:"The authority of the Parliament of Canada to legislate for 'the regulation of trade and commerce' conferred by section 91, enumeration 2,of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a provincial Legislature. Part VI of the Companies Act of British Columbia (R.S.B.C.,1911, c.39),which in effect provides that Companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore ultra vires the provincial Legislature under the British North America Act,1867". I can deal with that now, but if it is x inconvenient, I will reserve it.

VISCOUNT HALDANE: I think you had better reserve it and take it in its sequence.

SIR JOHN SIMON: There are two more/references in the Statutes I want.

MR STUART BEVAN: I am reminded that there is a reference in the statute which Sir John asked for on page 29.

SIR JOHN SIMON: I think it would be worth while to complete them by reading page 28, section 6.

MR STUART BEVAN: Yes, that is the 1918 amendment: "The said Act is amended by inserting the following sections immediately after section sixty-three thereof:- 63 A. Where in any industry any strike or lockout has occurred, and in the public interest

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or for any other reason it seems to the Minister expedient,the Minister,on the application of any municipality interested,or of the Mayor, reeve, or other head officer or acting head officer thereof,or of his own motion, may, without application of either of the parties to the dispute,strike, or lockout, whether it involves one m or more employers or employees in the employ of one or more employers, constitute a Board of Conciliation and Investigation under this Act in respect of any dispute,or strike or lockout" and so on.

LORD DUNEDIN: Do not think me impatient, but I hate a lot of sections being read in an Act of Parliament unless I know what they are being read for. Is there any particular point in any of these sections, except the absolutely general point that undoubtedly in many many ways these sections interfere with civil rights ?

MR STUART BEVAN: I think not. I am reading this section at the invitation of Sir John Simon.

SIR JOHN SIMON: I was only interposing because the Noble Lord presiding asked whether there was anything-else in the Statute relevant. I appreciate your Lordship's enquiry, but we thought them so. The phrase, my friend was not stressing it, is, "where in any industry any strike or lockout has occurred,and in the public interest" and so on it is"expedient"; that is the word that wants to be stressed. It may be it does raise a Dominion consideration.

MR STUART BEVAN: We stress the following words, or the alternative words, "or for any other reason".

VISCOUNT HALDANE: Yes, I think you may observe that to be relevant is one thing, and to be material is another.

LORD DUNEDIN: I do not think Sir John would have stated any public interest in that comment, he is for the Dominion.

SIR JOHN SIMON: Yes.

LORD DUNEDIN: You do not want this to be quoted because you think it is public interest; what has the Dominion to do with

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public interest ?

VISCOUNT HALDANE: Sir John was only answering a general question I put.

MR STUART BEVAN: I should like to read the other section, if convenient. It is section 16 of the 1920 Act.

LORD DUNEDIN: This is only the same. I am very sorry, but to me many of these things pass into the limbo of forgotten sections.

MR STUART BEVAN: I had better leave Sir John to read it. The general character and nature of this legislation is apparent from the terms of the original Act.

LORD DUNEDIN: It interferes grievously with civil rights.

MR STUART BEVAN: Yes, and I start with that.

LORD SALVESEN: I understand, if your contention is sound, it is that this Act is a dead letter except in so far as parties may consent to take advantage of it ?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE:- Yes, my doubt is whether they can do even that.

MR STUART BEVAN:- Subject to the observation which Viscount Haldane was good enough to make just now which I should like to have an opportunity of considering; it is subject to that undoubtedly.

Now it is perhaps convenient that I should refer to sections 91 and 92 that have been so often before your Lordships' Board.

VISCOUNT HALDANE:- I think it is those that are really the sections to be discussed. You may assume that we have heard of them before.

MR STUART BEVAN:- Yes, my Lord, they are in the Joint Appendix of Statutes in the earlier pages "Distribution of Legislative Powers. Powers of the Parliament". Then section 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".

VISCOUNT HALDANE:- The first step is, you cut out section 92 altogether?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- Now come to the next step and you see you go back on what you have done.

MR STUART BEVAN:- "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".

VISCOUNT HALDANE:- Section 91; that is a very important section there on which only this Board went back on its earlier decision

as to the meaning of the words at the end.

MR STUART BEVAN:- Yes: "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".

VISCOUNT HALDANE:- That was held by one decision to be confined to head 16 in section 92, but afterwards that opinion was declared to be wrong, and this Board has decided that it refers to the whole enumeration.

MR STUART BEVAN:- Yes. Now the matters upon which the Respondents rely in the Enumeration under section 91 are first of all, (2), "the regulation of trade and commerce" at the bottom of page 1, and (7) "Militia, Military and Naval Service and Defence," and (27) "the Criminal Law except the constitution of Courts of Criminal jurisdiction, but not including the procedure in criminal matters". Those are the three enumerations that they rely upon; they also contend that this Industrial Disputes Act is for the peace, order and good government of Canada in relation to matters not coming within the class of subject by the Act assigned exclusively to the Provincial legislation.

VISCOUNT HALDANE:- If that means the subject-matter does come within section 92 then they can only get at it if they can import that construction which was imported in the Manitoba Pulp case?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- And that is a very difficult matter to import; that is for the extreme necessities of war?

MR STUART BEVAN:- Yes, and for the purpose of enabling them to contend for that construction they called a good deal of evidence in the Court below directed to show if they could that a state of National emergency existed.

