PRIVY COUNCIL APPEAL NO. 73 OF 1928

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTION OF THE FISHERIES ACT 1914

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DECISION AND

RECORD OF PROCEEDINGS

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Source: Nikkei National Museum, 2010-4-3-9-1
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IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT 1914.

THE ATTORNEY-GENERAL OF CANADA - - - - - - - Appellant

v

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA AND OTHERS. - - - - - - - - - - - - - - Respondents

From

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 15th October 1929.

Present at the Hearing:

THE LORD CHANCELLOR
LORD DARLING.
LORD TOMLIN.
LORD THANKERTON.
SIR LANCELOT SANDERSON

(Delivered by LORD TOMLIN)

This is an appeal from a judgment dated the 28th May 1928 of the Supreme Court of Canada. The appellant is the Attorney-General of the Dominion of Canada. The respondents are the Attorneys-General of the Provinces of British Columbia, Quebec and Ontario and the fishermen of Japanese Origin in the Province of British Columbia.

By an Order of His Excellency the Governor-General in Council, dated the 19th October 1928 and made pursuant to the provisions of Section 60 of the Supreme Court Act three questions as to the constitutional validity of certain sections of the Fisheries Act 1914, & as to the interpretation of those sections and of certain Regulations made under that Act were referred to the Supreme Court for hearing and consideration.

The judgment complained of embodies the conclusions of the Supreme Court upon the questions referred. The questions were as follows:-

"(1) Are Sections 7a and 18 of the Fisheries Act 1914 or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?.

"(2) If the said provisions of the Fisheries Act 1914 or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationery cannery constructed on land, and if so, is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?.

Source: Nikkei National Museum, 2010-4-3-9-2
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"(3) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council, under the authority of Section 45 of the Fisheries Act 1914) respecting licenses to fish viz, subsection 3 of Section 14; paragraph (a) or (b) of Subsection 1 of Section 15 or paragraph (a) of Subsection 7 of Section 24 of the said Regulations, or under said Section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada) has:-

(a) Any British subject resident in the Province of British Columbia, or

(b) Any person so resident who is not a British subject.

upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject or not?.

The Supreme Court held that the sections mentioned in the first question are ultra vires the Parliament of the Dominion, and that in view of this conclusion the second question and so much of the third question as related to the impugned sections required no answer. As to the remainder of the third question a majority of the Court held in effect that under the Regulations there was no discretion in the Minister to grant or refuse a licence to a qualified person.

In order to answer the first question it is necessary to examine the extent of the respective legislative powers of the Parliament of the Dominion and of the Provincial Legislatures. These powers rest upon the British North American Act 1867. Part VI of the Act is entitled "Distribution of Legislative Powers" and includes Sections 91 and 92.

Section 91 is headed "Powers of the Parliament" and provides as follows:-

"91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the classes of Subjects next hereinafter enumerated".

There then follows an enumeration of 29 subjects, including:

(1) The Public Debt and Property (2) the Regulation of Trade and Commerce; (3) the raising of money by any mode or system of Taxation; (10) Navigation and Shipping; (12) Sea Coast and Inland Fisheries; and (29) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces. The section then concludes with these words:-

"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".

Source: Nikkei National Museum, 2010-4-3-9-3
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Section 92 is headed "Exclusive Powers of Provincial Legislatures", and provides that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next therein enumerated. There follows an enumeration of 16 subjects, including (2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes: (10) Local Works and Undertakings other than such as are of certain classes mentioned therein; (15) Property and Civil Rights in the Province, and (16) generally all matters of a merely local or private nature in the Province.

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 Section 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by Section 92 (see Tennant v Union Bank of Canada (19-4) A.C.31).

(2) The general power of legislation conferred upon the Parliament of the Dominion by Section 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 Section 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 of Ontario v Attorney-General of the Dominion (1896) A.C.384).

(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 Section 91 (See Attorney-General of Ontario v Attorney-General of the Dominion (1894) A.C.189, and Attorney-General of Ontario v Attorney-General of the Dominion (1896) A.C.348).

(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 Railway of Canada v Attorney-General of Canada (1907) A.C.65).

The impugned sections of the Fisheries Act 1914 are in the following terms:-

> "7a No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar (1917 c.16.)
>
> "18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a licence from the Minister (1-2 Geo.V.C.9 s.2)
>
> "(2) - (a) The annual fee for a salmon cannery licence shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto, of any other species of salmon, including steel-head (salmo rivularis) packed in such cannery during the continuance in force of the licence. The said twenty dollars shall be paid before the licence is issued, and the remainder of the licence fee shall be paid as the Minister may from time to time by regulation prescribe (1924 Chap.43, 14-15 Geo.V.)

Source: Nikkei National Museum, 2010-4-3-9-4
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market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries".

It was but faintly urged by the appellant that the matter was covered by any other of the enumerated subjects in Section 91. The raising of money by any mode or system of Taxation was admitted not to be applicable, and their Lordships are unable to see that any other enumerated subject under Section 91 applies.

The second point made by the appellant is that the licensing of fish canning and curing establishments is necessarily incidental to effective legislation under the subject "Sea Coasts and Inland Fisheries".

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subjects matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordships' judgment prima facie fall under the subject "Property and Civil Rights in the Province", included in Section 92 of the British North America Act 1867. As already indicated, these matters are not in their Lordships' opinion covered directly or incidentally by any of the subjects enumerated in Section 91. It is not suggested that they are of national importance and have attained such dimensions as to affect the body politic of the Dominion.

In their Lordships' judgment, therefore, the impugned sections deal with matters not within the legislative competence of the Parliament of the Dominion and cannot be supported.

Having regard to the view which their Lordships take of the first question the second question requires no answer.

It remains to deal with the third question.

So far as this question deals with the sections which are the subject of the first question it now requires no answer. That part of it however, which deals with certain provisions of the Special Fishery Regulations for the Province of British Columbia must be considered. The validity of these provisions is not attacked, their construction only is in question.

The following are the terms of these provisions:-

"Section 14" - Herring or Pilchard.

"(3) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorise his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such licence. The fee for such licence shall be one dollar.

"Section 15 - Leases or Licences.

(1)-(a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under licence from [illegible] and in salmon fishing no one shall act as a

Source: Nikkei National Museum, 2010-4-3-9-5
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boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm unless such person is a British subject resident in the Province or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is Canadian company or firm or is authorised by the Provincial Government to do business in the province.

"Section 24 - Salmon."

(7)-(a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license".

The question here is one of construction. Do the regulations rightly interpreted, give to the Minister any discretion in granting or refusing a license where it is applied for by the qualified person.

The regulations in question affect both public and private rights of fishing. There is no express provision for withholding a license where a qualified applicant submits a proper application and pays the small prescribed fee, and in their Lordships' judgment, there is nothing in the language of the regulations giving rise to a necessary application that the Minister has a discretion to grant or with-hold the licence. Their Lordships agree with the answer which the majority of the Supreme Court gave to the third question.

In the result, therefore, the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

In accordance with the usual practice there will be no costs of the appeal as between the appellant and the respondent Attorneys-General, but the respondent fishermen will have their costs of the appeal.

Source: Nikkei National Museum, 2010-4-3-9-6
www.nikkeimuseum.org

No. 73 of 1928.

ON APPEAL

FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA .-. Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA .-. .-. .-. .-. .-. Respondents

CASE OF THE ATTORNEY-GENERAL OF CANADA.

1. This is an Appeal from the judgment of the Supreme Court of Canada, dated 28th May, 1928, answering questions referred to the Court for hearing and consideration by Order of His Excellency the Governor General in Council, dated 19th October, 1927 (P.C.2032), pursuant to the provisions of Section 60 of the Supreme Court Act, relating to the constitutional validity of certain provisions of the Fisheries Act, 1914 (4 & 5 Geo. V. (Can.), chap. 8, and amendments thereto), and the interpretation of these provisions and of certain provisions of the Special Fishery Regulations for the Province of British Columbia made under the authority of the said Act. Record pp. 57-59 pp. 12,13 pp. 76,77 pp. 15,16

2. The questions so referred were:

(1) Are sections 7a and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada? p. 13

(2) If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

(3) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of section 45 of the Fisheries Act, 1914) respecting licenses to fish, viz., subsection 3 of section 14; paragraph (a) or (b) of subsection 1 of section 15 or paragraph (a) of subsection 7 of section 24 of the said Regulations, or under said section 7a or 18 of the said Act, (if these sections or either of them be intra vires of the Parliament of Canada), has

Source: Nikkei National Museum, 2010-4-3-9-7
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(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not?

3. The material provisions of the Fisheries Act, 1914 (as amended), and of the Special Fishery Regulations for the Province of British Columbia are as follows:-

7. The Minister may wherever the exclusive right of fishing does not already exist by law, issue or authorise to be issued fishery leases and licenses for fisheries and fishing whereseever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor in Council, R.S., c.8.

Record pp.76,77

7a. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar (1917,c.18).

18. No one shall operate a salmon cannery or salmon curing es establishment in British Columbia for commercial purposes except under a license from the Minister (1-2 Géo. V., c. 9, s. 2).

(2) (a) The annual fee for a salmon cannery license shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one-pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis) packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid as the Minister may from time to time by regulation prescribe. (1924, Chap. 43, 14-15 Geo. V.)

(b) The annual license fee for a salmon-curing establishment shall be:-

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;

Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons.

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons (12-13 Geo. V., c. 24, s. 1).

SPECIAL FISHERY REGULATIONS FOR THE PROVINCE OF BRITISH COLUMBIA.

Sec. 14.--Herring or Pilchard.

Record pp.15,16

(3) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorise his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license.

Source: Nikkei National Museum, 2010-4-3-9-8
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The fee for such license shall be one dollar.

Sec. 15--Leases or Licenses.

(1) (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine of drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm, unless such person is a British Subject resident in the Province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorised by the Provincial Government to do business in the province.

Sec. 24--Salmon.

(7) (a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license.

4. Section 45 of the Fisheries Act, 1914, under the authority whereof the said Special Fishery Regulations for the Province of British Columbia were made, is in the following words:-

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.77,1.5.

"45. The Governor in Council may make regulations--

(a) for the better management and regulation of the sea-coast and inland fisheries;

(b) to prevent or remedy the obstruction and pollution of streams;

(c) to regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses. R.S., s. 54;

(f) prescribing the time and the manner in which fish may be fished for and caught;

(g) to prohibit the export or sale of any fish or any portion of any fish from Canada or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in the Canada Gazette or from the date specified for such purpose in such regulations, and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (g) shall not take effect until after six months after the date of its publication in the Canada Gazette. R.S., s. 54, ss. 2.

3. Every offence against any regulation made under this Act may be stated as in violation of this Act. R.S., s. 54, ss. 2."

5. The British North America Act, 1867, provides, in sections 91 and 92, as follows:-

"91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing terms of this Section, it is hereby declared that (notwith-

Source: Nikkei National Museum, 2010-4-3-9-9
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standing 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:-

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.

6. The Census and Statistics.

10. Navigation and Shipping.

12. Sea Coast and Inland Fisheries.

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

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,--

13. Property and Civil Rights in the Province.

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

6. By section 146 of the British North America Act, 1867, it was enacted as follows:-

"146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

7. By an Order-in-Council, dated 16th May, 1871, Her Majesty, in pursuance of the enactments of said section 146, of the British North America Act, 1867, was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act and to certain Articles of Union which had been duly sanctioned by the Parliament of Canada and by the Legislature of British Columbia. The 5th of the said Articles of Union is, in part, in these terms:

"Canada will assume and defray the charges for the following services:

E. Protection and encouragement of Fisheries;

And such further charges as may be incident to and connected with the services which by the British North America Act, 1867, 'appertain to the General Government, and as are or may be allowed to the other provinces'."

8. On the hearing of argument on the 9th and 10th days of February, 1928, before the full Court (composed of Anglin, C.J., Duff, Mignault, Newcombe, Rinfret, Lamont and Smith, JJ.), the Case was presented by [illegible] Attorney-General of Canada, and Counsel were also heard

Source: Nikkei National Museum, 2010-4-3-9-10
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Record p.63,l.1. for the Provinces of Ontario, Quebec and British Columbia, and, by special order of the Court, on behalf of a Committee representing all the fishermen of Japanese origin in the last-mentioned Province, as a class of persons interested as provided by sub-section 4 of section 60 of the Supreme Court Act.

9. On the 28th May, 1928, the Court delivered judgment. The Court unanimously answered the first and second questions as follows:

p.58,59.

Question No.1: The answer as to both sections 7a and 18 is entirely in the affirmative.

Question No.2: In view of the preceding answer, this question requires no answer.

Question No. 3: The majority of the Court (the Chief Justice, Newcombe, Rinfret and Lamont, JJ).answered as follows:

"As to each of the specified regulations,viz.,subs.3 of sec.14, pars.(a)and(b) of subs. 1 of sec.15, and par.(a) of subs.7 of sec.24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has,according to the true interpretation of these clauses, the right to receive a license,if he submit a proper application and tend the prescribed fee. As to any person resident in the province of British Columbia, who is not a British Subject, he is not eligible for a license of the character described in subsection 3 of sec.14, it being expressly declared by that subsection that 'no other than a British Subject shall be eligible for such license.' And none of the other licenses in question shall, as provided by par.(b) of subs. 1 of sec.15, be granted to any person, unless he ' is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas.' It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as sections 7a and 18 are held to be Ultra Vires."

The minority of the Court (Duff, Mignault and Smith, JJ.) answered this question as follows:-

Record p.59,l.20.

"The Minister has a discretionary authority to grant, or refuse, such license to any person who is a British Subject resident in the province of British Columbia, or is a returned soldier in His Majesty's Canadian Navy or Army Overseas."

10. The reasons for the unanimous answers of the Court to the first and second questions and for the answer made by the majority of the Court upon the third questions were delivered by Newcombe, J.; and the reasons for the answer of the minority of the Court to the third question were delivered by Duff, J. pp.59-69. pp.70-73.

11. Upon the first question, Newcombe, J. was of the opinion that the power to enact either section 72 or section 18 could not be found in any of the enumerated powers of the Dominion under section 91 of the British North America Act, 1867, and was not, therefore, possessed by the Dominion. The learned judge did not consider that either of these enactments could be upheld by virtue of the Dominion's taxing power (section 91,head No.3), and, for reasons indicated in his judgment, he concluded that these sections, if they could be sustained at all, must be referred to the power which Parliament exercises under the 12th enumeration of section 91 in the regulation of "Sea Coast and Inland Fisheries." Undoubtedly Parliament had the exclusive authority to regulate what fell within that description, and one sort of regulation might be a licensing requirement. But neither the business of canning fish nor the operation of a fish canning factory was, according to any of the definitions, or in practice, embraced within "fisheries," Sea Coast or Inland, as that word was used in section 91, or the Terms of Union with British Columbia. It was for the preservation and marketing of the fish, when caught and landed, that a cannery fulfilled a commercial purpose. Much reliance had, however, been founded upon the [illegible] as "ancillary" in support of the argument that, pp.63-66.

Source: Nikkei National Museum, 2010-4-3-9-11
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although the canning of fish might not be a fishing operation, the regulation of it was, nevertheless, ancillary to the exercise of the powers of regulation which the Dominion possessed under the British North America Act and to the discharge of the obligation undertaken by the Dominion under the Terms of Union with British Columbia to "assume and defray the charges for the . . . . protection and encouragement of fisheries." The learned Judge proceeded to state the principles which had been laid down respecting ancillary powers. Applying these principles, he considered it to be undoubted that, in the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes was a civil right in the province where the operation was carried on, like the right to operate a fruit cannery or a vegetable cannery; and the question, as he saw it, was whether the exercise of this right might be restricted or regulated by force of any enumerated Dominion power to which sections 7a and 18 might be justifiably attributed. While the catching of fish for canning might, he suggested, be prohibited or regulated, there was no grant to the Dominion of the powers, which the sections in question assumed, to control broadly the operation of the canneries. It had been urged by the factum of the Dominion, but not pressed at the argument, that these sections might be sanctioned under the power to regulate trade and commerce, but that contention might, he thought, be regarded as disposed of by the considerations which were discussed by their Lordships of the Judicial Committee in the Insurance Reference (1916) IA.C.588. There was no other enumeration of section 91 which covered the case, and, therefore, the learned Judge came to the conclusion that the power to enact sections 7a and 18 was not to be found in any of the enumerations and was not possessed by the Dominion, seeing that the subject belonged to one of the provincial enumerations.

ecord
67,l.29. Question 2, in view of the foregoing, required no answer.

67,l.30. As to Question 3, that part of it which related to sections 7a and 18 was disposed of by the answer to Question 1. As to the rest, the regulations which they were asked to consider derived their force not by direct legislative enactment, but through the exercise of powers delegated by sec. 45 of the Fisheries Act, 1914, to the Governor in Council. They prohibited fishing of various kinds, except under license from the Minister; and, seeing that they affected both public and private rights of fishing, they should not, the learned Judge thought, be interpreted to derogate from those rights further than might be necessary to give the regulations their necessary and due effect. Those who were, according to the regulating provisions, declared to be ineligible, might not of course receive licenses; but where an applicant was eligible within the regulations, and not otherwise disqualified, there was no express provision for withholding a license, if he submitted a proper application and paid the prescribed fee, which, in each of the cases specified, appeared to be no more than the sum of $1.00. It was true that the licensing power was committed to the head of the Department and no doubt would be administered with due care, but if it were intended that he could exercise a discretion to refuse a license to a qualified applicant, there would, the learned Judge thought, have been something expressive and definitive of that intention. In his view it was improbable that it was intended to confer a reviewable discretion, or that, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner which might sanction discrimination. There was no provision, beyond those contained in sub-s. 3 of sec. 14, and sub-s. 1, para. (a) and (b) of section 15 of the regulations submitted, which prescribed disqualifications or prohibited classes, and the learned Judge was not satisfied that the statutory rules, which went no further than to impose a general requirement for licenses, for which a fee was to be paid as a condition to the exercise of the right of fishing, should be interpreted by implication further to limit that right by making the issue of the license discretionary in the judgment of the licensing authority.

Record pp.70-73.

12. In his reasons (concurred in by Mignault and Smith, JJ.) for differing from the opinion of the majority of the Court upon the third question, Duff, J., after observing that the only express authority for the grant of licenses by the Minister was that given by section 7 of the Act, proceeded to state his reasons for the view that the authority vested in the Minister under it was a discretionary authority and that, in point of law, the Minister was under no legal duty to grant leases or licenses or to

Source: Nikkei National Museum, 2010-4-3-9-12
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grant any particular lease or any particular license. The learned Judge's reasons may be summarized as follows:-

(a) The history of the section (which the learned Judge referred to) afforded much support for his view. As the Minister was by this section, authorized to grant leases of Crown property, it seemed probable that he was intended, in executing his powers thereunder, to act for and in the name of the Crown in his capacity of servant of the Crown and that in this view of the Minister's functions, a subject would possess no right capable of specific enforcement in a court of law to demand a lease or license.

(b) In form the section was permissive only and a grant of authority in the form of section 7 did not, in itself, imply any direction requiring the donee to act under the power. Therefore, looking first at the section itself, it was impossible to suppose that the authority vested in the Minister to grant leases was not a discretionary one, and prima facie, at all events, the same must be said with regard to the authority to grant licenses.

(c) As regards the context, sec. 45 which empowered the Governor-in-Council to make regulations expressly authorized in subsection (c) the prohibition of fishing except under leases or licenses. This enactment, in so far as it relates to leases or licenses, seemed to contemplate leases or licenses under sec. 7 and the particular regulations in question were probably passed in execution of this specific authority. There was nothing in the terms of sec. 45 nor, so far as he had been able to discover, in the terms of the regulations, pointing to a conclusion that the authority of a Minister was not a permissive one.

(d) As regards the character of the subject matter, while, speaking broadly, every subject of His Majesty was entitled to exercise the right of fishing in tidal waters in British Columbia, and a statutory enactment which in a reasonable view of it might expose such rights to oppressive or arbitrary or capricious restrictions would receive a jealous scrutiny in any Court called upon to enforce it, yet, on the other hand, the authority to grant leases, given by section 7, necessarily involved some restriction of the public right, the exclusive right of the lessee prevailed, and in the case of leases for nine years and less, the discretion to grant them was vested in the Minister; and so with regard to exclusive licenses. As to leases and exclusive licenses, the Minister's power was of course necessarily discretionary. There could not, self-evidently, be two leases or exclusive licenses operating in the same locus at the same time and affecting the same kinds of fish, and as no two localities were exactly the same, there was necessarily, not only a limitation in respect of numbers, but discrimination as between parties to whom applications were granted.

As to non-exclusive licenses, the learned Judge could discover nothing in the subject matter which dictated an inference that, as regards these, the authority of the Minister was of a different order. There was a power of cancellation given to the Minister in the case of licensees who offended against the law. It seemed difficult to suppose if, in point of law, a discretion was not vested in the Minister to refuse an application for a license, that provision would not have been made, empowering him to refuse in cases in which he was satisfied, for any reason, that the applicant was not a fit person to receive a license from the point of view of a government department concerned with the observance or enforcement of enactments or regulations governing fisheries. The learned Judge referred to different matters as to which he thought the Minister would be entitled, in the exercise of his authority to grant leases or licenses, to stipulate the terms and conditions on which they should be granted, and as to which some sort of discretionary authority would almost be necessary in order to secure, with any degree of confidence, the purpose of the regulation.

(e) One other consideration seemed to the learned Judge to be of importance. The donee of the power in this case was a Minister of the Crown, accountable first of all to the Crown, that was to say, to the Government as a whole, and then to Parliament, for the execution of his powers. Such examination as he had made of the statute and such attention as he had given to the subject matter had not, in the learned Judge's opinion, disclosed good reasons why the

Source: Nikkei National Museum, 2010-4-3-9-13
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political sanctions under which the Minister acts, should not, in the view of the legislature, have been regarded as quite adequate in themselves to insure an administration of the Act in good faith, with an eye to the public interest.

13. It is submitted on behalf of the Attorney-General of Canada that the judgment of the Supreme Court of Canada in answer to the first question, and of the majority of the Court in answer to the third question, is wrong, and should be reversed, and that the second question should be answered in the affirmative for the following, amongst other

II

REASONS.

As to Question No.1:

(1) The Parliament of Canada has authority to enact said section 7a and 18 of the Fisheries Act, 1914, under the 12th enumeration of sec. 91 of the British North America Act, 1867,-- "Sea Coast and Inland Fisheries"--and, in aid thereof, the 2nd enumeration of said sec. 91-- "The Regulation of Trade and Commerce"--or under the 3rd enumeration of said sec. 91--"The Raising of Money by any Mode or System of Taxation."

(2) The operation of fish and salmon canneries in the Province of British Columbia is inseparably connected with the conduct of the fisheries, and said sections 7a and 18 of the Fisheries Act, 1914, are designed to promote the attainment of the purposes of that Act, and are, moreover, reasonably just and necessary ancillary provisions in order to secure the comprehensive and effective enforcement of the substantive provisions of the said Act with regard to the fisheries, under the peculiar conditions and difficulties which surround them in that Province.

(3) Said sections 7a and 18 of the Fisheries Act, 1914, are proper and necessary provisions in order to secure the fulfilment of the obligation of Canada, under the Terms of Union with British Columbia, to assume and defray charges for the "protection and encouragement of fisheries."

(4) The Attorney-General will rely also upon the grounds appearing in the factum filed on his behalf in the Supreme Court of Canada.

