IN THE MATTER OF A REFERENCE AS TO THE RESPECTIVE LEGISLATIVE POWERS UNDER THE BRITISH NORTH AMERICA ACT, 1867, OF THE PARLIAMENT OF CANADA AND THE LEGISLATURES OF THE PROVINCES IN RELATION TO THE REGULATIONS AND CONTROL OF AERONAUTICS IN CANADA.

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*Apr. 10, 11.
*Oct. 7.

Constitutional law—Aerial navigation—Dominion and provincial jurisdiction—International Convention—Paramount, not exclusive, Dominion jurisdiction—Intra-provincial aviation within provincial jurisdiction—"Navigation and Shipping"—B.N.A. Act, 1867, ss. 91, 92, 132—Supreme Court Act, R.S.C., 1927, c. 35, s. 55—Aeronautics Act, R.S.C., 1927, c. 3—Convention Relating to the Regulation of Aerial Navigation of 1919—Air Regulations, 1920.

The Dominion Parliament has not, independently of treaty, jurisdiction to legislate on the subject of air navigation generally, the word "generally" being construed as equivalent to "in every respect"; and it did not, by the International "Convention relating to the Regulation of Aerial Navigation," acquire, under section 132 of the B.N.A. Act, *exclusive* authority to legislate in such a way as to carry out the obligations the Convention imposes on Canada and its provinces. But the Dominion Parliament's jurisdiction is *paramount* in the exercise of its authority to carry out these obligations.

The subject of intra-provincial aviation *prima facie* falls within the legislative jurisdiction of the provinces under one or other of the heads of section 92 of the B.N.A. Act.

The control of aeronautics does not come within the subject of "Navigation and Shipping" assigned to the Dominion by section 91 (10) of the B.N.A. Act.

The Dominion Parliament, in relation to aeronautics, has legislative control over aircraft and aerial navigation, so far as incidentally necessary, in connection with various matters assigned under specific heads

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

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of section 91, such as "The Regulation of Trade and Commerce," "Postal Service," "Militia, Military and Naval Service and Defence" and "Naturalization and Aliens."

As to the questions 3 and 4, concerning the provisions of section 4 of the *Aeronautics Act* and the "Air Regulations" of 1920, the members of the court (except Newcombe J. who raised a preliminary question as to the propriety of answering these questions and Cannon J.), considered that they were bound by section 55 of the *Supreme Court Act* to answer the questions submitted as fully as the circumstances permitted and, after examining these provisions and regulations, upheld certain of them as valid and denied the validity of others.

Per Anglin C.J.C. and Newcombe, Smith and Cannon JJ.—Legislative jurisdiction over intra-provincial flying *prima facie* belongs to the provinces under sub-section 13 of section 92 (Property and Civil Rights).

Per Anglin C.J.C. and Newcombe J.—Dominion powers derived under section 132 of the B.N.A. Act should be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so for performing those of a province, irrespective of the question as to where the power would have resided if section 132 had not been enacted.

Per Anglin C.J.C. and Smith J.:—Although a province may effectively legislate for the performance of treaty obligations in regard to any matter falling within section 92 of the B.N.A. Act while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the province about such matters.

Per Anglin C.J.C. and Smith J.—The Dominion Parliament has legislative authority to sanction the making and enforcement of the Air Regulations, respecting the granting of licences to pilots and their suspension or revocation; the regulation, etc., and licensing of all aircraft; and also the licensing, inspection and regulation of all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air stations referred to in the Convention, or in reading ground markings made in pursuance of the Convention.

Per Duff, Rinfret and Lamont JJ.—The legislative jurisdiction of the provinces under s. 92 runs through the space above the surface of provincial territory as through the surface itself and the space below; and the matters comprised within the subject of aviation primarily fall within that jurisdiction.—"Navigation and Shipping," within the meaning of Head 10 of s. 91, does not embrace that subject. The Dominion may exercise legislative jurisdiction in relation to aviation in the course of executing its authority over various matters which fall within certain of the enumerated heads of s. 91 or within the subject of Immigration (s. 95); it may also exercise such authority under s. 132 where the conditions exist under which that section comes into play. These conditions are, first, that there exists an obligation of

Canada or of a province(as part of the British Empire) towards a foreign country arising under a treaty between the Empire and a foreign country, and, second, that the obligation relates to the subject of aviation or in some manner affects it. The powers arising under that section are given for performing such obligations, and can only be validly exercised in the performance of, and for the purpose of performing, them. Legislation enacted in the valid exercise of such powers takes effect notwithstanding any conflicting law of a province; the Dominion has full competence under s. 132 to give effect by legislation to the rules embodied in the Convention of 1919, and to take measures for the effectual enforcement of them.—Any conflicting or repugnant provincial rules would be superseded by such legislation. The Heads of s. 91 which come under consideration in answering the questions submitted are no. 5, the Postal Service; no. 7, Military, Militia and Naval Service and Defence; no. 11, Quarantine; no. 25, Naturalization and Aliens; no. 2, the Regulation of Trade and Commerce; no. 3, Raising of Money by any Mode or System of Taxation. Under these Heads, the Dominion is entitled to exercise legislative control over the use of aircraft in carrying mails; over the conditions under which goods, mails or passengers may be imported and exported in aircraft into or from Canada; in respect of (in this case, in conjunction with s. 132) the prohibition of the navigation of aircraft over prescribed areas; over landing places for aircraft entering Canada and the conditions of such entry; in relation to the Air Force. The specific question as to the authority of the Dominion to control aerial locomotion between the provinces does not arise under any interrogatory submitted, upon any construction of the interrogatories. Likewise, no question arises (upon any reasonably possible construction of any of the interrogatories) in relation to Dominion legislative authority (under Head 29 of s. 91) in respect of the exceptions defined in Head 10 of s. 92, in their application or possible application to "lines" or regular services of aircraft between two provinces; or in their application to such "lines" or regular services beyond Canada. S. 4 of the *Aeronautics Act*, which is a re-enactment of the statute of 1919, and must not be treated as new law, cannot be regarded as having been enacted under s. 132 for the purpose of giving effect to the Convention of that year, because the Convention did not come into force until after the passing of the statute. S. 4 proceeds upon the theory that the Dominion has, independently of s. 132, complete control over the subject of aerial navigation in every respect, and by that section the Minister is given unrestricted authority to regulate and control such navigation in all its aspects, and particularly, in relation to certain matters enumerated by way of example. Parliament herein professes to exercise an authority which it does not possess, and s. 4 is, in its entirety, *ultra vires;* and consequently, the regulations promulgated under it. Treating, however, interrogatory no. 3 as requiring the court to express its opinion as to the severable matters enumerated in s. 4, as subjects of legislative jurisdiction, and as to the authority of Parliament, in view of the Convention of 1919, or otherwise, to enact s. 4 in relation to such severable matters or any of them, then the answer to interrogatory no. 3 is that, as regards the matters specified above (which are among the severable matters particularized in s. 4) Parliament has jurisdiction under s. 91 or s. 95; as regards

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identification and inspection of aircraft, and as regards inspection of aerodromes and air stations, Parliament has jurisdiction, in view of the Convention of 1919, under s. 132. While legislation under s. 132, for performing the obligations of Canada under the Convention of 1919, might properly include regulations in relation to registration and certification of aircraft and licensing of personnel and air harbours, if aptly framed to secure the performance of such obligations, and limited to that, the unrestricted powers in relation to such subjects which Parliament professes to exercise by s. 4 are neither "necessary" nor "proper" for performing those obligations. Answering question no. 4 on a similar assumption, the regulations on the subjects mentioned are not aptly framed for the purpose of performing the obligations under the Convention of 1919. The vice of the principal regulations (speaking generally) is that they are too sweeping in character to fall within the category of legislation "proper or necessary" for performing these obligations. The precise answers to questions 3 and 4 are given in the judgment.

Per Newcombe J.—The language of section 132 does not require, either expressly or by necessary implication, nor does it suggest, that a province should thereby suffer diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity, on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by section 132; and while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, the Dominion power cannot be interpreted as meaning to deprive the province of authority to implement its obligations. If that had been the intention it would have been expressed.

Per Newcombe J.—The right of way exercised within a province by a flying machine must, in some manner, be derived from or against the owners of the property traversed, and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the province, although it may be overborne by ancillary Dominion powers, where they exist.

Per Newcombe J.—This court ought not to determine under the present procedure question no. 2 which involves the definition of treaty obligations and the ascertainment, judicially, of the interest of foreign sovereign parties to the Convention, who are unrepresented and cannot be convened, especially so, seeing that the interpretation of the Convention is, by its article 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that court, by arbitration. The inadvisability of that question being answered should be called to the attention of the Governor General.

Per Cannon J.—The Dominion Parliament may have paramount legislative and executive power for performing the obligations of Canada, or any province thereof, under the Convention, but has not yet found it necessary or proper to exercise such legislative power. If the provinces refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the

Dominion, the latter, being compelled to do so, may pass necessary and proper legislation to perform treaty obligations.

Per Cannon J.—Aviation was not foreseen nor considered when the enumeration of section 91 was made; and the words "Property and Civil Rights" in section 92 are wide enough to give power to the provinces to legislate, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion and conform to the new requirements of international law since the sovereignty of each state over the air space above its territory was proclaimed in 1919.

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

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

"The Committee of the Privy Council have had before them a report, dated 27th February, 1929, from the Minister of Justice, submitting that by the *Air Board Act*, Chapter 11 of the Statutes of Canada, 1919, (1st session), (which, with amendments thereto, is consolidated in the Revised Statutes of Canada, 1927, under the title of *The Aeronautics Act*, Chapter 3 of the said Revised Statutes), provision was made by the constitution under the authority thereof of a Board on Aeronautics (called the Air Board) and the vesting in the Board of the administrative duties and powers thereby given to it (which duties and powers were by the National Defence Act, 1922, Chapter 34 of the Statutes of Canada, 1922, vested, by way of transfer, in the Minister of National Defence), and by the Air Regulations, 1920, and amendments thereto, approved by the Governor in Council under the authority of the said Act, for the regulation and control in a general and comprehensive way of aerial navigation within Canada and over the territorial waters thereof.

"The Minister apprehends that this legislation was enacted by Parliament by reason not only of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interests, but also of the necessity of making provision for performing the obligations of Canada, as part of the British Empire under the Convention relating to the regulation of Aerial Navigation which, drawn up by a Commission constituted by the Peace Conference at Paris in 1919, was, on 13th October of that year, signed by the representatives of 26 of the Allied and Associated Powers including Canada.

"This Convention was ratified by His Majesty on behalf of the British Empire on 1st June, 1922, and is now in force, as the Minister is informed, as between the British Empire and 17 other States.

"The Minister observes that the Air Regulations, 1920, conform in essential particulars to the provisions of the said Convention, and are designed to give effect to the stipulations thereof in discharge of the obligations of Canada, as part of the British Empire, towards the other contracting States.

"The Minister states that at the conference at Ottawa between representatives of the Dominion and the several Provincial Governments in the month of November, 1927, the representatives of the Province of Que-

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bec raised a question as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada, at all events in their application to flying operations carried on within a Province; and it was agreed that the question so raised was a proper question for the determination of the Supreme Court of Canada.

"The Committee, therefore, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased to refer the following questions to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of section 55 of the *Supreme Court Act,* R.S.C., 1927, chapter 35:—

"1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the Convention entitled 'Convention relating to the Regulation of Aerial Navigation'?

"2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the *British North America Act,* 1867?

"3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the *Aeronautics Act,* chapter 3, Revised Statutes of Canada, 1927?

"4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part of the regulations contained in the Air Regulations, 1920, respecting—

(*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;

(*b*) The regulation, identification, inspection, certification, and licensing of all aircraft; and

(*c*) The licensing, inspection and regulation of all aerodromes and air stations?"