VISCOUNT HALDANE:- Surely there must be a great many other states of National emergency if that was admissible.

MR STUART BEVAN:- That was the way in which they endeavoured

to apply it; they called no less an important witness than the Minister of Labour himself, and they were put to it to know whether the state of National emergency ought to be established as at the date of the passing of the Statute in 1907, or as at the date of the appointment of the Board in 1922.

VISCOUNT HALDANE:- If it was not in existence in 1907 the Act would not have been passed, and no good would be done by proving an emergency at the time the Board was appointed unless reappointed. Did the Court decide upon that footing?

MR STUART BEVAN:- No, my Lord, they did not; I shall be reading the Judgment in a moment. The evidence was not before the Judge who granted the interlocutory injunction. I propose to read the Judgment before I read the evidence or refer to the evidence which was before the Court when the final judgment was given. None of the judges put it upon that ground, but there is the case made upon the evidence and relied upon by the Respondents in this Appeal.

VISCOUNT HALDANE:- National emergency?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- You know the curious thing is that the United States who have got a rigidly written Constitution also have the doctrine of National emergency, and so far as I know every country that has a Constitution has got it. In a state of National emergency the provisions which define the Constitution are intended to be overridden and abandoned in order to provide for that emergency, in the United States Supreme Court it has been so held.

MR STUART BEVAN:- And in the case of the Dominion legislation in the Pulp case your Lordships held that.

LORD ATKINSON:- It is really requisition.

VISCOUNT HALDANE:- The Pulp case went further; they did could interfere with a newspaper.

MR STUART BEVAN:- Not only during the war but after the cessation of hostilities on the particular facts of the case.

VISCOUNT HALDANE:- We did not say they could, but we said: No Court would interfere with their Judgment.

MR STUART BEVAN:- Yes. There was the very recent case which was put on the ground of national emergency, the profiteering case, or the Board of Commerce case.

VISCOUNT HALDANE:- There, the decision was with the Province; we said, you cannot do it.

MR STUART BEVAN:- The decision there was with the Province, in the Pulp case with the Dominion.

Now it would be convenient if I read the Judgment of the learned Judge who granted the interlocutory injunction because he had the same material before him which I have now placed before your Lordships. His Judgment will be found on page 6 of the Record, it is the Judgment of Mr Justice Orde: "By virtue of Sections 16 and 17 of 1 George V, chapter 119, and Sections 34 (2) and 36 (1) of the Public Utilities Act, R.S.O. 1914, chapter 204, the Plaintiffs are a body corporate charged with the duty of managing and operating the municipal electric light, heat and power works of the City of Toronto. That duty calls for the employment of a large number of men" etc etc (Reading down to the words) "Counsel for the Defendant does not contend that the subject matter of the Act falls within any of the 29 enumerated classes expressly assigned to the Dominion Parliament by section 91, but he says that it does not come within any of the 16 classes exclusively assigned to the provinces by section 92, and that therefore it falls to the jurisdiction of the Dominion Parliament under the residuary power given by the opening words of section 91, as a law made for the peace order and good government of Canada".

LORD DUNEDIN:- The counsel at that stage of the case seems to have given up the idea.

MR STUART BEVAN:- Yes, but at a later stage he came back and relied upon three of the enumerations under section 91.

LORD DUNEDIN:- The ones you have read.

MR STUART BEVAN:- Yes; "And he contends that when so legislating the Parliament of Canada may, as ancillary to the main subject matter of the Act, enact laws which interfere with or over-ride civil and municipal rights within the provinces". Then he says: "The features of the Act to which objection is taken by the Plaintiffs are to be found in those sections which interfere with civil rights and not in the innocuous sections which provide some means for settling industrial disputes. It is those provisions for conciliation and those alone that Counsel for the Defendants relies upon as falling within the residuary powers under Section 91 and as justifying the ancillary coercive sections. It may not be amiss to observe parenthetically that it is open to argument that legislation for the appointment of a Board whose sole duty is to endeavour to adjust a dispute but who are clothed with no coercive powers, and whose judgment or award has no binding effect, is not a 'law' at all in the sense in which that word is used in sections 91 and 92 of the British North America Act".

VISCOUNT HALDANE:- There is a good deal in that point if you consider what the principle of the British North America Act is; it is that it gives two sets of legislative capacities, one to the Dominion Parliament, the other to the Provincial Parliament, and it is absolutely ultra vires in the case of either to trench on the other's field. If that is so, what are these laws that are innocuous, they are nothing at all, if the matter comes within the sphere of the Province the Province ought to disregard them.

MR STUART BEVAN:- There is in fact an Ontario Act in force dealing with Trade# disputes.

VISCOUNT HALDANE:- I should be surprised if there was not in most of the Provinces. I know whenever the Dominion passes an Act of this kind it is promptly followed up by a rival, and then we have to determine which is to prevail.