As to Question No.2:

(5) The expression "cannery" as used in said sections 7a and 18 of the Fisheries Act, 1914, is not defined by the Act, and ought, therefore, to be construed in its ordinary and popular sense, in which sense it is apt to include any cannery whether it be a floating cannery constructed on a float or a stationary cannery constructed on land.

(6) The authority of the Minister to issue a license for the operation of a cannery under either of the said provisions is discretionary, and it is competent to the Minister, subject to the provisions of the Special Fishery Regulations, to determine the conditions, as matter of administrative policy, under which he shall exercise his discretion to issue a license for the operation of a floating cannery and there being nothing in the said regulations in conflict, to stipulate, as a condition of the grant of a license, the place or area of operation of any such cannery in the waters of British Columbia.

(7) The Attorney-General will rely on the grounds set out in the factum filed on his behalf in the Supreme Court of Canada.

Source: Nikkei National Museum, 2010-4-3-9-14
www.nikkeimuseum.org

As to Part (a) of Question No.3:

(8) The provisions of sec. 7 of the Fisheries Act, 1914, and of the regulations in question, under and subject to which licenses to fish are granted, are, as regards the authority of the Minister to issue fishery leases or licenses, in form enabling and permissive only, and there is nothing either in the terms of these provisions or in the context or in the subject matter or general scope and objects of the legislation from which the existence of a legal duty upon the Minister to issue a license may properly be implied.

(9) The authority of the Minister, under said sec. 7 to grant fishery leases is, in its essential nature, a discretionary one, and there is no principle or reason upon which the Minister may consistently be denied a discretionary authority under the same provision in regard to fishery licenses.

(10) The Minister, in executing his powers under said sec. 7, acts for and in the name of the Crown in his capacity of servant of the Crown and therefore a subject possesses no right capable of specific performance in a court of law to demand a lease or license.

(11) The purposes of the regulations would be largely defeated and great detriment to the fishery be likely to ensue if the Minister had no discretionary authority to grant or refuse a license to qualified applicants.

(12) Neither the provisions of the Fisheries Act, 1914, nor those of the Special Fishery Regulations made thereunder afford any reason for concluding that the political sanctions under which the Minister acts were not considered by Parliament to be adequate in themselves to insure the due execution of the power vested in the Minister in the public interests.

(13) On similar grounds, the authority of the Minister to issue licenses under sec. 7a and 18 of the Fisheries Act, 1914, for the operation of a fish cannery or of a salmon cannery or salmon curing establishment in British Columbia for commercial purposes, is likewise a discretionary authority.

(14) The Attorney-General will rely also upon the grounds appearing in the factum filed on his behalf in the Supreme Court of Canada and upon the grounds stated in the reasons for judgment of Mr. Justice Duff, concurred in by Mignault and Smith, JJ.

As to Part (b) of Question No.3:

(15) By the express terms of the regulations in question, no person other than a British Subject is eligible to obtain a license thereunder, and to that extent, therefore the Minister has no discretion to exercise and no authority to issue a license.

H. P. MACMILLAN.

E. LAFLEUR.

T. MATHEW.

Source: Nikkei National Museum, 2010-4-3-9-15
www.nikkeimuseum.org

IN THE PRIVY COUNCIL.

No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - - - - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE OF THE ATTORNEY-GENERAL OF CANADA.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2,

Solicitors for the Attorney-General of Canada.

Source: Nikkei National Museum, 2010-4-3-9-16
www.nikkeimuseum.org

ON APPEAL

FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE FOR THE RESPONDENT

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Record

1. This is an appeal by special leave granted on 30th July 1928, pp.57-59.
from a decision of the Supreme Court of Canada dated 28th May 1928, answering questions referred to the Court for hearing and consideration by Order of His Excellency the Governor-General of Canada dated 19th October p. 12.
1927, pursuant to the provisions of the Supreme Court (Canada) Act, Section 60.

2. Such questions concerned (A) the legislative competence of the Parliament of Canada to set up whether by virtue of its taxing powers or its exclusive powers to legislate with respect to "Sea Coast and Inland Fisheries," a system of licensing fish canneries generally throughout Canada and particularly salmon canneries and salmon curing establishments in the Province of British Columbia; (B) the proper interpretation of certain fishery regulations, namely, whether thereunder any resident of the Province of British Columbia has a right, whether a British subject or not, to apply for and receive a licence to fish or operate a salmon cannery, or whether the power of the Minister of Marine and Fisheries to grant such licences is discretionary.

Record
.5,l.9.
.4,l.7.

3. The Reference out of which this appeal arises had its origin in the prosecution before and acquittal by a stipendiary magistrate of British Columbia of the Somerville Cannery Company Limited on a charge of unlawfully operating a fish cannery in violation of the provisions of the Fisheries Act 1914 (R.S.C. Cap. 45) without obtaining a licence. The magistrate decided that Section 7a of such Act was ultra vires and on appeal by way of case stated the Supreme Court of British Columbia (Mr. Justice Macdonald) upheld his decision. No appeal lay from the said Judgment of Mr. Justic Macdonald. This Respondent craves leave to refer to the reasons of the said learned
pp.3-12. judge on the hearing of the appeal.

4. The questions submitted to the Supreme Court of Canada by such reference were:-

p. 13,
ll. 13-39. 1. Are Sections 7a and 18 of the Fisheries Act 1914, or either of them, and in what particular or particulars, or to what extent, ultra vires of the Parliament of Canada?

Source: Nikkei National Museum, 2010-4-3-9-17
www.nikkeimuseum.org

of them, be intra vires of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

3. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of Section 45 of the Fisheries Act 1914) respecting licences to fish, viz.: Sub-section (3) of Section 14; paragraph (A) or (B) of Sub-section (1) of Section 15; or paragraph (A) of Sub-section (7) of Section 24 of the said regulations; or under said Section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada) has

(A) any British subject resident in the Province of British Columbia, or

(B) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject or not?

And the answers to such questions of the said Supreme Court were: Record

Question No. 1: The answer, as to both Sections 7a and 18, is entirely in the affirmative. p.58, ll. 40-41

Question No. 2: In view of the preceding answer, this question requires no answer. p.58, ll. 42-43

As to Question No. 3: The answer found by the Chief Justice, Newcombe, Rinfret and Lamont, JJ., is as follows:- p.59, ll. 1-18.

As to each of the specified regulations, viz.: Sub-section (3) of Section 14; paragraphs (A) and (B) of Sub-section (1) of Section 15; and paragraph (A) of Sub-section (7) of Section 24, any British subject resident in the Province of British Columbia, who is not otherwise legally disqualified has, according to the true interpretation of these clauses, the right to receive a licence, if he submit a proper application and tender the prescribed fee. As to any person resident in the Province of British Columbia, who is not a British subject, he is not eligible for a licence of the character described in Sub-section (3) of Section 14, it being expressly declared by that sub-section that "no other than a British subject shall be eligible for such licence." And none of the other licences in question shall, as provided by paragraph (B) of Sub-section (1) of Section 15, be granted to any person, unless he "is a British subject resident in the Province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as Sections 7a and 18 are held to be ultra vires.

Duff, Mignault and Smith, JJ., would answer this question as follows:-

The Minister has a discretionary authority to grant, or refuse, such licence to any person who is a British subject, resident in the Province of British Columbia or is a returned soldier in His Majesty's Canadian Navy or Army Overseas. p.59, ll. 19-23.

5. The relevant sections of the Fisheries Act 1914 are set out in the appendix of statutes herein. The said fishing regulations are printed so pp.76-77

Source: Nikkei National Museum, 2010-4-3-9-18
www.nikkeimuseum.org

far as material on pages 61 and 62 of the Record herein.

6. By the British North America Act, Sections 91 and 92, it is provided as follows:-

"Section 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; 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:-

1. The public Debt and Property.

2. The Regulation of Trade and Commerce.

3. The raising of Money by any Mode or System of Taxation.

6. The census and Statistics.

10. Navigation and shipping.

12. Sea coast and Inland Fisheries.

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.

Section 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:-

9. Shop Saloon Tavern Auctioneer and other licences in order to the raising of a revenue for Provincial Local or Municipal purposes.

10. Local works and undertakings other than such as are of the following classes:

13. Property and Civil Rights in the Province.

16. Generally all matters of a merely local or private nature in the Province."

7. The Province of British Columbia was admitted to and forms part of the Dominion of Canada by virtue of an Order in Council, made pursuant to Section 146 of the British North America Act. Such admission was subject to Articles of Union, the fifth article whereof, so far as material, is--

Record p. 35, ll. 1-28

"Canada will assume and defray the charges for the following services

E. Protection and Encouragement of Fisheries;

And such further charges as may be incident to and connected with the services which by the British North America Act 1867 appertain to the General Government and as are or may be allowed to the other provinces.

8. The said reference was heard by the Full Court of the Supreme Court of Canada (Anglin, C.J., Duff, Mignault, Newcombe, Rinfret, Lamont and Smith, JJ.) [illegible] Attorney-General of Canada, the Attorneys-

Source: Nikkei National Museum, 2010-4-3-9-19
www.nikkeimuseum.org

General of the Provinces of British Columbia, Ontario and Quebec, and for a Committee representing all fishermen of Japanese Origin in the Province of British Columbia. The said court reserved judgment which was delivered on 28th May, 1928. Record pp.57-59

9. On behalf of the Appellant it was submitted that the said sections of the Fisheries Act were intra vires by virtue of--

(A) The exclusive authority of the Dominion Parliament to regulate and control sea coast and inland fisheries.

(B) Its obligation to assume and defray the charges for the protection and encouragement of fisheries.

(C) Its powers for the regulation of trade and commerce.

(D) Its powers to raise money by any mode or system of taxation.

It was further submitted that the said sections were ancillary to the effective exercise of the Dominion's powers under the said British North America Act, and the Terms of Union with the various Provinces. With regard to the said regulations it was submitted that licences thereunder could not be issued to any person other than a British subject and that the Minister had full discretion to issue or refuse such licences.

10. Onebehalf of this Respondent it was submitted--

(1) That the admitted right of the Dominion Parliament to regulate and control fisheries applies only to fish when in the water and the mode of taking the same: that fish lawfully caught become the private property of the taker and pass from the sphere of fishery legislation.

(2) That power to regulate and control fisheries does not expressly or by necessary implication include a power to control canneries which do not engage in fishing but merely purchase a food namely fish from the lawful owner thereof and deal with the same.

(3) That a power to regulate and control canneries cannot possibly be ancillary to the regulation and control of fisheries because any possible process which can come under the description of fishing or fishery has definitely ceased before the dead fish reach the cannery.

(4) That the right to regulate and control canneries is not conferred upon the Dominion Parliament by the British North America Act but is clearly within the exclusive realm of the Provincial Legislatures under Section 92 of that Act, falling within the categories "Property and Civil rights" and "matters of a merely local or private nature in the Province" as well as within item 9 of such section.

(5) That Section 18 of the Fisheries Act is by its express terms scope and application exclusively made applicable to one province of the Dominion, namely, the Province of British Columbia, and that Dominion legislation which overrides or interferes with the exercise of provincial powers must be of general Dominion application.

(6) That Sections 7a and 18 are in terms prohibitive of the exercise of a legal right possessed by the people and cannot be justified by a power to regulate and control and that the British North America Act gives no power to prevent the carrying on of a lawful trade.

(7) That such sections upon a proper construction are not an exercise of the Dominion's powers of taxation: and that even if

Source: Nikkei National Museum, 2010-4-3-9-20
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they could fall within the definition of taxation they would be invalid as being discriminatory and a breach of the terms of Union whereby the Dominion agreed with this Respondent to pay the cost for protecting the fisheries of British Columbia out of the general revenues of Canada.

(8) That as to question 2, a cannery does not become part of a fishery or subject to a power to control and regulate fisheries if it is afloat any more than if constructed on shore.

(9) With reference to the said regulations, that in so far as they require the licensing of others than actual fishermen and restrict the free employment of labour by persons in the province, they are ultra vires; that upon a proper construction of the same there is no discretion in the Minister to refuse to issue a license upon tender of the prescribed fee, seeing that the public right to fish is not abrogated by the Fisheries Act and that the Minister is not by such Act and indeed could not be authorised to abrogate that right.

(10) On behalf of the Respondent fishermen it was further submitted that said regulations were ultra vires as contravening the terms of the Treaty of Commerce and Navigation between the United Kingdom and Japan embodied in and adopted by the Japanese Treaty Act (Canada) 1913, 3 & 4 Geo. V, c. 27.

11. In his reasons for judgment in holding the said sections ultra vires, with which all the members of the Court concurred, Mr. Justice Newcombe found that Sections 7a and 18 were not taxing sections and were to be justified, if at all, under the power to regulate and control Sea Coast and Inland Fisheries; that the right to operate and carry on a fish cannery is a civil right in the province in which the operation is to be carried on, and that whilst the catching of fish for canning may be prohibited or regulated as necessary by the Dominion Parliament there was no grant by the British North America Act of any powers, principal or ancillary, to regulate canneries. Record p.59 et seq.

As to the said regulations, his Lordship held that statutory rules imposing a general requirement for licences as a condition for the exercise of the right of fishing should not be construed as limiting the right by making the issue of a licence discretionary. His Lordship therefore held that such licence must be granted to any British subject resident in British Columbia. In such decision the learned Chief Justice, Mr. Justice Rinfret and Mr. Justice Lamont concurred. p. 67, l.30 et seq.

12. Mr. Justice Duff, Mr. Justice Mignault and Mr. Justice Smith, by a minority judgment held that the power to issue a licence to a British subject resident in British Columbia was discretionary. pp.70-73

13. This Respondent humbly submits that the unanimous judgment of the Court upon the question of the validity of the said sections and the judgment of the majority of the same as to the Minister's powers under the said regulations were right and should be upheld for the following amongst other

REASONS.

(1) BECAUSE Sections 7a and 18 of the Fisheries Act 1914 are ultra vires the Parliament of the Dominion of Canada.

(2) BECAUSE the subject matter of such sections is not within any of the enumerated powers of the Dominion Parliament nor is it necessarily or properly ancillary thereto.

(3) BECAUSE a cannery is not a fishery and because a power to regulate or control sea coast and inland fisheries cannot and does not include a power of controlling canning or dealing with dead fish.

Source: Nikkei National Museum, 2010-4-3-9-21
www.nikkeimuseum.org

(4) BECAUSE the subject matter of such sections is a matter within the exclusive legislative control of the Provinces by virtue of Section 92 of the British North America Act.

(5) BECAUSE the Dominion Parliament cannot in its legislation discriminate between provinces.

(6) BECAUSE the imposition of licence duties by Section 18 is a breach of the Terms of Union between British Columbia and the Dominion.

(7) BECAUSE the regulations upon a proper construction give no power to the Minister to refuse a licence upon payment of the prescribed fee.

(8) BECAUSE the Fisheries Act does not abrogate the public right to fish or empower the Minister to deprive any member of the public of that right and because, if the regulations did purport to empower the Minister by refusing to issue a licence to abrogate that right, they would be ultra vires the Fisheries Act and ultra vires the Dominion Parliament.

(9) BECAUSE the reasoning of the judgment of the majority in the Supreme Court of Canada is right.

GEOFFREY LAWRENCE.

WILFRID BARTON.

Source: Nikkei National Museum, 2010-4-3-9-22
www.nikkeimuseum.org

IN THE PRIVY COUNCIL.

No. 73 of 1928.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE

FOR THE RESPONDENT THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

GARD, LYELL & CO.,
47 Gresham Street, E.C.2

Solicitors for Respondent THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Source: Nikkei National Museum, 2010-4-3-9-23
www.nikkeimuseum.org

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents

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CASE OF THE RESPONDENT

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC.

---

1. This is an appeal by special leave granted on the 30th day of July, 1928, from a judgment of the Supreme Court of Canada, dated the 28th day of May, 1928, answering certain questions referred to the Court for hearing and consideration by the Governor-General of Canada in Council under the provisions of Section 60 of the Supreme Court Act. Record P.73

2. The questions referred with the answers made by the Court are as follows:- p.58

Question 1: Are Sections 7a and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?

Answer: The answer, as to both Sections 7a and 18, is entirely in the affirmative.

Question 2: If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contra-distinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

Answer: In view of the preceding answer, this question requires no answer.

Question 3: Under the provision of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of Section 45 of the Fisheries Act, 1914), respecting licenses to fish, viz., sub-section 3 of Section 14; paragraph (a) or (b) of sub-section 1 of Section 15 or paragraph (a) of sub-section 7 of Section 24 of the said regulations, or under said Section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada), has

(a) any British subject resident in the Province of British Columbia, or

Source: Nikkei National Museum, 2010-4-3-9-24
www.nikkeimuseum.org

(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not?

Record p.59.

Answer: The answer found by the Chief Justice, Newcombe, Rinfret and Lamont, JJ., is as follows:-

As to each of the specified regulations, viz., sub-section 3 of Section 14; paragraphs (a) and (b) of sub-section 1 of Section 15, and paragraph (a) of sub-section 7 of Section 24, any British subject resident in the Province of British Columbia, who is not otherwise legally disqualified has, according to the true interpretation of these clauses, the right to receive a license, if he submit a proper application and tender the prescribed fee. As to any person resident in the Province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in sub-section 3 of Section 14, it being expressly declared by that sub-section that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by paragraph (b) of sub-section 1 of Section 15, be granted to any person, unless he "is a British subject resident in the Province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as Sections 7a and 18 are held to be ultra vires.

Duff, Mignault and Smith, JJ., would answer this question as follows:-

The Minister has a discretionary authority to grant, or refuse, such license to any person who is a British subject, resident in the Province of British Columbia or is a returned soldier in His Majesty's Canadian Navy or Army overseas.

5. Sections 91 and 92 of the British North America Act, 1867, are as follows:-

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:-

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.

Source: Nikkei National Museum, 2010-4-3-9-25
www.nikkeimuseum.org

13. Ferries between a Province and any British or Foreign Country or between two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
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 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:-

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:-

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by

Source: Nikkei National Museum, 2010-4-3-9-26
www.nikkeimuseum.org

the Parliament of Canada to be for the General Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

4. The Fisheries Act, 1914 (now Chapter 73 of the Revised Statutes of Canada, 1927), makes the following provisions:-

Interpretation.

2. "fishery" means and includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed, or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith.

Application.

5. Nothing in this Act contained shall be taken to authorize the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to some province thereof.

Fishery leases and licenses.

7. The Minister, may wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing whersoever situate or carried on, but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor in Council.

7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar (1917, c.16, s.2).

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a license from the Minister (1914, c. 8, s. 18).

(a) (c) The annual fee for a salmon cannery license shall be twenty-dollars, and in addition, four cents for each case of forty-eight one-pound cans, or the equivalent thereto, of sockeye salmon, and three cents. for each case of forty-eight one-pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis), packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid as the Minister may from time to time by regulation prescribe (1924, c. 45).

(b) The annual licensee fee for a salmon curing establishment shall be:-

Source: Nikkei National Museum, 2010-4-3-9-27
www.nikkeimuseum.org

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;

Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons, but is not more than twenty tons;

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons, but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons. (1922, c. 24, s. 1.)

Regulations.

45. The Governor in Council may make regulations:-

(a) for the better management and regulations of the seacoast and inland fisheries;

(b) to prevent or remedy the obstruction and pollution of streams;

(c) to regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses; R.S., s. 54;

(f) prescribing the time when and the manner in which fish may be fished for and caught;

(g) to prohibit the export or sale of any fish or any portion of any fish from Canada, or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in 'The Canada Gazette' or from the date specified for such purpose in such regulations and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extend vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (g) shall not take effect until after six months after the date of its publication in 'The Canada Gazette.'

3. Every offence against any regulation made under this Act may be stated as in violation of this Act.

5. The provisions of the Special Fishery Regulations for the Province of British Columbia referred to in question 3 are as follows:-

Section 14.--Herring or Pilchard.

3. If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

Section 15.--Leases or Licenses.

1. (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating

Source: Nikkei National Museum, 2010-4-3-9-28
www.nikkeimuseum.org

a purse-seine or drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm, unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

Section 24.--Salmon.

7. (a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license.

Record .59. 6. The reasons for the judgment or opinion of the Court were delivered by Mr. Justice Newcombe and concurred in by the Chief Justice Anglin and Rinfret and Lamont, JJ., Duff, Mignault and Smith, JJ., concurring as to the .70. answers to questions Nos. 1 and 2 but dissenting as to the answer to the third question.

.64,l 1 7. Mr. Justice Newcombe in his reasons for judgment sets out that Section 7a, if it can be sustained at all, must be referred to the power which Parliament exercises in the regulation of sea-coast and inland fisheries. (British North America Act, 1867, s. 91, para. 12.)

He held that "a fish cannery is not, according to any of the definitions, "or in practice, embraced within a fishery, seacoast or inland. It is for "the preservation and marketing of the fish when caught and landed that the "cannery fulfils a commercial purpose," and that "the right to operate a fish p.65,l 4 "cannery for commercial purposes is a civil right in the Province."

p.65,l 45 He dismissed the contention of the Appellant that Section 7a might be supported under the power to regulate trade and commerce (s. 91 (2)).

p.65,l 42 And also held that it was not an exercise of the taxing power of the Parliament under s. 91 (3), since under Section 7a the annual fee for a license was only the nominal sum of one dollar.

p.66,l 5. He concludes: "There is no other enumeration of s. 91 which covers "the case, and therefore I come to the conclusion that the power to enact "s. 7a is not to be found in any of the enumerations, and is not possessed "by the Dominion, seeing that the subject belongs to one of the provincial "enumerations."

p.66, l 9 He further held that Section 18 was governed by the considerations which determine the invalidity of Section 7a for though under Section 18 there were more substantial sums for the annual license fees therein mentioned yet the provision in its entirety was a fishery regulation and not p.67,l 23. a taxing Act and he concludes: "I think a purpose of s. 18 was to authorise "the Minister to regulate salmon canneries and salmon curing establishments "by means of a system of licenses, and I think, for reasons which I have "indicated, that the Dominion has no power to do this; and that, if so, the "legislation is not exclusively attributable to the exercise of powers "possessed by the Dominion, and cannot therefore be upheld as an exercise "of the taxing power."

Record

"Question 2 in view of the foregoing requires no answer." p.67,l 29

"As to question 3, that part of it which relates to Sections 7a and p.67,l 30 "18 is disposed of by the answer to question 1."

As to the Regulations specified the judgment proceeds: "the p.67,l 38 "question submitted appears to be intended to relate only (to) their "interpretation. . . ."

"No express power is conferred upon the Minister, except to issue P.69,l 9 [illegible] and in view it is improbable that it was intended to confer

Source: Nikkei National Museum, 2010-4-3-9-29
www.nikkeimuseum.org

"discretionary licensing authority would have been
"exercised in a manner which might sanction discrimination. There is no
"provision, beyond those contained in sub-s. 3 of s. 14, and sub-s. 1,
"pars. (a) and (b) of s. 15, of the regulations submitted, which prescribes
"disqualifications or prohibited classes, and I am not satisfied that the
"statutory rules, which go no further than to impose a general requirement
"for licenses, for which a fee is to be paid as a condition to the exercise
"of the right of fishing, should be interpreted by implication further to
"limit that right by making the issue of the license discretionary in the
"judgment of the licensing authority."