Section 4 of *The Aeronautics Act,* R.S.C., 1927, c. 3, reads as follows:

"4. Subject to approval by the Governor in Council, the Minister shall have power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular, but not to restrict the generality of the aforegoing terms of this section, he may, with the approval aforesaid, make regulations with respect to

(*a*) licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licences;

(*b*) the registration, identification, inspection, certification and licensing of all aircraft;

(*c*) the licensing, inspection and regulation of all aerodromes and airstations;

(*d*) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever and the licensing of any such services;

(*e*) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory;

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified;

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;

(*h*) aerial routes, their use and control;

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada; and

(*j*) organization, discipline, efficiency and good government generally of the officers and men employed in the Air Force.

2. Any person guilty of violating the provisions of any such regulation shall be liable, on summary conviction, to a fine not exceeding one thousand dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.

3. All regulations enacted under the provisions of this Act shall be published in the *Canada Gazette*, and, upon being so published, shall have the same force in law as if they formed part of this Act.

4. Such regulations shall be laid before both Houses of Parliament within ten days after the publication thereof if Parliament is sitting, and if Parliament is not sitting, then within ten days after the next meeting thereof. 1919, c. 11, s. 4; 1922, c. 34, s. 7.

The *Air Regulations* of 1920, which are referred to in the judgments now reported, are the following:

3. (1) Except aircraft flown only for the purpose of experiment or test within three miles of an airharbour, kites and fixed balloons, no aircraft shall fly unless it has been registered as herein provided. *See I.C., Art. 5.*

(2) This paragraph does not apply to aircraft duly registered in some other state or a foreign country with which Canada has made a Convention relating to interstate flying. (Amendment dated Jan. 15, 1924.)

4. Subject as hereinafter provided, the Air Board may define the conditions under which, and the mode in which aircraft may be primarily registered in Canada. *New.*

5. No aircraft shall be primarily registered in Canada unless it belongs wholly to a British subject or British subjects, or to a company which has been incorporated in His Majesty's Dominions, and of which the president or chairman and at least two-thirds of the directors are British subjects. *See I.C., Art. 7.*

6. No aircraft shall be primarily registered in Canada while it is so registered in any other of His Majesty's dominions, or in any foreign country, but it may be primarily registered in Canada upon cancellation

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of an earlier registration in such other Dominion or foreign country. *See I.C., Art. 8.*

7. No aircraft shall be primarily registered in Canada unless either it has been built or made in Canada or any customs duties which are or would become payable upon the importation of the aircraft into Canada have been paid. *New.*

8. (1) Upon every registration in Canada the Minister of National Defence shall assign to the registered aircraft a registration mark and shall grant a certificate of registration for which there shall be payable a fee of $5.

(2) In the event of any change in the ownership of an aircraft registered in Canada, then

(*a*) The registered owner shall forthwith notify the Department of National Defence, and

(*b*) The registration and certificate thereof shall lapse as from the date of such change of ownership. (Amendment dated Jan. 15, 1924.)

9. When a registered aircraft has been destroyed or permanently withdrawn from use, the registered owner shall as soon as possible notify the Department of National Defence accordingly, and the registration and the certificate thereof shall lapse as from the date of such notification.

(2) Certificates of registration shall not remain valid unless endorsed by the Minister of National Defence at intervals not exceeding twelve calendar months. (Amendment dated January 15, 1924.)

10. It shall be a condition of the primary registration in Canada of any aircraft that, upon the Governor in Council declaring that a national emergency exists or is immediately apprehended, every such aircraft shall be subject to requisition in the name of His Majesty by the Air Board or any officer of the Canadian Air Force, and upon being so requisitioned shall become the property of His Majesty, subject to its return or to the payment of compensation or to both as may be provided by law. *New.*

(2) The registration in Canada of any aircraft primarily registered in any of His Majesty's dominions other than Canada shall be subject to the like condition unless, under the law of that one of His Majesty's dominions in which the aircraft was primarily registered, it is subject to a paramount right to be requisitioned on His Majesty's behalf. *New.*

11. Any certificate of registration of an aircraft may be suspended or cancelled at any time by the Air Board for cause. *New.*

12. (1) No aircraft registered in Canada shall fly beyond Canada unless it has been certified as airworthy by the Department of National Defence.

(2) Except private aircraft flying wholly within Canada, all aircraft registered in Canada shall be certified as airworthy by the Department of National Defence.

(3) Every aircraft entering Canada from abroad shall be in possession of a certificate of airworthiness issued by the proper authority of the foreign country or of the Dominion, Colony or Possession of His Majesty in which it is registered. (Amendment dated January 15, 1924.)

15. No aircraft required to be registered shall fly unless it bears the prescribed nationality and registration marks. *See I.C., Art. 10.*

16. In the case of an aircraft primarily registered in Canada the nationality mark shall be the letter "G" and the registration mark the assigned combination of four capital letters commencing with the letter "C." The marks shall be painted in black on a white ground in the following manner:—

(*a*) On flying machines the marks shall be painted once on the lower surface of the lower main planes and once on the upper surface of the top main planes, the top of the letters to be towards the leading edge. They shall also be painted along each side of the fuselage between the main planes and the tail planes. In case the machine is not provided with a fuselage the marks shall be painted on the nacelle.

(*b*) On airships the marks shall be painted near the maximum cross section on both sides so as to be visible both from the sides and from the ground and on the upper surface equidistant from the letters on the sides.

(*c*) On balloons the marks shall be painted on two sides near the maximum cross section so as to be visible both from the sides and ground, and on the upper surface equidistant from the marks on the sides.

(*d*) On flying machines and airships the nationality mark shall also be painted on the right and left sides of the lower surface of the lowest tail planes or elevators and also on the upper surface of the top tail planes or elevators, whichever are the larger. It shall also be painted on both sides of the rudder or on the outer sides of the outer rudders if more than one rudder is fitted.

(*e*) On balloons the nationality mark shall also be painted on the basket.

(*f*) The nationality and registration marks need in no case exceed eight feet in height, but subject to this provision shall be as hereafter specified.

(*g*) On flying machines the height of the marks on the main planes and tail planes respectively shall be equal to four-fifths of the chord, and in the case of the rudder shall be as large as possible. The height of the marks on the fuselage or nacelle shall be four-fifths of the depth of the narrowest part of that portion of the fuselage or nacelle on which the marks are painted.

(*h*) On airships the nationality marks painted on the tail plane shall be equal in height to four-fifths of the chord of the tail plane and on the rudder the marks shall be as large as possible. The height of the other marks shall be equal at least to one-twelfth of the circumference at the maximum transverse cross section of the airship. On balloons the height of the nationality mark on the basket shall be four-fifths of the height of the basket, and the height of the other marks shall be equal to at least one-twelfth of the circumference of the balloon.

(*i*) The width of the letters shall be two-thirds of their height and the thickness shall be one-sixth of their height. The letters shall be painted in plain block type and shall be uniform in shape and size. A space equal to half the width of the letters shall be left between the letters.

(*j*) Except in state and commercial aircraft, the nationality and registration marks shall be underlined with a black line. The

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thickness of the line shall be equal to the thickness of the letter and the space between the bottom of the letters and the line shall be equal to the thickness of the line.

(*k*) Where the nationality and registration marks appear together, a hyphen of a length equal to the width of one of the letters shall be painted between the nationality mark and registration mark.

(*l*) The nationality and registration marks shall be displayed to the best possible advantage, taking into consideration the constructional features of the aircraft. The marks must be kept clean and visible. *See I.C., Annex A.*

17. All aircraft, except kites, shall carry affixed to the car or to the fuselage in a prominent position a metal plate inscribed with the names and residences of the owners and the nationality and registration marks of the aircraft. *See I.C., Annex A, I (d).*

18. No place, building, or work shall be used as an airharbour unless it has been licensed as herein provided. *New.*

19. Licences to airharbours may be issued by the Air Board and may be made subject to such conditions respecting the aircraft which may make use of the airharbour, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Air Board may direct. *New.*

21. The licence of an airharbour may be suspended or cancelled by the Air Board at any time for cause and shall cease to be valid two weeks after any change in the ownership of the airharbour, unless sooner renewed to the new owner. *New.*

22. Every licensed airharbour shall be marked by day and by night as may be from time to time directed by the Air Board. *See I.C., Annex F, II.*

23. The owner of any licensed airharbour shall be permitted to charge for the use of the harbour or for any services performed only such fees as have been approved by the Air Board for such airharbour. The tariff shall be prominently posted up at the airharbour. *New.*

24. (1) No person shall without authority of the Air Board—

(*a*) mark any unlicensed surface or place with any mark or display any signal calculated or likely to induce any person to believe that such surface or place is an airharbour or emergency alighting ground;

(*b*) knowingly use or permit the use as an airharbour of any unlicensed place;

(*c*) knowingly use or permit the use of an airharbour for any purposes other than those for which it has been licensed.

(2) The onus of proving the existence of any authority or licence shall be upon the person charged. *New.*

25. No water-craft shall cross or go upon that part of the water area forming part of any seaplane station which it is necessary to keep clear of obstruction in order that flying machines may take off and alight in safety, having regard to the wind and weather conditions at the time, and every person in charge of a watercraft is guilty of a breach of these regulations if such craft crosses or goes upon such area after reasonable warning by signal or otherwise. *New.*

26. There shall be kept at every licensed airharbour a register in which there shall be entered immediately after the alighting or taking off of an aircraft a record showing the nationality and registration marks of such aircraft, the name of the pilot and the hour of such alighting or taking off. *New.*

27. (1) Every licensed airharbour, and all aircraft and the goods therein shall be open to the inspection of any customs or immigration officer or any officer of or other person authorized by the Air Board, but no building used exclusively for purposes relating to the construction of aircraft or aircraft equipment shall be subject to inspection except upon the special written order of the Chairman or Vice-Chairman of the Air Board. *New.*

(2) All state aircraft shall have at all reasonable times, the right of access to any licensed airharbour, subject to the conditions of the licence.

(Amendment dated Jan. 15, 1924.)

28. It shall be a condition of every licence to any airharbour that in case the Governor in Council declares that a national emergency exists or is immediately apprehended, the owner of such airharbour shall comply with such directions, if any, with respect to the use of the airharbour as may be given by the Air Board or an officer of the Canadian Air Force, subject only to the payment of such compensation as may be provided by law. *New.*

29. At every licensed airharbour the direction of the wind shall be clearly indicated by one or more of the recognized methods, e.g., alighting tee, conical streamer, smudge fire, etc. *See I.C., Annex D, 40.*

30. At every licensed aerodrome and seaplane station, if an aircraft about to land or leave finds it necessary to make a circuit or partial circuit, such circuit or partial circuit shall, except in case of distress, be left-handed (anti-clockwise).

(Amendment dated Jan. 15, 1924.)

31. At every aerodrome and seaplane station licensed for use by the public at night there shall at night be exhibited a red light to indicate a left-hand circuit or a green light to indicate a right-hand circuit. *See I.C., Annex D., 46 (a).*

32. Every licensed aerodrome shall be considered to consist of three zones when looking up-wind. The right-hand zone shall be the taking-off zone and the left-hand shall be the alighting zone. Between these two there shall be a neutral zone. If the centre of the aerodrome is marked, the taking-off and alighting zones shall commence fifty yards to the right and left respectively of the centre of such mark. *I.C., Annex D, 44.*

33. No person shall act as pilot of any aircraft or as navigator, engineer or inspector of any commercial aircraft, or of any aircraft primarily registered in Canada when flying outside Canada unless such person holds a certificate issued by the Air Board authorizing him to so act. *See I.C., Art. 12.*

(2) This paragraph shall not apply,—

(a) to persons under instruction flying over water or, with the consent of the owner or owners, over an airharbour and such additional surrounding area as is approved by the Air Board, or

(b) to pilots, navigators and engineers of aircraft registered in another contracting state, or a foreign country with which Canada has made a convention relating to interstate flying, who hold licences authorizing them to act as such, issued by the proper authority in the contracting state or foreign country in which the aircraft is registered.

(Amendment dated Jan. 15, 1924.)

34. (1) Certificates to pilots, navigators and engineers may be issued by the Air Board and may be limited in time and to flying only under specified conditions, for specified purposes, in specified types of aircraft, on specified routes or otherwise. *New.*

(2) Licences issued by a duly competent authority within His Majesty's Dominions, Colonies or Possessions, to a pilot, navigator, or engineer shall for the purpose of these regulations have the same validity and effect as if they had been issued under these Regulations. (Amendment dated Jan. 15, 1924.)