MR STUART BEVEN:- Then at line 42 the learned Judge goes on: "The same end might be attained by a mere resolution of the House of Commons or of the Senate. Such a resolution could not affect civil rights, and I can see little practical difference between an Act of Parliament or of a Provincial Legislature merely appointing a body for that purpose, and a resolution passed by any deliberative body of men. A municipal council might do it, or any religious or fraternal body might do it, with as much force of law, as the Act in question when stripped of all those provisions which interfere with civil rights or municipal powers. But it is not upon any such construction that my judgment is based. It may be that any Act which the Canadian Parliament or a provincial legislature sees fit to pass is a 'law' within the meaning of sections 91 and 92 of the British North America Act". Then he says the Act is entitled and so on, and then he sets it out; and then I can go to line 37: "It is not necessary to review all the provisions of the Act in detail. Its scheme is very simple." Then there are various references, and then at the bottom of the page he draws attention to the coercive features of the Act "to which exception especially is taken by the Plaintiffs". Then he says: "The Board is empowered to summon witnesses including the parties to the dispute, to compel the production of books, papers and other documents, and to enter buildings and other premises for purposes of inspection, and to interrogate persons therein, and these powers are sanctioned by penalties for failure to attend or to give evidence or to permit inspection". Then the learned Judge refers to sections 56 to 59 which preserve the status quo.

I think I had better read this: "Sections 56 to 59 contain extremely drastic provisions designed to preserve the status quo from the moment the Minister grants the application for a Board until it has made its report", etc etc (Reading down to the words) "In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919 (1922) 1 Appeal Cases, 191, at pp. 198 and 199".

VISCOUNT HALDANE:- Now we come to the Pulp case, and that will take a good deal of time to consider, and therefore we had perhaps better adjourn.

(Adjourned for a short time).

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MR. STUART BEVAN: The Judgment goes on, on page 10, line 45: "The recent judgment of the Judicial Committee delivered on the 25th July last, in the case of Fort Frances Pulp and Paper Company v. Manitoba Free Press Company, might lend colour to the suggestion that there may be cases, notwithstanding what was laid down in the Montreal Street Railway case, where in a 'national emergency' the Parliament of Canada may have power to pass legislation under the residuary clause infringing upon provincial rights.", etc., etd. (Reading to the words, line 32) "The authority of that decision has been so affected by later decisions of the Privy Council that I do not feel that it is binding upon me or that it is now a correct exposition of the law."

LORD DUNEDIN: Does that matter, because it is all about the interim injunction?

MR. STUART BEVAN: Yes; I need not trouble your Lordships with that. That is how the matter stood when the injunction was granted. The only statute that I have not referred your Lordships to is the statute under which the Toronto Commissioners derive their powers, and it will, perhaps, be right that I should gave your Lordships the reference to that.

VISCOUNT HALDANE: Tell us the substance of it?

MR. STUART BEVAN: The substance is that the power which the municipality had are all conferred upon these Commissioners.

VISCOUNT HALDANE: It is a statutory delegation?

MR. STUART BEVAN: Yes, a convenient delegation.

VISCOUNT HALDANE: The municipality would require power to regulate the organisation of the City of Toronto, but that, I take it, they have.

MR. STUART BEVAN: Yes, no issue really arises on that. I think it may be taken just as if the municipality themselves were the plaintiffs in the action.

VISCOUNT HALDANE: I suppose they said: This is a municipal institution within the Province?

MR. STUART BEVAN: I ought perhaps, before I deal with the evidence

that was called, to tell your Lordships that there is an Ontario Act of 1914, which is to be found at page 38 of the Joint Appendix, entitled "An Act respecting Councils of Conciliation and of Arbitration for settling Industrial Disputes."

LORD SALEVESEN: How do the provisions differ from the other ones?

MR. STUART BEVAN: There is not the same interference with property and civil rights, but there is a complete procedure provided for the reference.

VISCOUNT HALDANE: That is only to show that they have acted.

MR. STUART BEVAN: Yes, that is really all. I do not think I need trouble your Lordships with the terms of that.

VISCOUNT HALDANE: I do not think we are much troubled here with the old doctrine of the occupied field; it originated in Victorian times, and, although it has been recognised more and more as time goes on, as the two sets of legislatures have crowded one another, that you come back to the question of whether it is ultra vires or intra vires.

MR. STUART BEVAN: Yes, I think that position was recognised by the respondents, because at the trial they put their case, it is true, upon section 91, and said that it did not come within section 92 at all, but mainly they based their case upon an allegation of national emergency, and, in order to meet that case, they called a good deal of evidence.

VISCOUNT HALDANE: Before you go into the evidence, let us see what "national emergency" means. If a hostile force is invading a country, notwithstanding its constitution, the people of that country will rise and resist, and organise themselves in order to attain its end. That has been recognised, I think, by the United States, where I do not think there was much controversy about it; I think everybody said that must be so, but it was said: In the United States it is not so very easy to find such a power within the constitution, but it was said: There is power to make laws for the peace, order and good government of Canada, except with

regard to matters within section 92. Then it was said that an emergency which threatens Canada as a whole does not come within section 92, and, therefore, Parliament is free to proceed affirmatively under the general words of section 91. That is a very different thing from legislation as regards strikes, which is very important legislation, but each Province can deal with it.

MR. STUART BEVAN: Certainly this particular Province is dealing with it.

VISCOUNT HALDANE: The important thing against you is that the Lemieux Act, which was acquiesced in, as far as I know, was put forward for the whole of Canada, as a sort of natural construction of the powers of section 91.

MR. STUART BEVAN: Your Lordship says "acquiesced in".

VISCOUNT HALDANE: It has gone on since 1907.

MR. STUARD BEVAN: It has gone on since 1907, but the statement is that in the case of municipal authorities no Board has ever been appointed, where their interests are concerned, except with the consent of those authorities.

LORD ATKINSON: What is the difference between a municipal Board and a Board under section 92?

MR. STUART BEVAN: Under section 92 there is an express field.