Record p.70,l 5

Mr. Justice Duff delivering the dissenting judgment said: "As to
"Question 5, the only express authority for the grant of licenses by the
"Minister of Marine and Fisheries is that given by Section 7 of the Act,
"which is in these words: 'The Minister may wherever the exclusive right
"' of fishing does not already exist by law issue, or authorise to be issued,
"' fishery leases and licenses for fisheries and fishing whatsoever situate
"' or carried on; but leases or licenses for any term exceeding nine years
"' shall be issued only under authority of the Governor in Council.' . . ."

"Looking first at the section itself, it is impossible to suppose that p.71,l 24
"the authority vested in the Minister to grant leases was not a discretion-
"ary one, and prima facie at all events, the same must be said with regard
"to the authority to grant licenses. . ."

"There is nothing in the terms in which these provisions are expressed, p.71,l 42
"nor, as far as I have been able to discover, in the terms of the regula-
"tions, pointing to a conclusion that the authority of the Minister is not
"a permissive one. . . ."

"As to leases and exclusive licenses, the Minister's power is of course p.72,l 11
necessarily discretionary. . . ."

"As to non-exclusive licenses, I can discover nothing in the subject p.72,l 21
"matter which dictates an inference, that, as regards these, the authority
"of the Minister is of a different order."

8. All of the judges of the Supreme Court are therefore agreed that question No. 1 should be answered in the affirmative and consequently that question No. 2 requires no answer.

9. As to question No. 3 there is a like concurrence of opinion so far as concerns section 7a and Section 18 of the Fisheries Act 1914. None of the learned judges consider the validity of the provisions of the legislation in Section 45 authorizing the regulations or the validity of the regulations made thereunder and the only difference of opinion is as a matter of interpretation whether the power of the Minister to grant licenses is a discretionary one or not.

Record p.67,l 37

10. The question being only one of the interpretation of the regulations therein specified and this view of its scope having been adopted by the Court it is not necessary to consider how far the legislation in Section 45 may be ultra vires or the regulations invalid under the legislation if intra vires.

And the Attorney-General of Quebec submits that as to questions Nos. 1 and 2 the judgment or opinion of the Court concurred in by all the judges is right for the following, amongst other,

REASONS.

(1) Because the sections in question are part of an enactment which is professedly a Fishery Act and the only authority under which they can be supported is "Sea Coast and Inland Fisheries," the 12th item in the enumeration of objects in section 91 of the British North America Act 1867, but these sections are not concerned with fisheries [illegible] "fish canneries for commercial purposes."

Source: Nikkei National Museum, 2010-4-3-9-30
www.nikkeimuseum.org

(2) Because the fish which are ferae naturae are not when alive in the water the subject of property, yet dead fish are absolute property, a subject within the exclusive jurisdiction of the Province under "Property and Civil Rights." (British North America Act 1867 section 92 (13).)

(3) Because the right to operate a fish cannery for commercial purposes is a civil right within the Province, and falls under the exclusive legislative powers of the Provincial Legislature under the subject of "Property and Civil Rights." (British North America Act 1867, Section 92 (13).)

(4) Because the Parliament has no power to regulate any particular trade or business which is a matter under Section 92 (13) "Property and Civil Rights in the Province" or (16) "Gnerally all matters of a merely local or private Nature in the Province."

(5) Because under section 91 of the British North America Act 1867 the Parliament of Canada has no power over the subject of trade or business licenses which are within the exclusive legislative authority of the Provinces under Section 92 (9) "Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a revenue for Provincial, Local or Municipal Purposes."

(6) And for the reasons stated in the judgment of Mr. Justice Newcombe, concurred in by all the judges of the Court.

CHARLES LANCTOT.

AIME GEOFFRION.

Source: Nikkei National Museum, 2010-4-3-9-31
www.nikkeimuseum.org

IN THE PRIVY COUNCIL.

No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

-.-.-.-.-.-.-.-.-

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - - - Appellant.

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE OF THE RESPONDENT

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC

BLAKE & REDDEN,
17, Victoria Street, S.W 1

Solicitors for the Respondent.

Source: Nikkei National Museum, 2010-4-3-9-32
www.nikkeimuseum.org

IN THE PRIVY COUNCIL. No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE

FOR THE ATTORNEY-GENERAL OF ONTARIO

RESPONDENT.

The Attorney-General of Ontario Respondent adopts and relies upon the Cases of the Attorney-General of British Columbia and the Attorney-General of Quebec and submits that the appeal should be dismissed for the reasons therein mentioned.

GEOFFREY LAWRENCE.

EDWARD BAYLY.

Source: Nikkei National Museum, 2010-4-3-9-33
www.nikkeimuseum.org

IN THE PRIVY COUNCIL.

No. 73 of 1928

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE

FOR THE ATTORNEY-GENERAL OF

ONTARIO RESPONDENT.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.

Source: Nikkei National Museum, 2010-4-3-9-34
www.nikkeimuseum.org

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO, AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA- Respondents

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CASE OF THE RESPONDENTS,

THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA.

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1. This is an appeal by Special Leave from so much of the Judgment of the Supreme Court of Canada dated the 28th May 1928, as answered adversely to the claim of the Dominion certain questions referred to the Court for hearing and consideration by the Governor-General in Council pursuant to the provisions of Section 60 of the Supreme Court Act.

2. The questions referred, with the enactments or regulations to which they relate, are the following:-

Record p. 13

" 1. Are sections 7a and 18 of the Fisheries Act, 1914 or "either of them and in what particular or particulars or to "what extent ultra vires of the Parliament of Canada?"

Section 7a of the Fisheries Act, 1914, was enacted as an addition to the Act of 1914. It is to be found in c. 16 of 1917, and reads as follows:-

P. 76

"7a. No one shall operate a fish cannery for commercial "purposes without first obtaining an annual license therefor "from the Minister. Where no other fee is in this Act pres- "cribed for a cannery license, the annual fee for each such "license shall be one dollar. (1917, c. 16.)"

Section 18 appeared in the Fisheries Act, 1914, as a section of four lines, but it was amended in 1919 by c. 52; in 1922 by c. 24; and again in 1924 by c. 43. These amendments have made important additions, and the section, as submitted at the hearing, reads as follows:-

p. 76

"18. No one shall operate a salmon cannery or salmon curing "establishment in British Columbia for commercial purposes "except under a license from the Minister (1-2 Geo.V.c.9, s.2).

"(2) (a) The annual fee for a salmon cannery license shall be "twenty dollars, and in addition, four cents for each case of "forty-eight one pound cans, or the equivalent thereto, of any "other species of salmon, including steelhead (salmo rivularis)

Source: Nikkei National Museum, 2010-4-3-9-35
www.nikkeimuseum.org

"license the said twenty dollars shall be paid before the license "is issued, and the remainder of the license fee shall be paid as "the Minister may from time to time by regulation prescribe." (1924, Chap. 43, 14-15 Geo. V.).

" (b) The annual license fee for a salmon curing establishment "shall be:-

"Fifty cents on each ton or fraction thereof of dry-salted "salmon put up in the establishment during the season, when "the total quantity of dry-salted salmon put up in one season "does not exceed ten tons;

"Seventy-five cents on each ton or fraction thereof of dry- "salted salmon put up in the establishment during the season, "when the total quantity of dry-salted salmon put up in one "season exceeds ten tons but is not more than twenty tons;

"One dollar on each ton or fraction thereof of dry-salted "salmon put up in the establishment during the season, when "the total quantity of dry-salted salmon put up in one season "exceeds twenty tons but is not more than fifty tons;

"One dollar and twenty-five cents on each ton or fraction "thereof of dry-salted salmon put up in the establishment during "the season when the total quantity of dry-salted salmon put up "in one season exceeds fifty tons. (12-13 Geo.V. c. 24, s. 1)."

Question 2 is in these words:- Record p. 15

"2. If the said provisions of the Fisheries Act, 1914, or "either of them be intra vires of the Parliament of Canada, has "the Minister authority to issue a license for the operation of "a floating cannery constructed on a float or ship, as contra- "distinguished from a stationary cannery construed on land, and "if so, is he entitled to make the license subject to any "restrictions particularly as to the place of operation of any "such cannery in British Columbia?"

Question 3 reads as follows:-

"3. Under the provisions of the Special Fishery Regula- "tions for the Province of British Columbia (made by the Governor "in Council under the authority of section 45 of the Fisheries "Act, 1914), respecting licenses to fish, viz., subsection 3 of "section 14; paragraph (a) or (b) of subsection 1 of section 15 "or paragraph (a) of subsection 7 of section 24 of the said "regulations, or under said section 7a, or 18 of the said Act, "(if these sections or either of them be intra vires of the "Parliament of Canada), has

" (a) any British subject resident in the Province of "British Columbia,

"or

" (b) any person so resident who is not a British subject, "upon application and tender of the prescribed fee, the right to "receive a license to fish or to operate a fish or salmon cannery "in that Province, or has the Minister a discretionary authority "to grant or refuse such license to any such person whether a "British subject or not?"

The special fishery regulations for the Province of British Columbia to which this question refers are to be found in a pamphlet printed, for the Department of Marine and Fisheries, which was introduced by Counsel for the Attorney General at the hearing. They read as follows:-

Source: Nikkei National Museum, 2010-4-3-9-36
www.nikkeimuseum.org

"Sec. 14--Herring or Pilchard.

1.)
2.) Omitted.

3. "3. If the captain of a herring or pilchard drag-seine or "purse-seine boat that is being used in operating a herring or "pilchard drag-seine is not himself the licensee of the said drag-"seine or purse-seine, he shall require a license from the Minister "to authorise his operation of the said drag-seine or purse-seine; "and no other than a British subject shall be eligible for such "license. The fee for such license shall be one dollar."

"Sec. 15--Leases or Licenses.

"1. (a) Except as herein otherwise provided fishing with nets "or other apparatus, and the taking of abalone or crabs, except "under license from the Minister is prohibited; and in salmon "fishing no one shall act as a boat puller or be otherwise employed "in a boat used in salmon drifting, or as a helper, or in any other "capacity in operating a purse-seine or drag-seine that is being "used in salmon or herring fishing except under license from the "Minister.

" (b) No license shall be granted to any person, company or "firm unless such person is a British subject resident in the "province, or is a returned soldier, who has served in His Majesty's "Canadian Navy or Army overseas, or to such company or firm unless "it is a Canadian company or firm or is authorized by the Provincial "Government to do business in the province."

"Sec. 24--Salmon."

1. to 6. Omitted.

"7. (a) No one shall fish for salmon for commercial purposes "by means of trolling, except under license from the Minister. "Each person in a boat that is being used in trolling for salmon "shall be required to have a license."

Paragraph (b) of this section adds that "the fee for a salmon trolling license shall be one dollar."

Record p. 77

Section 45 of the Fisheries Act, 1914, under which these regulations were made, reads as follows:-

"Sections 45, "The Governor in Council may make regulations--

"(a) for the better management and regulation of the sea-coast and inland fisheries;

"(b) to prevent or remedy the obstruction and pollution of streams;

"(c) to regulate and prevent fishing;

"(d) to prohibit the destruction of fish;

"(e) to forbid fishing except under authority of leases or licenses; R.S. s. 54.

"(f) prescribing the time when and the manner in which fish may be fished for and caught;

"(g) to prohibit the export or sale of any fish or any portion "of any fish from Canada or the taking or carrying "of fish or any portion of any fish from any one "province of Canada to any other province thereof."

"2. Such regulations shall take effect from the date of the "publication thereof in THE CANADA GAZETTE or from the date "specified for such purpose in such regulations, and such "regulations shall have the same force and effect as if enacted "herein notwithstanding that such regulations extend, vary or "alter any of the provisions of this Act respecting the places "or modes of fishing and shall be printed in the prefix in the

Source: Nikkei National Museum, 2010-4-3-9-37
www.nikkeimuseum.org

"next succeeding issue of the Dominion Statutes: Provided that "any regulation made under the provisions of paragraph (g) shall "not take effect until after six months after the date of its "publication in THE CANADA GAZETTE. R.S., s. 54. ss. 2.

"3. Every offence against any regulations made under this "Act may be stated as in violation of this Act. R.S., s. 54, ss. 3".

3. On the hearing of the argument before the full Court (composed of Anglin, C.J., Duff, Mignault, Newcombe, Rinfret, Lamont and Smith, JJ.) the case was presented by Counsel for the Attorney General of Canada and Counsel were also heard for the Provinces of British Columbia, Quebec and Ontario, and by Special Order of the Court on behalf of the Fishermen of Japanese origin in the Province of British Columbia.

4. The Court was unanimous in answering the first and second questions as follows:- Record p. 58

"Question No. 1: The answer, as to both sections 7a and 18, is entirely in the affirmative.

"Question No. 2: In view of the preceding answer, this question requires no answer."

As to the third question the Court was not unanimous and the answer returned by the Chief Justice, Newcombe, Rinfret and Lamont, JJ. was as follows:- p. 59

"As to each of the specified regulations, viz.:

"Subsection 3 of section 14, paragraph (a) and (b) of "subsection 1 of section 15, and paragraph (a) of sub-section "7 of section 24, any British subject resident in the Province "of British Columbia, who is not otherwise legally disqualified "has, according to the true interpretation of these clauses, "the right to receive a license, if he submit a proper "application and tender the prescribed fee. As to any person "resident in the Province of British Columbia, who is not a "British subject he is not eligible for a license of the "character described in subsection 3 of section 14, it being "expressly declared by that subsection that 'no other than a "British subject shall be eligible for such license.' And "none of the other licenses in question shall as provided by "paragraph (b) of subsection 1 of section 15, be granted to "any person, unless he 'is a British subject resident in the "Province, or is a returned soldier who has served in His "Majesty's Canadian Navy or Army Overseas.' It is unnecessary "to interpret the regulations with respect to the operation of "fish or salmon canneries, inasmuch as Sections 7a and 18 are "held to be ultra vires."

Duff, Mignault and Smith, JJ., did not concur and would have answered this question as follows:- p. 59

"The Minister has a discretionary authority to grant, or "refuse, such license to any person who is a British subject, "resident in the Province of British Columbia or is a returned "soldier in His Majesty's Canadian Navy or Army overseas."

The written opinions of Newcombe, J., for the Court, and Duff, J., for the minority dissenting from the answer made to Question 3 will be found at pages 59 to 73 of the Record.

5. On behalf of the Respondents the Fishermen of Japanese origin in the Province of British Columbia it will be contended that the answers returned by the majority of the Supreme Court of Canada are right and should be upheld for the following and other

Source: Nikkei National Museum, 2010-4-3-9-38
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(1) Because the Parliament of Canada has no power under section 91 of the British North America Act of 1867 to regulate fish canneries or salmon canneries for commercial purposes.

(2) Because the powers which the Dominion possesses with regard to seacoast and inland fisheries and with regard to taxation do not justify the enactments which are in question.

(3) Because sections 7a and 18 of the Fisheries Act affect property and civil rights in the Provinces and are therefore within the exclusive authority of the Legislatures under section 92 of the British North America Act.

(4) Because section 18 of the Fisheries Act, if it imposes taxation, also is intended to regulate salmon canneries and salmon curing establishments and such regulation is not within the Dominion powers and therefore the section is not exclusively within Dominion powers.

(5) Because the powers of the Governor in Council to sanction the regulations in question cannot extend beyond those conferred by section 45 of the Fisheries Act and that section confers no power of taxation and no power to delegate any legislative authority to the Minister.

(6) Because no power is conferred upon the Minister to refuse licenses to those who are by the regulations eligible for licenses.

(7) Because the regulations confer upon the Minister no power, either express or implied, to discriminate in the issue of licenses as among applicants within the eligible classes. The Minister has no statutory authority to impose a discriminatory rule.

(8) Because no express power is conferred upon the Minister except to issue licenses and he has no discretion to exercise.

(9) Because the regulations should not be interpreted to empower the Minister to prohibit the public right of fishing or to interfere with private rights of fishing.

(10) For the reasons stated in the Judgment delivered by Newcombe, J., which is the Judgment of the Court.

WILLIAM A. JOWITT.

EDMUND F. NEWCOMBE.

Source: Nikkei National Museum, 2010-4-3-9-39
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IN THE PRIVY COUNCIL

No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA - - - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

CASE OF THE RESPONDENTS,

THE FISHERMEN OF JAPANESE

ORIGIN IN THE PROVINCE OF

BRITISH COLUMBIA

KAYS & JONES,
37, Norfolk Street,
Strand, W.C.,

Solicitors for the Fishermen of Japanese Origin

in the Province of British Columbia.

Source: Nikkei National Museum, 2010-4-3-9-40
www.nikkeimuseum.org

IN THE PRIVY COUNCIL. No. 75 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA - - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents

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RECORD OF PROCEEDINGS

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ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA- Respondents

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RECORD OF PROCEEDINGS

No. 1.

Reasons for Judgment of Hon. Mr. Justice Macdonald in Somerville Cannery Case. No.1 Reasons for Judgment of Hon. Mr. Justice Macdonald in Somerville Cannery Case. 23, Sept. 1927.

In the Supreme Court of British Columbia.

The King (ex rel. Adam Mackie) - - - - - - Appellant

Somerville Cannery Company Limited - - - - Respondents

REASONS FOR JUDGMENT OF HON. MR. JUSTICE W. A. MACDONALD.

The Appellant, hereafter called the "Dominion," appeals, by way of a stated case, from an order of H. O. Alexander, Stipendary Magistrate, whereby the Somerville Cannery Company Limited, hereafter called "Company" was acquitted, upon a charge that the said Company on the 25th March, 1927, at the City of Prince Rupert--

"unlawfully did operate a fish cannery, to wit, a clam cannery for commercial purposes, contrary to and in violation of the provisions of the Fisheries Act, 1914, R.S. Cap. 45, and amending Acts, without first obtaining an annual licence therefor from the Minister of Marine and Fisheries."

Upon the trial, before the Magistrate, certain facts were admitted, which may be shortly stated as follows: The Company was duly incorporated under the laws of British Columbia, with powers authorizing it to engage in the canning business, including the canning of fish, salmon, clams and other fish products and was the owner of a cannery at Seal Cove in the City of Prince Rupert; that it canned clams for commercial purposes on the 25th March, 1927, without having a license from the Minister of Marine and Fisheries so to do.

Further, that the clams, so canned, were purchased by the Company, at its cannery, from diggers and were legally removed from the bed of the foreshore, between high and low water-marks in British Columbia, from land belonging to private individuals or the Crown in the right of the Province of British Columbia.

It was also admitted that, while the Company had no licence to operate

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a cannery from the Dominion, it had such a licence from the Province of British Columbia, on the said 25th day of March, 1927.

No. 1
Reasons for Judgment of Hon. Mr. Justice Macdonald in Somerville Cannery Case, 23, Sept. 1927
--continued

The Magistrate held that "Section 7a of the Fisheries Act" is ultra vires of the Parliament of Canada and, upon application of the Dominion, he reserved the following question for the opinion of this Court: "Has the Parliament of Canada Jurisdiction to enact Section 7a of the Fisheries Act?" Such section is as follows:-

> "No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery, the annual fee for each such license shall be one dollar. (1927) c. 16."

This provision, as to licensing a fish cannery, which might operate for commercial purposes, was enacted in 1917 by an amendment to the Fisheries Amendment Act, 1914, which had already provided for the issuance of fishery leases and licences for fisheries and fishing. It was a re-enactment, more broadly worded, of Section 23a, 1 & 2 Geo. V, Cap. 9.

While the annual fee for a cannery licence was thus only nominal, still, the revenue derived by the Dominion from its operation was, as far as British Columbia was concerned, supplemented by Section 18 of the Fisheries Act. This Section provided, in part, that no one should operate a salmon cannery, or salmon curing establishment, in British Columbia, except under a licence from the Minister of Fisheries and that the annual fee for such a licence should be $20 and, in addition, the licensee was required to pay the Dominion 4 cents for each case of sockeye salmon and 3 cents for each case of any other species of salmon canned in such cannery.

When you consider the large amount which is annually received by the Dominion Government for such cannery licences, the importance of the question to be decided becomes apparent, because a consideration of said Sec. 7a involves a determination also as to the validity of said Section 18. If the Dominion cannot legally prevent the operation of an unlicensed cannery, then it follows that it cannot restrict the output of such cannery by what amounts to taxation.

It is contended, on the behalf of the Dominion, that the legislation in question was properly enacted under Item 12 of the Classes of subjects, enumerated in Sec. 91 of the British North America Act, concerning which it was declared that the exclusive legislative authority of the Parliament of Canada extended to all matters coming within "Sea Coast and Inland Fisheries." Then, by the 5th paragraph of the "Terms of the Union" amongst the services assumed by Canada is that of protection and encouragement of Fisheries-- British Columbia being thus relieved from the responsibility or liability in that behalf, but not debarred of any right it might possess to tax or licence a building used and operated in canning salmon or other sea products. Then does the exclusive legislative authority conferred upon the Dominion Parliament, with respect to Sea Coast and Inland Fisheries, remove a cannery, owned by the company, from the class of subjects concerning which the legislature of a province may make exclusive laws and render it subject to the enactment which is the subject of attack?

It is contended by the company, that being the owner of the building, although used as a cannery, it is property within the province and comes under the heading of "Property and Civil Rights of a Province" and exclusively subject to Provincial legislation.

It is contended, on the contrary, on behalf of the Dominion, "that the enactment giving it jurisdiction over 'Sea Coast and Inland Fisheries' " should receive a liberal interpretation and that it was broad enough to enable the Dominion even to regulate and licence wholesalers or retailers who might deal in fish far from the waters from which they had been obtained. I do not require to consider, however, such contention. If it were accepted, it would, to my mind, be contrary to the spirit and intention of the British North America Act. It would mean Dominion ownership of fish as distinguished

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The definition of a "Fishery" is afforded by Sec. 2 of the Act as follows:-

" 'Fishery' means and includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance and also the pound, seine, net, weir or other fishing appliance used in connection therewith."

A fishery is the right to take fish in a certain place or in particular waters. "Webster New International Dictionary", Hart vs. Hill, 1 Whart. Pa. 124. It has the right to employ within a particular stretch of water lawful means for the taking of fish which may be found there. Vid: Hume vs. Rogue River Packing Co. 51 Ore 237--92 Pacific Reporter p. 1061. The latter case refers to the incidents attached to the Rogue River, being a navigable stream, as to the common right of user and fishing and, pointedly, as concerns the present case, states that a "fishery"

"is to be distinguished from a fishing place which has the right to use a particular shore or beach as a basis for carrying on the business and is always vested in the shore owner."

Lefroy, in his work on legislative power in Canada, lays down two propositions, at p. 582, which may be profitably used as a guide, in considering the power vested in the Dominion Parliament in dealing with a cannery utilized for rendering more merchantable, or fit for sale, sea products.

"53. We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon the Dominion Parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another legislature."

"54. When a question arises as to whether the Dominion Parliament has power in any case over any property or civil rights in a Province, it is always necessary to form an accurate judgment upon what is the particular subject-matter in each case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the subject."

He had already considered the effect of the decision of the Privy Council in Tennant vs. Union Bank of Canada (1894) A.C. p. 31, which, at p. 45, states:-

"Section 91 expressly declares that 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to those matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are 'Patents of Invention and Discovery,' and 'Copyrights.' It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the Provinces."

It is on the strength of such decisions that the Dominion contends that the legislation with respect to canning fish, as distinguished from fishing, comes within its jurisdiction as part of the "fisheries" or, in the language of Lefroy, at p. 583:

Source: Nikkei National Museum, 2010-4-3-9-45
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"That there may be cases where in accordance with the principle embodied in proposition 37, at p. 425, the Dominion Parliament may have power to interfere with provincial property in order to effectually exercise all the enumerated powers conferred upon it by sect. 91."