35. Certificates to inspectors may be issued by the Air Board and may be limited in time, to specified types of aircraft, or otherwise. *New.*

36. A fee not exceeding $5 may be charged for any certificate issued under this Part IV. *New.*

37. No person who is not a British subject or a subject of a foreign country which grants reciprocal aeronautical privileges to Canadians on equal terms and conditions with subjects of such foreign country shall be issued with a certificate authorizing him to act as pilot, navigator, engineer or inspector of commercial or state aircraft.

38. A certificate issued to any pilot, navigator, engineer or inspector may be suspended or cancelled at any time by the Air Board for cause, including the failure to comply beyond Canada with the provisions of Parts V, VI, VII and VIII of these regulations. *New.*

116. Every aircraft carrying five persons or more and bound on a flight by night, or on a continuous flight overland between two points more than 300 miles apart, or on a flight over sea between two points more than 125 miles apart, shall have on board a person holding a navigator's certificate. *See I.C., Annex E, IV.*

118. Every aircraft in flight shall have on board its certificate of registration, the certificate of airworthiness, if any, the licences of all the members of the crew requiring licences, the authority and licence for the equipment and working of the wireless installation, if any, and a journey log book containing the following particulars:—

(a) The category to which the aircraft belongs; its nationality and registration marks; the full name, nationality and residence of the owner; the name of the maker, the description and the carrying capacity of the aircraft.

(b) In addition for each journey:—

(i) A record of all signals and wireless communications and observations concerning navigation;

(ii) The names, nationality and residence of the pilot and of each of the members of the crew;

(iii) The place, date and hour of departure, the route followed, and all incidents of the journey, including alightings. (Amendments dated January 15, 1924.)

124. (1) No aircraft of a state with which Canada has not concluded a convention relating to interstate flying and no foreign military aircraft shall fly over or alight in Canada except with the express written permission of the Minister of National Defence. (Amendment dated Jan. 15, 1924.)

(2) No aircraft shall engage in the carriage of persons or goods for hire between points in Canada unless it is registered as a commercial aircraft in Canada or in some other of His Majesty's Dominions, Colonies or Possessions, nor shall any aircraft carry out any operation for remuneration or reward wholly within Canada unless it is registered as a commercial aircraft in Canada, in some other of His Majesty's Dominions, Colonies or Possessions, or in a contracting State to the International Convention for Air Navigation. (Amendment dated April 12, 1924.)

L. Cannon K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

F. D. Hogg K.C. for the Attorney-General of Ontario.

Aimé Geoffrion K.C. for the Attorney-General of Quebec.

F. H. Chrysler K.C. for the Attorney-General of Manitoba.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinions of my brothers Newcombe, Smith and Cannon.

By s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), this court is required to "hear and consider"

> Important questions of law or fact touching
>
> (*a*) the interpretation of the *British North America Acts,* or
>
> (*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or
>
> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
>
> (*e*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;
>
> * * * and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question * * *;

and it is declared to be

> the duty of the Court * * * to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; * * *

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Lord Chancellor Haldane, in the *British Columbia Fisheries* Case, *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), contrasting the position of this court with that of the Judicial Committee of the Privy Council, trenchantly observed that

> The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament.

While I agree with Mr. Justice Newcombe that the advisability of propounding for the consideration of the court abstract questions, or questions involving considerations of debatable fact, is, to say the least, doubtful; that it is undesirable that the court should be called upon to express opinions which may affect the rights of persons not represented before it, or touching matters of such a nature that its answers must be wholly ineffectual in regard to parties that are not, and cannot be, brought before it (e.g., foreign governments); and that, where the court is asked to hear and determine any such question, it is entirely proper for it to represent to the Governor in Council the undesirability of its being called upon to do so (*Attorney-General for Ontario* v. *Attorney-General for Canada* (2), in the present instance I do not find in the questions submitted enough that is objectionable to justify the adoption of that course. On the contrary, as I understand the questions, they can be, at least partially, answered without going beyond the clear jurisdiction of the court or expressing an opinion upon any debatable matter affecting foreign governments. So far as concerns the interests of private parties in the several provinces, the questions submitted touch them only obliquely, inasmuch as they are directed to the respective legislative powers of the Dominion and the provinces. Such private interests are probably sufficiently represented by counsel for the several provinces concerned; but, if not, by subs. 4 of s. 55, the court is empowered to direct notice to any persons interested, or, where there is a class of persons interested, to nominate one or more persons as representatives thereof, and, by subs. 5, it may, in its discretion request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear. I am, accordingly, unable to accept the view

(1) [1914] A.C. 153, at p. 162. (2) [1912] A.C. 571, at pp. 588-9.

that there is here such absence, or non-representation, of parties interested as would justify our declining to answer the questions submitted.

As I read the opinions of my three learned brothers, they all agree that "the Convention relating to the regulations of Aerial Navigation," dated the 13th of October, 1919, is "a treaty between the Empire and foreign countries," within the meaning of s. 132 of the B.N.A. Act. They are also in accord in regarding intra-provincial aviation as, *prima facie*, a matter of provincial legislative jurisdiction and as falling within the purview of s. 92 (13) of the B.N.A. Act; and I share those views.

When it comes, however, to the question of how far, and under what circumstances, Dominion legislative power supersedes that of the provinces in regard to aviation, my learned brothers differ, *toto coelo*. While Newcombe and Cannon JJ. recognize the power of Parliament, under s. 132, to legislate

* * * for (the) performing (of) the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries,

they are not prepared to admit that that power involves or implies the supersession of provincial by Dominion legislation under the circumstances of the case now before us.

My brother Smith, while of the opinion that the power of Parliament, under s. 132, is not "exclusive", but merely "paramount" (so far Cannon J. agrees), holds the view that the circumstances of the present case, as disclosed in the record, justify its exercise regardless of any provincial legislation, existing, or proposed, or possible. My brother Cannon, on the other hand, thinks that, in regard to matters of provincial legislative competence, the power conferred on Parliament by s. 132 arises only in the absence of adequate provincial legislation, and that Parliament may not anticipate failure or refusal on the part of any province to pass "necessary or proper" legislation for performing its obligations under the treaty, or that identic legislation (and regulations) will not be enacted by the legislatures of the several provinces interested. Mr. Justice Newcombe, I understand, shares the views of my brother Cannon in this regard.

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My brother Newcombe, as I read his judgment, is further of the opinion that questions nos. 1 and 2 cannot be answered without first ascertaining in detail the precise obligations imposed by the treaty on Canada, or any of its provinces, and that this court should not be called upon to answer these questions because of the fact that the other contracting parties, viz., the foreign governments concerned, are not before it. If I found it necessary to interpret in detail the entire Convention, I would be disposed to accept my brother Newcombe's view; but, in my opinion, it is necessary only to envisage the Convention as a whole, to ascertain its general tenor and to discern its obvious purpose and to determine a very few of the outstanding obligations imposed by it in terms so clear that their meaning admits of no dispute, and, therefore, does not require interpretation.

With regard to the power of Parliament to implement any term of a treaty, it is entirely competent to, and, indeed, it is the duty of this court, explicitly imposed by s. 55 (d) of the *Supreme Court Act*, to advise the Government of Canada, if duly called upon to do so, as to the meaning and effect of such treaty and as to the right of Parliament to enact legislation necessary to carry it out, whether or not the government proposes to legislate in regard thereto.

I agree with the view taken by my brother Smith as to the obligations of Canada (and its several provinces) created by the treaty in question, so far as he has found it necessary to define them, and with his conclusion as to the powers of Parliament under s. 132 of the B.N.A. Act with respect thereto.

The first question submitted, it will be noted, is framed almost in the language of s. 132, although it omits some significant phrases thereof and inserts words which may be regarded as important. For instance, the word "exclusive" is inserted. The word "exclusive" is not found in the section. Again, for the words "all powers necessary or proper" are substituted the words "legislative and executive authority"; the words of the section "as part of the British Empire, towards foreign countries" are omitted; and for the words of the section "arising under treaties between the Empire and such foreign countries"

are substituted the words " under the Convention entitled 'Convention relating to the Regulation of Aerial Navigation' ".

It will be perceived that the word " exclusive " appears to introduce an idea quite foreign to s. 132 and not warranted by anything which that section contains. I agree with the view of my brother Smith that, if the question is to be answered in the affirmative, the word " paramount " must be substituted for " exclusive ". It might also be better to insert the words " as part of the British Empire, towards Foreign Countries " immediately after the word " thereof ", so as definitely to limit the question and answer to the very matter dealt with by s. 132.

I fail to appreciate my brother Newcombe's difficulties in regard to the meaning and scope of question no. 2, and as to the right and duty of this court to hear and consider it and to express its opinion to the best of its ability upon the matter thereby submitted to it. While the Judicial Committee is, no doubt, in a position, as it did in the *British Columbia Fisheries* Case, (1) to decline to answer questions which it thinks cannot conveniently be dealt with, this court has no such discretion. As to it, the statute is imperative.

Question no. 2 is distinctly directed to the validity of legislation of the character described, under the authority of s. 132 of the B.N.A. Act. The general application of the maxim *audi alteram partem* is beyond dispute. But, in a question of legislative power as between the Dominion and its provinces, submitted to the court by the Governor General in Council, the provinces are " the other party " —and they have been heard. As pointed out by my brother Smith, s. 37 of the Convention provides for the adjudication of disputes between contracting parties to it as to its interpretation. Nothing which this court may do in the present reference can affect any such matter.

My three brothers are also in accord with regard to the legislative control of Parliament over aircraft and aerial navigation in connection with various matters assigned by s. 91 of the B.N.A. Act to the Dominion, such as military and naval service, defence, postal service, customs, aliens, regulation of trade and commerce, etc. How far the exer-

(1) [1914] A.C. 153.

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cise of powers necessarily incidental to such control may be made effectual, without regulating and controlling aeronautics generally, is, to say the least, questionable; but question no. 2, as I read it, is not directed to that aspect of the case, but rather to the bearing of s. 132 of the B.N.A. Act upon Dominion legislative jurisdiction. In this connection, my brother Newcombe very properly observes that

> Dominion powers derived from s. 132 should be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined * * * irrespective of the question as to where the power would have resided if s. 132 had not been enacted.

My brother Smith also agrees with Newcombe and Cannon JJ. in holding that the control of aeronautics in no sense comes within the subject of "Navigation and Shipping" assigned by s. 91 (10) of the B.N.A. Act to the Dominion. In that view I entirely concur.

While it is quite true that the Dominion Act of 1919 antedated the Convention under consideration, and, consequently, cannot be regarded as having been enacted by Parliament in the exercise of its jurisdiction conferred by s. 132 as legislation

> necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries

under that Convention, as Mr. Justice Cannon points out, the statute which we have to consider, is not the Act of 1919, but c. 3 of R.S.C., 1927, which became law on the 1st of February, 1928, long after the date of the Convention. So far as this legislation implements the Conventional obligations its validity may probably be upheld under s. 132 of the B.N.A. Act.

I understand Mr. Justice Cannon to concur in the view of Mr. Justice Smith that

> Parliament and the Government of Canada have paramount, though not exclusive, jurisdiction to legislate for the performance of all treaty obligations of Canada or any province thereof under the Convention.

Mr. Justice Cannon, however, adds that

> Parliament has not yet found it necessary or proper to exercise this legislative power.

With deference, I can hardly accede to this latter view.

Dealing with s. 4 as giving to the Minister single and complete control over aerial navigation throughout Canada and the territorial waters of Canada in all respects, followed by enumeration of certain matters by way of illustration

merely, such enumeration being preceded by the words "and in particular, but not to restrict the generality of the foregoing terms of this section," I would answer question no. 3 in the negative. But, I agree with my brothers Smith and Newcombe that it is scarcely possible fully to answer question no. 3 if it requires consideration in detail of each enumerated subhead under subs. 4. The regulations adopted by the Governor General in Council, under the provisions of s. 4 of the *Aeronautics Act* (R.S.C. 1927, c. 3) are so general and comprehensive in their terms that it would require minute and meticulous consideration of each of them before deciding whether or not it is necessary or proper in order to implement some treaty obligation within s. 132 of the B.N.A. Act, or may be defended as an exercise of power necessarily incidental to some one of the enumerated heads of Dominion legislative jurisdiction under s. 91. I cannot, however, think that it was intended by question no. 3 to involve the court in such a detailed and minute examination of each particular regulation enacted under s. 4—still less of the possibilities under all the subheads of s. 4. Adequate argument was not directed to such details either of the section or of the regulations. I, therefore, refrain from further discussion of these matters.