LORD ATKINSON: If you cannot invade the civil rights of the Board, can you invade the civil rights of an invidual?

MR. STUART BEVAN: No, you cannot; but I have the additional ground, being a municipal corporation, to put forward under section 92, which would not be open in the case of a private employer. There is exclusive power in the provincial legislation under section 92 in respect of municipal institutions in the Province.

VISCOUNT HALDANE: If you could rely upon the regulation of trade and commerce, that would be enough for you. It may be that the decisions of this Board require a good deal of interpretation before you can rely upon that as giving this powers; otherwise I should have thought they did give this power.

MR. STUART BEVAN: For that one would have to consider the various

decisions, and the question of trade and commerce was dealt with by your Lordships in one of the recent cases, the Board of Commerce case.

VISCOUNT HALDANE: And the John Deere Plow case and the others.

MR. STUART BEVAN: Yes, and, so far as I am concerned, though, as your Lordship has reminded me, there is a large body of judicial decision by this board upon this class of case, the whole of the law is dealt with and summarised in the two last cases before your Lordships' Board. It may be necessary to refer to some of the earlier decisions perhaps to expand the references. But my case is really based upon the reasoning of your Lordships' Board in those last two cases in 1921 and 1922.

VISCOUNT HALDANE: In the Board of Commerce case we did say something about trade and commerce.

MR. STUART BEVAN: Your Lordships dealt with what trade and commerce was within the meaning of section 91, and as to whether the positio could be covered by trade and commerce in the particular case under consideration.

I shall have to deal with it when I come to the cases, but I thought the most convenient way, as this is put well to the front of the Respondents' case, would be to deal with the evidence relied upon as showing that there was a position of national emergency both at the date of the passing of the Statute and at the date of the Order constituting the Board.

Lord ATKINSON: I can understand national convenience.

Viscount HALDANE: That will not do.

Mr. STUART BEVAN: I suppose it was for the national convenience and certainly in the national interest that profiteering should be restrained in the years immediately following the War, but that is not an emergency.

Viscount HALDANE: An emergency is something so terrible as to be outside anything in Section 92, such as the Dominion being in peril.

Mr. STUART BEVAN: Yes. In my submission no such case could be made here and the sort of evidence which has been led to establish such a case falls far short of anything in the nature of a national emergency.

Viscount HALDANE: May we see the judgment on the main question and then we can come back to the evidence.

Mr. STUART BEVAN: If your Lordship pleases. I have read the judgment of Mr. Justice Ord. Then there is the judgment of Mr. Justice Mowat which led to the reference of the action to the Supreme Court. That is on page 166. He says: "This action is for a declaration that the Defendants have no right to act as a Board of Conciliation and Investigation in respect of an alleged dispute between the Plaintiffs and their employees" etc. etc.(Reading to the words, line 32) "that such requirements are necessary and that the effective or possible determination of industrial strife gives the Dominion Parliament power so to trench upon the subjects mentioned in subsections 8, 13 and 16 of section 92, in order that a law necessary for 'the peace, order and good government of Canada' may be effectively administered and enforced". That is a consideration of national

emergency. "Having come to the conclusion that the constitutional question raised is the all important one, I do not here deal with the evidence directed to that feature of the case which deals with the procedure leading up to the appointment of the Board of Conciliation which was made, and the propriety of its appointment. In a general way I find that the requirements of the statute have been complied with. I therefore pass on to discuss the constitutional point raised. The question of industrial strife, together with its ramifications and the growth of labour unions, is vastly different from the condition existing at the time of the passing of the British North America Act in 1867, and the silence of the Act regarding 'labour' and the absence of the specific allocation of that subject to the Dominion or the Provinces is thus accounted for. But it may be observed that the question of labour has, for more than twenty years, been appropriated by the Dominion Parliament and Government. There is a Department of Labour with a Minister of Labour in charge; periodical publications dealing with labour questions, the labour market, the current cost of living, and the employment of the military forces of Canada in the protection of property and the public safety where violent eruptions have occurred or may".

Viscount HALDANE: The Ministry of Labour is quite a recent thing, is it not?

Mr. STUART BEVAN: It was established by the Act of 1905 which is to be found on page 4 of the Appendix. My friend, Mr. Duncan, tells me that the original Act was in 1900. This is 1906. It does not refer to the 1900 Act, but my friend is in a much better position to know than I am and when he says there was a similar Act of 1900, I have no doubt that is so. This is the Revised Statutes of Canada of 1906. I have no doubt my friend is right. Then line 10: "This Department has, by common consent of the Provinces during this long period, been the principal administrative means of dealing with the question of eruptive industrial strife; and, while the fact of

acquiescence does not settle a constitutional point of law, and if there is no authority for the taking over of labour problems by the Dominion, yet a declaration of the Court that all such administrative actions are to cease, and inferentially that all the Governments and their law officers have erred, or slept, should not be arrived at unless the law is clear". May I pause there for a moment to say on this suggestion of acquiescence, the only evidence of acquiescence is that in the case of municipal institutions the Minister of Labour has ~~only sought~~ always sought, and obtained their consent before appointing the Board. In the case of individual firms and private companies it is true that no one has taken objection except in the one case which has found its way into the Law Reports. "Canada's constitutional problems have all found their way to the Judicial Committee of the Privy Council, whose members have taken enormous pains, from period to period, in their elucidation, and it is by the views of that tribunal that we are to be guided". etc. etc. (Reading to the words, page 169) "simple local strikes which alone could have been in contemplation of the Fathers in 1864 and 1867 have given place to these of Brotherhoods composed in some instances of hundreds of thousands and Dominion-wide in their operations and probably beyond the resources of each Province to deal with". The number dealt with by this particular piece of legislation is as low as ten. "As was said by Lord Watson in stating the opinion of the Judicial Committee in Attorney General for Ontario v. Attorney General for the Dominion (1896) A.C. 348, 361: 'Some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provinicial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament

of Canada"".