As to the right of the Dominion to tax and licence a cannery, the exercise of such a power extends further than was decided in the Fisheries case (1898) A.C. 700. It was laid down in that case, at p. 716, that

"the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature and is not within the legislative powers of the provincial legislature,"

and at p. 715, as to taxation, as follows:-

"it is impossible to exclude as not within its power (raising money) the provision imposing a tax by way of licence as a condition of the right to fish. It is true, that by virtue of Sec. 92, the provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention"--

viz., power to licence, giving the right to fish. In this connection, the Company submits that while the power of the Dominion to tax, by way of licence, may be conceded, it could not be reasonably contended that such right could be extended so as to include a power of licence or taxation after fish had been legally caught and the control and regulation of the fish had ceased.

The question, as to the right of the Dominion to grant a lease of a salmon fishery and raising a question as to the scope of the various classes of Secs. 91 & 92 British North America Act, was decided in Queen vs. Robertson, 6 S.C.R. p. 52.

Ritchie, C. J., at p. 120, discussed the limitations of Class No. 12 of Sec. 91 as follows:-

"I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' (Sea Coast and Inland Fisheries) contemplated by the B.N.A. Act, was not in reference to 'property and civil rights'-- that is to say not as to the ownership of the beds of the rivers or of the fisheries or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large who are interested in the fisheries as a source of national or provincial wealth."

Then Strong, J., at p. 134, S.C., after referring to it being

"A sound and well-recognized maxim of construction that in the interpretation of Statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implications . . . . and that this principle was well fixed as a canon of construction and not open to the least doubt or question"--

said, as to "Inland Fisheries," and his expressions are equally applicable to "Sea Coast Fisheries," as follows:-

"We are not to assume, without express words or unavoidable

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implication, that it was the intention of the Imperial Legislature to confer upon parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another legislature. I am of opinion, therefore, that the thirteenth enumeration of section 91 by the single expression 'Inland Fisheries,' conferred upon parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word 'property' can only be interfered with by the provincial legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries."

This view was substantially affirmed by the Privy Council in the Fisheries Case (1898), A.C. 700 at p. 712--67, L.J.P.C. 90. Lord Herschel in delivering the judgment of the Board in that case said:-

"Their Lordships are of the opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading 'Sea Coast and Inland Fisheries' in s. 91. Whatever proprietary rights in relation to 'fisheries' were previously vested in private individuals or in the provinces respectively remained untouched by that enactment."

Consideration then followed in the judgment, as to the proprietary rights being affected by proper enactment under the 91st section, such as prescribing the times of the year during which fishing might be allowed or the instruments which might be employed for that purpose--

"The extent, character and scope of such legislation is left entirely to the Dominion Legislature."

"If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has by the British North America Act, been left to the Provinces and not vested in it."

Lefroy, at p. 585, states that the proposition 53, supra, has been followed and re-affirmed by the Supreme Court in re Provincial Fisheries, 26, S.C.R. 444 and that such decision follows Queen v. Robertson, supra. In his opinion--

"The legislative authority of Parliament under sec. 91, No. 12, of the Act is confined to the conservation of the fisheries by what may be conveniently designated 'police regulations.' "

It may thus be contended that, while the Dominion Parliament has the right to dispose of any property belonging to the Dominion, it has only as far as fishing is concerned, the right to regulate, and incidentally license, persons seeking to obtain the right to fish within waters under the control of the Dominion.

As already mentioned, the submission, on behalf of the Company, is that

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comes within that of the Province under the class termed "Property and "Civil Rights."

Hon. Mr. Justice Macdonald in Somerville Cannery Case, 23, Sept. 1927 --continued.

The rights of fishing and the ownership acquired by fishermen is referred to in Attorney General for British Columbia vs. Attorney General for Canada, (1914) A. C. 153, at pp. 168 to 171.

In addition to the authorities already referred to, the Company cited what may be termed the "Grain" cases and "Insurance" cases as leading support to its position.

In the King vs. Eastern Terminal Elevator Co. (1925) 3 D.L.R. p. 1, it was held, according to the head-note, that--

> "The Dominion cannot by legislation ultimately intended to regulate external trade in a particular commodity assume control over particular occupations and local works and undertakings in the Provinces, notwithstanding that the intended effect of the legislation could not be attained by the provinces individually or in concert."

Anglin, C.J.O., in a dissenting judgment, at p. 8, dealing with the Canada Grain Act (1912), cap. 27, states that, in his view

> "not only is the grain trade of Canada a matter of national concern and of such dimensions as to affect the body politic of the Dominion, but the provisions of the Canada Grain Act, with some possible exceptions, deal with matters which as envisaged by that legislation, do not 'come within the Class of Matters of a local or private Nature. . . . assigned exclusively to the Legislatures of the Provinces." (s. 91 (29), B.N.A. Act.)

The majority of the Supreme Court, however, held the Grain Act ultra vires.

Duff, J. at p. 11, says:-

> "The Act is an attempt to regulate, directly and through the instrumentality of Grain Commissioners, the occupations mentioned. It is also an attempt to regulate generally elevators as warehouses for grain, and the business of operating them, and it seems, ex facie, to come within the decision of the Judicial Committee, Att'y Gen'l. for Can. v. Att'y. Gen'l. of Atla. and Att'y. Gen'l. of B.C., 26 D.L.R. 288, condemning the Insurance Act of 1910, (Can.) c. 32, as ultra vires."

Mignault, J. at p. 21, after referring to numerous authorities, culminating in the then recent decision in Toronto Elec. Commissioners vs. Snider, (1925) A.C. 396, states, that all arguments in support of the validity of the Grain Act had been addressed to the Court but were all finally answered by these decisions. He considered that the Statute then under consideration could not be sustained on the ground that it was a regulation of trade and commerce or for the general advantage of Canada nor could it be contended that it was designed to cope with a national emergency. He then added:-

> "I have not overlooked the appellant's contention that the statute can be supported under s. 95 of the B.N.A. Act as being legislation concerning agriculture. It suffices to answer that the subject-matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products."

Here, the Company contends that the purchase of salmon and clams at its cannery, though natural products of the Coast Waters, should not require a

Source: Nikkei National Museum, 2010-4-3-9-48
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licence nor should there be a tax imposed for trading and dealing with such natural products and that they should only be subject to the rights of the province under its powers of legislating as to property and civil rights.

In Attorney-General for Dominion of Canada vs. Attorneys-General for Provinces of Quebec and Nova Scotia, (1898) A.C. p. 700, various questions relating to the property rights and legislative jurisdiction of Canada and the Provinces respectively in relation to rivers, lakes, harbours, fisheries and other cognate subjects were considered by the Privy Council. Lord Herschell, at p. 709, says:-

"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction, in respect of a particular subject matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

While other authorities were cited bearing upon the subject under consideration, I think it is sufficient simply to refer in conclusion to Toronto Elec. Commissioners vs. Snider (1925), A.C. p. 396. In that case, it was held that the Industrial Dispute Investigations Act, 1907, of Canada, was not within the competence of the Parliament of Canada under the British North America Act; that it was clearly in relation to property and civil rights within the provinces. It lends support to the argument of the company in this respect and the first portion of the judgment of their Lordships delivered by Viscount Haldane covers the contention of the "Dominion" as to the portion of the Fisheries Act in question not being declared ultra vires after it had been in force for a number of years as follows:-

"It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty Incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act, 1867, and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of its terms that has now been established by a series of authorities."

It was argued, or rather drawn to my attention that the province, though interested, beyond question, in the outcome of this contest, was not assisting nor supporting the attack upon the Dominion legislation. I do not think this is material, as taxation was sought to be imposed upon the company and its business was affected. It thus had the right to take advantage of any legal means of defence.

In my opinion, the "Dominion" in enacting that part of the Fisheries Act, which provides for licensing and taxing canneries, has exceeded its powers under the British North America Act. The portion of the Act in question is not "truly ancillary" to legislation with respect to the fisheries which are within the jurisdiction of the Dominion. It is not by any reasonable implication necessary to proper or effectual regulation or "policing" of such fisheries.--It is legislation as to civil rights and as such appropriate to the province.

Source: Nikkei National Museum, 2010-4-3-9-49
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The question, as to the validity of Section 7a, is answered in the negative. In view of this answer the other less important question submitted does not require consideration.

Vancouver, B. C., 23rd September, 1927.

No. 2

Order of Reference by the Governor General in Council.

P. C. 2032.

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 19th October, 1927.

In the Supreme Court of Canada.

No. 2 Order of Reference by the Governor General in Council, 19th, Oct. 1927.

The Committee of the Privy Council have had before them a report, dated 18th October, 1927, from the Minister of Justice, submitting that by a judgment recently pronounced by the Honourable Mr. Justice Macdonald of the Supreme Court of British Columbia upon a case stated by H. O. Alexander, Esq., Stipendiary Magistrate in and for the County of Vancouver in the Province of British Columbia, under the provisions of Section 761 of the Criminal Code, in the case of The King vs. The Somerville Cannery Company, Limited, the learned judge affirmed the determination of the Magistrate acquitting the defendant company of the charge that, on the 25th day of March, 1917, at Seal Cove, in the City of Prince Rupert, it did unlawfully operate a fish cannery, to wit, a clam cannery, contrary to and in violation of the provisions of the Fisheries Act, 1914, without first obtaining an annual license therefor from the Minister of Marine and Fisheries. The judgment proceeds upon the ground that section 7a of the said Act which requires an annual license from the Minister to be obtained for the operation of a fish cannery from commercial purposes, is ultra vires of the Parliament of Canada. From this decision there is no appeal, and the Minister, therefore, considers it to be expedient that immediate steps should be taken to obtain an ultimate judicial determination of the important questions, which this decision raises, as to the constitutional validity of Section 7a and of other like provisions of the Fisheries Act, 1914.

The Minister further submits that important questions have also been raised as to the constitutional validity of certain other provisions of the Fisheries Act, 1914, and as to whether under certain provisions of the said Act and of the Special Fishery Regulations for the Province of British Columbia made under the authority of the said Act, the Minister of Marine and Fisheries has a discretionary authority to grant or refuse licenses to fish or to operate a fish or salmon cannery in that Province; and the Minister also considers it to be expedient to obtain a final judicial determination of these questions.

The Minister accordingly recommends that the following questions be referred by Your Excellency in Council to the Supreme Court of Canada, for hearing and consideration, pursuant to the provisions of section 60 of the Supreme Court Act:

1. Are sections 7a and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?

2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

Source: Nikkei National Museum, 2010-4-3-9-50
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5. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of section 45 of the Fisheries Act, 1914), respecting licenses to fish, viz., subsection 3 of section 14; paragraph (a) or (b) of subsection 1 of section 15 or paragraph (a) of subsection 7 of section 24 of the said regulations, or under said section 7a or 18 of the said Act, (if these sections or either of them be intra vires of the Parliament of Canada), has

(a) any British subject resident in the Province of British Columbia, or
(b) any person so resident who is not a British subject,

upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not?

The Minister further recommends that the Minute of Council of the 7th October, 1927 (P.C. 1970) be, and that the same be hereby rescinded.

The Committee concur in the foregoing recommendations and submit the same for approval.

E. J. LEMAIRE,
Clerk of the Privy Council.

No. 3.

Order of Supreme Court for Inscription of Reference and Directions.

In the Supreme Court of Canada.

Before the Honourable Mr. Justice Newcombe

Friday, the 21st day of October, A.D. 1927.

In the Matter of a reference as to the constitutional validity of certain sections of The Fisheries Act, 1914.

Upon the application of the Attorney General of Canada for directions as to the inscription for hearing of the case relating to the above questions referred by His Excellency the Governor General, for hearing and consideration by the Supreme Court of Canada under the provisions of section 60 of the Supreme Court Act, and upon hearing read the Order in Council of the 19th October, 1927, (P.C.2032), setting forth the said questions, upon reading the affidavit of Charles P. Plaxton filed herein, and upon hearing what was alleged by counsel for the applicant:

It is Ordered that the said case be inscribed for hearing at the foot of the Ontario list of the October, 1927, sittings of this Honourable Court.

And it is Further Ordered that the respective Attorneys General of the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan, be notified of the hearing of the argument of the said case by sending to each of them by registered letter on or before the 22nd day of October, 1927, a notice of hearing of the said reference and a copy of the said Order in Council, as well also as a copy of this Order.

And it is Further Ordered that the said respective Attorneys General of the said provinces be at liberty to file factums of their respective

Source: Nikkei National Museum, 2010-4-3-9-51
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arguments on or before the 5th day of November, 1927, and that they be at liberty to appear personally or by counsel upon the argument of the said reference.

And it is Further Ordered that notice of the said reference be given in the CANADA GAZETTE on or before the 22nd day of October, A.D. 1927.

E. L. NEWCOMBE
J.

No. 4.

Notice of Hearing.

In the Supreme Court of Canada.

No. 4.
Notice of Hearing, 22nd, Oct. 1927.

In the Supreme Court of Canada

In the Matter of a Reference as to the Constitutional Validity of Sections 7a and 18 of The Fisheries Act, 1914.

TAKE NOTICE that the reference herein has, by Order of the Honourable Mr. Justice Newcombe, dated 21st October, 1927, been inscribed for hearing at the October, 1927, sittings of the Supreme Court of Canada, at the foot of the Ontario list, and you are hereby notified of the hearing of the said reference pursuant to the terms of the said Order, copy of which is annexed hereto.

Dated at Ottawa, this 22nd day of October, A.D. 1927.

W. STUART EDWARDS,
Deputy Minister of Justice.

To the Attorneys General of the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan.

No. 5.

No. 5
Extracts from the Special Fishery Regulations for the Province of British Columbia, 27th, May 1927.

Extracts from the Special Fishery Regulations for the Province of British Columbia (adopted by Order in Council of May 27, 1927).

Sec. 14. Herring or Pilchard.

3. If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

Sec. 15. Leases or Licenses.

1. (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm,

Source: Nikkei National Museum, 2010-4-3-9-52
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unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

No. 5. Extracts from the Special Fishery Regulations for the Province of British Columbia, 27th, May 1927-- continued.

Sec. 24. Salmon.

7. (a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license,

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No. 6.

No. 6. Factum of the Attorney-General of Canada.

Factum on Behalf of the Attorney-General of Canada.

In the Supreme Court of Canada.

In the Matter of a Reference as to the Constitutional Validity of certain sections of the Fisheries Act, 1914.

I.

STATEMENT OF THE CASE.

1. By Order in Council of the 19th October, 1927 (P.C.2032) (Case. pp. 2-3), His Excellency the Governor General in Council was pleased to refer to the Supreme Court of Canada, for hearing and consideration, pursuant to section 60 of the Supreme Court Act, the following questions:-

1. Are sections 7a and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?

2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license usbject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

3. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of section 45 of the Fisheries Act, 1914) respecting licenses to fish, viz., subsection 3 of section 14; paragraph (a) or (b) of subsection 1 of section 15 or paragraph (a) of subsection 7 of section 24 of the said Regulations, or under said section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada), has

(a) any British subject resident in the Province of British Columbia, or
(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to such person whether a British subject or not?

Source: Nikkei National Museum, 2010-4-3-9-53
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ARGUMENT.

2. The following argument is submitted on behalf of the Attorney General of Canada upon each of the foregoing questions:-

3. As to the first question.--The Dominion bases its right to enact the Fisheries Act, 1914, upon the following grounds:-

1. Its exclusive legislative authority over sea coast and inland fisheries. (B.N.A. Act, sec. 91, subsec. 12).

2. Its obligation to assume and defray the charges of the services of protection and encouragement of fisheries. (Imp. Order in Council, May 16, 1871, Schedule sec. 5, subsec. E., British Columbia; The Manitoba Act, 1870, sec. 76, subsec. 5; Imp. Order in Council, June 26, 1873, Prince Edward Island).

3. The regulation of trade and commerce. (B.N.A. Act, sec. 91, subsec. 2).

4. The raising of money by any mode or system of taxation. (B.N.A. Act, sec. 91, subsec. 3).

4. In pursuance of the powers above conferred and the obligations assumed, the Dominion in legislating thereon considered it necessary to enact sections 7a and 18 of the Fisheries Act, 1914 (Record, p. 76).

The contention of the Dominion is that the said sections are properly ancillary to the effective exercise of the powers vested in the Dominion under the B.N.A. Act, and the obligations assumed under the Terms of Union with the various provinces. Further, that the sections in question are designed to promote the attainment of the purposes of the Fisheries Act, 1914, and are essential to the proper working thereof.

The obligations of protection and encouragement of fisheries placed upon the Dominion by a Statute which neither the Dominion nor the Provinces have the power to repeal implies that the Dominion should be clothed with power to enact such legislation as it may deem reasonably necessary for the proper fulfilment of such obligations. The powers conferred by the B.N.A. Act, are enlarged by the terms of union, and inasmuch as the Provinces have placed an obligation upon the Dominion, a much broader and more generous interpretation should be placed upon the powers of the latter. It is submitted that the obligation to "protect and encourage" increases and broadens the legislative jurisdiction of the Dominion in respect of the subject matter of sec. 91, subsec. 12 of the B.N.A. Act, to the extent that the Dominion may pass any enactment they may consider reasonably necessary for the carrying out of such obligations.

5. The grounds upon which the Dominion contend that licensing is necessary and ancillary to the proper and effective working of the Fisheries Act are as follows:-

1. Owing to the vast territory on the Pacific Coast, the innumerable inlets, bays, islands, etc., it is a practical impossibility to regulate or control fisheries unless canneries are under Dominion control.

2. Canneries are inseparable from the fishing industry and it is for or in conjunction with canneries that the great percentage of fish (particularly salmon) are caught.

3. Information as to the state and condition of the fisheries may be collected from day to day from the canneries.

4. Enables the authorities to regulate, control and enforce [illegible] closed periods.

Source: Nikkei National Museum, 2010-4-3-9-54
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5. The only practical way to keep in close and immediate touch with the actual fishing.

6. To prevent the canning of unfit fish caught in prohibited areas.

7. To prevent the packing and placing on the market of inferior qualities of fish.

6. The fishing industry is a national and basic industry. It is unique to the extent that any relaxation of the strict regulations will cause damage that will take years to repair. In the case of salmon it takes four and five years for the fish to mature. The situation on the Pacific Coast has reached a very serious, in fact critical, period. Parliamentary Commissions have inquired into it and International conferences have been held. Drastic measures are being considered and advised not only by the Dominion but by all branches of the industry.

With these facts facing it and for the reasons above enumerated, the Dominion considers it necessary to enact the sections in question and enforce them. It is submitted that it must be shown that they are clearly not reasonable or ancillary before they can be held to be ultra vires. The fact that they may to a limited extent, affect "property and civil rights in a Province" Sec. 92, subsection 13 of the B.N.A. Act, is not of itself reason for a declaration that they are ultra vires.

In the last year approximately 5,000 fishermen were operating under license in British Columbia. It is obvious that to obtain daily or weekly reports from such a number scattered over the whole of the Pacific Coast, is an impossibility. Again, any reports that could be obtained would be of doubtful accuracy. Days and weeks might elapse before the required information could be obtained. Many of the fishermen are of foreign birth and illiterate, and the obtaining of statistics, reliable and prompt, from them, would place a tremendous burden upon the Dominion, and seriously interfere with the proper administration of the Fisheries Act.

Under the Act as it now stands the Dominion is able to keep its finger on the pulse of the fishing industry.

7 In Grand Trunk Railway vs. Att.-Gen. for Canada (1907) A.C. 65, Lord Dunedin is quoted as follows at p. 68. "Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right--which may be conceded--but whether this law is truly ancillary to railway legislation," and again, "of the merits of the policy their Lordships cannot be judges." In the same case in the Supreme Court of Canada (1905), 36, S.C.R. 136, Davies, J. at p. 142-3, says:- "Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matter as fully, properly and effectively to carry out the construction, management and operation of these railways. In so legislating it matters not that they infringe upon the powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management and operation of the classes of railways excepted from subsection ten of section ninety-two and embraced within subsection twenty-nine of section ninety-one. I think it may fairly be so held." . . . . . "I do not think the courts should be astute to discover reasons to annul the legislation of parliament on a subject matter within its exclusive jurisdiction even if, in the exercise of its powers, it does trench upon the subjects generally within the provincial jurisdiction, or if plausible arguments can be urged that, [illegible] legislation is not necessary to control effectively the subject matter of such legislation."

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8. It is submitted that the present case goes no further than was allowed under Sec. 91, subsec. 10, of the B.N.A. Act in regard to "Navigation and Shipping." In Paquet vs. Pilots Corporation (1920), A.C.1089, it was attempted to overthrow Dominion legislation dealing with the distribution of the earnings of pilots. Viscount Haldane at p. 1031 :-- "It is, of course, true that the class of subjects designated as 'property and civil rights' in Sec. 92, and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of Sec. 92, has to be read along with that of Sec. 91 and the generality of the wording of Sec. 92 has to be interpreted as restricted by the specific language in Sec. 91, in accordance with the well established principle that subjects which in one aspect may come under Sec. 92, may, in another aspect that is made dominant, be brought under Sec. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was therefore, in their opinion, for the Dominion and not for the Provincial Legislatures to deal exclusively with the subject of pilotage after Confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected."

9. It has been held that legislation of an ancillary nature need not be absolutely necessary or incidental to the particular power given to the Dominion. It is not necessary to go further than establish as was laid down by the Privy Council in City of Toronto vs. Canadian Pacific Railway Co., 1908, A.C. 54, at p. 58: "The sections impugned do no more than provide reasonable means for safeguarding in the common interest, the public and the railway, which is committed to the exclusive jurisdiction of the legislature which enacted them, and were therefore intra vires."

It is sufficient, therefore, if the legislation is reasonably necessary, and, it is submitted, the onus is on those attacking the legislation to establish that it is not reasonable. As was laid down by Davies, J., in In Re Railway Act (1905) 36, S.C.R., 136, at p. 145:-- "We cannot ignore, in determining what are and what are not fairly within the ambit, the actual existing condition in Canada."

10. It is essential to the proper determination of the questions submitted that existing conditions in Canada be carefully scrutinized and considered. Owing to the extremely serious condition of the Fisheries on the Pacific Coast, approaching a national emergency, very considerable latitude should be allowed the Dominion in what it considers necessary legislation. It is being seriously advocated that in certain areas, particularly on the Fraser River system and adjacent United States areas, a closed period of at least five years should be enforced for sockeye fishing. This will give some idea of the serious condition which British Columbia Fisheries are in. In this regard see the Report and Recommendations of the British Columbia Fisheries Commission, 1922.

The mere fact that it is conceivable that the Dominion might have adopted some other course is not, it is submitted, material.

11. Tennant vs. Union Bank, 1894, A.C. 31, per Lord Watson, at p.45:--"It would be practically impossible for the Dominion Parliament to legislate upon either of these usbjects (Patents of Invention and Discovery and Copyrights) without affecting the property and civil rights of individuals in the Province." And at p. 47: "But the argument even if well founded can afford no test of the legislative powers of the Parliament of Canada. These depend upon Section 91 and the power to legislate conferred by that clause may be fully exercised although with the effect of modifying civil rights in the Province."