As has been stated, legislative jurisdiction over intra-provincial flying—and there must be a great deal of it—*prima facie* belongs to the provinces under s. 92 (13), and it is only where legislation by the Dominion can be justified, either as falling directly within an enumerated head under s. 91, or as necessarily incidental to such a head, or in so far as the subject of aeronautics can be said to be of such Dominion-wide importance that provincial legislative jurisdiction over it may be regarded as ousted, or because it falls within the purview of s. 132, that such Dominion legislation can be held valid.

In order to avoid possible misapprehension, I should, perhaps, add that, in so far as the questions submitted are directed to legislative capacity of the Dominion Parliament, I am not satisfied that the establishment and maintenance of a line of aircraft covering an international or interprovincial route is not an "undertaking" within the meaning of subs. 10 (*a*) of s. 92 of the B.N.A. Act. More-

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over, it is possible that although lines of air transportation are not physical works, the construction, maintenance and operation of flying machines may be regarded as "works" within the meaning of clause (c) of subs. 10 of s. 92. That aspect of the case, however, was not fully dealt with at bar, and, therefore, I do not give it further consideration.

As to question no. 4, I agree with the views thereon expressed by my brother Smith.

I certify the foregoing to be my opinion (and reasons therefor) upon the four questions herein submitted for hearing and consideration of the Court by His Excellency the Governor in Council.

The answers of Mr. Justice Duff (concurred in by Rinfret and Lamont JJ.) to the interrogatories submitted.

Question 1

To question 1, the answer is in the negative.

Question 2

To question 2, construing the word "generally" as meaning "in every respect", the answer is in the negative.

Question 3

Reading section 4, as I think it ought to be read, as conferring a single indivisible authority to regulate and control, in every respect, aerial navigation over Canada, with an enumeration by way of illustration of particular matters falling within this authority, the answer to question 3 is in the negative.

Assuming, on the other hand, as some of my brethren think, that the question requires us to consider the matters mentioned in the enumerated sub-heads as severable fields for the operation of the power, and the section as comprising distinct enactments, in relation to each of these severable matters, enacted in view of the Convention relating to aerial navigation, 1919, the answer to question 3 is partly in the negative and partly in the affirmative.

In relation to the matters mentioned in sub-paragraphs (a), (h) and (i), such enactments would be invalid.

In relation to the matters within sub-paragraph (b) such enactments would be valid in respect of "identification" and "inspection", and in other respects invalid.

In relation to the matters within sub-paragraph (c) such enactments would be valid as respects "inspection" and in other respects invalid.

In relation to the matters within sub-paragraph (d) such enactments would be valid as respects the subject the carriage of mails, in other respects invalid.

In relation to the matters within sub-paragraph (e) such enactments would be valid in so far as concerns

> the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada, or within the limits of the territorial waters of Canada;

and in so far as concerns the second part,

> the conditions under which goods, mails and passengers * * * may be transported over any part of such territory,

such enactments would, in relation to the subject the transport of mails, be valid, but in relation to other matters, invalid.

In relation to the matters within sub-paragraphs (f), (g) and (j), the enactments would be valid.

Question 4

Treating this question on the assumption that it requires us to consider whether the regulations referred to, or any of them, (and, if so, which) are susceptible of legislative sanction under section 132 (in view of the Convention of 1919) or under any other power vested in the Dominion Parliament, the answers are as follows:

Sub-paragraph (a).

The regulations which deal specifically with the subjects mentioned in this paragraph are those numbered 33 to 38.

Regulation 33 would be valid in so far as it relates to flying outside Canada; but invalid in so far as it relates to commercial aircraft generally. Regulations 34 to 38, inclusive, are subsidiary regulations and would be valid if associated with a valid principal regulation.

Regulations 116 and 118 are also subsidiary regulations as to which the answer is the same.

Sub-paragraph (b).

Regulations 3, 4, 124 (2) and 10 would be invalid. Regulations 5 and 6 would be valid. Regulations 7, 8, 9, 11, 15, 16 and 17 are subsidiary regulations which would be valid

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if associated with a valid principal regulation. Subsections 1 and 3 of regulation 12 would be valid, and subsection 2 of that regulation invalid.

Sub-paragraph (*c*).

Regulations 18 to 32 deal specifically and substantively with the licensing, inspection, and in some respects with the regulation, of air harbours. The principal provisions are regulations 18, 19, 22, 23 and 24. These regulations would be invalid. Regulations 21 and 26 are subsidiary regulations, which would be valid if attached to a valid principal regulation. Regulations 25 and 29 to 32, inclusive, would be valid. Regulation 27 (1), dealing with inspection of air harbours and construction buildings would be valid. Subsection 2 of regulation 27 would be invalid. Regulation 28 would be invalid.

The judgment of Duff, Rinfret and Lamont JJ. was delivered by

DUFF J.—The view presented by the Solicitor General of the questions raised by the interrogatories, which it is our duty to answer, was based primarily upon the proposition that the Dominion possesses authority to legislate upon the subject of aeronautics, in every respect, and that this authority is exclusive, or, at all events, over-rides any law of a province.

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

authority of the Dominion under section 132, to legislate for the performance of its obligations under the Convention relating to Aerial Navigation, 1919, extends over the whole field.

I am unable to agree that "navigation and shipping" would, "according to the common understanding of men," embrace the subject of aeronautics. Nor can I agree that aerial navigation as a subject for legislation is outside the purview of s. 92 of the *British North America Act*, as not comprising matters which are provincial within the contemplation of that section. The provincial jurisdiction under heads 10 to 16 extends through the air space above, as well as the soil below; and the control of the province over its own property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles. The employment of aircraft for survey, exploration, inspection and patrolling, in the management of the public domain, for police purposes, and in the interests of public health (head 7), is as strictly a provincial matter as the employment of any other local agency for such purposes. Primarily the matters embraced within the subject of aerial navigation fall within section 92.

The argument that because the Dominion has authority to legislate in relation to this subject, in several, it may be many, aspects, it therefore has authority to appropriate the whole subject to itself, is one which in various forms has been often advanced; and always rejected. It really amounts to this, that it would have been simpler and more convenient if the subject had in terms been committed to exclusive jurisdiction of the Dominion Parliament. As for section 132, the provisions of the *Aeronautics Act*, and the regulations thereunder, must be considered in relation to the undertakings embodied in the Convention for the purpose of testing the Dominion contention.

Section 4 of the *Aeronautics Act* confers upon the Minister a single, indivisible authority to regulate and control aerial navigation in Canada. What I have just said will indicate my reasons for the conclusion that it is not competent for the Dominion to exercise or authorize the Minister to exercise such a comprehensive control over that subject. In my own view, that is sufficient to dispose of question 3.

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But it is thought by some of my colleagues that each of the sub-paragraphs of section 4 may be treated as comprising severable fields of legislation, and that the section may be considered as involving distinct enactments in the terms of the principal clause applying to each of the severable matters therein comprised; and that by the question we are directed to say to what extent the Dominion might now authorize the Minister to exercise unrestricted control over these several matters under the powers conferred by section 132 (in view of the Convention of 1919) or under any other powers vested in the Dominion Parliament.

The section was originally enacted before the Convention came into effect and could not therefore be treated as passed in execution of any power under section 132. As reproduced in the Revised Statutes, 1927, it does not take effect as the re-enactment of a new law, and to the extent to which it was invalid in 1919, it is invalid to-day. Nevertheless some of my brethren think it is our duty to examine the sub-clauses of section 4 with a view to ascertaining to what extent the section, if enacted to-day, and with reference to the Convention of 1919, could take effect as law.

While I do not agree that this course is in conformity with the purport of the question, the point is not free from doubt, and therefore I shall proceed to discuss the questions raised by the interrogatory when so interpreted.

It will be convenient to consider, first of all, some of the matters of primary importance embraced within the sub-paragraphs of section 4. The most important of all are those falling within sub-paragraphs (a) (b) and (c). An unrestricted power of regulation and control is conferred upon the Minister. Such a sweeping authority in relation to the matters within these sub-paragraphs could be derived from no section or sections of the *British North America Act* other than section 132; and it is necessary therefore to consider whether, under that section, Parliament possesses such authority in itself, or can invest the Minister with it, in consequence of the obligations undertaken by the Dominion under the Convention.

The question in concrete form is whether the power to give the force of law to section 4 in relation to such mat-

ters is a power necessary or proper for performing the obligations of Canada under the Convention.

One observation should be made here. The powers under that section are given for performing (in the concrete case before us) the obligations under the Convention; and, in this connection, can be validly exercised only in the performance of, and for the purpose of performing, these obligations.

The subject of paragraph (a) is the licensing of personnel, which is dealt with by article 12 of the Convention. Under article 12, when read with Annex E, the obligation of each of the contracting states is to enforce in respect to certificates and licences, the conditions set forth in Annex E as regards international traffic, and, as regards domestic traffic, to enforce such conditions, not more stringent than those stated in Annex E, as the contracting state may deem adequate to ensure the safety of air traffic. No argument seems to be needed to shew that for performing that obligation the Dominion does not require an unrestricted authority to regulate and control the licensing of personnel in all respects; which would include power to select licensees upon some principle having no relation to the safety of air traffic, or indeed, to any of the conditions laid down in Annex E.

It is convenient to refer to regulation 33, which seems broadly to require a certificate from the Air Board to entitle anybody to act as pilot, engineer or inspector of any commercial aircraft, or of any Canadian aircraft flying outside Canada. It would be inadmissible to suppose that regulations 33 to 38 contemplate the issue, upon demand, of a certificate to any applicant; and indeed the enactment of regulations to that effect would constitute a grave departure from the requirements of Annex E.

The regulations appear to leave the conditions upon which licences may be granted to the unlimited discretion of the Air Board, which conditions might be framed without any reference to article 12 or Annex E. Clearly regulations 33 to 38 on any construction of them, could not be validly sanctioned under the powers given under section 132 to legislate for the performance of the obligations mentioned.

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Sub-paragraph (b) of section 4 deals with registration, identification, inspection, certification and licensing of aircraft. Let us first consider registration. There is an implied duty to provide for registration in accordance with the provisions of section 1 (c) of Annex A of the Convention. The main purpose of registration under the provisions of the Convention is to provide facilities for identification. There is no duty, arising out of these provisions, to impose conditions other than those indicated in the Annex. There is nothing in that part of the Convention requiring legislation in the terms of section 4, or in the terms of regulations 3 and 4, the effect of which is, that aircraft may be registered only on compliance with the conditions defined by the Air Board, and that registration is a condition of the right to fly. These regulations as they stand could not be validly sanctioned under section 132.

As to certification and licensing of aircraft, the Convention imposes no duty as to such certificates, except in relation to international navigation. No duty arises out of the Convention which would enable the Dominion to sanction the sweeping enactment of section 4 in relation to the certification and licensing. Regulation 12 (2) seems to require a certificate of air worthiness in respect of commercial aircraft and provincial aircraft registered in Canada. By regulation 13, such certificates may be issued upon compliance with specified conditions. In the result, such aircraft may not be registered, and consequently will not be permitted to fly, unless certified as air worthy upon conditions prescribed by the Air Board. These regulations are rather obscurely worded, but this seems to be the practical effect of them. There is no obligation, under the Convention, that is to say, no express obligation, to require such certification as a condition of domestic flying, and it is difficult to discover on what ground the condition imposed by these regulations, which affects all commercial aircraft flying in Canada, and all provincial aircraft, can be justified. The regulation as it stands would not be a valid one.

