

In the Privy Council.

No. 16 of 1911.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

In the matter of a Reference by His Excellency the Governor-General in Council to the Supreme Court of Canada pursuant to Section 60 of the Supreme Court Act of certain questions for hearing and consideration as to the respective legislative powers under the British North America Acts of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of companies and as to the other particulars therein stated.

BETWEEN

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND,
THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA,

Appellants,

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA,

Respondent,

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA,

Respondent.

CASE FOR THE APPELLANTS.

1. This is an appeal by special leave from the opinion expressed by the Supreme Court of Canada on the 11th day of October, 1910, upon a reference to it under Section 60 of the Supreme Court Act (Revised Statutes of Canada, 1906, Cap. 139) that it had jurisdiction under the said section to entertain the reference.

2. The question raised by the Appeal is whether under the Canadian Constitution the Governor-General in Council has power to frame and refer to the Supreme Court questions as to the constitutional powers of the Provinces as to the effect of Provincial statutes and as to the interests of individuals who may be unrepresented upon such reference and to require the Supreme Court to answer such questions.

The Appellants contended before the Supreme Court and now contend that the Governor-General in Council has no such power, and that the reference in question having been made without the consent and against the protest of the Provinces concerned cannot be 10 entertained by the Supreme Court.

3. The question depends upon the construction of the provisions of the British North America Act, 1867, and of the Supreme Court Act (R.S.C., 1906, C. 139).

The most material Sections of these Acts are for convenience here set out.

BRITISH NORTH AMERICA ACT.

“ VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the advice 20 and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,— 30

* * * *

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

* * * *

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

* * * *

And any matter coming within any of the classes of subjects 40 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.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

* * * *

11. The Incorporation of Companies with Provincial Objects.

* * * *

13. Property and Civil Rights in the Province.

10 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts.

* * * *

VII.—JUDICATURE.

96. The Governor-General shall appoint the Judges of the Superior District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in
20 those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

30 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better Administration of the laws of Canada."

SUPREME COURT ACT.

40 "3. The Court of Common Law and Equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general Court of Appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a Court of Record."

* * * *

References by Governor in Council.

- “ 60. Important questions of law or fact touching :—
- (A) The interpretation of *The British North America Acts, 1867 to 1886*; or,
 - (B) The constitutionality or interpretation of any Dominion or Provincial legislation; or,
 - (C) The appellate jurisdiction as to educational matters, by *The British North America Act, 1867*, or by any other Act or law vested in the Governor in Council; or,
 - (D) The powers of the Parliament of Canada, or of the Legislatures¹⁰ of the Provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed; 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;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively²⁰ deemed to be an important question.

2. When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and 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; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

3. In case any such question relates to the constitutional validity³⁰ of any Act which has heretofore been or shall hereafter be passed by the Legislature of any Province, or of any provision in any such Act, or in case, for any reason, the Government of any Province has any special interest in any such question, the Attorney-General of such Province shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The Court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be⁴⁰ heard thereon.

5. The Court 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, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties."

* * * * *

Cases removed by Provincial Courts.

" 67. When the Legislature of any Province of Canada has passed an Act agreeing and providing that the Supreme Court of Canada shall have jurisdiction in any of the following cases, that is to say :—

- 10 (A) Of suits, actions or proceedings in which the parties thereto by their pleading have raised the question of the validity of an Act of the Parliament of Canada, when in the opinion of a judge of the Court in which the same are pending such question is material ;
- (B) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the Legislature of such Province, when in the opinion of a judge of the Court in which the same are pending such question is material ;

20 the judge who has decided that such question is material shall, at the request of the parties, and may without such request if he thinks fit, in any suit, action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly.

2. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the court or judge whence it came to be then and there dealt with as to justice appertains.