12. The Queen vs. Robertson (1882) 6, S.C.R. 52, per Ritchie C.J., at p. 110:--"But, while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion [illegible], I think such latter rights must be exercised as far as may

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13. No attempt is being made to deal with property and civil rights or "proprietary rights" as in the case of Attorney-General for Canada vs. Att.-Gen. for Ontario, Quebec and Nova Scotia, (1898), L.J. P.C. 90, and similar cases. In the sections under consideration there is no attempt on the part of the Dominion to deprive the Provinces of any rights vested in them. In fact, the particular legislation very slightly affects the Provinces. They license and tax Canneries.

The Province cannot make fishery regulations. It has been held in Att.-Gen. for Canada vs. Att.-Gen. for Ontario, et al, supra, at p. 95: "Their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative power of provincial legislatures."

The present enactments are clearly distinguishable from those dealt with in the Reciprocal Insurance Legislation Case, 1924, A. C. 328, where there was an attempt indirectly to take away powers vested in and exercised by the Province.

14. As to the second question--The expression "cannery" an used in said section 7a and 18 of the Fisheries Act, 1914, is not defined by the Act, and it must therefore be read in its ordinary and popular sense. In that view, it is manifest that a cannery is not the less a cannery because it is constructed on a float or a ship rather than on land, and if that be so, then no reason exists why, if the provisions of the Fisheries Act, 1914, are intra vires, the Minister should not have authority to issue a license for a floating cannery as well as for a stationary cannery. Furthermore, if the authority of the Minister to issue a license for the operation of a cannery under either of the said provisions be discretionary, as is respectfully contended, then it must be open to the Minister, subject of course to the provisions of the Special Fishery Regulations, to determine the conditions, as matter of policy, under which he shall exercise his discretion to issue a license. There being nothing in the regulations in conflict, the Minister, it is submitted, has the power to regulate the place of operation of any such cannery in the waters of British Columbia. He would, undoubtedly, have the right to see that such floating cannery did not interfere with navigation, and further he would have authority to see that such floating cannery did not interfere with the exercise of the privileges granted to fishermen and the operators of other canneries under their licenses.

15. As to the third question--First, with regard to the regulations cited in the question respecting the granting of licenses to fish: These regulations were sanctioned by the Governor in Council under the authority conferred by sec. 45 of the Fisheries Act, 1914, which reads as follows:-

"The Governor in Council may make regulations--

(a) for the better management and regulation of the sea-coast and inland fisheries;

(b) to prevent or remedy the obstruction and pollution of streams;

(c) to regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses; R.S., s. 54.

(f) prescribing the time and the manner in which fish may be fished for and caught;

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(g) to prohibit the export or sale of any fish or any portion of any fish from Canada or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

"2. Such regulations shall take effect from the date of the publication thereof in The Canada Gazette or from the date specified for such purpose in such regulations, and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (g) shall not take effect until after six months after the date of its publication in The Canada Gazette. R.S., s. 54, ss. 2.

"3. Every offence against any regulation made under this Act may be stated as in violation of this Act. R.S., s. 54, ss. 3."

16. The validity of the regulations in questions is not, and cannot be, the subject of question: they are regulations and restrictions for the control of fishing within the exclusive legislative authority of the Parliament of Canada to sanction: Attorney-General for the Dominion v. Attorneys-General for the Provinces, (1898) A.C. 700, 716; Attorney-General for British Columbia v. Attorney-General for Canada, (1914) A.C. 153, 171, 172. The only point of the question referred is whether the Minister, as the donee of the power to issue licenses under the regulations mentioned, is under a duty to exercise that power on all occasions, or, on the contrary, has a discretion to refuse to exercise it, on the application of (a) any British subject resident in the province of British Columbia, or (b) person so resident who is not a British subject. It is to be observed, in the first place, that by the express terms of the said regulations, no person other than a British subject is eligible to obtain a license thereunder. To that extent, therefore, the Minister has no discretion to exercise and no authority to issue a license to any person not a British subject.

17. It remains, however, to consider whether the exercise of his power to grant a license, on the application of a British subject resident in the province of British Columbia and payment of the prescribed fee, is obligatory or discretionary. In Julius V. Bishop of Oxford, 5 A.C. 214, there was much discussion by the great lawyers who decided the appeal upon the subject of the indicia which may be considered to determine whether a grant of authority to a public officer by the legislature is or is not coupled with a duty to exercise that authority. Lord Selborne observed (p. 235) with regard to the question before the House--whether there was an enforceable duty to exercise a power admittedly conferred--that "in general it is to be solved from the context, from the particular provisions or from the general scope and objects, of the enactment conferring the power." The judgments of the other Law Lords show that they also considered the decision of the question to be governed by the same considerations. It is to be noted, first, that the terms in which the said regulations are framed are inconsistent with the idea, on the one hand, that anyone, even though eligible to apply for and obtain a grant of a license, is intended to have a right to the grant of a license, or, on the other hand, that the Minister is placed under a duty or obligation to grant a license upon the application of any such person. By these regulations, fishing in the capacities and with the devices or instruments mentioned is, in effect, forbidden "except under a license from the Minister." The grant of a license makes legal and possible that which, without the license, there would be no right or authority to do. These words "except under a license from the Minister" and equivalent expressions prima facie are permissive or enabling only; they confer a faculty or power and do not of themselves do more than confer a faculty or power. Is there anything in the nature of the thing empowered to be done, anything in the object for which it is to be done, anything in the title of the person or persons for whose [illegible] exercised, which couples the power with a duty

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or makes it the duty of the Minister, in whom the power is reposed, to exercise that power when called upon to do so? The answer seems to be emphatically in the negative. These regulations were plainly designed, not to enforce rights in members of the public at common law in regard to fishing, but, on the contrary, to place such rights under restriction and control, in the interests of the protection and conservation and encouragement of the fishery for the benefit of the public generally. They were passed, professedly, in the language of the authorizing section of the Act (sec. 45), "for the better management and regulation of the seacoast and inland fisheries,"--"to regulate and prevent fishing,"--"to forbid fishing except under authority of leases or licenses" and for "prescribing the time and manner in which fish may be fished for and caught." Such being the objects for which the regulations were passed, it would manifestly frustrate any effective scheme of regulation if the Minister were bound on all occasions to issue a license to any person eligible to apply for same.

18. These considerations, it is respectfully submitted, justify the conclusion that the power conferred upon the Minister, in terms which are permissive or enabling only, was intended to be, in all cases, an absolutely discretionary authority to grant or refuse a license. Furthermore, if it be the true view that no legal duty is imposed upon the Minister towards the subject, then it must follow that, for the manner in which he exercises his discretionary authority, the Minister, as the agent in this matter of the Executive Government, is, in his capacity as such, solely responsible to the Government, which, in turn, is answerable in Parliament, and in no sense is he amenable in this matter to the jurisdiction of the courts. (See Lake Champlain and St. Lawrence Ship Canal Co. v. The King, 54 S.C.R. 461.)

It is further submitted that the Minister's authority under section 7a and 18 of the Fisheries Act, 1914, (assuming these sections or either of them to be intra vires of the Parliament of Canada), in regard to the granting of licenses, is of precisely the same nature as his authority under the said regulations.

EUGENE LAFLEUR,
A. B. MACDONALD.

No. 7.

Factum of the Province of British Columbia.

In 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, as to the constitutional validity of certain sections of the Fisheries Act, 1914. And of certain regulations passed thereunder.

Question 1. Are Sections 7a and 18 of the "Fisheries Act" (1914), or either of them, and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?--Answer. Fisheries mean: (a) The fish while in the water or (b) The right to take fish.

Halsbury, Vol. 14, p. 572, paragraph 1266:

"In law the term 'Fishery' means either an extent of land "covered with water containing fish, or a right to take fish or a "certain class of fish from a defined stretch of water."

Re British Columbia Fisheries case (1913), 47 S.C.R., p. 493. Duff, J., at p. 501 and 502:

Source: Nikkei National Museum, 2010-4-3-9-59
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"relating only to rights of fishing
"that is to say rights to take fish (not being Royal fish as
"to which our opinion is not desired) that as ferae naturae
"are where the fishing is public, the property of nobody until
"caught."

This also covers the scope considered by the judicial committee in Attorney General for Canada v. Attorney General for the Provinces (1898), Appeal Cases, p. 700; Attorney General for British Columbia v. Attorney General for Canada (1914), Appeal Cases, p. 153; and Attorney General for Canada v. Attorney General for Quebec (1921), 1 Appeal Cases, p. 413.

Fishing is completed when the fish are taken from the water by the fisherman, and taken into his certain possession. (Frederick Geering v. The Queen (1897), 27 S.C.R. p. 271.)

Sedgwick, J., at p. 281, says:-

"It is a continuous process beginning from the time when
"the preliminary preparations are being made for the taking of
"the fish and extending down to the moment when they are finally
"reduced to actual and certain possession. That, at least, is
"the idea of what 'fishing' according to the ordinary acceptation
"of the word, means, and that, I think, is the meaning which we
"must give to the word in the statutes and treaty."

See also King, J., at p. 298.

The Dominion Parliament has exclusive, regulative, legislative jurisdiction over the fisheries, i.e., for their protection and conservation while they are still in the water, and also over both public and private rights of taking fish.

The Queen v. Robertson (1882), 6 S.C.R., p. 52; Attorney General for Canada v. Attorneys General for the Provinces (1898) A.C., p. 700; Attorney General for British Columbia v. Attorney General for Canada (1914) A.C. 153; Attorney General for Canada v. Attorney General for Quebec (1921) 1 A.C., 413.

These cases expressly hold that the Dominion Government has no property interest in the fish (except in particular cases where the Crown in the right of the Dominion is the owner of lands on which there is situated non-tidal waters, in which cases the fish are profits of the soil).

In tidal waters the ownership of the fish is in no person until caught. The right of fishing is a public right in all the King's subjects or the public of Canada.

Attorney General for British Columbia v. Attorney General for Canada (1914) A.C. 153.

Viscount Haldane, L.C., at p. 169, says:-

"But their Lordships are in entire agreement with him (Lord
"Blackburn in Neill v. Duke of Devonshire, 8 A.C. 135 at p. 177)
"in his main proposition, namely, that the subjects of the Crown
"are entitled as of right not only to navigate but to fish in the
"high seas and tidal waters alike."

At page 170:-

"Since the decision of the House of Lords in Malcolmson v.
"O'Dea (10 H.L.C. 593) it has been unquestioned law that since
"Magna Charter no new exclusive fishery could be enacted by
"Royal Grant in tidal waters, and that no public right of fish-
"ing in such waters then existing can be taken away without
"competent legislation. This is now part of the law of England,

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"and their Lordships entertain no doubt it is part of "the law of British Columbia."

And at page 172 and 173, Infra.

In tidal water, the fish, when caught, become the property of the fisherman who converts them into his certain physical possession.

Frederick Geering v. The Queen (1897) 27 S.C.R. 271. King, J., at p. 298:

It also follows from the decision in Attorney General for British Columbia v. Attorney General for Canada, (1914) A.C. 153, that the right to fish carries with it the right to acquire the ownership of the fish.

When fish are legally caught they cease to be part of the Fisheries of Canada within the meaning of "Sea Coast and Inland Fisheries," B.N.A. Act, S. 91, S.S. 12. They are the products of the fisheries, but have passed completely outside of the sphere of fisheries in the same way as beef in a factory for canning meat has passed outside of the sphere of agriculture. They are no longer fish, but fish-food. A salmon cannery is a factory and has no more to do with the "Fisheries" than has a fruit Cannery or meat cannery with agriculture. It is outside the direct jurisdiction of the Parliament of Canada under "Sea Coast and Inland Fisheries." The King v. Eastern Terminal Elevator Company, (1925) S.C.R. 434. Mignault, J., at page 457, says:-

"I have not overlooked the appellant's contention that the "statute can be supported under S. 95 of the B.N.A. Act as being "legislation concerning agriculture. It suffices to answer the "subject-matter of the Act is not agriculture but a product of "agriculture considered as an article of trade. The regulation "of a particular trade, and that is what this statute is in sub-"stance, cannot be attempted by the Dominion on the ground that "it is a trade in natural products. What we have here is trade "legislation and not a law for the encouragement or support of "agriculture, however wide a meaning may be given to the latter "term."

Also Rex v. Manitoba Grain Company (1922) 66 D.L.R. 406, Manitoba Court of Appeal.

See Perdue, C.J.M., at page 415:-

"They deal with the business of selling grain upon commission. "The expression 'commission merchant' as defined in the Act means " 'any person who sells grain on commission'; (sec. 2 (t)). The "meaning attached to the expression is wide enough to include "persons who engage in transactions which are completely local in "character and which naturally come within the class of " 'property " 'and civil rights in the province,' under Sec. 92 (13) of the "B.N.A. Act, and would not fall within any of the enumerated "powers conferred on the Dominion Parliament by Sec. 91 of that Act."

And at page 416:-

"I do not think that Sec. 215 can be supported by the powers "conferred on the Dominion Parliament by Sec. 95 of the B.N.A. Act. "No doubt the term 'Agriculture' must be given as wide a meaning "as the word will naturally convey. It would, no doubt, cover "practical husbandry and tillage, the growing of crops, the "planting and care of fruit trees, the rearing of domestic animals, "the sciences applied to or bearing upon these subjects and perhaps "the disposition of the products by the producer; but I do not "think it would apply to these products when they have left his "hands and become articles of ordinary merchandise."

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Dominion, J. A., page 423:-

"There remains for consideration the point to which I "referred above as applicable to this case which was not "available in the Insurance case supra. It is to be found in "Sec. 95 of the B.N.A. Act, which provides:-

"This section greatly enlarges the powers of Parliament "in respect to farm products beyond the scope of its powers in "respect to the business of insurance.

"The question then arises--Is the business of selling "grain on commission or the receiving or soliciting consign-"ments of grain for sale on commission covered by the word " 'agriculture' in the statute? I do not think it is."

It is submitted that the power to license or in any way regulate fish or salmon canneries cannot be considered as ancilliary or incidental to the powers vested in the Parliament of Canada to regulate the fisheries, because everything which could be regulated under the heading of fisheries has ended before the dead fish reach the cannery. The fish has ceased to be a live fish in the water, where it could be protected, and the public right of taking the fish out of the water has also terminated with the catching of the fish, and converting it into private personal property. The fisherman sells the dead fish to the canner as an article of trade, and the canner manufactures it. The fisherman might just as well sell it to the fresh fish vendor or dry salt it, smoke and dry it, freeze it, or sell it to the consumer. If Parliament can demand a license from a cannery it would have the same jurisdiction to demand a license from the fresh fish vendor or the consumer. Parliament in effect is trying to regulate trading in dead fish, i.e., fish-food as articles of trade and commerce.

It may be contended for the Dominion that the easiest way to regulate the fisheries is to regulate the markets. No doubt there is a commercial connection between the fisheries and the markets for fish (canneries are but one of several markets for fresh fish), but this is not regulating fisheries but markets in the Province which are clearly matters of property and civil rights. It is submitted that in no juridical sense can the regulation of markets be considered "of necessity incidental" to the regulation of the fisheries. If the Dominion could go so far afield on the doctrine of incidental powers there would be little left within the jurisdiction of the Provinces. The Courts have ruled strictly against such claims.

The Rule to be kept in mind in determining whether powers are incidental or not is laid down in:

Attorney General for Ontario v. Attorney General for the Dominion (1896) A.C. 348, at pp. 359-360;
City of Montreal v. Montreal Street Rly. (1912) A.C. 333, at p. 343;
In British Columbia Electric Company v. V.V. & E.R. & N. Co. and the City of Vancouver (1913) 13 D.L.R. 308.

Duff, J., at p. 321, says:-

"In this view then in every case in which a conflict does "arise the point for determination must be whether there exists "such a necessity for the power to pass the particular enactment "in question as essential to the effective exercise of the "Dominion authority, as to justify the inference that the power "has been conferred."

It is submitted that jurisdiction to license fish canneries is not conferred upon Parliament by B.N.A. Act, Section 91, Subsection 12. And further that this jurisdiction is not conferred upon Parliament by any other subsection of Section 91, nor by any other provision in the B.N.A. Act. But such jurisdiction is clearly in the Provinces under Section 92, [illegible], and that the Provinces have exclusive

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Neither the "Peace, Order and Good Government" jurisdiction, nor the general jurisdiction conferred by Sec. 91, Subsec. 2. will support any encroachment by the Dominion upon the exclusive jurisdiction vested in the Provinces under Sec. 92.

Attorney General for Canada v. Attorney General for Alberta (1916) A.C. 588.

Viscount Haldane, L. C., at p. 595:-

"It must be taken to be now settled that the general "authority to make laws for the peace, order and good govern- "ment of Canada which the initial part of Section 91, B.N.A. "Act, confers does not, unless the subject matter falls within "some one of the enumerated heads which follow, enable the "Dominion Parliament to trench on the subject matter entrusted "to the Provincial legislatures by the enumeration in Section "92."

At p. 596:-

"Their Lordships think that as the result of these decisions "it must now be taken that the authority to legislate for the "regulation of trade and commerce does not extend to the regula- "tion, for instance, by a licensing system of a particular trade "in which Canadians would otherwise be free to engage in the "Provinces."

See re The Board of Commerce Act (1922) 1 A.C., p. 191.

Industrial Disputes Act v. Snider (1925) A.C. 406.

Viscount Haldane, page 409:-

"Nor does the invocation of the specific power in S. 91 to "regulate trade and commerce assist the Dominion contention. In "Citizens Ins. Co. v. Parsons (1881), 7 App. Cases, 96, at p. 112, "it was laid down that the collocation of this head (S. 91 (2)), "with classes of subjects enumerated of national and general "concern, indicates that what was in the mind of the Imperial "Legislature when this power was conferred in 1867 was regulation "relating to general trade and commerce. Any other construction "would, it was pointed out, have rendered unnecessary the specific "mention of certain other heads dealing with banking, bills of "exchange and promissory notes, as to which it had been signifi- "cantly deemed necessary to insert a specific mention. The "contracts of a particular trade or business could not, therefore, "be dealt with by Dominion legislation so as to conflict with the "powers assigned to the Provinces over property and civil rights "relating to the regulation of trade and commerce."

The operation of a cannery in British Columbia is very similar in principle to the operation of a coal mine in British Columbia.

Union Colliery Company of British Columbia, Limited v. Bryden (1899) A.C. 564.

Lord Watson at page 585:-

"There can be no doubt that, if S. 92 of the Act of 1867 had "stood alone and had not been qualified by the provisions of the "clause which precedes it, the provincial legislature of British "Columbia would have had ample jurisdiction to enact S. 4 of the "Coal Mines Regulation Act. The subject matter of that enactment "would clearly have been included in S. 92, Sub-sec. 10, which "extends to provincial undertakings such as the coal mines of the

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"appellant company. It would also have been included in "S. 92, Sub-sec. 13, which embraces 'Property and Civl "Rights in the Province'."

Canneries are also within the meaning of "matters of "a merely local or private nature in the Province."

Attorney General of Manitoba v. Manitoba License Holders' Association (1902) A.C. 73.

Lord Macnaghten, at page 79:-

"The judgment, therefore, as it stands, and the Report "of Her late Majesty consequent thereon show that in the "opinion of this tribunal matters which are 'substantially "of local or of private interest' in a province--matters "which are of a local or private nature 'from a provincial "point of view' to use expressions to be found in the "judgment--are not excluded from the category of 'matters "of a merely local or private nature,' because legisletion "dealing with them, however carefully it may be framed, may, "or must have an effect outside the limits of the province, "and may or must interfere with the sources of Dominion "revenue and the industrial pursuits of persons licensed "under Dominion statutes to carry on particular trades."

At page 80:-

"Unless the Act becomes a dead letter, it must interfere "with the revenue of the Dominion, with licensed trades in "the Province of Manitoba, and indirectly at least with the "business operations beyond the limits of the province. That "seems clear."

Definition of "Matters of a merely local or private nature in the Province."

See L'Union St. Jacques de Montreal v. Belisle (1874) L.R. 6, P.C. 31.

Lord Selborne at p. 35:-

"If there is nothing to control that in the 91st Section, "it would seem manifest that the subject matter of this Act "(dealing with staying payments to beneficiaries) is a matter "of a merely local or private nature in the province, because "it relates to a benevolent or benefit society incorporated "in the City of Montreal within the province which appears to "consist exclusively of members who would be subject prima "facie to the control of the Provincial Legislature. . . . "Clearly this matter is private; clearly it is local, so far "as locality is to be considered, because it is in the "province and in the City of Montreal; and unless, therefore, "the general effect of that head of Section 92 is for this "purpose qualified by something in Sec. 91, it is a matter "not only within the competency, but within the exclusive "competency of the provincial legislature."

In the Bryden case the Judicial Committee held the British Columbia Act was ultra vires the Province, because the real purpose of the Act was to exclude aliens, but it is apparent from the decision that any legislation directed towards the regulation of coal mines would have been within the powers of the province.

It is also submitted there is no distinction in principle between canneries in British Columbia and the undertakings or businesses, unsuccessfully attempted to be regulated by the Parliament of Canada, in the following cases:-

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City of Montreal v. Montreal St. Rly. Co. (1912) A.C. 333.

The regulation of the liquor traffic within a province, which was held to be a matter of a merely local or private nature in the province within the B.N.A. Act, Sec. 92, Sub.-sec. 16.

Attorney General for Ontario v. Attorney General for Canada (1896) A.C. 348.

Lord Watson at page 364:-

"A law which prohibits retail transactions and restricts "the consumption of liquor within the ambit of the province, "and does not affect transactions in liquor between persons in "the province and persons in other provinces or in foreign "countries, concerns property in the province which would be "the subject matter of the transactions if they were not "prohibited, and also the civil rights of persons in the "province."

Attorney General for Manitoba v. Manitoba License Holders' Association (1902) A.C. 73. Lord Macnaghten at page 79, supra.

The regulation of an insurance business within a province, which was held to be a matter of "Property and Civil Rights."

The Citizen's Insurance Co. v. Parsons (1881) 7 A.C. 96:-

Sir Montague Smith at page 115:-

"It is enough for the decision of the present case to say "that, in their view, its authority to legislate for the regula- "tion of trade and commerce does not comprehend the power to "regulate by legislation the contracts of a particular business "or trade, such as the business of fire insurance in a single "province, and therefore that its legislative authority does "not in the present case conflict or compete with the power over "property and civil rights assigned to the legislature of "Ontario by No. 13 of Sec. 92."

Attorney General for Canada v. Attorney General for Alberta (1916) A.C. 588, supra.

Reciprocal Insurance Legislation v. The King (1924) A.C. 328.

Re Insurance Contracts (1926) 2 D.L.R. 204, Court of Appeal for Ontario.

The regulation of trading in grain and the regulation of grain elevators, etc. (It is submitted there is no distinction between the jurisdiction over elevators or flour-mills and the jurisdiction over fish canneries.)

Rex v. Manitoba Grain Co. (1922) 68 D.L.R. 406, Manitoba Court of Appeal.

The King v. Eastern Terminal Elevator Co. (1925) S.C.R. 434, Duff, J., at page 446.

Tremble v. Copling (1927) I D.L.R. 717, Alberta Court of Appeal.

The regulation of dealing in and marketing of merchandise:-

Attorney General for Canada v. Attorney General for Alberta. The Board of Commerce case (1922) 1 A.C. 191, which held this to be an

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The regulation of employment.

Re Industrial Disputes Act against Snider (1925) A.C. 406.