Sub-paragraph (*c*) deals with the licensing, inspecting and regulation of aerodromes and air-stations. No obligation arises under the Convention, which requires, for the performance of it, the unrestricted power of regulation in

relation to these subjects given by section 4. In truth, the only undertakings on the subject of aerodromes and air-stations in the body of the Convention are undertakings against discrimination and as to places fixed for the landing of foreign aircraft; while certain duties respecting aerodromes arise out of the rules in Annex D. But there is no obligation under the Convention, the performance of which would require the enactment of sub-paragraph (*c*) or of regulations 18 and 19.

It seems to be sufficiently clear that neither subsections (*a*), (*b*) and (*c*) of section 4 which were enacted before the Convention were concluded, nor the regulations made under that section were framed with a view to providing for the performance of obligations undertaken or to be undertaken by Canada in the Convention. They appear to be framed on the theory, which the Dominion now supports as the true view, that the Dominion Parliament possesses authority to control aerial navigation in all respects. The result is that we have regulations which are framed too broadly to go into effect under section 132 of the *British North America Act;* but although these enactments and regulations could not now be validly sanctioned under the powers conferred by section 132, it does not follow that the Dominion may not exercise under that section very considerable powers of regulation in respect to the matters enumerated in sub-paragraphs (*a*), (*b*) and (*c*) of section 4. Indeed there seems to be no room for doubt that for the purpose of procuring the observance of its valid regulations, regulations, that is to say, framed for the purpose of securing the observance of its undertakings under the Convention and regulations put into force under the powers arising under section 91, the objects aimed at by the regulations of 1919 could be very largely, if not entirely, accomplished. For example, article 25 of the Convention imposes upon the Dominion a duty to take measures to insure the observance of the regulations contained in Annex D, and the prosecution and punishment of persons contravening these regulations. I can see no reason to doubt, if the Dominion considered it a suitable measure for implementing its obligations under article 25 to require, as a condition of registration, that aircraft should in design and otherwise be adapted and equipped for the observance of the rules

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laid down in Annex B, that such a condition might properly be exacted. To exact such a condition or other conditions aptly designed to secure the performance of obligations under the Convention, and limited to that, would of course be a vastly different thing from legislation in the form of regulations 3 and 4, which leave the conditions of the right to register, that is to say, of the right to fly, to the unbridled discretion of the Air Board. So with regard to air harbours, it is competent to the Dominion in order to secure the observance of the rules in Annex D, to require aerodromes to perform the duties expressly or impliedly imposed upon them by that Annex. For this purpose, it would be within the power of the Dominion to prohibit the use of, or suspend the use of, any locality as an aerodrome, where these duties were disregarded, and to take proper measures to maintain such control over such aerodromes as would enable the Government to make its decrees effective; and it would also seem a reasonable and proper measure, for this purpose, to require the licensing of aerodromes under such conditions as to granting licences or as to the suspension or rescission of them as should appear to be calculated to secure this object. It would, of course, be competent to the Dominion, in licensing aerodromes as landing places for aircraft entering the country, to enact such conditions as it might see fit; as well as to provide for the observance at all aerodromes of the undertakings against discrimination in charges or in facilities under article 24 of the Convention. Furthermore, I do not doubt the power of the Dominion to control the use of aerodromes in such a way as to prevent the frustration of the rules of Annex D, and, for this purpose, to prescribe conditions as to the granting suspension and cancellation of licences. I have already stated my views as to the obligations incurred by the Dominion with respect to the conditions to be imposed in respect of the licensing of personnel. As I have said, the Dominion, in my judgment, is entitled to exact, as a condition of the granting of such a licence, the minimum conditions laid down in article 12 and Annex E. But I do not doubt that the Dominion is also entitled to exact sanctions for the performance of the rules in Annex D by providing for the suspension or cancellation of licences upon a breach of such rules; and furthermore, to take any measures cal-

culated to prevent any person acting as navigator, pilot, or member of the crew of an aeroplane not fully equipped by knowledge of the rules in Annex D, and otherwise, to perform any duty cast upon him by them.

In addition to all this, there are other regulations which could be sustained as enacted in view of the obligations imposed by the Convention in article 25. Regulation 15, for example, requires any registered aircraft to bear the prescribed nationality and registration marks. The Convention provides explicitly for the use of these marks in international navigation though not in domestic navigation. But it would obviously be proper, in order to secure identification for the purposes of enforcing, and punishing breaches of, the rules, to require that all aircraft should bear the marks of identification mentioned in regulation 15. Similar considerations apply to a number of other regulations; those, for example, requiring aircraft to land in response to signals of police officers, representatives of the Air Board, the Immigration and Customs officials, those requiring the possession and production of licences and certificates and other documents by aircraft, and generally those dealing with inspection.

As to "identification" and "inspection," in sub-paragraphs (b) and (c), I do not doubt the authority of the Dominion to legislate fully and completely on these subjects. The reasons appear to be too obvious to require statement. As to the remaining sub-paragraphs of section 4, little need be said. The Dominion has authority to provide for the carrying of mails, to prescribe the areas in which aircraft entering Canada shall land and the conditions to be observed on such landings, and to provide for the control of the Air Force. Other matters stand in a different situation. For example, the carriage of goods and passengers, the use and control of aerial routes, and those embraced in sub-paragraph (i) which is in the following terms:

> the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada.

In relation to all these last mentioned matters, the vice of section 4 is that its terms are too comprehensive. Under various heads of section 91, the Dominion, as I have already

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said, possesses authority to legislate in respect to certain aspects of some of these matters, but section 4 is framed in such a way as to render it impossible to treat the enactment, in its relation to the matters just mentioned, as one falling within the Dominion's authority under, for example, the regulation of Trade and Commerce, undertakings extending beyond the limits of a province, or Defence.

Some comment is required upon sub-paragraph (f). The Dominion possesses, I am disposed to think, authority to prohibit the navigation of non-Canadian aircraft over prescribed areas, and by the terms of the Convention, where such a prohibition is put into effect, there is an obligation to treat foreign aircraft on the same terms as Canadian aircraft. In the result, I am disposed to think, section 4 could be validly enacted in respect of sub-paragraph (f).

A further comment is required in respect to regulation 33. As affecting flying outside of Canada, I am disposed to think this regulation is valid under the powers of the Dominion independently of the Convention.

No reference was made upon the argument to regulation 133, which among other things provides that the regulations shall not apply to aircraft or to air harbours to the extent to which they have been relieved by the Air Board from compliance therewith. Every regulation is subject to this declaration; and the existence of this dispensing power exercisable according to the absolute discretion of an administrative board, affecting as it does every order, prohibition and declaration in the regulations, on the subject with which it deals, adds to the difficulty of holding that these regulations could be sanctioned validly in exercise of the powers under section 132, which are given for the purpose of providing for the performance of the obligations under the Convention. There is nothing in the Convention giving any countenance to the idea that the performance by each State of its obligations is, strictly, not obligatory, but within the discretion of the State itself.

Two regulations, 10 and 28, the first classified as relating to the subject of registration, and the second as relating to the subject of air harbours, both within the scope of question 4, cannot be passed over wholly without comment. I shall quote verbatim regulation 10, the form of which is closely followed in regulation 28:

10. It shall be a condition of the primary registration in Canada of any aircraft that, upon the Governor in Council declaring that a national emergency exists or is immediately apprehended, every such aircraft shall be subject to requisition in the name of His Majesty by the Air Board or any officer of the Canadian Air Force; and upon being so requisitioned shall become the property of His Majesty subject to its return or to the payment of compensation or to both as may be provided by law. New.

(2) The registration in Canada of any aircraft primarily registered in any of His Majesty's dominions other than Canada shall be subject to the like condition unless, under the law of that one of His Majesty's dominions in which the aircraft was primarily registered, it is subject to a paramount right to be requisitioned on His Majesty's behalf. (New.)

Although two of my brethren would answer question 4 (*c*) in a sense which recognizes regulation 10 as valid, I must say, with great respect, that neither of these regulations has any sort of relation to anything in the Convention; and that there is no section of the *British North America Act* other than section 132 under which they could be susceptible of valid sanction. Under them, the power of the Air Board to requisition aeroplanes and aerodromes in the name of His Majesty comes into play upon a proclamation by the Governor General declaring that a "national emergency" exists or is immediately apprehended. "Emergencies" may possess widely different degrees of gravity and urgency. But this authority is not conditioned upon the existence, in fact, of any conjuncture of the sort loosely and vaguely indicated by the words "national emergency." According to the tenor of the regulation, the condition is fulfilled upon a proclamation that this undefined state of affairs has come into being. These regulations afford instructive examples of the extremes to which an administrative board may allow itself to be carried, even when restrained by the necessity of securing the approval of the Governor in Council. They bring into relief, also, in a striking way, the sweeping character of section 4 of the Aeronautics Act of 1919. For under sub-paragraphs (*b*) and (*c*) of that section, (if it had itself been valid) investing, as it does, the Air Board with unlimited authority over the registration and the licensing of aircraft as well as over the licensing and regulation of aerodromes (in all the aspects of these subjects), these regulations could have been effectively put into force.

On the argument, there was an extended discussion touching the authority of the Dominion in respect of a

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regular service (or line) of aeroplanes operating between two provinces. The discussion centred in the scope and effect of the excepting clauses of no. 10 of section 92. But these subjects are not before us for consideration. The enactment in the principal clause of section 4, could not in its application to any one of the severally enumerated matters, be supported as within the ambit of any of the powers contemplated by the excepting clauses of section 92 (10). The subject of lines of aeroplanes, regular services of aeroplanes " ferries " of aeroplanes, is not the subject, or one of the severable subjects, of that section; or of any of the regulations we are asked to consider. It must be understood that I express no opinion, favourable or unfavourable, upon the contentions presented in argument on these points.

The same may be said of head no. 2 of section 91 " trade and commerce." Except in cases already specifically dealt with, there is nothing in the statute or in the regulations which properly, as subject of legislation, could be assigned to the subject of interprovincial or of foreign trade.

Save as to cases specified above, it would be necessary to rewrite these enactments in order to bring them within the ambit of any power possessed by the Dominion under head 2 of section 91.

Before taking leave of the reference, it is desirable, perhaps, to refer to a suggestion that the position taken in these reasons, if made good, would lead to confusion, indeed, to chaos, through the prevalence at one and the same time and place of different, and possibly conflicting, rules of aerial navigation. There is no foundation for such fears. The Dominion, I repeat, has full authority under section 132, to give effect to the rules embodied in the Convention and to take effective measures for the enforcement of them. It is now settled, if, indeed, there ever was a doubt upon it, that provincial legislation repugnant to valid legislation of the Dominion under section 132 is thereby superseded. *The Attorney-General of British Columbia* v. *Attorney-General of Canada* (1).

(1) (1921) 63 Can. S.C.R. 293, at p. 327 to 331; [1924] A.C. 203 at p. 211, 212 and 213.

The course followed in these reasons in examining the regulations in some detail, with a view to answering question 4, has necessitated the consideration of some points in respect of which we had little or no assistance from the argument. That questions 3 and 4 call for such an examination, in the one case, of the matters enumerated in the sub-paragraphs, and in the other, of the regulations, was assumed in the factums, and in the factum of the Dominion, the particular regulations falling under the several divisions of question 4 were indicated. It was also assumed by counsel, and this assumption to a considerable degree, dictated the course of the argument. The argument for the provinces was addressed in detail to the provisions of the statute and to most of the essential regulations upon each subject. In the argument for the Dominion, although the emphasis was predominantly upon the broader contentions, matters of detail were also the subject of extended discussion. It has seemed right to deal with these questions from the point of view from which they were discussed, especially since that point of view rests upon a construction of those questions which (although I think it is not strictly the right one) is in itself not an unreasonable one.

Nevertheless, I think it my duty to say that I sympathize with the feeling of my learned brethren as to the extreme difficulty of making what in practice will be regarded as a judicial pronouncement upon such a variety of topics, presenting, not in one or two cases only, but in many cases, points of no inconsiderable importance. While theoretically not impossible, it would not have been practicable, for counsel, to deal adequately in this case with every question presented by the statute and the regulations; and judicial conclusions arrived at without the assistance of argument, are not necessarily exempt from the weaknesses which often attend conclusions, so reached, elsewhere.