30 3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

4. This section shall apply only to cases of a civil nature."

40 These provisions are the result of modifications in the original Supreme Court Act of 1875 (38 Vict. c. 11, ss. 1, 52, and 54—57), which Act constituted the Supreme Court of Canada as a general Court of Appeal for the Dominion of Canada. The Act was re-enacted in substance in 1886 (Revised Statutes of Canada, 1886, c. 135, ss. 3, 37, and 72—74), amended in 1891 (54 and 55 Vict. c. 25, s. 4), again amended in 1906 (6 Edw. VII., c. 50, ss. 1 and 2), and finally re-enacted in the form above set out in the Revised Statutes of Canada for 1906.

4. The Appellants respectfully submit that neither the provisions above set out nor any other provisions of the British North America Act authorise the Parliament of Canada to enact Section 60 of the Supreme Court Act and that that Section is *ultra vires* of the Parliament

RECORD. of Canada and void, and that it is an interference with the exclusive power conferred on the Legislatures of the Provinces by Section 92 (14) of the British North America Act.

5. The circumstances under which the jurisdiction of the Supreme Court to entertain the above-mentioned reference was called in question are as follows :

pp. 3 & 5.

By Orders in Council dated the 9th of May, 1910, the 30th of May, 1910, and the 26th of September, 1910, the Governor-General in Council referred to the Supreme Court under Section 60 of the Supreme Court Act certain questions as to the powers *inter se* of the Parliament of 10 Canada and the Legislatures of the Provinces to incorporate companies and as to the effect of such incorporations.

6. The questions thus propounded are designed to obtain the opinion of the Supreme Court on the question whether companies incorporated under Provincial Statutes have power or capacity to do business outside the territorial limits of the incorporating Province. They affect the standing of a great number of companies incorporated by the Provinces since the Confederation in 1867 and now carrying on business in two or more Provinces, and they may affect the legislative control over companies incorporated in the several Colonies prior to their 20 entry into Confederation. Although the questions are of vital importance to the Appellants yet they were not consulted in any way in the framing of them. Every previous reference under Section 60 of the Supreme Court Act has been made with the consent of the Provinces concerned and thus, although doubts have been expressed from time to time by learned judges of the Supreme Court as to their jurisdiction, the question of jurisdiction has never before been directly raised or decided.

7. By two Orders in Council dated the 29th of June, 1910, the Governor-General in Council referred to the Supreme Court under 30 Section 60 of the Supreme Court Act certain other questions as to the competency of the Legislature of the Province of British Columbia to authorise the Government of the Province to grant exclusive fishery rights in certain inland waters and parts of the sea and as to the validity and effect of the Insurance Act, 1910, passed by the Parliament of Canada.

p. 6. No. 2.

8. On the 28th of May, 1910, Mr. Justice Idington (one of the Justices of the Supreme Court) made an Order that the above-mentioned reference as to the incorporation of companies should be inscribed for hearing at the October sittings of the Supreme Court and that notice 40 thereof should be given to the Attorneys-General of all the Provinces and that they should be at liberty to file factums and to appear by counsel upon the argument. The Attorneys-General for all the Provinces were duly notified in accordance with Mr. Justice Idington's Order.

p. 7. No. 3.

p. 7. No. 4.

9. On the 26th of September, 1910, notice of motion was given on behalf of the Attorneys-General for the Provinces of Ontario, Nova

Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta RECORD.
 protesting against the jurisdiction of the Supreme Court to entertain
 any of the above-mentioned references, and asking that the said
 references should be struck out.

A memorandum on behalf of the said Attorneys-General was also p. 8. No. 5.
 filed setting out their arguments against the jurisdiction.

10 10. On the 11th of October, 1910, the said motion came on for p. 14. No. 7.
 hearing before the Supreme Court (Fitzpatrick, C.J., Girouard, Davies,
 Idington, Duff, and Anglin, JJ.), and on the same day after hearing
 Counsel on behalf of the Attorney-General for the Dominion of Canada
 and on behalf of the said Attorneys-General and also as to the first
 above-mentioned reference on behalf of the Attorneys-General for
 the Provinces of Quebec and British Columbia and as to the above-
 mentioned Reference as to the Insurance Act 1910 on behalf of the
 Attorney-General for the Province of Quebec, the Supreme Court
 (Girouard and Idington, JJ., dissenting) pronounced the opinion
 appealed from declaring that it has jurisdiction to hear the said
 references.