Lord ATKINSON: I suppose the Dominion could deal with foot and mouth disease over the whole of Canada.

Mr. STUART BEVAN: I should think so undoubtedly. Agriculture is assigned to the Dominion Parliament. "In Russell v. The Queen it was held that the restriction of intemperance was a matter of public order and safety, although it infringed on property and civil rights. And this case, although the Attorneys General were not represented, has been expressly reaffirmed in statements by the Committee". I think, as your Lordships will see when I refer to the decision, that turned upon the particular facts of that case. "If such an ill as occasional over-drinking is subject to Dominion legislation, it must follow that the prevention of strikes by conciliation, which conceivably might occasion the starving of the people, should also be. In the last case on the subject, it was held that regulation of the price of newsprint paper, upon which soothing and uninterrupted information might be written to quiet the nerves of the people racked by the Great War, but which was over when the regulation was passed, was within the powers of the Dominion, the Viscount Haldane saying:'No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship'. The elements of 'municipal affairs' and 'matters of a merely local and private nature' come within the same reasoning. I note that Mr. Justice Orde in this very case reported 25 O.W.N. 64 heard a motion for an interim injunction upon material which substantially raised the same issue as that raised by the evidence at the trial before me, and gave a considered judgment". That deals with the learned Judge's ground for referring the case to the Divisional Court.

Then the judgment of the Supreme Court is to be found on page 171. The Chief Justice says: "I agree with my brother Ferguson that the impugned portion of the legislation in question is legislation within the competency of the Dominion Parliament

under its powers to make laws for the peace orderand good government of Canada in relation to the regulation of trade and commerce, and, therefore, think the action should be dismissed with costs". Then Mr. Justice Ferguson gives the reasons. The first ten lines deal with the reference to the Divisional Court and at line 18 he says: "The Plaintiffs are a Board of Commissioners appointed under Sections 16 and 17 of 1 George V, Chapter 119" etc. etc. (reading to the words, line 46) "it is an interference with a local work or undertaking, subjects (Class 10) exclusively assigned to Provincial Legislatures by Section 92 of the British North America Act". Then he sets out the relief asked for. The second paragraph refers to the injunction that was ordered and the third paragraph deals with the circumstances under which the matter comes before the Supreme Court. I will go to line 33, page 172.

Mr. DUNCAN: Will you read at line 28?

Mr. STUART BEVAN: Certainly. "It is not, I think, necessary for the decision of the case at bar, to consider the constitutional validity of any sections or provision in this Act which do not deal with the powers of the Board, and consequently it is not necessary to consider the constitutional validity of Sections 56 to 61 which deal with strikes and lock outs prior to and pending a reference to a Board of Inquiry" etc. etc. (Reading to the words, line 13, page 173) "Counsel for the Defendants and the Attorney General for the Dominion submitted that as according to its 'true nature and effect', its 'pith and substance', and its title, the Act here in question is legislation in reference to industrial disputes, and as the Imperial Parliament inh the Australian Constitution Act (63-64 Victoria) recognised and treated industrial disputes as presenting an aspect of peace, order and good government that required special legislative treatment, (see Section 51 of the Australian Act)" -- that comparison does not seem to be very helpful -- "we may and should hold that the legislation does not fall within any of the classes enumerated in Section 92 of the British North America Act"etc. et

(Reading to the words, line 40) "'the Parliament of Canada had not by its general power 'to make laws for the peace, order and good government of Canada' full legislative authority to pass it'". In the Russell case it was held it did not fall within either of the classes of Section 92. The Alberta case referred to is in 1916 Appeal Cases. "'It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of Section 91 of the British North America Act confers, does not, unless the subject matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject matters entrusted to the provincial Legislatures by the enumeration in Section 92. There is only one case, outside the heads enumerated in Section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject matter lies outside all of the subject matters enumeratively entrusted to the province under Section 92'". Russell v. The Queen is an instance of such a case.

Viscount HALDANE: Objection has been taken to the enunciation of the law in Russell v. The Queen.

Mr. STUART BEVAN: The quotation from the Alberta case is from the judgment of this Board delivered by your Lordship.

Viscount HALDANE: We adopted Russell v. The Queen as right to that extent.

Mr. STUART BEVAN: Yes, so far as the construction of Section 92 was concerned. "Counsel for the Plaintiffs and the Attorney General for Ontario submit that the legislation here in question trenches upon the classes of legislation enumerated in subsections 8, 10, 13 and 16 of Section 92" etc. etc. (Reading to the words, line 41) "In the Board of Commerce Case, Mr. Justice Duff's statement does not take the form of a pronouncement on a point necessary to the decision of the case he was considering. In the Distillers and Brewers Case (1896) Appeal Cases" -- that was a judgment delivered by Lord Watson -- "the

Committee states the proposition as it is stated by Mr. Justice Duff in the Board of Commerce Case, and yet in the same case accepts and treats Russell v. The Queen as rightly decided".