In the above cases (except the Bryden case) the Courts held the true subject matter was under the jurisdiction of the Provinces, and the Dominion Legislation attacked in each case did in its true aspect its object and purpose relate to matters within the B.N.A. Act, S. 92, and were not within the specific enumerated heads of the B.N.A. Act, S. 91, and that the legislation was not ancilliary to any jurisdiction conferred by such enumerated heads of S. 91.

Sec. 18 of the "Fisheries Act" is open to objection on the ground it is purely Provincial in terms, scope and application.

Attorney General for Ontario v. Attorney General for the Dominion (1896) A.C. 348.

Lord Watson at p. 367:

> "The old Temperance Act of 1864 was passed for Upper "Canada, or, in other words, for the Province of Ontario; and "its provisions being confined to that province only, could not "have been directly enacted by the Parliament of Canada. In the "present case the Parliament of Canada would have no power to "pass a prohibitory law for the Province of Ontario; and could, "therefore, have no authority to repeal in express terms an Act "which is limited in its operation to that Province."

It is submitted that where the Dominion acting under the provisions of Sec. 91 passes legislation which may override Provincial powers under Sec. 92, then the Dominion Legislation must be general in character and be truly Canadian legislation, Dominion wide in scope and application, and in no sense may it be aimed at a single Province, or applicable to but one Province. If Parliament may pass legislation on any matter under Sec. 91, which is purely Provincial in terms, scope and application, Parliament has powers inconsistent with the autonomy of the Province, because differential legislation would leave a Province helpless. It would mean Political domination by the Dominion. This could not have been in the minds of the Framers of the B.N.A. Act, and the decisions of the Judicial Committee hold that within their sphere the Provinces are co-ordinate sovereign powers with the Dominion, and this independence cannot be made subservient to the Dominion by any indirect means.

This principle that Dominion legislation under Sec. 91 must be general in scope is given effect to by the Judicial Committee in the following cases:-

> (a) In dealing with the powers of Parliament under the "Peace, Order and Good Government" provisions and the "Regulations of Trade and Commerce" heading of Sec. 91.
>
> Citizens' Insurance Company of Canada v. Parsons (1881) 7 A.C. 96.
>
> Sir Montague E. Smith, at p. 113:-
>
> "Construing, therefore, the words 'regulation of trade and "commerce' by the various aids to their interpretation above "suggested, they would include political arrangements in regard "to trade requiring the sanction of Parliament, regulation of "trade in matters of interprovincial trade concern, and it may "be that they would include general regulation of trade affect-"ing the whole Dominion."
>
> (b) The Court appeared to favor this principle in dealing

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Lord Haldane, L.C., at p. 586:-

"But since that case was decided the question has been "more completely sifted before the Committee in Parson's case "and it was found absolutely necessary that the literal meaning "of the words should be restricted, in order to afford scope "for powers which are given, exclusively to the provincial "legislature. It was there thrown out that the powers of "regulation given to the Parliament meant some general or inter-"provincial regulation. No further attempt to define the subject "need now be made, because their Lordships are clear that if they "were to hold that this power of regulation prohibited any "provincial taxation on the persons or things regulated, so far "from restricting the expressions, as was found necessary in "Parson's case, they would be straining them to their widest "conceivable extent."

(c) And to Bankruptcy and Insolvency, Sec. 91 (21).

Cushing v. Dupuy (1880) 5 A.C., p. 409.

Sir Montague E. Smith, at p. 415-416:-

"It is therefore to be presumed, indeed it is a necessary "implication, that the Imperial Statute, in assigning to the "Dominion Parliament the subjects of bankruptcy and insolvency, "intended to confer on it legislative power to interfere with "property, civil rights, and procedure within the Province, so "far as a general law relating to those subjects might affect "them."

(d) And to aliens, S. 91, S.S. 25.

Brooks-Bidlake & Whittall, Limited v. Attorney General for British Columbia (1923) 2 D.L.R. 189 (P.C.O.

Viscount Haldane, L.C., at p. 192:-

"Section 91 reserves to the Dominion Parliament the general "right to legislate as to the rights and disabilities of aliens "and naturalized persons, but the Dominion is not empowered by "that section to regulate the management of the public property "of the Province, or to determine whether a grantee or a "licensee of that property shall or shall not be permitted to "employ a person of a particular race."

In re Oriental Orders-in-Council (1922), 65 D.L.R., page 577 (Later sustained by the Privy Council).

Duff, J., at p. 594-5:-

"The Dominion authority in respect of aliens it must be "taken, I think, in consequence of the decision in Bryden's "case comprehends the right to define the rights and dis-"abilities of aliens in a general way. But whether it com-"prehends the right even by general enactment to attach to "grantees of rights in provincial property a special disability "in relation to the employment of aliens, is, I think, at least "gravely questionable; and the difficulty is not diminished "when one considers the question in relation to grants of "public moneys. Assuming aliens to be under no applicable "general disability is it truly legislation on the subject of "aliens to prohibit the employment of them in circumstances in "which they are to be paid out of public funds?"

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Masten, J. A., at p. 216:-

"But the granting of subjective status and powers of "the company is one thing, and the regulation of the objective "exercise of its powers in a particular Province is quite "another thing."

(e) And to Dominion Companies.--

John Deere Plow Company, Limited, v. Wharton (1915) A.C. 330.

Viscount Haldane, L.C., at p. 340:-

"Their Lordships find themselves in agreement with the "interpretation put by the Judicial Committee in Citizens "Insurance Co. v. Parsons (1) on head 2 of Sec. 91, which "confers exclusive power on the Dominion Parliament to make "laws regulating trade. This head must, like the expression " 'Property and Civil Rights in the Province' in Sec. 92, "receive a limited interpretation. But they think that the "power to regulate trade and commerce at all events enables "the Parliament of Canada to prescribe to what extent the "powers of companies the objects of which extend to the "entire Dominion should be exerciseable, and what limitations "should be placed on such powers."

It is submitted this principle must be applicable in the case of taxation, Sec. 91 (3) or the autonomy of the Province would be lost, and that the rule must be applicable to all matters falling under B.N.A. Act, Sec. 91, for if the rule is applicable under the general provisions of Sec. 91, which gives no power to Parliament to override Provincial powers, a fortiori, it must be so where the specific heads of Sec. 91 enable Parliament to override Provincial Jurisdiction under Sec. 92.

The discriminatory tax cannot be explained, as being imposed for the purpose of meeting the cost of the fishery protection service. In the first place it is not a fishery matter, and in the second place Canada agreed to pay the cost of Protecting the Fisheries of British Columbia out of the general revenues of Canada.

See Act of Union, Schedule S. 5, E, and S. 10:

(5) "Canada will assume and defray the charges for the following services:

"A. Salary of the Lieutenant-Governor;
"B. Salaries and allowances of the Judges of the Superior Courts and the County or District Courts;
"C. The charges in respect to the Department of Customs;
"D. The Postal and Telegraphic Services;
"E. Protection and encouragement of fisheries;
"F. Provision for the Militia;
"G. Lighthouses, buoys, and beacons, shipwrecked crews, quarantine and marine hospitals, including a marine hospital at Victoria;
"H. The Geological Survey;
"I. The Penitentiary.

"And such further charges as may be incident to and connected with "the services which, by the 'British North America Act, 1867,' "appertain to the General Government, and as are or may be allowed "to the other Provinces."

(10) "The provisions of the 'British North America Act, 1867' "shall (except those parts thereof which are in terms made, or by "reasonable intendment may be held to be specially applicable to "and affect, one and not the whole of the Provinces now com- "prising the Dominion, and except so far as the same may be varied

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"same way and to the like extent as they apply to the other "Provinces of the Dominion, and as if the Colony of British "Columbia had been one of the Provinces originally united "by the said Act."

Sections 7a and 18 of the "Fisheries Act" are prohibitive in terms and are beyond any regulative jurisdiction which the Dominion could exercise under B.N.A. Act, Section 91, Subsection 12.

The jurisdiction in Parliament under B.N.A. Act, Sec. 91, Subsec. 12 is purely regulative. (The fishery cases, supra)

Attorney General for Canada v. Attorney General for Quebec (1921) 1 A.C., p. 413.--

Viscount Haldane, L.C., at p. 420:-

"In other words the capacity conferred by Sec. 91 extended "to regulation only, however far regulation might proceed."

The principal jurisdiction being regulative any ancillary jurisdiction must also be only regulative. And if it were held that Parliament had jurisdiction over fish canneries as incidental to its jurisdiction over fisheries, it would be a purely regulative jurisdiction and would not extend to the prohibition of the operation of canneries.

Attorney General for Ontario v. Attorney General for Canada (1896) A.C. 348.--

Lord Watson at p. 363:-

"A power to regulate, naturally, if not necessarily, assumes, "unless it is enlarged by the context, the conservation of the "thing which is to be made the subject of regulation. In that "view, their Lordships are unable to regard the prohibitive "enactments of the Canadian statute of 1886 as regulations of "trade and commerce."

City of Toronto v. Virgo (1896) A.C. 98.--

Attorney General for Canada v. Attorney General for Quebec (1921) 1 A.C., page 413.

At page 428:-

"Even under the guise of their taxing powers the Government "of a Province could not confer any exclusive or preferential "rights of fishing on individuals or classes of individuals, "because such exclusion or preference would import regulation and "control of the general right of the public to fish."

It is submitted the same reasoning would hold that any exclusive or preferential rights of canning fish conferred by the Dominion would import a regulation and control of Property and Civil Rights in the Province, and total prohibition imports complete jurisdiction over the right prohibited.

In the John Deere Plow case, the Judicial Committee held that the Province must exercise its jurisdiction generally so as not to discriminate against Dominion companies, nor to deprive Dominion companies of any of their status by prohibiting their operation in the Province. By similar reasoning the Dominion, when exercising jurisdiction affecting Provincial matters, should legislate in a general way, and so as not to discriminate amongst people in the enjoyment of their Property and Civil Rights in the Provinces, nor to prohibit the enjoyment of such rights.

It is submitted jurisdiction to prohibit the operation of canneries in the Province cannot be held to be incidental to the regulation of the

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The Dominion cannot make the payment of a tax a condition precedent to citizens of the Province exercising their civil rights of owning and operating canneries in the Provinces. If the Dominion has taxing powers over canneries they must be imposed as taxes and collected as taxes, i.e., by action.

Great West Saddlery Co. v. The King (P.C.) (1921) 58 D.L.R., p. 1.

Viscount Haldane, L.C., at p. 19:-

> "Nevertheless the methods by which the direct taxation is "to be enforced may be restricted to the bringing of an action "with the usual consequences, which was all that was decided "to be legal in Bank of Toronto v. Lambe."

Question 2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?--Answer. It is submitted that the jurisdiction of the Parliament of Canada over a fish cannery on a ship or float would be in no respect different from its jurisdiction over a fish cannery on land.

The jurisdiction would have to rest on the doctrine of incidental powers, as being strictly "necessarily incidental" to the jurisdiction to regulate the "fisheries."

It is submitted that in no sense the further jurisdiction of dictating where the cannery might operate, could be considered "necessarily incidental" Such power of interference is exclusively within the jurisdiction of the provinces. The Dominion cannot by such indirect means appropriate to itself the jurisdiction of the provinces; what the Dominion could not do directly it could not do indirectly.

Re Reciprocal Insurance Legislation (1924), A.C. 328.

Great West Saddlery Co. v. The King (P.C.) (1921), 58 D.L.R. 1.

Viscount Haldane, L.C., at p. 25:-

> "It is sufficient to observe once more that in such matters "what cannot be done directly can no more be effected 'by indirect " means.' "

The Dominion Parliament has jurisdiction over navigation and shipping, B.N.A. Act, Sec. 91 (10). This is a purely regulative jurisdiction. It does not enable Parliament (a) To stop shipping; (b) To determine what cargo may be handled; (c) Or where in a Province or on the high seas navigation and shipping may be carried on.

For the meaning of "navigation and shipping" as used in the B.N.A. Act, Sec. 91 (10):-

McMillan v. The South West Boom Co. (1878) 17 N.B.R., 715 (Court of Appeal).

1 Pugsley v. Burbidge, 715.

Allen, C. J., at p. 730:-

> "The question depends upon the construction to be given to "the words 'navigation and shipping' in the 91st Section of the "British North America Act (1867) and to certain clauses of the "92nd Section. If the right to authorize the erection of booms "comes under the heading of 'navigation,' then undoubtedly it is "one of the subjects over which Parliament has exclusive right of "legislation, and the several Acts of the Provincial Legislature "containing the Charter of the Boom Company and authorizing the

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"consideration of the matter I am inclined to think that the "word 'navigation' used in connection with 'shipping' was "not intended to have such a construction; but that it was "used in the sense in which it is used in the several Acts "of Parliament of Great Britain relating to 'Navigation and "Shipping' and in the Act of the Parliament of Canada, 31 "Vic., Ch. 58, viz.: the right to prescribe rules and "regulations for vessels navigating the waters of the "Dominion. It appears by the preamble of that Act that such "a law was in force in Canada previous to the Union, and, "therefore, the delegates would necessarily have had the "subject before them when they agreed upon the terms of the "B.N.A. Act."

"The Acts then were entirely within the powers given to "the Provincial Legislature unless the construction of the "word 'navigation' is, as has been contended for by the "plaintiff's Counsel, for in that case the general power over "all local works and undertakings must yield to the particular "power given to the Dominion Parliament over the subject matter "of navigation."

"But I think that is not the proper construction of the "term, and, therefore, that the Acts in question are not ultra "vires."

For the meaning of "navigation." The "Warkworth," 53 L.J.P.D. & A. 65.

Fry, L. J., at p. 66:-

"We have been referred to the definitions in the dictionaries "of the word 'navigation'. It is defined as the science or art "of conducting a ship from one place to another. This includes "the supply of necessary implements and skilful mariners. . . . "Navigation includes two things, the supply of the instruments or "organs of the ship, and the living instruments or seamen."

Orr-Ewing v. Colquhoun (1877) 2 A.C. 839.

Per Lord Hatherley:

"There are two totally distinct and different things. One "is the right of property, the other is the right of navigation. "The right of navigation is simply a 'right of way'."

It is submitted that "navigation and shipping" is limited in its operation to making general regulations of Canadian-wide application providing for the proper manoeuvering of ships and for the protection of shipping and the safety and protection of passengers, crews and cargoes, and the registration and ownership of British Ships in Canada, and such kindred subjects.

Coulson & Forbes Law of Waters, 4th Edn., at page 437:-

"The right of navigation is a right of way which may be "enjoyed in the sea, in tidal and in non-tidal waters; and as such "it includes all rights necessary for the full enjoyment and "exercise of the rights of convenient passage, such as the right "to pass, and to ground and to anchor, to remain for a reasonable "time for the purposes of loading and unloading, or completing "repairs; or of waiting till the wind or weather or, probably "also, the season permits the ship to leave.

"The consideration of this right involves not only the "discussion of the nature of the right itself, but also that of "the rules governing its exercise. These, in the case of the sea, "embrace (in addition to the mere rules of the road) matters of "considerable extent and importance, such as the seaworthiness

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"regulated by the Merchant Shipping Laws, as well as the
"various questions arising in connection with the jurisdiction
"of the Court of Admiralty."

Parliament may require a license from ships as incidental to its power to regulate navigation and shipping, and it may require a license from the navigators as incidental to the same matter. See "The Warkworth" (Supra). But it cannot demand a license from the shipper of goods, or the owner of cargoes, or the charterer of the ship.

If the claim set up by the Dominion is to be supported on the jurisdiction of Parliament over "Navigation and Shipping" Parliament would have the same right to demand a license from every shipper of goods by water. The contention is not limited to a claim to license ships, but extends to the additional power to license the businesses which employ ships, such as the timber industries, which hires, charters, or purchases a ship to carry lumber, or which operates a sawmill on a ship, or the mining industry if the ship carries coal or ore, or operates a concentrating plant on it. It is submitted there is no evidence of any such jurisdiction having been exercised under the head of "navigation and shipping" at the time of Confederation; that neither the Imperial Parliament nor the Framers of the B.N.A. Act could have had such a jurisdiction in mind, and that the jurisdiction now sought cannot be considered in any sense important to the regulation of "navigation and shipping," and is outside the ambit of "incidental powers." The "pith and substance" of the jurisdiction sought is the regulation of industries which make use of shipping.

It is also submitted that jurisdiction to regulate "navigation and shipping" does not carry with it the further power to dictate where navigation and shipping may be carried on: to say that ships may call at Prince Rupert, but not at Vancouver, or to dictate the destination of the ship, or to say that a ship may engage in the cannery business in Northern British Columbia waters but not in Southern British Columbia waters.

The choice of location where industry chooses to engage in the fish cannery business is purely a Provincial matter, and comes under neither Sub-sec. 10 nor Sub-sec. 12, of Sec. 91 of the B.N.A. Act. Such matters have to do exclusively with the enjoyment of property in the Provinces and the exercise of civil rights in connection with such property in the Province.

It is proper to consider English Statutes and Canadian Statutes prior to Confederation as an aid to the meaning of terms used in the B.N.A. Act. See City of Halifax v. The Estate of James P. Fairbank (P.C.) (1927) 4 D.L.R. 945.

See Attorney General for Quebec v. Queen Insurance Company (1878) 3 A.C., p. 1090.

Master of the Rolls (Sir G. Jessel) at p. 1099:-

"With regard to the precedents cited it was alleged on behalf
"of the appellants, that though at first sight it might appear that
"this was not a license, and that this was not the price paid for
"a license, yet it could be shown by the existing legislation in
"England and America that licenses were constantly granted on
"similar terms; and that therefore in construing the Dominion Act
"we ought to construe it with reference to the other subsisting
"legislation. Their Lordships think that a very fair argument."

Also McMillan v. South West Boom Co., supra.

Such restrictive regulations may not be supported as incidental to either the Fisheries or to Navigation, because they are not in their nature either Fishery or Navigation matters.

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In dealing with the attempt of the Dominion to appropriate to itself jurisdiction over insurance contracts through its criminal jurisdiction.

Viscount Haldane, L.C., says at p. 198:-

> "For analogous reasons the words of head 27 of Sec. 91 "do not assist the argument for the Dominion. It is one thing "to construe the words 'the Criminal Law, except the Constitu- "tion of Courts of Criminal Jurisdiction, but including the "procedure in criminal matters,' as enabling the Dominion "Parliament to exercise exclusive legislative power where the "subject matter is one which by its very nature belongs to the "domain of criminal jurisprudence. A general law, to take an "example, making incest a crime, belongs to this class. It is "quite another thing, first to attempt to interfere with a "class of subject committed exclusively to the Provincial "Legislature, and then to justify this by enacting ancillary "provisions, designated as new phases of Dominion Criminal law "which require a title to so interfere as basis of their "application."

See also in re Reciprocal Insurance Legislation (1924) A.C. 328, Duff, J., at p. 340.

The "true nature and character" of such regulation would be the regulation of canneries as matters of Property and Civil Rights in the Province.

Question 5.--Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of Section 45 of the Fisheries Act, 1914) respecting licenses to fish, viz., Sub-section 3 of Section 14; paragraph (a) or (b) of Sub-section 1 of Section 15 or paragraph (a) of Sub-section 7 of Section 24 of the said regulations, or under said Section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada), has

(a) any British subject resident in the Province of British Columbia, or

(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not;

Answer.--Dealing first with the right to receive a license to fish.

It is submitted that all subjects of the King, resident in Canada, have the right to fish in tidal waters.

Attorney General for British Columbia v. Attorney General for Canada, 1914, A.C. 153.

Viscount Haldane, L.C., at page 172-173:

> "It was a right open equally to all the public, and there- "fore, when by Sec. 91 sea coast and inland fisheries were placed "under the exclusive legislative authority of the Dominion Parlia- "ment, there was in the case of the fishing in tidal waters "nothing left within the domain of the Provincial Legislature. "The right being a public one, all that could be done was to "regulate its exercise, and the exclusive power of regulation was [illegible] Dominion Parliament. Taking this in connection

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"shipping' their Lordships have no doubt that the object and "the effect of these legislative provisions were to place "the management and protection of the cognate public rights "of navigation and fishing in the sea and tidal waters ex- "clusively in the Dominion Parliament, and to leave to the "Province no right of property or control in them. It was "most natural that this should be done, seeing that these "rights are the rights of the public in general and in no "way special to the inhabitants of the Province."

The jurisdiction of the Parliament of Canada over "Fisheries" is purely a regulative jurisdiction.

The Fishing cases, supra.

It is not yet quite clear that the capacity in Parliament to regulate Fisheries enables Parliament in the case of Tidal Water Fisheries (where the right is a public right) to abrogate the right.

See same case at p. 427-428:

"But the decision of this point does not conclude the "question before them, which is not whether the Dominion has "power to grant exclusive rights of fishing in waters the "property of a Province, but whether the Provincial Government "has power to grant such an exclusive right of fishing in "tidal waters. When the Act of 1865 was passed, the Govern- "ment of the United Provinces of the Upper and Lower Canada "could unquestionably confer on itself the capacity to do this. "For it had full power to make laws for the peace, order and "good government of the Provinces without any such restrictions "as affected the right of a Province under the B.N.A. Act of "1867, and it could consequently abrogate the fishing rights "not only of private persons but of the public. After Con- "federation, neither the Dominion nor any Province possessed "this power in its integrity. The Dominion Parliament having "exclusive jurisdiction over sea coast and inland fisheries, "could regulate the exercise of all fishing rights, private, "and public alike. As the public right was not proprietary, "the Dominion Parliament has in effect exclusive jurisdiction "to deal with it. But as to private rights, the Provincial "Legislature has exclusive jurisdiction so long as these "present no other aspects than that of property and civil "rights in the Province, or of matter of a local or private "nature within it, in the meaning of the words of Sec. 92.... "As this Board said in the British Columbia Fisheries case, "15 D.L.R. 308 (1914) A.C. 155, the object and effect of the "provisions of Sec. 91 were to place the management and "protection of the cognate public rights of navigation and "fishing in the sea and tidal waters exclusively in the "Dominion Parliament and to leave to the Province no right of "property or control in them."

If Parliament is "the Competent Legislature" to abrogate the public right of fishing, by first abrogating the right Parliament could then confer a discretion upon the Minister to refuse a license to fish. Because the public would then have no rights in the matter beyond what Parliament saw fit to give.

This course has not been adopted. The Public Right of fishing has not been abrogated. The right exists, and no discretion has been reposed in the Minister to refuse a license to fish.

Section 45 of the "Fisheries Act" reads as follows:-

"The Governor in Council may make regulations:-

"(a) For the management and regulation of the sea-

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coast and inland fisheries;

"(b) To prevent or remedy the obstruction and pollution of streams;

"(c) To regulate and prevent fishing;

"(d) To prohibit the destruction of fish;

"(e) To forbid fishing except under authority of leases or "licenses; R.S., S. 54;

"(f) Prescribing the time when and the manner in which fish may be fished for and caught;

"(g) To prohibit the export or sale of any fish or any portion of any fish from Canada or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

"(2) Such regulations shall take effect from the date of the "publication thereof in The Canada Gazette or from the date "specified for such purpose in such regulations and such regulations "shall have the same force and effect as if enacted herein, notwith- "standing that such regulations extended, vary or alter any of the "provisions of this Act respecting the places or modes of fishing "and shall be printed in the prefix in the next succeeding issue of "the Dominion Statutes: Provided that any regulation made under "the provisions of paragraph (g) shall not take effect until after "six months after the date of its publication in The Canada Gazette. "R.S., S. 54, SS. 2.