20 11. The learned Chief Justice rested his opinion in the first place p. 15. No. 8.
 upon the rule of conduct which he held the previous references under
 Section 60 of the Supreme Court Act had established. In the second
 place he was of opinion from the analogy of the British Constitution
 that the Judges of the Supreme Court are the official advisers of the
 Executive in the same way as His Majesty's Judges are in England
 the advisers of the Crown. He was further of opinion that Section 60
 of the Supreme Court Act is authorised by Section 101 of the British
 North America Act as being the establishment of a Court for the better
 administration of the laws of Canada, and, if not by that section, by
 Section 91, which vests in the Parliament of Canada the power of
 30 making laws for the peace, order, and good government of Canada.

Mr. Justice Girouard, who dissented, was of opinion that the p. 21. l. 30.
 jurisdiction of the Court in references by the Governor-General in
 Council was confined to Federal matters, and that in so far as the
 subject matter of a reference was Provincial it was *ultra vires* of the
 Governor-General in Council and beyond the jurisdiction of the Court.

40 Mr. Justice Davies agreed with the Chief Justice in thinking that p. 21. l. 45.
 Section 60 of the Supreme Court Act was authorised by Section 101
 of the British North America Act as being the establishment of an
 additional Court for the better administration of the laws of Canada,
 and that in any event it was authorised by the general provision of
 Section 91. The learned Judge took the view that there was no neces-
 sary conflict between the powers assigned to the Provincial Legislatures
 under Section 92 (14) of the British North America Act and the power
 claimed by the Dominion of Canada to refer questions to the Supreme
 Court under Section 60 of the Supreme Court Act, and further, that
 even if there was any such conflict the words "Notwithstanding any-
 thing in this Act," at the beginning of Section 101 of the British

RECORD. North America Act, indicate that it was the intention of the Imperial Parliament to override Section 92 (14) by Section 101.

p. 25. 1. 19. Mr. Justice Idington, who dissented, was of opinion that Section 101 of the British North America Act, besides authorising the establishment of a general Court of Appeal for Canada, authorises the creation of additional Courts for the better administration of Federal laws. He held that whilst the Supreme Court has jurisdiction in references in which both the Provinces and the Dominion have agreed in submitting the questions asked, it has no jurisdiction to entertain references by the Dominion authorities of questions affecting the Provinces without 10 their consent and against their wish.

p. 35. 1. 3. Mr. Justice Duff, arguing from the analogy of the Imperial Constitution, was of opinion that there was nothing in the consultative jurisdiction conferred upon the Supreme Court by Section 60 of the Supreme Court Act inconsistent with its jurisdiction as a general Court of Appeal for Canada. He was further of opinion that the jurisdiction would not necessarily interfere with the powers conferred upon the Provincial Legislatures by Section 92 (14) of the British North America Act, but that if questions were referred to the Supreme Court which were being raised in proceedings pending in the Provincial Courts they 20 would be open to objection on this ground.

p. 37. 1. 1. Mr. Justice Anglin doubted whether Section 60 of the Supreme Court Act was authorised by Section 101 of the British North America Act, and preferred to rest his opinion upon the general provision of Section 91 of the British North America Act.

12. The contention of the Appellants was and is that Section 91 and Sections 96 to 101 of the British North America Act do not authorise such a reference as has been directed in the present case, and that Section 60 of the Supreme Court Act is *ultra vires* if read as authorising such a reference as the present. 30