Viscount HALDANE: I think in Russell v. The Queen what they proceeded on was that the scope of the Canada Temperance Act was so wide and concerned the Dominion so much as a whole that the matter was really outside Section 92 and they decided it on that footing and there were suggestions as to trade and commerce that were not adopted in subsequent decisions.

Mr. STUART BEVAN: As I read the judgment the Board held that they did not fall within Section 92 at all on the particular facts in that case and having regard to the particular scope and extent of the legislation in question.

Viscount HALDANE: There were some very critical remarks in Russell v. The Queen made by Lord Watson in a case that is not in the reports with regard to the McCarthy Act. It has been printed, but it is not in the reports.

Mr. GEOFFREY LAWRENCE: In the judgment in the Insurance Reference of 1916 your Lordships referred to the case on the McCarthy Act.

Viscount HALDANE: Did we quote what was said in that case?

Mr. GEOFFREY LAWRENCE: Your Lordship said you had no difficulty in holding it was ultra vires notwithstanding Russell v. The Queen.

Mr. STUART BEVAN: I have here the argument in the Great West Saddlery case.

Viscount HALDANE: More than once since objections have been taken to ~~quoted~~ quoting remarks that were made by their Lordships, probably rather precipitately, in the course of the discussion as indicating their settled view. In the McCarthy Act case this Board gave no reasons for its judgment. It simply pronounced the Act ultra vires.

Mr. STUART BEVAN: Would your Lordships desire me to read the passage from the Great West Saddlery case?

Viscount HALDANE: We will come to that in due course.

Lord ATKINSON: They critisised the argument in Russell v. The Queen.

Mr. STUART BEVAN: Yes. Mr. Justice Ferguson goes on at the top of

page 175: "After a careful perusal of the authorities, I am unable to reconcile the cases or the two propositions in the statement I have quoted from the Alberta Insurance Case, unless it be that the legislation in Russell v. The Queen did not, in the opinion of the Judicial Committee, even trench upon any of the powers conferred upon the provinces by Section 92" -- I think that is right, if I may say so with respect -- "or unless it be that the opinion of the Judicial Committee in Russell v. The Queen, and in the Fort Frances Case are founded upon the proposition that where a condition arises in which the peace, order and welfare of the Dominion as a whole is affected and that condition cannot be effectively met, controlled and regulated by provincial legislation, the Dominion Parliament has power to legislate under the peace, order and good government clause of Section 91 even if in so doing it trenches upon some of the classes enumerated in Section 92. While there are statements in the reasons for judgments in the Russell Case and the Fort Frances Case which appear to support the last proposition it is not, I think, clear that the proposition was necessary to the decision of either case or that it is laid down in either case. In the absence of clear and binding authority requiring me to do so, I am not prepared to hold that such a wide and far-reaching power must, can or should be implied in order to give effect to the agreement which the Imperial Parliament embodied in the North British America Act".

Lord ATKINSON: I suppose that would apply where there was a plague of some sort, ~~xxxxx~~ cholera, for instance.

Mr. STUART BEVAN: Yes.

Lord ATKINSON: In India they are obliged to deal with that in great districts. People are not allowed to shift from one stricken district to another.

Mr. STUART BEVAN: I suppose plague would come under the description of a national emergency or peril.

Lord ATKINSON: It is not confined to war.

Mr. STUART BEVAN: No, I do not think I could contend that; it would be a national emergency. "I incline to the view that if the Russell Case is not supported by reference to sub-section 27 of Section 91, criminal law, and sub-section 2, trade and commerce, then it must be taken to have been determined on a finding that the legislation did not in fact trench upon any class enumerated in Section 92 and that the Fort Frances Case is based upon a finding of such an abnormal condition that the necessities of the situation demanded, required and justified the implying of an overriding power to legislate so as to meet, regulate and control an abnormal condition amounting to a great national emergency, in which the safety of the nation as such was threatened".

Viscount HALDANE: No doubt that is so, but you will find somewhere, I am not sure it was not in the 1906 case, a judgment of this Board in which they said it was impossible to reconcile the Russell Case with the decision in the Ontario Liquor case. I was Counsel in the case. For a time no self respecting Counsel cited the Russell case before this Board; there was a gloomy silence whenever he did, but I think we have got over that now.

Mr. STUART BEVAN: Perhaps it is because I am not very familiar with these earlier decisions that I have introduced the Russell case. I submit that the judgment of Mr. Justice Ferguson in this passage between lines 18 and 30 is correct in the reasons he assigns for the particular finding in the Russell case and the Fort Frances case.

Viscount HALDANE: The judgment in the Russell case was delivered by a very eminent authority on the British North America Act, Sir Montague Smith.

Mr. STUART BEVAN: Yes, Then at line 30: "For these reasons I am of opinion that the weight of authority is in favour of the proposition that except in conditions involving the very safety of the Dominion as a political entity, the Parliament of Canada

may not in its legislation trench upon any of the subjects enumerated in Section 92 unless such legislation according to its pith and substance, is legislation in relation to a class of legislation enumerated in Section 91 of the British North America Act".

Viscount HALDANE: Surely that is too broad.