We hereby certify to His Excellency the Governor in Council that the reasons expressed in the paper hereunto annexed, are our reasons for the answers, certified of this date, to the questions referred herein by His Excellency for hearing and consideration by this Court.

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NEWCOMBE J.—In the *British Columbia Fisheries Case,* (1) the Lord Chancellor (Haldane) introduced his judgment, disposing of the questions submitted, with the following observations. He referred to the statutory authority under which the questions were, as he said, competently put to the Supreme Court, and he said that

> The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.

An illustration is to be found in the course adopted by the Privy Council in the *Fisheries Case* (2), from which it would seem that we should be careful not to declare or advise upon the rights of proprietors of lands in the provinces; they are not parties here, and cannot conveniently be represented in a general statutory reference, although some of these questions necessarily involve the consideration of proprietary rights. See also Lord Haldane's observations in *Attorney General for Ontario* v. *Attorney General for Canada* (3).

I shall endeavour, in my answers, to adhere to a course which is justified by these precedents.

Under the first question it is contended, on behalf of the Attorney General of Canada, that the convention relating to the regulation of aerial navigation is a treaty within the meaning of s. 132 of the *British North America Act, 1867,* and that the powers possessed by the Parliament and Government of Canada under that section are exclusive of any like powers which might, in its absence, have belonged to the provinces.

It is not denied, and no reason has been suggested to doubt, that the convention is a treaty; but the language

(1) [1914] A.C. 153, at p. 162. (2) [1898] A.C. 700, at p. 717.
(3) [1916] 1 A.C. 598, at pp. 601, 602.

of s. 132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by s. 132; and, while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. If that had been the intention, I think it would have been expressed. For example, to put a simple case, which perhaps conceivably may be imagined, if a province were bound by treaty between the Empire and a foreign country to pay a sum of money borrowed on the sole credit of the province, and if the province, by direction of its legislature, were in due course to cause the money to be paid, I do not doubt that the obligation would thereby lawfully and constitutionally be discharged, even without any action on the part of the Parliament or Government of Canada.

I have considered question 2 with the utmost solicitude to discover its meaning, and I remain in some perplexity; but, accepting the view, which seems not unreasonable, that the necessity of legislation to sanction the obligations of the treaty is intended to be brought within the scope of the enquiry, I am met by an objection which seems successfully to challenge the validity of the reference; and it is this: Granted that under section 132 the Parliament has authority, in excess of its powers elsewhere defined, to authorize the performance of treaties, the language of the section is not the less restricted to treaty obligations towards foreign countries, and it is to such obligations that the question addresses itself. When, therefore, it is considered that the court has no jurisdiction over a foreign sovereign, except by submission, and that the foreign States, party to the convention, have made no submission, it results, as I am disposed to think, that this court ought

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not to determine, under the present procedure, a question which involves the definition of the treaty obligations; and, especially so, seeing that the interpretation of the convention is, by Article 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that court, by arbitration.

Although the answers of the court upon questions referred are declared by the statute to be advisory only, and although, as said by the Judicial Committee in a passage which I shall quote more fully, they "will have no more effect than the opinions of the law officers," yet the proceedings are judicial, and the questions are referred to the court for "hearing and consideration"; and it is the statutory duty of the court to "hear" and consider. In the discharge of this duty, the court, in ordinary course, and necessarily, as I see it, applies the principle of the maxim *audi alteram partem,* and that, I think, comports with the just intention of the statute. Moreover, Parliament has been careful to provide expressly for this procedure. By subsecs. 4 and 5 of s. 55 of the *Supreme Court Act,* the court may direct that any person or class of persons interested shall be notified of the hearing, and that such person or class shall be entitled to be heard; also, where there is no appearance, the court may, in its discretion, request counsel to argue the case as to any interest which is affected. These provisions strengthen the view that the section is not intended to apply to the adjudication of interests in support of which the court is not empowered to require argument at the hearing. I am not overlooking the case of the *Japanese Treaty Act, Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), where an Act of British Columbia was held *ultra vires* for conflict with a valid Dominion statute, and which is thus quite distinguishable. And there is also the case, which should be mentioned, of the *Reference in the matter of Legislative Jurisdiction over Hours of Labour* (2). But I do not think that in either of these cases the reasons or answers were intended to come into conflict with the view which I am now expressing, and which, certainly, was not therein suggested or considered.

If, as would appear, it be desired to know whether Dominion legislation is *necessary,* one must ascertain what

(1) [1924] A.C. 203. (2) [1925] S.C.R. 505.

the obligation is, and that cannot judicially be declared without learning or inviting the contentions of the obligees. It may, of course, be suggested that there is no evidence of any controversy; but, on the other hand, we are not informed that the contracting parties are *ad idem* in their interpretation of the treaty obligations. It may likewise be said that foreign sovereign powers are not within the purview of the *Supreme Court Act;* that their interests are impliedly excepted and should be disregarded; but, in the *British Columbia Fisheries Case* (1), reasons were advanced why their Lordships should not answer a cognate question relating to the territorial rights claimed by the Crown in the shore extending below low water mark to within three miles of the coast, and affecting the pretensions of foreign nations. And, for my part, although I do not mean to suggest that litigation might not arise in which it would be convenient or necessary that the court should construe the treaty, the view which impresses itself upon my mind is that since the foreign sovereign parties to the convention are unrepresented and cannot be convened, a question which looks to the ascertainment of their interests judicially, cannot, upon submission by the Governor in Council, be determined compatibly with the statutory requirements and procedure.

Dominion powers derived under s. 132 should, I think, be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so, for performing those of a province; and this is true, irrespective of the question as to where the power would have resided if s. 132 had not been enacted. There is ample authority for the view that, if the treaty obligations cannot legally be performed under the domestic law as it exists, legislation is necessary to justify the performance; and, in *Walker* v. *Baird* (2), the Attorney-General of England (Sir Richard Webster)

conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary, in order to compel obedience to the provisions of a treaty.

(1) [1914] A.C. 153, at pp. 174, 175.

(2) [1892] A.C. 491, at p. 497.

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But the question remains of ascertaining and interpreting the conventional obligations; and, as to that, I have endeavoured to explain my difficulty as it presents itself.

Moreover, even if the jurisdiction were held to persist, notwithstanding that the court cannot convoke or summon the parties for hearing, I would have thought that the inexpediency or liability to miscarriage of a judicial attempt exhaustively to interpret and declare these obligations, when practical differences have not arisen and specific cases are not formulated, rests upon grounds so impressive and obvious as to justify a representation to the Governor in Council against the advisability of requiring an answer to a question possessing the general character and obscurity of no. 2.

It is true that a question as to the power of the Governor in Council to require this court to answer questions of law or fact, in the broad terms provided by s. 55 of the *Supreme Court Act,* was determined favourably to the legislation in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), but, in pronouncing that judgment, the Lord Chancellor (Earl Loreburn) said at pages 588, 589:

> It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e.g., must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have thought of saying it was *ultra vires.* It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV, applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinion of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor General in Council when it thinks right so to treat any question that may be put.

And the course so suggested appears to me appropriate for the present occasion.

Questions 3 and 4 relate to specific legislation, which has been enacted by the Dominion; and, even by all the fore-

(1) [1912] A.C. 571.

thought and imagination which we can exercise or may possess, they cannot be comprehensively or perfectly answered, if room is to be found, as I think it must be, for the operation of provincial rights. We were told at the argument that no practical difficulties had been encountered; and, obviously, questions could be better considered and more satisfactorily determined when, or from time to time as, they practically emerge, and so become capable of being stated with adequate point and precision. Meantime, in the discharge of our duty under the statute, we have certainly to face a question as to the authority of Parliament to enact these clauses under s. 91 of the *British North America Act, 1867;* and, as to that, I am satisfied that we cannot usefully do more than indicate generally the principles to be applied for the avoidance of controversy, or for the determination of specific differences, should they practically arise.

I would reject the argument urged on behalf of the Dominion that the subject matter of either of these questions is "navigation and shipping", within the 10th enumeration of s. 91 of the *British North America Act, 1867.* I see no evidence of any Parliamentary intention that this was ever intended.

> The earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad coelum,* as is holden 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin.* and in other bookes.

These are the words of Coke's venerable Commentary upon Littleton (4 a.), and they express, as I have been taught to believe, the common law of England, which applies in the English provinces of Canada. In the province of Quebec, the law is not materially different, for, by art. 414 of the Civil Code, it is declared that

> ownership of the soil carries with it ownership of what is above and what is below it.

The principle is thus established, and the courts have no authority, so far as I can perceive, to explain and qualify it so as to admit of the introduction of a public right of way for the use of flying machines consequent upon the demonstrations in recent times of the practicability of artificial flight. The appropriate legislature may, of course, provide for airways as it has habitually done for roads and highways, notwithstanding the rights of the proprietors; but the project is legislative, not judicial.

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"Navigation and shipping" are words inapt and unauthorized to connote flight or the utilization of atmospheric resistance or buoyancy for the carriage of craft or traffic. Flight is one thing, and navigation another. The way of a flying machine may in some respects be assimilated to the way of an eagle in the air, but not to that of a ship in the midst of the sea, which has been recognized as something different. Navigation consists in the exercise of a right of way, which may be enjoyed in the sea, in tidal and in non-tidal water. (Coulson & Forbes on Waters, 4th edition, by H. Stuart Moore, 437.) This meaning is emphasized for the purposes of s. 91, where the word is associated with "shipping." Moreover, as to tidal waters at least, the right is public, not dependent upon property. On the other hand, the right of way exercised within a province by a flying machine must, in some manner be derived from or against the owners of the property traversed; and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the province, although, no doubt, it may be overborne by ancillary Dominion powers, where they exist. It was enacted by sec. 9 of the Imperial *Air Navigation Act*, 1920, 10-11 Geo. V, c. 80, that, subject to its provisions, no action should lie in respect of trespass or in respect of nuisance, by reason of the flight of aircraft over any property at a reasonable height; and, if, for example, it were desired to confer similar immunity in the provinces of Canada, I see no reason to doubt that the resort would *prima facie* lie to the legislatures of the provinces. Therefore, if the subject of "navigation and shipping" is to be extended to what, in the absence of a definitive name, has been described as "aerial navigation," that is a function to be discharged by the enactment of appropriate words, and it belongs to the Imperial Parliament, not to this court.

If it be desirable to have uniformity of regulations for the licensing, inspection, etc., of air traffic, an inference may be drawn from the judgment of the Privy Council in *City of Montreal* v. *Montreal Street Railway* (1), that the object should be attained by co-operation between the Dominion and the local authorities. The federal system, as it is known in the Dominion, while it has proved its

(1) [1912] A.C. 333, at p. 346.

adaptation to local conditions of government, is not without some disadvantages, and one apparently is that an inconvenient situation may arise requiring a legislative remedy for which, notwithstanding some wayside utterances to the contrary, the concurrence or co-operation of both federal and provincial law-making bodies is necessary; but, as was said by Lord Atkinson, with relation to railways, in the *City of Montreal* case (1), page 346:

> It cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the Province, as the regulation of "through traffic."

The Dominion enumerated powers must, of course, have their full effect, even when they seem to conflict with those of the provinces. This follows from the concluding paragraph of s. 91 of the *British North America Act, 1867:*

> 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.

The meaning of this clause was explained by Lord Watson in the *Prohibition* Case (2), as follows:—

> It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that * * *

And his Lordship, having quoted the clause, proceeded:—

> It was observed by this Board in *Citizens Insurance Company of Canada* v. *Parsons* (3), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language in the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens Insurance Company of*

(1) [1912] A.C. 333, at p. 346. (2) [1896] A.C. 359, at p. 360.
(3) (1881) 7 App. Cas. 96, at pp. 108, 109.

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Canada v. *Parsons* (1), and in *Cushing* v. *Dupuy* (2); and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (3), and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (4).