The Supreme Court Act constitutes the Supreme Court of Canada a general Court of Appeal for Canada, but Section 60 thereof purports to create a Court, not as a general Court of Appeal nor for the administration of the laws of Canada, but for advising upon any question which the Governor-General sees fit to refer to it. The giving of such advice is no part of the administration of the law, nor is it to be confined to the laws of Canada; it would include, among other matters, advice upon the legislation of the Imperial Parliament and of the Provincial Legislatures; but although it is no part of the administration of the law yet it interferes with and hampers that administration, and thus, 40 as the Appellants submit, conflicts with the powers assigned to the Provincial Legislatures by Section 92 (14) of the British North America Act. The points involved in such references may afterwards arise in the course of legal proceedings between individuals or between the Provinces and the Dominion. It will then be the duty of the Provincial Courts and ultimately of the Supreme Court to decide such points according to law, and it is submitted that it is highly prejudicial to the administration of justice that the members of the Supreme Court should

be required to express opinions upon any such points until they actually arise for adjudication before them in their judicial capacity. Such opinions publicly expressed must inevitably tend to prejudice the proper hearing and decision of the points when they arise in a regular way. It is submitted that the Parliament of Canada has no power to impose upon the Supreme Court the obligation to express extra-judicial opinions upon such matters.

13. The Appellants therefore respectfully submit that it should be declared that the Supreme Court has no jurisdiction to entertain
10 the Reference in question for the following among other

REASONS.

1. Because the Governor-General in Council has no power to refer to the Supreme Court questions which affect the interests of the Provinces without obtaining their consent to such Reference.
2. Because upon the true interpretation of the British North America Act, 1867, the powers of the Parliament of Canada as to the administration of justice are exhaustively defined in Section 91 (27) and in Sections 96-101 of the said Act.
3. Because the British North America Act has dealt expressly with the powers of the Parliament of Canada on the subject of the administration of justice, and no further powers can be implied.
4. Because Section 60 of the Supreme Court Act is not authorised by Section 91, or by Section 101 of the British North America Act, and is *ultra vires* of the Parliament of Canada.
5. Because Section 60 of the Supreme Court Act does not deal with the administration of the law.
6. Because the Reference in question is not confined to the construction or administration of the laws of Canada, but relates to the laws of the Provinces and to the construction of a law of the Imperial Parliament.
7. Because the subject of the administration of justice in the Province is assigned by Section 92 (14) of the British North America Act, exclusively to the Legislature of the Province and it is not competent to the Parliament of Canada under the authority of its general power to make laws for the peace, order and good government of Canada to interfere therewith.
8. Because References under Section 60 of the Supreme Court Act do interfere with the administration of Justice in the Provinces.

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9. Because the Parliament of Canada has no power to impose the duty of answering such questions upon the Judges of the Supreme Court as individuals.
10. Because Section 60 of the Supreme Court Act purports to empower the Governor-General in Council to refer questions to the Supreme Court as a Court and to impose upon the Supreme Court as a Court the duty of answering in the form of a judgment any questions so referred.
11. Because when questions upon which the Supreme Court have expressed extra-judicial opinions under Section 60 arise in actual cases in the ordinary course of the administration of justice it is impossible for the Provincial Courts or for the Supreme Court to decide those questions without being influenced by such opinions.
12. Because the British North America Act effects a division of legislative powers between the Dominion Parliament on the one hand and the Provincial Legislatures on the other giving to each exclusive legislative authority in its own sphere and it cannot be supposed, in the absence of express words, to have been intended that either the Dominion or the Provinces should have the power of calling in question the legislative competency of the other by the reference to Courts of Law of hypothetical or other questions framed *ex parte*.
13. Because the British Constitution contains no power analogous to that claimed.
14. Because the British Constitution affords in this connection no guide to the construction of the British North America Act.
15. Because the opinions of Mr. Justice Girouard and Mr. Justice Idington are to be preferred to those of the other learned Judges in the Supreme Court.

R. B. FINLAY.
 WALLACE NESBITT.
 E. LAFLEUR.
 A. GEOFFRION.
 H. MELLISH.
 GEO. PATTERSON.
 S. B. WOODS.
 CHARLES LANCTOT.
 EDWARD BAYLY.
 GEOFFREY LAWRENCE.

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CASE FOR THE APPELLANTS.

BLAKE & REDDEN,
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