"3. Every offence against any regulation made under this Act may "be stated as in violation of this Act. R.S., S. 54, SS. 3."

It is submitted that all the regulations submitted in Question 3 are ultra vires of Section 45 of the "Fisheries Act." Subsection (e) does not enable the Minister to refuse a license where the right to fish exists. There is a duty upon the Minister to issue the license to any applicant who has a right to fish.

See Craies on Statute Law (1923) 3 Edn., at p. 251.

Julius v. Bishop of Oxford, 5 A.C. 214 at p. 224;

Craies on Statute Law, p. 251:-

"Statutes passed for the purpose of enabling something to be "done, are usually expressed in permissive language, that is to "say, it is enacted that 'it shall be lawful' &c., or that 'such "and such a thing may be done.' 'Prima facie these words import "a discretion, and they must be construed as discretionary unless "there be anything in the subject-matter to which they are applied, "or in any other part of the statute, to show that they are meant "to be imperative.' The words 'it shall be lawful' are words, "said Lord Cairns in Julius v. Bishop of Oxford, 'making that "legal and possible which there would otherwise be no right or "authority to do. They confer a faculty or power, and they do "not of themselves do more than confer a faculty or power. But "there may be something in the nature of the thing empowered to "be done, something in the object for which it is to be done, "something in the conditions under which it is to be done, some- "thing in the title of the persons for whose benefit the power is "to be exercised, which may couple the power with a duty, and "make it the duty of the person in whom the power is reposed to "exercise that power when called upon to do so'."

Craies p. 252:-

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"It is, however a well recognized canon of construction, "as Lord Cairns said in Julius v. Bishop of Oxford, that " 'where a power is deposited with a public officer for the "purpose of being used for the benefit of persons who are "specifically pointed out, and with regard to whom a defini- "tion is supplied by the Legislature of the conditions upon "which they are entitled to call for its exercise, that power "ought to be exercised and the Court will require it to be "exercised'."

Also see the case of Rex v. Barlow, 2 Salk, 609.

And Craies at page 252:-

"When a Statute authorizes the doing a thing for the sake "of justice or the public good the word 'may' means 'shall,' "and the rule has been acted upon up to the present time."

In re Neath and Brecon Rail Company, 9 Ch. Appeals, 254:-

"It shall be lawful, that said Lord James, is the usual "courtesy of the legislature in dealing with the judicature, "but when so employed this expression 'it shall be lawful' "means in substance 'it shall not be lawful to do otherwise.' "

See also The King against the Local Board (1916).

2 Irish Reports, page 18, and cases there cited.

Archibald against The King, 39 D.L.R., 166.

It is further submitted that these regulations deal with matters in their pith and substance the regulation of employment a matter of "property and civil rights" in the Province, and not a "Fishery Matter."

The regulation of employment is a Provincial matter.

Industrial Disputes Act v. Snider, supra.

Quong Wing v. The King (1914) 18 D.L.R., p. 121 (Supreme Court of Canada).

(re Employment of white girls in Chinese Restaurants.)

This is so even where aliens are concerned.

Cunningham v. Tomey Homma (1903) A.C. 151.

Lord Chancellor at page 156. Referring to B.N.A., Act, Sec. 91, Sub-sec. 25:

"The truth is that the language of that section does not "purport to deal with the consequences of either alienage or "naturalization. It undoubtedly reserves these subjects for "the exclusive jurisdiction of the Dominion--that is to say, "it is for the Dominion to determine what shall constitute "either the one or the other, but the question as to what con- "sequences shall follow from either is not touched. The right "of protection and the obligations of allegiance are necessarily "involved in the nationality conferred by naturalization; but "the privileges attached to it, where these depend upon residence "are quite independent of nationality."

Re Insurance Contracts (1926) 2 D.L.R., 204.

Masten, J. A., at page 216, supra.

Brooks-Bidlake & Whittall, Limited v. Attorney General for British Columbia (1923), 2 D.L.R. 189.

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Duff, J., at p. 594-5, supra.

If the right to employ labor is to be encroached on as incidental to the regulation of fisheries, it is submitted it must be done by legislation of Dominion-wide application. (See argument under Question 1.)

The regulations submitted under Question 3 require workmen who are not fishermen to take out fishing licenses. It is submitted this is in excess of jurisdiction. A captain of a ship, which ship is engaged in the fishing business, is a navigator and not a fisherman. His employment is the same whether the ship is engaged in fishing or in carrying freight. Workmen on a trolling boat may be engineers or cooks, and their occupation is the same whether they are afloat or on land, and a puller of a row boat, who rows a boat for a licensed fisherman to fish from, is a laborer. The regulations imposed are too remote from the "Fisheries." If the use of the sort of boat in question is permitted, and the method of fishing in question is permitted, and the actual fisherman who controls the boat is licensed, it is submitted the licensing of workmen on the boats cannot be considered as incidental to the regulation of the Fisheries.

It is submitted the regulative power of Parliament to license is exhausted with the licensing of the actual fisherman.

It is submitted there is nothing to show that power to discriminate or to refuse a license to either fishermen or cannery operators is necessarily incidental to the power to regulate fisheries. Whether this power is necessary is as much a question of fact as of law.

The right to operate a fish or salmon cannery in British Columbia is a matter of "Property and Civil Rights in the Province," and any jurisdiction which the Dominion might have to license them would be ancillary in nature. As the chief jurisdiction is regulatory the ancillary jurisdiction would also be limited to regulation, and would have to be exercised in a general way so as not to discriminate between operators, because to discriminate amongst canneries would be the regulation of canneries in their Provincial aspect, and would not be the regulation of fisheries.

Attorney General for Canada v. Attorney General for Quebec. (1921) 1 A.C., page 413, at page 428, supra.

W. E. WILLIAMS,

Of Counsel for the Province of British Columbia.

No. 8.

Factum of the Attorney General for the Province of Quebec.

In the Supreme Court of Canada.

In the Matter of a Reference as to the Constitutional Validity of certain sections of the Fisheries Act, 1914.

The Attorney General intervenes in this matter by leave granted by order of the Honourable Mr. Justice Newcombe, dated the 21st day of October, 1927, and submits that the answers to questions referred Nos. 1 and 2, should be in the negative.

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Section 7a of the Fisheries Act, 1914, provides that:-

"No one shall operate a fish cannery for commercial "purposes without first obtaining an annual license therefor "from the Minister. Where no other fee is in this Act pres- "cribed for a cannery license, the annual fee for each such "license shall be one dollar."

The cases which have come before the Judicial Committee of His Majesty's Privy Council to which reference will be made at the hearing show that the power of the Parliament to legislate under section 91, paragraph 2, of the British North America Act, 1867, "The Regulation of Trade and Commerce," is strictly limited, and that such a provision as in section 7a of the Fisheries Act, 1914, cannot be justified under this heading.

Clearly a fish cannery could only be established for commercial purposes, but this is a purely provincial matter under section 92, item 10, or 13, or 16, or some or one of the subjects in these items mentioned.

Neither does the legislation in 7a come under the subject of item 12 of s. 91 "Sea Coast and Inland Fisheries," for it is not a question of fisheries but of dealing with fish, a subject of commerce.

There is in section 91 nothing which can authorise the Parliament to prohibit any local works or undertakings, property or civil rights in the Province or any other matter of a merely local or private nature in the Province by imposing an obligation to obtain a license of the Minister of Fisheries or to exact fees for the issue of such license.

The Parliament of Canada has no power to prohibit the carrying on of any lawful trade or business within any Province without a license therefor from the Dominion Government or any Minister thereof.

Whilst there is no authority in section 91 for the issuing of licenses for carrying on any trade or business, section 92 does provide that the exclusive power of the provincial legislatures includes item 9: "Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial Local or Municipal Purposes."

It is submitted that by the omission of any such authority from section 91 and the express provision in 92 the latter must be construed as bringing the subject of trading licenses exclusively within the power of provincial legislatures.

The provision of section 7a of the Fisheries Act, 1914, is obviously not a taxing provision as the amount to be derived from all such licenses would be a derisive one.

The same remarks apply to section 18, unless it is suggested that it provides only for a taxing license, but should this be held to be the case and to render the section valid, it is submitted that the Court should, in that event, in answering question 3 respecting this section, say that the granting or refusing of the license is not discretionary.

The Attorney General of the Province of Quebec further adopts the factum submitted for the Province of British Columbia.

CHARLES LANGLOIS,

AIME GEOFFRION,

Of Counsel for the Attorney-General of Quebec.

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Factum on Behalf of the Fishermen of Japanese Origin in the Province of British Columbia.

In the Supreme Court of Canada.

In the Matter of a Reference as to the Constitutional Validity of certain sections of the Fisheries Act, 1914.

I.

STATEMENT OF FACTS.

This is a reference by the Governor-in-Council under an order dated the 19th day of October, 1927, to determine the validity of certain sections of the Fisheries Act, 1914 (4 and 5 Geo. V. c. 8), and of certain of the regulations made thereunder.

The Fisheries Act was passed by the Parliament of Canada on the 27th of May 1914, and the first question is, whether sections 7a and 18 contain such provisions as are beyond the legislative competence of Parliament. These sections read as follows:

> 7a. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar.
>
> 18. No one shall operate a salmon cannery or salmon curing establishmant in British Columbia for commercial purposes except under a license from the Minister.

Both sections deal with the same subject-matter, viz., the operation for commercial purposes, in the one case of a fish cannery, in the other case, of a salmon cannery or salmon curing establishment in British Columbia.

II.

ARGUMENT.

The Fisheries Act was, no doubt, enacted by Parliament under head (12) of section 91 of The British North America Act, viz., "sea-coast and inland fisheries." It is submitted that these two sections cannot possibly be supported under that head. The power to legislate with regard to fisheries must be confined to regulating activities on the sea or the inland waters, where fishing is carried on, for otherwise the authority of Parliament would be unjustifiably extended. For instance, one of the subjects of legislation confided to Parliament is shipping and navigation. Now, if the power to legislate upon the subject of fisheries could be stretched to include canneries or fish curing plants, then the power to legislate with regard to shipping could be stretched to include ship-building plants; nor could the line be drawn there: marine-engine works, boiler works, ships-chandlers and a host of allied trades are all concerned with shipping, as well as marine insurers and customs brokers. Can it be that, because all these businesses derive the subject matter of their activities from shipping, therefore they can be prohibited by Parliament from operating a licence from a Minister of the Dominion?

It is true that canneries and curing plants require fish, though not necessarily fish caught in Canadian waters, but then bill-brokers and pawn-brokers require money in their business, and money may be obtained from banks, which are a special subject of Dominion legislation, but it has not yet been suggested that Parliament can prohibit the carrying on of bill-[illegible] without a licence. Again, bills of exchange are

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which use bills of exchange subject therefore to regulation by Parliament? Or, still further, are all businesses which manufacture patented articles within the sphere of Parliament, because it has power to legislate with regard to patents of invention? The truth is that the activity of fishing is one thing, and the use made of the product, when caught, is another and a wholly different thing. If Parliament has power to legislate with regard to canneries and curing plants, because fish are used therein, then Parliament can also legislate upon the subject of corset-makers, who, it is believed, use whalebone for their articles. What Parliament has done, in these two sections, is to legislate not on the subject of fisheries, but on the subject of property and civil rights in the Provinces, where these canneries and curing plants have their local habitations.

It is of course, now well established that Parliament cannot, under cover of the general powers conferred by some one or more of the enumerated heads of legislative competence, assume control of the businesses of private companies and individuals, or otherwise interfere with matters of a merely local or private nature in the Provinces.

For instance, the subject of the regulation of trade and commerce has been entrusted to Parliament, but this does not enable it to regulate trade disputes or to assume control of the business of insurance. In Toronto Electric Commissioners v. Snider (1925), A.C. 396, Lord Haldane said at p. 409:-

> "Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. In Citizens Insurance Co. v. Parsons (7 App. Cas. 96, 112), it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce."

Again in Attorney General for Canada v. Attorney General for Alberta (1916), 1 A.C. 588, Lord Haldane said at p. 595, in speaking of the Insurance Act, 1910 (9 and 10 Edw. VII, C. 32):-

> "It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. In other words, the capacity is interfered with which, according to the judgment just delivered by their Lordships in the case of the Bonanza Company (1916, A.C. 566), such a company possesses to take advantage of powers and rights proffered to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with the civil rights within the province of incorporation, as well as with the power of the Legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.
>
> It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada

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which the initial part of s. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matter entrusted to the provincial Legislatures by the enumeration in s. 92. There is only one case, outside the heads enumerated in s. 91 to which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matter enumeratively entrusted to the province under s. 92. Russell v. The Queen (7 App. Cas. 829) is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee though that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion..... The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in Russell v. The Queen, supra. But in Hodge v. The Queen (9 App. Cas. 117) the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. . . . Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Sect. 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in Russell v. The Queen (7 App. Cas. 829). No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded."

Again, with regard to the power of Parliament over the subject of criminal law, Mr. Justice Duff, in delivering the judgment of the Judicial Committee in Attorney General of Ontario v. Reciprocal Insurers (1924, A.C. 328), said, at p. 342:-

"In accordance with the principles inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principal of the Confederation scheme, the object of which as Lord [illegible] Bank of Canada v. Receiver-General of New Brunswick (1892, A.C. 437, 441), was 'not to weld the Provinces

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into one or to subordinate the Provincial Governments to a central authority.' 'Within the spheres allotted to 'them by the Act the Dominion and the Provinces are," as Lord Haldane said in Great West Saddlery Co. v. The King, (1921, A.C. 91, 100), 'rendered in general principle 'co-ordinate Governments'."

Now clearly the operation of fish canneries and curing plants constitutes "a particular trade in which Canadians would otherwise be free to engage in the provinces." Sections 7a and 18 "deprive private individuals of their liberty to carry on that business, even when that business is confined within the limits of a province," section 18, indeed, being specifically confined to British Columbia. In the case of a company operating a fish cannery for commercial purposes, "the capacity is interfered with, which . . . . . such a company possesses to take advantage of powers and rights proffered to it by authorities outside the provincial limits." It is submitted, therefore, that "such an interference with its status" does in fact "interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it." And it is also submitted that "private individuals are likewise deprived of civil rights within their provinces." In short, sections 7a and 18 of the Fisheries Act are just as violent an invasion of provincial rights as was section 4 of the Insurance Act, and such legislation is equally subversive of the "essential principle of the Confederation scheme."

On the other hand, it certainly cannot be said that the operation of fish canneries and curing establishments "lies outside all of the subject-matters enumeratively entrusted to the province under section 92" of the British North America Act. Such a subject-matter, indeed, falls both within the ambit of property and civil rights in the province and also within the ambit of matters of a merely local and private nature. "No doubt the business of" #fish canning and curing "is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority."

Sic.

Turning now to the regulations, those in question here are sub-section 3 of section 14, paragraphs "A" and "B" of sub-section one of section 15, and paragraph "A" of sub-section 7 of Section 24 of the Special Fishery Regulations of the 27th of May 1927. These provisions read as follows:-

14. (3) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine, or purse-seine, he shall require a license from the Minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

15. (1) (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm, unless such person be a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorized

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by the Provincial Government to do business in the province.

24. (7) No one shall fish for salmon for commercial purposes means of trolling except under license from the Minister. Each person in a boat that is used for trolling for salmon shall be rquired to have a license.

It is to be observed, in the first place, that the only power of the Governor-in-Council, to make such regulations, is derived from section 45 of the Act, which reads as follows:-

"45. The Governor-in-Council may make regulations:-

(a) for the better management and regulations of the sea-coast and inland fisheries;

(b) to prevent or remedy the obstruction and pollution of streams;

(c) to regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses;

(f) prescribing the time when and the manner in which fish may be fished for and caught;

(g) to prohibit the export or sale of any fish or any portion of any fish from Canada or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in The Canada Gazette or from the date specified for such purpose in such regulations, and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extended, vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (g) shall not take effect until after six months after the date of its publication in The Canada Gazette.

3. Every offence against any regulation made under this Act may be stated as in violation of this Act."

It is noticeable that the only instances, in which the Governor-in-Council may extend, vary or alter any of the provisions of the Act, relate to the places or modes of fishing.

Now in both section 14 and section 15 of the Regulations, the class of persons entitled to receive a licence is so defined as to exclude subjects of the Empire of Japan, and it is submitted that these regulations are invalid, as contravening the provisions of the Treaty of Commerce and Navigation between the United Kingdom and Japan, signed at London on the 3rd of April, 1911, and embodied in The Japanese Treaty Act, 1913, (3 and 4 Geo. V., c. 27). The first Article of the Treaty of 1911 provides in part as follows:-

"The subjects of each of the High Contracting Parties shall have full liberty to enter, travel, and reside in the territories of the other and, conforming themselves to the laws of the

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3. They shall have the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce, either in person or by agents singly or in partnerships with foreigners or native subjects.

3. They shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

4. They shall be permitted to own or hire and occupy houses, manufactories, warehouses, shops, and premises which may be necessary for them, and to lease land for residential, commercial, industrial and other lawful purposes, in the same manner as native subjects.

5. They shall, on condition of reciprocity, be at full liberty to acquire and possess every description of property, movable or immovable, which the laws of the country permit or shall permit the subjects or citizens of any other foreign country to acquire and possess, subject always to the conditions and limitations prescribed in such laws."

On the subject of this Act much light has recently been shed by the judgments of the members of the Supreme Court of Canada on a Reference by the Governor-in-Council of certain questions respecting the validity of chapter 49 of the Statutes of British Columbia, 1921 (1921, 63, S.C.R. 293). Mr. Justice Duff is reported as saying, at p. 329:-

"I now come to section 132, which is in these terms:-

'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.'

It is a condition of the jurisdiction created by this section that there shall be some obligation of Canada or of some province thereof as part of the British Empire towards some foreign country arising under a treaty between the Empire and such foreign country. A treaty is an agreement between states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasize this point that a treaty is a compact between states and internationally or diplomatically binding upon states. The treaty making power, to use an American phrase, is one of the prerogatives of the Crown, under the British constitution. That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding, and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of parliament, the public monies or to impose a tax or to alter the laws of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial government or legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation. As regards these matters the supreme legislative authority in the British Empire is, of course, the Parliament of the United Kingdom. Three views are perhaps conceivable as to the scope of the authority arising under s. 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of Parliament

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by section 91 and other provisions of the B.N.A. Act. It might be supposed, on the other hand, to constitute a delegation of the entire authority of the parliament of the United Kingdom, in so far as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand it may be supposed that a less sweeping authority is conferred by this section; that it is subject to some limitations arising out of co-ordinate provisions of the B.N.A. Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. As to the other two; there are certain fundamental terms of the arrangement upon which the B.N.A. Act was founded, and these it is difficult to think it was intended that parliament should have power to disregard in any circumstances. But it is unnecessary to pass upon these points. The authority given by section 132 is an authority to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only; and I am satisfied it is broad enough to support the legislation in question. The treaty validated by statute of 1913 deals with subjects which are ordinary subject-matters of international convention; with precisely the kind of thing which must have been in the contemplation of those who framed this section. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes."

It would certainly seem from this language that not even Parliament itself can enact legislation "abrogating rights guaranteed by the treaty," for this would constitute "not only a law passed against the good faith of the treaty but . . . . . a law repugnant to the treaty." And the matter is one of the class of "subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only."

Apart, however, from this grave consideration, it may suffice to notice that Parliament, in the Fisheries Act, has said nothing whatever evincing an intention to abrogate or interfere with any of the provisions of The Japanese Treaty Act, 1913. In section 7 of the Fisheries Act, power is, indeed, granted to the Minister to issue leases and licences, but no restriction, as to race or nationality, is to be found in the section, and there is nothing to indicate any design on the part of Parliament to repeal its previous legislation embodied in The Japanese Treaty Act, 1913, and, it is submitted, it would be entirely contrary to every canon of construction to imply an intention to interfere with previous legislation on a special and independent subject, even if, which seems not to be the case, Parliament has any power to denounce a treaty between the High Contracting Parties, the British Empire and the Empire of Japan.

Very certainly, while the Treaty remains unabrogated, the regulations are invalid, since "the effect of the Act of 1913 is at least this:-that with respect to the right to dispose of their labour" and "in all that relates to the pursuit of their industries and callings," they, "the Japanese are to be in the same position before the law, as the subjects of the most favoured nation; while their right to carry on their commerce and to trade in all kinds of merchandise is to be equal to that of native subjects." In short, "equality in the eye of the law in respect of these matters is what . . . . . the legislation (The Japanese Treaty Act) establishes." If these regulations were effectual, then the Japanese who wishes to pursue his calling of captain of a herring or pilchard drag-seine or purse-seine boat, and the Japanese who seeks to pursue his industry of fishing with nets or other apparatus, or the Japanese who tries to dispose of his labour by acting as boat puller or helper, would find himself not at all in a position of "equality in the eye of the law in respect of these matters."

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There is, moreover, a further ground for considering these discriminatory regulations to be invalid. "The Dominion authority in respect of aliens, it must be taken, I think, in consequence of the decision in Bryden's case, comprehends the right to define the right and disabilities of aliens in a general way. But whether it comprehends the right even by general enactment to attach to grantees of rights in provincial property a special disability in relation to the employment of aliens is, I think, at least gravely questionable" (per Duff J., 63, S.C.R. at p. 522). Now, so far as lakes and rivers are concerned, fisheries are in their nature susceptible of private ownership, and this is also the case "on the foreshore or within an estuary or elsewhere where the tide flows and re-flows." (A.G. for B.C. v. A.G. for Canada, 1914, A.C. at pp. 167, 168). The regulations do, therefore, cover ground where the Province may exercise or grant rights of property: and since there is no express severance in the regulations, between different areas where fishing may be carried on, they are, it is submitted wholly bad. An even wider ground is, however, it is submitted, also tenable. The regulations do not, as in their nature they can not, purport to "define the rights and disabilities of aliens in a general way." They select one particular pursuit, or rather a branch of a particular pursuit, and seek to discriminate against a section of the inhabitants of the province. Since aliens are permitted to live in the province, and must necessarily seek their living there, under the provincial laws, is it competent to Parliament so to restrict the area of employment?

The third question submitted asks whether if the sections referred to or either of them are intra vires of the Parliament of Canada (a) any British subject resident in British Columbia or (b) any person so resident who is not a British subject has upon application and tender of the fee, the right to receive a license or has the Minister a discretionary authority to grant or refuse such license to any person whether British subject or not. The Respondents are vitally concerned in the answers to these questions in so far as they relate to the practice that has prevailed following the Report and recommendations of the British Columbia Fisheries Commission, 1922, of reducing the proportion of British subjects of Japanese origin and Japanese subjects engaged in the fishery by arbitrarily refusing to renew licenses to applicants, merely because of their Japanese origin.

These Respondents submit that even if any of the provisions are intra vires, none of them justify discrimination as between British subjects or as between them and other residents entitled by treaty to the rights of British subjects refusing licenses to applicants of Japanese origin merely because of their origin. In other words no right is conferred to rule out from possible licensees British subjects of Japanese origin according to some pre-arranged scheme for the partial or entire exclusion from the fishery. If any authority is conferred on the Minister to consider whether a license shall be granted in a particular case it is the duty of the Minister to deal with the case of each applicant as it arises without introducing extraneous matters and to adopt a fixed rule of exclusion because the applicant is of Japanese origin is tantamount to refusing to exercise his discretion if he has any to exercise.