Mr. STUART BEVAN: If it trenches upon any subject enumerated in Section 92, it is ultra vires unless according to its pith and substance it is legislation in relation to Section 91. "Counsel for the Attorney General for the Dominion and the Defendants submit that if the legislation cannot be supported as not falling within or trenching upon any of the classes enumerated in Section 92, it can and should be supported as legislation in respect of one or more of the classes enumerated in Section 91 of the British North America Act" etc. etc. (Reading to the words, line 1, page 177) "Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees".

That must depend upon the particular dispute and the facts of the particular case: "It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance" etc etc (Reading down to the words) "I would dismiss/ the action with costs including costs of injunction proceedings but would stay the issue of the judgment and the order dissolving the injunction restraining the Defendant from proceedings with the inquiry for such time as is reasonably necessary to allow an appeal to be taken". Then Mr Justice Smith and Mr Justice Magee agree.

The view expressed by the learned judge here at lines 14 and 15 on page 177 that it is an Act "to authorize an inquiry into conditions or disputes and that the prevention of crimes, the protection of public safety, peace and order and the protection of trade and commerce are of the 'pith and substance and paramount purposes' of the Industrial Disputes Act" would hardly seem to be in accordance with the provisions of the Act itself because taking the view which is expressed by the learned Judge, one would have thought some drastic remedy would be provided by the Act itself in order to prevent the continuance or recurrence of a condition so dangerous to the public safety peace and order, and when one looks at the Act itself one sees there is no drastic remedy provided by the Act and no real effective remedy at all. All the Act provides for is that in this alleged condition of a breach of public safety peace and order three gentlemen should meet together and if they are unable to settle the industrial dispute, should publish an accurate statement of the case leading up to the dispute and a pious recommendation that the parties should settle that dispute upon particular lines. The very nature of the Act and of the machinery of the Act seems to negative the

existence of a state of things seriously affecting public peace and order which in ordinary circumstances would call for drastic means to be applied for the removal or alleviation of the dangerous position.

Then Mr Justice Hodgins on page 178 gives a dissenting judgment in favour of the Appellants. I do not think I need read the first two paragraphs. In the third paragraph he says: "It was suggested during the argument that as the Act was passed in 1907, it must be viewed and judged in relation to the industrial and social conditions which existed at that date, irrespective of what has happened since" etc etc (Reading down to the words) "'Dispute' and 'industrial dispute' are defined"; then they are set out. Then strikes and lock-outs are defined, and then at line 18: "It is provided that no dispute shall be referred to a Board where the employees affected are fewer in number than ten (section 21) and by Section 6 the Minister is obliged to establish the Board if satisfied that the provisions of the Act apply. How is he to satisfy himself that there are at least ten persons affected is not stated". Then the learned Judge sets out Section 30 as to the powers to compel the attendance of witnesses and to accept evidence whether strictly legal or not. Then the other sections dealing with failure to attend and produce books are set out. Then section 56 is referred to at line 40, and then section 57, the status quo provision, and then at the top of page 182: "Any violation of these provisions subject the party offending to a fine to be recovered by proceedings under Part XV of the Criminal Code". Then the judgment proceeds: "The salient features objected to are" etc etc (Reading down to the words), on page 186: "If, in the latter quotation the words 'for prohibiting strikes and lock-outs throughout Canada except under restrictive conditions' are substituted for those referring to the liquor traffic, the analogy is obvious and something similar may be said about the other extract".

VISCOUNT HALDANE:- I do not think I was expressing any opinion on the Russell case in quoting it there, I was really saying what the reasons were.

MR STUART BEVAN:- Yes, my Lord. Then: "In the case of Attorney-General for Ontario v Attorney-General for Canada (1896) Appeal Cases 348 these words occur on page 361" etc etc (Reading down to the words on page 187) "In Attorney-General for Australia v Colonial Sugar Company (1914) Appeal Cases, page 252, Lord Haldane sums up the earlier pronouncements in these words: 'By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace,order and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by section 92'". Then there is a passage in the judgment delivered by your Lordship in the Attorney-General for Canada v The Attorney-General for Alberta which I have already read twice.

VISCOUNT HALDANE:- You need not read that again, it adds nothing.

MR STUART BEVAN:- Then the judgment proceeds: "I find these carsful pronouncements by Lord Haldane to be reinforced in the Board of Commerce and the Fort Frances cases" etc etc (Reading down to the words on page 189) "Indeed, it would be difficult to assign limits to the measure in which, by procedure strictly analogous to that followed in this instance,the Dominion might dictate the working of provincial institutions and circumscribe or supersede the legislative and administrative authority of the provinces".

LORD ATKINSON:- Obviously in such a case as that the criminal jurisdiction would not be to form a body of criminal law, but to have a penal section as a means of enforcing it.

MR STUART BEVAN:- Similarly in this case the only way of forcing the parties to the Board is by forcing them to give disclosure of their books and works and so forth, and forcing them to maintain

the status quo by imposing these penalties for any disobedience of an Order of the Board; without the penalties the Act would be ineffective, without the other provisions of the Act, of course, there would be no necessity to have penal provisions at all. Then the judgment proceeds on page 190: "Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian constitution as enunciated and establishe by the judgments of this Board. The language of sections 91 and 92 (which establish 'interlacing and independent legislative authorities')'" ----

LORD DUNEDIN:- This is Lord Haldane now?