And so, it cannot be successfully denied that the Dominion may have, maintain and operate aircraft, as part of its military or naval service, or for customs, postal or other Dominion services, and may regulate their use for these purposes; and, as well, may prohibit or regulate their use commercially for exporting or importing goods out of or into Canada, or for the carriage of passengers to and from Canada, or, I suggest, interprovincially. In respect of these and other services, as to which the Dominion derives its powers from the enumerations of s. 91, or exercises general powers not belonging to provincial subjects, the regulations in s. 4 of the *Aeronautics Act* appear to be competent to Parliament, but, on the other hand, it is, I think, certain that there are uses for aircraft, which appertain exclusively to "property and civil rights in the province," in relation to "matters of a merely private or local nature in the province"; and, as to these, some of the regulations in question cannot be applied without entering a field exclusively reserved for provincial authority. The same may be said with regard to the *Air Regulations, 1920,* respecting the matters specified in the fourth question.

A province, for example, amongst its other legislative powers, may exclusively make laws in regard to the establishment and tenure of provincial offices and the appointment and payment of provincial officers; the management and sale of public lands belonging to the province and of the timber and wood thereon, and the comprehensive subject of property and civil rights in the province. (S. 92 (4), (5) and (13)). And, if, therefore, to introduce only one illustration, the province desire to provide an air service for the oversight, protection and management of its Crown lands and timber, or for its mines and minerals or mining reserves, it is not, I believe, destitute of power for the institution and use of it; and so, if a legislature should

(1) (1881) 7 App. Cas. 96 at pp. 108, 109.
(2) (1880) 5 App. Cas. 409, at p. 415.
(3) [1894] A.C. 31, at p. 46.
(4) [1894] A.C. 189, at p. 200.

sanction the appointment of officers to perform the duties of provincial air guides or pilots or operators for the conduct of that service, I am far from persuaded that these officers must qualify for the discharge of their duties by production of Dominion licences, unless the province by its legislation should so enact.

I have thus endeavoured briefly to state what I think may usefully be submitted in answer to the questions referred, and, pursuant to the statute, I certify the above as my opinion and reasons for the information of the Governor in Council.

Newcombe J.

SMITH, J.—The following are the questions submitted:—

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the *British North America Act*, 1867?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the *Aeronautics Act*, chapter 3, Revised Statutes of Canada, 1927?

4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting—

(*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;

(*b*) The regulation, identification, inspection, certification and licensing of all aircraft; and

(*c*) The licensing, inspection and regulation of all aerodromes and air stations?

In my opinion, the answer to question 1 is determined by the decision in *Attorney General of British Columbia* v. *Attorney General of Canada*. (1) In that case, a treaty was made in 1913 between His Majesty the King and the Emperor of Japan, by which it was, among other things, agreed that the subjects of each of the High Contracting Parties should have full liberty to enter, travel and reside in the territories of the other, and in all that relates to the pursuit of their industries, callings, professions and educa-

(1) [1924] A.C. 203.

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tional studies, should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

On April 10, 1913, the Parliament of Canada passed the *Japanese Treaty Act* of that year, and this Act provided that the treaty should be thereby sanctioned and declared to have the force of law in Canada.

In 1902 two minutes had been passed by the Executive Council of the province of British Columbia, and approved by the Lieutenant Governor, which set out resolutions passed by the Legislative Assembly and recommended, in accordance with these resolutions, that all tunnel and drain licences issued under s. 58 of the *Mineral Act* and s. 48 of the *Placer Mining Act*, and all leases granted under part VII of the latter Act, should contain provisos that they were granted on the express condition that no Chinese or Japanese should be employed in or about the tunnels, drains or premises to which the licences or leases related, and that a similar provision should also be inserted in all instruments relating to a number of enumerated leases and licences which should be issued by the officers of the provincial government.

On April 2, 1921, the legislature of British Columbia passed the *Oriental Orders in Council Validation Act*, which statute purported to validate and confirm the two Orders in Council of the province already referred to, and passed in the form of recommendations of the provincial Executive Council, approved by the Lieutenant Governor, in May, 1902. The statute further provided that the Orders should be deemed to have been valid and effectual according to their tenor as from the dates of their approval, and that where, in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, any provision had heretofore been inserted, or was thereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision should be deemed to have been and to be valid, and always to have had the force of law according to its tenor. It was further enacted that every violation of or failure to observe any such provision on the part of any licensee, or other person in whose

favour the instrument operated, should be sufficient ground for the cancellation of the instrument by the Lieutenant Governor.

Section 132 of the *British North America Act* is as follows:—

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire, towards Foreign Countries arising under treaties between the Empire and such foreign countries.

The question at issue in the case was the validity of the British Columbia statute referred to. One of the grounds urged against the validity of the Act was that it purported to deal with the status of aliens, a matter solely under the jurisdiction of the Dominion under s. 91 of the *British North America Act;* and the other ground was that the provincial statute violated the principle laid down in the Dominion Act of 1913.

It was held that the provincial Act was not inconsistent with s. 91 of the *British North America Act,* but was void because it violated the principle laid down in the Dominion Act of 1913.

It is to be noted that it was not argued that the Dominion Act was invalid or that the provincial Act could prevail over the Dominion Act, passed pursuant to s. 132 of the *British North America Act.* The whole argument was that the provincial Act did not in fact conflict with the Dominion Act.

It is argued here, on behalf of the provinces, that where there is a stipulation in a treaty that something shall be done that the provinces have jurisdiction to do, it is only on failure of the provinces to discharge the provincial obligations that the Dominion has jurisdiction to intervene. This contention seems to be totally at variance with the decision of the Privy Council in the case just referred to, which holds that, apart from the question of jurisdiction over aliens, the Dominion Parliament had jurisdiction to implement the treaty by legislation, and that the province could not validly enact legislation inconsistent with the principle of the Dominion legislation.

It follows, in my opinion, that the Dominion Parliament has *paramount* jurisdiction to legislate for the performance of all treaty obligations, and that, while a province may effectively legislate for that purpose in regard to any mat-

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ter falling within s. 92 of the *British North America Act* while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the provinces about such matters. The answer to the first question, therefore, substituting the word "paramount" for the word "exclusive," is in the affirmative.

I am of the opinion that, taking the words in question 2, "regulation and control of aeronautics generally within Canada," as meaning unlimited regulations and control of aeronautics within Canada, the answer must be in the negative.

The contention on behalf of the provinces is that the international Convention applies only to aircraft operated internationally, and has no application to aircraft of any of the contracting countries which flies wholly within the territory of the country where it is owned. In some respects the Convention purports to deal only with international flying, but in others with the flying of all aircraft.

For example, article 25 is as follows:

> Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of *its* territory and that every aircraft, wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Annex D lays down elaborate rules as to lights and signals, and rules for air traffic, following closely the rules of water navigation. If the contention of the provinces be sound, every province, so far as this Convention is concerned, would be entitled to establish rules of its own, as to lights and signals and air traffic, which might be entirely at variance with the international rules laid down in the Convention, and each of which might be at variance with the other. The manifest object of these rules as set out in the Convention is to secure safety in air navigation for all craft flying over the territory of the parties to the treaty; and it is unreasonable to suppose that these rules were to apply only to aircraft flying internationally, and that every country and every province was at liberty to make its own rules for aircraft owned and flying within its own territory. I am of opinion, therefore, that under article 25 the Dominion is under obligation to adopt measures to ensure that

every aircraft flying above the limits of Canadian territory shall comply with the regulations contained in Annex D, and has authority to enact accordingly.

Article 12 is as follows:—

Art. 12. The commanding officer, pilots, engineers and other members of the operating crew of *every aircraft* shall, in accordance with the conditions laid down in Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

Annex E has the following:—

The conditions set forth in the present Annex are the minimum conditions required for the issue of certificates and licences valid for international traffic.

Nevertheless, each contracting State will be entitled to issue certificates and licences, not valid for international traffic, subject to such less stringent conditions as it may deem adequate to ensure the safety of air traffic.

The said certificates and licences will not, however, be valid for flight over the territory of another State.

Article 12 in terms refers to the operating crew of *every aircraft,* while the preceding article 11, expressly refers to *every aircraft engaged in international navigation.*

In the portion of Annex E just quoted, we have express provision for the issue of certificates and licences by each of the states for flying within its own territory, on such less stringent conditions as each state may deem adequate to ensure the safety of air traffic. By virtue, therefore, of article 12 and Annex E, there is imposed upon each party to the Convention an express obligation to control in this way all aircraft flying exclusively within its own territory.

The Articles of Convention do not explicitly provide that aircraft shall be registered; but this is necessarily implied.

Article 5 provides that no contracting state shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting state. By article 6, aircraft *possess the nationality* of the state on the register of which they are entered, in accordance with the provisions of section I (*c*) of Annex A; and article 10 provides that all aircraft engaged in international navigation shall bear their nationality and registration marks, as well as the name and residence of the owner, in accordance with Annex A. As nationality under these provisions can only be *possessed*

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by registration, the necessary inference is that there must be registration of all aircraft as provided in Annex A, except in cases where such aircraft are flying under a "special and temporary authorization."

It is contended on behalf of the provinces that article 5 refers only to aircraft engaged in international navigation; but the language of the article has no such limitation: and, in view of the general intention to be gathered from the whole tenor of the Convention, and particularly from the provisions of Annex E quoted above, to provide for the safety of air navigation, there would seem to be no good reason for introducing such a limitation. If the argument on behalf of the provinces were sustained, then every state, and each province of Canada, so far as the Convention is concerned, might allow aircraft of all descriptions, uninspected, unregistered, and of any nationality, to fly within its own borders, which, in my opinion, would be contrary to the express language of article 5 and the general intent and provisions of the Convention.

It is to be noted, however, that article 37 provides that, in case of a disagreement between two or more states relating to the interpretation of the Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and, until its establishment, by arbitration. This Court, therefore, has no jurisdiction to give an opinion binding upon the various parties to the Convention on disputes as to interpretation, whereas a decision under article 37 would be binding on all parties to the Convention, and the obligation of the Dominion and the jurisdiction to legislate would thereafter accord with the interpretation thus arrived at.

It is admitted on behalf of the provinces that, independently of the Convention, the Parliament of Canada has jurisdiction over aircraft and air navigation, by virtue of s. 91 of the *British North America Act,* in connection with various matters thereby assigned to the Dominion, such as Military and Naval Service and Defence, Customs, Postal Service, Control of Aliens, and, possibly to some extent, for the regulation of Trade and Commerce.

On behalf of the Dominion it is argued that the whole subject comes within Navigation and Shipping, under clause (10) of sec. 91.

I am of opinion that Navigation and Shipping, as used in s. 91, refers only to the navigation of water, and shipping plying on or in water. This is the definition of navigation and shipping in the "New English Dictionary," and there can be little doubt that it was the meaning attached to these terms at the time the Act was passed. In my opinion, jurisdiction over aeronautics belongs to the provinces under the heading Property and Civil Rights in the province, section 92 (13) of the *British North America Act,* subject to the jurisdiction of the Dominion under s. 91, as indicated, and to the provisions of the Convention referred to and of s. 132 of the *British North America Act.*

Question 3 is apparently construed by the majority of the members of the court as an enquiry as to whether or not s. 4 of the *Aeronautics Act,* as it now stands in the Revised Statutes, is *intra vires* and valid. On that view it is contended that, as the statute was passed long before the treaty came into effect, no jurisdiction under s. 132 of the *British North America Act* by virtue of the treaty can be invoked to sustain the validity of the Act, and that the re-enactment of this statute in the Revised Statutes of 1927 does not alter the matter because of the provisions of s. 8 of 14-15 Geo. V, c. 65, which provides that the Revised Statutes shall not be held to operate as new laws.

In my view, the question relates to the present legislative authority of the Dominion Parliament, including legislative authority under the various headings in s. 91 of the *British North America Act* and under s. 132, by virtue of the treaty. Interpreting the question in this way, it follows from what has been already said that Parliament has authority to enact the provisions of s. 4 of the *Aeronautics Act* in relation to the matters set out in s. 91 of the *British North America Act,* and, so far as necessary and proper, within the meaning of s. 132 of that Act, for carrying out the provisions of the treaty. S. 4, however, goes beyond this, and purports to assume unlimited regulation and control of aeronautics in Canada.

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It is difficult, therefore, to answer categorically question 3, but, interpreting the question as indicated, it follows from what has been said that, as to a great part of the provisions of s. 4, the answer is "Yes." Clause (*d*) refers not only to the carrying of mails, but to the carrying of goods and passengers, and the operation of any commercial service whatsoever, and jurisdiction as to these matters, independently of the Convention, would depend on whether or not they are of such a nature as to amount to Regulation of Trade and Commerce as set out in s. 91 of the *British North America Act.* The same remarks would apply to transport of goods and passengers over part of the territories of Canada, as set out in clause (*e*).

Question 4 (*a*) and (*b*) should be answered in the affirmative.

Question 4 (*c*) should be answered in the affirmative as to all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air stations referred to in the Convention or in reading ground markings made in pursuance of the Convention.

I certify the foregoing to be my opinion and reasons therefor upon the four questions herein submitted for hearing and consideration by the court by His Excellency the Governor in Council.

CANNON, J.—The Governor General in Council, on the 15th of April, 1929, referred the following questions to this court for hearing and consideration pursuant to the provisions of section 55 of the *Supreme Court Act,* R.S.C., 1927, chapter 35:—

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or any province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the British North America Act, 1867?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the Aeronautics Act, chapter 3, Revised Statutes of Canada, 1927?

4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting—

(a) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircrafts and the suspension or revocation of such licences;

(b) The regulation, identification, inspection, certification and licensing of all aircrafts; and

(c) The licensing, inspection and regulation of all aerodromes and air stations?

The Minister of Justice, in his report to Council, apprehends

that this legislation was enacted by Parliament by reason not only of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interests, but also of the necessity of making provision for performing the obligations of Canada, as part of the British Empire under the Convention relating to the regulation of Aerial Navigation which, drawn up by a Commission constituted by the Peace Conference at Paris in 1919, was, on 13th October of that year, signed by the representatives of 26 of the Allied and Associated Powers including Canada.

This convention was ratified by His Majesty on behalf of the British Empire on 1st June, 1922, and is now in force, as the Minister is informed, as between the British Empire and 17 other States.

The Minister observes that the Air Regulations 1920, conform in essential particulars to the provisions of the said Convention, and are designed to give effect to the stipulations thereof in discharge of the obligations of Canada, as part of the British Empire, towards the other contracting States.

The Minister states that at the conference at Ottawa between representatives of the Dominion and the several Provincial Governments in the month of November, 1927, the representatives of the province of Quebec raised a question as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada, at all events in their application to flying operations carried on within a Province; and it was agreed that the question so raised was a proper question for the determination of the Supreme Court of Canada.

At the argument, Mr. Geoffrion suggested that the order of the questions should be reversed, as it seemed logical that we should first see whether flying is federal or not. If it is federal, it is unnecessary to discuss the application of section 132. If flying is provincial, then it will become important to determine how far section 132 carries federal legislative power.

Questions 3 and 4

The impugned section 4 of *The Aeronautics Act*, R.S.C. 1927, c. 3, reads as follows:

4. Subject to approval by the Governor in Council, the Minister shall have power to regulate and control aerial navigation over Canada and

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the territorial waters of Canada, and in particular, but not to restrict the generality of the foregoing terms of this section, he may, with the approval aforesaid, make regulations with respect to

(*a*) licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licences;

(*b*) the registration, identification, inspection, certification and licensing of all aircraft;

(*c*) the licensing, inspection and regulation of all aerodromes and air-stations;

(*d*) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever, and the licensing of any such services;

(*e*) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory;

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified;

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;

(*h*) aerial routes, their use and control;

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada; and

(*j*) organization, discipline, efficiency and good government generally of the officers and men employed in the Air Force.

2. Any person guilty of violating the provisions of any such regulation shall be liable, on summary conviction, to a fine not exceeding one thousand dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.

3. All regulations enacted under the provisions of this Act shall be published in the *Canada Gazette*, and, upon being so published, shall have the same force in law as if they formed part of this Act.

4. Such regulations shall be laid before both Houses of Parliament within ten days after the publication thereof if Parliament is sitting, and if Parliament is not sitting, then within ten days after the next meeting thereof.

Section 14 of the *Interpretation Act*, R.S.C. 1927, c. 1, says:

The preamble of every Act shall be deemed a part thereof intended to assist in explaining the purpose and object of the Act.

I note immediately that Parliament has not deemed it desirable, when passing 9-10 Geo. V, c. 11, assented to on 6th June, 1919, to state in a preamble the object and purport of the Act, so that we remain only with the report of the Minister of Justice who apprehends that

the legislation was enacted by Parliament on account of the expediency of making provision for the regulation of a service essentially important in itself as touching the national life and interest.

The latest decisions of the Privy Council on our Constitution are to be found, first, in the case of *Edwards* v. *Attorney General for Canada,* (1) where Lord Chancellor Sankey says at page 136:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention;" Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's Canadian Constitution, 3rd ed., p. 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catharine's Milling and Lumber Co.* v. *The Queen* (2). "That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *Attorney-General of Manitoba* (3), the question is not what may be supposed to have been intended, but what has been said.

The Lord Chancellor, however, restricts his observations in the following way:

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government.

The other case is *Attorney-General for Canada* v. *Attorney-General for British Columbia* (4), where Lord Tomlin, speaking for the Board, on October 15, 1929, lays down

(1) [1930] A.C. 124.
(2) (1888) 14 App. Cas. 46, at p. 50.
(3) (1895) A.C. 202, at p. 216.
(4) [1930] A.C. 111.

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these four propositions relative to legislative competence in Canada as being established by decisions of the Judicial Committee:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92; see *Tennant* v. *Union Bank of Canada* (1).

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (3); and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

(4) 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, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada* (4).

Applying these four tests, I find

1st. That aviation, even if designated as aerial navigation, is not a subject enumerated in section 91, or in subsection 10 of s. 92. The works and undertakings connecting a province with another province or extending beyond the limits of the province are "physical things, not services," as pointed out by Lord Atkinson in *City of Montreal* v. *Montreal Street Railway* (5). The air lines cannot be assimilated to railways as physical things and this authority applies with singular force to exclude federal control of aviation, unless the latter is assimilated to interprovincial lines of navigation.

(1) [1894] A.C. 31.
(2) [1896] A.C. 348.
(3) [1894] A.C. 189.
(4) [1907] A.C. 65.
(5) [1912] A.C. 342.

2nd. Nothing before us shows conclusively that it is unquestionably a matter of national interest and importance and that it does not trench on any of the subjects enumerated in s. 92 or that it has attained such dimensions as to affect the whole body politic of the Dominion.

3rd. My first finding disposes of the third test; this legislation is not necessarily incidental to effective legislation by Parliament upon a subject of legislation expressly enumerated in s. 91, amongst others "navigation and shipping, militia, military and naval service and defence, regulation of trade and commerce." Perhaps an all powerful national air-board and an all-inclusive national air code would be the desideratum if we were drafting *de novo* section 91, but under our peculiar dual form of government, it is difficult to see how such results can be accomplished without ignoring the federal constitution. Such legislation might be required in case of war, in time of extraordinary peril to the national life of the Dominion, but this Act was not passed for such an emergency, and it cannot be justified as an exception to the exclusive right of the provinces to legislate concerning property and civil rights.

4th. This legislation, so far as property and civil rights are concerned, does not touch a domain where provincial and Dominion legislation may overlap. The ownership of the air space is *prima facie* a subject within the exclusive jurisdiction of the provinces; and they alone can impose restrictions to the rights of the owners of land and to those of the owners of aircraft. Almost every federal power could be somewhat more conveniently exercised if some portion of provincial sovereignty were added to it. This rule for the extension of the federal power should require a strict necessity for its application. If mere convenience is to be a sufficient cause, then assuredly the reservation to the provinces of the control of property and civil rights is meaningless and futile. As pointed out by my brother Duff, re *Montreal Street Railway* v. *City of Montreal* (1),

> Division of legislative authority is the principle of the B.N.A. Act, and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division, that is the end of the federal character of the Union,

(1) (1910) 43 Can. S.C.R. 197, at p. 232

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and paraphrasing Lord Atkinson's statement in the same case (1): "It cannot be assumed that the legislatures will decline to co-operate in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of air traffic."

Although the Lord Chancellor in the *Edwards* case (2), says that

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

it would seem by the above-quoted reservation that he makes that statement non-applicable to the question of the legislative competence either of the Dominion or its provinces; judges cannot afford to give to a text which is clear a liberal and large interpretation in favour of Dominion power to the detriment of the provinces, and vice versa.

I would therefore say, with respect for those who believe that our constitution must be stretched to meet new conditions as they arise in the life of the people, that aviation was not foreseen nor considered when the enumeration of 91 was made, and that the words "property and civil rights" in section 92, are wide enough to give power to the provinces of legislating, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion and conform to the new requirements of International Law since the sovereignty of each State over the air space above its territory has been proclaimed in 1919.

I would therefore answer question 3 in the negative.

Question 4 as framed I would answer in the negative under sections 91 and 92 of the B.N.A. Act; but, under 132, I would refer to my answers to questions 1 and 2.

Questions 1 and 2

Reaching the above conclusions with respect to the application of sections 91 and 92, I must now come to the main contention of the Dominion that section 132 of the Act validates the impugned provisions.

Question 1

Section 132 provides that

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or *of any province thereof*, as *part of the British Empire*, towards foreign countries arising under treaties between the Empire and such foreign countries.

(1) [1912] A.C. 346. (2) [1930] A.C. 124.

As already stated, the treaty was signed on behalf of the Empire on the 13th October, 1919, and ratifications deposited in Paris on June 1st, 1922.

The *Air Board Act* was assented to on the 6th of June, 1919, before the Parliament of Canada could invoke article 132 to secure the power of performing the obligations of Canada under a treaty which was not then in existence. It requires an existing treaty to give validity to legislation, not merely a prospective convention.

But the Act has been re-enacted as chapter 3 of the Revised Statutes of Canada (1927) which, under proclamation, came into force and have affect as law on, from and after the first day of February, 1928, pursuant to the Act respecting the Revised Statutes of Canada, assented to on 19th July, 1924. At both the latter dates, the convention was in force. But at no time has the Parliament of Canada, as they had done for the Japanese Treaty, passed an Act providing that the treaty should be thereby sanctioned and declared to have the force of law in Canada.

I would therefore answer the first question, as drafted, in the negative. The Parliament and Government of Canada may have paramount, though not exclusive, legislative and executive authority for performing the obligations of Canada, or any province thereof, under the Convention, but have not yet found it necessary or proper to exercise such legislative power.

Question 2

We have not before us the elements required to answer question 2 in the affirmative. Is Parliament or this court to decide what legislation may be *necessary* or *proper* for performing the obligations of Canada under the Convention?

By inserting the words "or of any province thereof" in clause 132, the Fathers of Confederation seem to imply that some of the Treaty obligations might, as an internal matter, be considered as within the jurisdiction of Canada as a whole, and others as within the provincial competence.

If the provinces, or any of them, refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the Dominion, then the question may come before Parliament which might, in a preamble explain why it had become either necessary or

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Cannon J.

proper, to legislate and make regulations under the special powers given by 132. This has not yet been done and, with the data submitted, I cannot answer the question in the affirmative. Moreover, if the words "generally" in the question are equivalent to "in every respect", the answer is in the negative.

Pursuant to the statute, I certify the above as my opinion and reasons for the information of the Governor in Council.

The judgment rendered by the court was as follows:

"The court unanimously answers question no. 1 as follows:

"As framed, question no. 1 must be answered in the negative.

"The answer of the Chief Justice, Duff, Rinfret, Lamont, Smith and Cannon JJ. to question no. 2 is 'construing the word 'generally' in the question as equivalent to 'in every respect' the answer is in the negative.'

"The answer of the Chief Justice, Duff, Newcombe, Rinfret, Lamont and Cannon JJ. to question no. 3 is 'construing the question as meaning, 'Is the section mentioned, as it stands, validly enacted?' the answer is in the negative.'

"But, if the question requires the court to consider the matters in the enumerated subheads of s. 4 of the Statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the judges.

"As to question no. 4, the answers are to be ascertained from the individual opinions or reasons certified by the judges."

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

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

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

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