MR STUART BEVAN:- Yes, this is Lord Haldane after quoting from Mr Justice Duff --- "Great West Saddlery v The King being popular rather than scientific, the necessity was recognised at an early date of construing words describing a particular subject matter by reference to the other parts of both sections. As Sir Montague Smith observed, in a well-known passage in the judgment in Citizens Insurance Company v Parsons, 7 Appeal Cases at page 109, 'The two sections must be read together and the language of one interrupted and, where necessary, modified by that of the other'. The scope of the powers received by the Dominion under Item 27, section 91, is not to be ascertained by obliterating the context, in which the words are placed, in disregard to this rule'". Then the judgment proceeds: "If, therefore, this legislation is one substantially in relation to property and civil rights, this case applies and governs here" etc etc (Reading down to the words) "I think the appeal must be dismissed with costs and judgment entered for the Respondents in the action, in accordance with these reasons, for the relief they seek, with costs". That is the consequential relief.

C.

Now my case is really based upon the reasoning of Mr Justice Hodgins, which, as your Lordships observe, dealt in great detail and care with the case.

VISCOUNT HALDANE: What do you say is the difference between the two Judges in the Court of Appeal on the law ?

MR STUART BEVAN: I do not think there is really any difference in the views that the Judges took as to the principles laid down in those various decisions that have been pronounced by your Lordships' Board, but Mr Justice Ferguson finds two things; he finds undoubtedly that the matter came within section 92 "civil rights and property within the province", but he found in addition to that that the legislation is covered by two of the enumerations in section 91, namely,"criminal law" and "trade and commerce". That is the only distinction between the judgments.

Now with regard to criminal law, Lord Atkinson just put the question, my answer to which indicates the submission I make with regard to that.

LORD ATKINSON: It is not a provision widening the criminal law, but a penal provision enacted to enforce an ultra vires statute.

MR STUART BEVAN: Yes.

LORD ATKINSON: Without which the Act would be a dead letter.

MR STUART BEVAN: Yes. That is my answer to the finding or the view expressed by the majority of the Judges, that this is covered by "criminal law". With regard to "trade and commerce", the answer,I submit, is by the dissenting judgment of Mr Justice Hodgins in which he reviews the cases in which the phrase "trade and commerce" has been considered.

LORD ATKINSON: It would be competent to indicate any of these things come under section 92; they said, you shall do such and such things which are an invasion of them, and if you do not do them you are to be fined.

MR STUART BEVAN: That is it, you are transferred, according to the Respondents' case, from this particular enumeration under

2 section 92 into a sub-division or sub-enumeration of the criminal law enumeration in section 91; that is the effect of it.

VISCOUNT HALDANE: Mr Justice Orde gave judgment for an injunction, taking the view that the Act was valid. Mr Justice Mowat heard the evidence and said, I do not agree with this, and referred the case to a full Bench; the full Bench agreed with Mr Justice Mowat for substantially the same reasons, and said the new Act was ultra vires.

MR STUART BEVAN: No, the majority of the full Court confirmed Mr Justice Mowat.

VISCOUNT HALDANE: I mean that, but Mr Justice Mowat's judgment refusing the injunction confirmed that the new Act was ultra vires.

MR STUART BEVAN: No, treated it as being intra vires. Mr Justice Orde granted the injunction on the view that the new Act was ultra vires. Mr Justice Mowat, the trial Judge, took a different view, and gave a considered judgment for giving a different view, but he pronounced no order in the action, he took advantage of procedure which was open to him, by which the whole action could be referred to the full Court. The matter then came before the full Court, and the majority of the Judges took the view that the Judge who granted the injunction on the view that the Act was ultra vires was wrong, and held that the Act was intra vires, because it fell within the enumeration of "trade and commerce" and "criminal law". Mr Justice Hodgins took the other view, he held it was within section 92 and was not within any of the enumerations in section 91; that is the position.

VISCOUNT HALDANE: The new Act ?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: And therefore was ultra vires ?

MR STUART BEVAN: According to the dissenting judgment. I come here with the finding of the majority of the full Court against me, the majority held that the new Act is intra vires; it is that judgment I am appealing from and seek to have reversed.

VISCOUNT HALDANE: You have Mr Justice Hodgins with you ?

MR STUART BEVAN: Yes, and the Judge who granted the interim injunction.

VISCOUNT HALDANE: The curious thing is, in stating the law they come so near each other.

MR STUART BEVAN: Yes, they do, and really the only distinction between the majority m in the Supreme Court and Mr Justice Hodgins is that the majority against Mr Justice Hodgins did find that this legislation fell within section 91 under both the enumerations "trade and commerce" and "criminal law". That is really the whole point.

LORD DUNEDIN: I would like to be quite sure about this, as the adjournment will be long. Mr Justice Mowat rather went upon the question of the general view that the thing became of such importance that it would be of Dominion as against local importance, whereas the Judges in the Appeal Court say this may be tacked on the enumerated subjects ?

MR STUART BEVAN: Yes, so that I shall have to deal with the three views.

LORD DUNEDIN: Their views differed ?

MR STUART BEVAN: Yes, and I shall have to deal with Mr Justice Mowat's view as well as with the others.

(Adjourned until Tuesday morning).

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IN THE PRIVY COUNCIL.

On Appeal from the Appellate Division of the the SUPREME COURT OF ONTARIO.

TORONTO ELECTRIC COMMISSIONERS.

and

SNIDER & OTHERS

and

THE ATTORNEY GENERAL OF CANADA,
&
THE ATTORNEY GENERAL OF ONTARIO.

Friday, 14th November, 1924.