These Respondents therefore submit that the answer to clause "A" of question 3 is that a British Subject resident in British Columbia is entitled upon application and tender of the fee to a license and that the Minister has not a discretionary authority to grant or refuse such license and in particular the Minister has no discretionary authority to grant or refuse a license because the applicant is of Japanese origin or because a Parliamentary Committee or Commission has approved the carrying out of a pre-arranged scheme of refusing licenses to British subjects of Japanese origin merely because of their origin. And the Respondents submit that a similar answer is to be given to the question asked in clause "B" in so far as the Minister claims the right to discriminate against Japanese subjects in violation of their treaty right.

All of which is respectfully submitted.

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In the Supreme Court of Canada.

Monday, the 28th day of May, A.D. 1928.

Present:

The Right Honourable Francis Alexander Anglin, P.C., C.J;
The Right Honourable Mr. Justice Duff, P.C.;
The Honourable Mr. Justice Mignault;
The Honourable Mr. Justice Newcombe;
The Honourable Mr. Justice Rinfret;
The Honourable Mr. Justice Lamont;
The Honourable Mr. Justice Smith;

IN THE MATTER of a Reference as to the Constitutional Validity of certain sections of the Fisheries Act, 1914.

WHEREAS by Order-in-Council of His Majesty's Privy Council for Canada bearing date the 19th day of October, 1927 (P.C. 2032), the several questions hereinafter set out were referred to the Supreme Court of Canada for hearing and consideration pursuant to Section 60 of the Supreme Court Act, namely:-

1. Are Sections 7a and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada;

2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contra-distinguished from a stationary cannery constructed on land, and, if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia;

3. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of section 45 of the Fisheries Act, 1914), respecting licenses to fish, viz., subsection 3 of section 14; paragraph (a) or (b) of subsection 1 of section 15 or paragraph (a) of subsection 7 of section 24 of the said regulations, or under said section 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada), has

(a) any British subject resident in the Province of British Columbia, or

(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not;

AND WHEREAS the said questions came before this Court for hearing on the 9th and 10th days of February, 1928, in the presence of Counsel for the Attorney General of Canada, the Attorneys General of the Provinces of British Columbia, Quebec and Ontario, and of the Fishermen of Japanese origin in the Province of British Columbia.

WHEREUPON and upon hearing what was alleged by Counsel aforesaid this Court was pleased to direct that the said Reference should stand over for consideration and the same having come on this day for determination the following judgment was pronounced.

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The unanimous answers may be stated as follows:-

In the Supreme Court of Canada.

No. 10. Certificate of Judgment, 28th May 1928-- continued.

Question No. 1: The answer, as to both sections 7a and 18, is entirely in the affirmative.

Question No. 2: In view of the preceding answer, this question requires no answer.

As to question No. 3, the answer found by the Chief Justice, Newcombe, Rinfret and Lamont, JJ., is as follows:-

As to each of the specified regulations, viz.: subsection 3 of section 14; paragraphs (a) and (b) of subsection 1 of section 15, and paragraph (a) of subsection 7 of section 24, any British subject resident in the Province of British Columbia, who is not otherwise legally disqualified has, according to the true interpretation of these clauses, the right to receive a license, if he submit a proper application and tender the prescribed fee. As to any person resident in the Province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in subsection 3 of section 14, it being expressly declared by that subsection that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by paragraph (b) of subsection 1 of section 15, be granted to any person, unless he "is a British subject resident in the Province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as Sections 7a and 18 are held to be ultra vires.

Duff, Mignault and Smith, JJ., would answer this question as follows:-

The Minister has a discretionary authority to grant, or refuse, such license to any person who is a British subject, resident in the Province of British Columbia or is a returned soldier in His Majesty's Canadian Navy or Army overseas.

E. R. CAMERON,

Registrar.

No. 11.

No. 11. Reasons for Judgment delivered by Newcombe, J., 28th May 1928.

Reasons for Judgment delivered by Newcombe, J.

IN THE MATTER of a reference as to the constitutional validity or interpretation of certain sections of, or regulations under, The Fisheries Act, 1914.

NEWCOMBE, J. (concurred in by the CHIEF JUSTICE and RINFRET and LAMONT, JJ.)

The questions referred for the hearing and consideration of the Court, with the enactments or regulations to which they relate, are the following:-

"1. Are sections 7a and 18 of the Fisheries Act, 1914, or either of them, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?

Section 7a of the Fisheries Act, 1914, of the Dominion, was enacted as an addition to the Act of 1914. It is to be found in c. 16 of 1917, and reads as follows:-

"7a. No one shall operate a fish cannery for commercial

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from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar."

Section 18 appeared in the Consolidated Fisheries Act, c. 8 of 1914, as a section of four lines, but it was amended in 1919 by c. 52; in 1922 by c. 24, and again in 1924 by c. 24. These amendments have made important additions, and the section, as it stands within the purview of the question, as I interpret it, and as submitted at the hearing, reads as follows:-

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a license from the Minister. (1914, c. 8,s.18).

(2) (a) The annual fee for a salmon cannery license shall be twenty dollars, and in addition, four cents for each case of forty-eight one-pound cans, or the equivalent thereto, of sockeye salmon, and three cents for each case of forty-eight one-pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis), packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid as the Minister may from time to time by regulation prescribe. (1924, c. 43.)

(b) The annual license fee for a salmon curing establishment shall be:-

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons. Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons, but is not more than twenty tons.

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when total quantity of dry-salted salmon put up in one season exceeds twenty tons, but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons. (1922, c. 24, s. 1.)

Question 2 is in these words:-

2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contra-distinguished from a stationary cannery constructed on land, and, if so, is he entitled to make the license subject to any restrictions, particularly as to the place of operation of any such cannery in British Columbia;

Question 3 reads as follows:-

3. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of sec. 45 of the Fisheries Act,

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1914), respecting licenses to fish, viz., subs. 3 of sec. 14; par. (a) or (b) of subs. 1 of sec. 15, or par. (a) of subs. 7 of sec. 24 of the said regulations, or under sec. 7a or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada) has

(a) any British subject resident in the Province of British Columbia, or

(b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such license to any such person, whether a British or not;

The special fishery regulations for the Province of British Columbia to which this question refers are to be found in a pamphlet printed for the Department of Marine and Fisheries, which was introduced by Counsel for the Attorney General at the hearing. They read as follows:-

Subs. 3 of sec. 14: If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

Paragraphs (a) and (b) of subs. 1 of sec. 15:-

(a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under license from the Minister.

(b) No license shall be granted to any person, company or firm, unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy, or Army overseas, or to such company or firm, unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

Paragraph (a) of subs. 7 of sec. 24:-

7. (a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license.

Paragraph (b) of this section adds that "the fee for a salmon trolling license shall be one dollar."

Section 45 of the Fisheries Act, 1914, under which these regulations were made, is in the following words:-

45. The Governor in Council may make regulations--

(a) for the better management and regulation of the sea-

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(c) to regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses; R.S., s. 54;

(f) prescribing the time when and the manner in which fish may be fished for and caught;

(g) to prohibit the export or sale of any fish or any portion of any fish from Canada, or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in The Canada Gazette or from the date specified for such purpose in such regulations and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extended (sic) vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (g) shall not take effect until after six months after the date of its publication in The Canada Gazette.

3. Every offence against any regulation made under this Act may be stated as in violation of this Act.

At the hearing the case was presented on behalf of the Attorney General, and Counsel were also heard for the Provinces of Quebec and British Columbia, and on behalf of Fishermen of Japanese origin in the latter province, as a class of persons interested, as provided by subs. 4 of sec. 60 of the Supreme Court Act, under which the questions were referred.

Turning now to the first question, it will be observed that sec. 7a is grouped by Parliament along with sec. 7, under the subtitle "Fishery Leases and Licenses." Section 7 appeared, in identical terms, as sec. 4 of the Fisheries Act, c. 95 of the Revised Statutes of Canada 1886, and it was impeached by the provinces in the argument of the Fisheries Case of 1898 (1898 A.C. 700), but it withstood that attack, subject to one observation which I shall mention. Lord Herschell had pointed out that sec. 91 of the British North America Act, 1867, did not convey to the Dominion any proprietary rights in relation to fisheries; he had referred to the distinction which should be borne in mind between rights of property and legislative jurisdiction; it was only the latter, he said, which was conferred under the 12th enumeration, "Seacoast and Inland Fisheries" ; he had held moreover that, in addition to the legislative power derived under the item "Seacoast and Inland Fisheries," the third item of sec. 91, "the raising of money by any mode or system of taxation," conferred that power exclusively, and he said "their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of sec. 92 the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

Then came the observation to which I have alluded. It followed, he said, that, in so far as sec. 4 of the Revised Statutes of Canada, 1886, c. 95, "empowers the grant of fishery leases" (with which in the text of the section is coupled "licenses") "conferring an exclusive right to fish in property belonging not to the Dominion but [illegible] not within the jurisdiction of the Dominion Parliament to pass it." The qualification expressed in the last

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sentence was subsequently introduced by Parliament, ipsissima verba, into the Fisheries Act, and appears in the Consolidated Act of 1914 as sec. 3, limiting the application of the whole Act. That limitation was legislatively declared so early as the Revised Statutes of 1906, the revision which followed the reference of 1898, and it seems therefore to be manifest that the licensing of fish canneries for which sec. 7a provides is not intended to affect rights in the soil. It is an annual license for the operation of a fish cannery which the section requires, and it is inaptly grouped with the licenses mentioned in the preceding section.

An Annual fee of $1.00 is imposed, unless another fee be prescribed by the Act; I have not discovered any such other provision, and our attention was not directed to any. It appears difficult to realise that the purpose of this section could have been the raising of money by taxation; certainly that was not the only purpose. The tax viewed as such is merely nominal, and could not, I should think, have been expected to indemnify for the cost of raising it. I have no doubt that the section, if it can be sustained at all, must be referred to the power which Parliament exercises in the regulation of Seacoast and Inland Fisheries. Undoubtedly Parliament has the exclusive authority to regulate what falls within that description, and one sort of regulation might be a licensing requirement. But a fish cannery is not, according to any of the definitions, or in practice, embraced within a fishery, seacoast or inland. It is for the preservation and marketing of the fish when caught and landed that the cannery fulfils a commercial purpose.

It was argued on behalf of the Attorney General that, although the canning of fish may not be a fishing operation, it is nevertheless ancillary to the exercise of the powers of regulation which the Dominion possesses under the British North America Act, and the obligation which it assumed under the terms of Union with British Columbia; much reliance was founded upon the powers which are described as ancillary. The word does not occur either in the Act or Terms of Union; but "it must be borne in mind in construing the two sections (91 and 92) that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other" (John Deere Plow Co. vs. Wharton, 1915, App. Cas., 339) and "ancillary" has on occasions been used judicially as a convenient expression by which to characterise some Dominion powers which have a provincial aspect, in relation to which the provinces may legislate, in the absence of a conflicting Dominion provision. An instance of this is to be found in the Assignments and Preferences Case, 1894, App. Cas., 189; but the explanation is not that the Parliament, in the execution of an ancillary power, legislates upon a subject not strictly comprised in the enumerations of sec. 91, but that when the Dominion power, in the particular in question, overlaps provincial powers, it suspends them only to the extent of its exercise.

> "Sec. 91 expressly declares that 'notwithstanding anything in this Act' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament so long as it strictly relates to these matters is to be of paramount authority."

Tennant vs. Union Bank of Canada, 1894, App. Cas., at 46.

The powers thus known as ancillary must belong to the Dominion enumerated powers, while the subject, in another aspect and for another purpose, is embraced within the Provincial powers. Usually the competition has arisen as between a specified Dominion power and the very comprehensive provincial power of property and civil rights within the province. These enumerations, as has been said, do not embody exact [illegible] precise definition of the area broadly embraced under an enumerated power is possible only to a limited extent. There

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is, not unfrequently, as has been pointed out, a margin within which either legislation may operate, the one in the aspect of the enumerated Dominion power, the other under the broad Provincial powers, so long as the field be clear. But the Dominion authority when exercised is paramount.

Now applying these principles, I think it is undoubted that, in the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the province where the operation is carried on, like the right to operate a fruit cannery or a vegetable cannery; and the question, as I see it, is whether the exercise of this right may be restricted or regulated by force of any enumerated Dominion power to which sec. 7a may be justifiably attributed.

I have said that in my opinion the enactment is not upheld by virtue of the taxing power.

In Patterson on the Fishery Laws (1863), p. 1, the definition of a fishery is given as follows:

> "A fishery is properly defined as the right of catching fish in the sea, or in a particular stream or water; and it is also frequently used to denote the locality where such right is exercised."

In Dr. Murray's New English Dictionary, the leading definition is:

> "The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water."

Neither the business of canning fish, nor the operation of a fish canning factory, is, by either of these definitions, nor by any other which I have found, comprised in "fisheries," as that word is used in sec. 91, or the terms of Union with British Columbia. Section 7a has no limited or special application to British Columbia, nor to anyone of the provinces as distinguished from another and it should therefore receive a general and uniform interpretation. The colony was admitted into the Union on the terms and conditions expressed, subject to the provisions of the British North America Act, 1867, and the stipulation with regard to the fisheries which is embodied in the terms of Union consists merely in an undertaking on the part of the Dominion to "assume and defray the charges for the . . . protection and encouragement of fisheries," a provision which I am disposed to think does not extend the legislative powers of the Dominion to the licensing of fish canneries.

To prohibit, or to impose restrictive regulations upon, the sale or the storage of fish, or the manufacture and sale of fishing lines or nets, or of whalebone, etc., might operate to protect the fish and to reduce the catch. It might be a useful power to possess in connection with, or as auxiliary to, the regulation of the fisheries. Unlimited powers would be still more useful, but none of these powers could become effective in the hands of the Dominion unless, upon the true interpretation, included within the definition of seacoast and inland fisheries, as used in sec. 91. While the catching of fish for canning may, I suggest, be prohibited or regulated, there was no grant to the Dominion of the power, which s. 7a assumed, to control broadly the operation of the canneries.

It was urged by the factum of the Dominion, but was not pressed at the argument, that sec. 7a might be sanctioned under the power to regulate trade and commerce, but that contention may I think be regarded as disposed of by the considerations which were discussed by their Lordships of the Judicial Committee in the Insurance Reference, [illegible] vs. Attorney General of Alberta et al., [illegible] A.C. 588.

Source: Nikkei National Museum, 2010-4-3-9-93
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and therefore I come to the conclusion that the power to enact s. 7a is not to be found in any of the enumerations, and is not possessed by the Dominion, seeing that the subject belongs to one of the provincial enumerations.

Section 18 relates to salmon canneries and salmon curing establishments in British Columbia, and, viewed as a regulating provision, is governed by the considerations which determine the invalidity of sec. 7a. But there are, in the case of salmon canneries, a fixed annual license fee of $20.00, and additional payments to be made which are regulated according to the annual pack; it is moreover provided that, for a salmon curing establishment, the annual license fee shall be from fifty cents per ton to $1.25 per ton for the number of tons put up in the establishment during the season. These exactions give the enactment the appearance of a taxing provision, and it might perhaps, in other company, pass for that; but the Fishery Act is throughout a regulating Act, and it was as such that its predecessor, R.S.C. 1886, c. 95, was upheld in the Fishery Case of 1898 (1898 A.C., 700). In like manner, in the present case, sections 7a and 18 were, on behalf of the Attorney General, maintained as deriving their sanction through the Dominion power to regulate seaccast and inland fisheries. In the Special Fishery Regulation of 27th May, 1927, which were introduced into the case for purposes of the third question, it will be seen, by reference to s. 16, that the power to license canneries is, in fact, administered with a purpose to regulate their erection and operation. It provides as follows:

> Section 16: Before a cannery license shall be granted the applicant therefor shall make a statutory declaration setting forth, in the case of an existing cannery, if it is owned by a company or firm, the name of such company or firm, whether it is a Canadian company or firm, licensed to do business in the province, or if not owned by a company or firm, the name or names and nationality or nationalities of the actual owner or owners of such cannery, and in the case of a new cannery if it will be owned by a company or firm, the name of such company or firm and whether it is a Canadian Company or firm licensed to do business in the province, or if it will not be owned by a company or firm, the name or names and nationality or nationalities of the person or persons who will own such cannery, and that in either case the applicant or applicants have the necessary capital to erect and operate such cannery.

This regulations was passed under no other power than that which the Governor in Council has by sec. 45 of the Fisheries Act to regulate the seacoast and inland fisheries. There is of course nothing conclusive about it, but it seems to put the governmental practice in accord with the contention which was advanced on behalf of the Attorney General that sections 7a and 18 were enacted in execution of the regulating power. If, then, the regulation of the fisheries by means of the local establishments be a real purpose, as it is an avowed purpose, of requiring the licenses in respect of which the fees are imposed, it must I think follow that if these two sections fail in that respect for lack of enacting authority, they cannot be saved by invoking the taxing power.

"Within the spheres allotted to them by the (B.N.A.) Act, the Dominion and the Provinces are rendered on general principle co-ordinate governments. As a consequence where one has legislative power the other has not, speaking broadly the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly." per Lord Haldane in Great West Saddlery Co. vs. The King, 1921, 2 Ap. Cass., at 100. And in the same case, His Lordship, in approaching the consideration of the pertinent question, which had to do with the validity of provincial legislation affecting the powers of Dominion Companies, put it this way at p. 114:

> "Can the relevant provisions of all or any of the three sets of provincial statutes be justified as directed exclusively to the [illegible] of an object of legislation assigned by sec. 92 to the

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legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion and so affect its status?"

I think a purpose of s. 18 was to authorize the Minister to regulate salmon canneries and salmon curing establishments by means of a system of licenses, and I think, for reasons which I have indicated, that the Dominion has no power to do this; and that, if so, the legislation is not exclusively attributable to the exercise of powers possessed by the Dominion, and cannot therefore be upheld as an exercise of the taxing power.

Question 2, in view of the foregoing, requires no answer.

As to Question 3, that part of it which relates to ss. 7a and 18, is disposed of by the answer to Question 1.

There remain subs. 3 of sec. 14; paras. (A) and (B) of subs. 1 of sec. 15, and para. (a) of subs. 7 of sec. 24 of the Special Fishery Regulations for British Columbia. These regulations are made by the Governor in Council under the authority of s. 45 of the Fisheries Act, 1914. It is not necessary to determine whether this section contains any delegation of authority to levy taxes. The regulations specified are put forward as Special Fishery Regulations for British Columbia, and the question submitted appears to be intended to relate only their interpretation.

These regulations are of the same character and subject to common considerations. They prohibit fishing of various kinds, except under license from the Minister. They affect the public right of fishing, and, in some cases, may be found to extend to private rights, or several fisheries.

Subsection 3 of s. 14 is confined to fishing for herring or pilchard by drag-seine or purse-seine, and it is declared that no other than a British subject shall be eligible for the license provided for.

Paragraphs (a) and (b) of subs. 1 of s. 15 are introduced under the general heading of "Leases or Licenses"; paragraph (a) relates to the taking of abalone or crabs, and salmon fishing by means of drifting, or the operation of purse-seines or drag-seines; but paragraph (b) is of general application; it prescribes generally the conditions of disqualification for license in these words:

> "No license shall be granted to any person, company or firm unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm, unless it is a Canadian company or firm, or is authorized by the Provincial Government to do business in the province.

As to s. 24, subs. 7 (a), it applies only to the fishing for salmon for commercial purposes by means of trolling, and requires that every person in a boat that is being used in trolling for salmon shall have a license.

The regulations in question thus affect both public and private rights of fishing, and they should not be interpreted to derogate from those rights further than may be requisite to give the regulations their necessary and due effect. Those who are, according to the regulating provisions, declared to be ineligible, may not of course receive licenses; but where an applicant is eligible within the regulations, and not otherwise disqualified, there is no express provision for withholding a license, if he submit a proper application, and pay the prescribed fee, which, in [illegible], appears to be no more than the sum of $1.00.

[illegible] is true that the licensing power is exercised to the [illegible]

Source: Nikkei National Museum, 2010-4-3-9-95
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declared by that subsection that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by par. (b) of subs. 1 of sec. 15, be granted to any person unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as sections 7a and 18 are held to be ultra vires.

In the Supreme Court of Canada.

No. 11.
Reasons for Judgment delivered by Newcombe, J., 28th May 1928--continued.

No. 12.

Reasons for Judgment delivered by Duff, J.

In the Supreme Court of Canada.

No. 12.
Reasons for Judgment delivered by Duff, J., 28th May 1928.

Duff, J. (concurred in by Mignault and Smith, JJ.)

As to Questions 1 and 2, I concur entirely with the view of my brother Newcombe.

As to Question 3, the only express authority for the grant of licenses by the Minister of Marine and Fisheries is that given by section 7 of the Act, which is in these words:-"The Minister may wherever the exclusive right of fishing does not already exist by law issue, or authorize to be issued, fishery leases and licenses for fisheries and fishing wheresoever situate or carried; but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor in Council." This section was considered by the Judicial Committee of the Privy Council on the Fisheries Reference in 1898. And it was there held that in so far as is authorized the granting of the leases for fishing in places which were the property, not of the Dominion, but of a Province, it was beyond the power of Parliament to enact; and, by section 3, the Act is to be read subject to this pronouncement. Section 3, leaves a considerable field for the operation of section 7 in relation to leases and exclusive licenses, where that action was passed. The beds of the tidal waters within the British Columbia Railway belt and on the coast of James Bay and the Arctic were the property of the Crown in the right of the Dominion, and to these waters the provisions of the section would apply. It would also apply to fresh-water lakes and rivers, the beds of which are in the Dominion. In British Columbia this would include the beds of such waters in the Railway belt and in the Peace River tract.

When the section was first enacted, it was no doubt assumed, according to the view then held by the advisers of the Dominion, that the property in the beds of tidal waters was in the Crown in the right of the Dominion, and probably the intention of the section was to vest in the Minister, authority to grant leases, and licenses, exclusive as well as non-exclusive apparently, for fishing in such waters.

In view of the history of the section, there is much to be said for the view that the authority vested in the Minister under it, is a discretionary authority. That is to say, that in point of law, the Minister is under no legal duty to grant leases or licenses, or to grant any particular lease or any particular license. It is sometimes not easy in construing the provisions of a modern statute, by which powers are vested in a Minister of the Crown, to determine whether or not the Minister, as the depositary of such powers, is intended to be constituted an agent of the Legislature (see the argument of Sir George Jessel, L.R. 7 Q.B. at p. 389), to exercise those powers, an instance of that being the statute considered in re Massey, 13 O.A.R., 446; or whether the Legislature has named him as the donee of the power in his capacity of servant of the Crown. As the Minister here is authorized to grant leases of Crown property, it seems probable that

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he is intended in executing his powers under the section, to act for, and in the name of the Crown. In this view of the Minister's functions, a subject would possess no right capable of vindication in a court of law to demand a lease or license, The Queen v. The Lords Commissioners, L.R. 7 Q.B. 388; although it would not necessarily follow that the Minister is not under a duty, a legal duty owing to and enforceable by the Crown, to grant licenses to applicants as they demand them.

In considering the question whether or not the section has the effect of constituting rights, that is to say legal rights, vested in His Majesty's subjects, or a legal duty binding the Minister, owing to the Crown, one must first notice that, in form, the clause is permissive only. There has been a good deal of discussion upon the subject of the indicia, to which one must give attention, in considering whether a grant of authority permissive in form is coupled with an obligation to exercise that authority. The word "may" and similar expressions are always, in themselves, permissive in effect as well as in form, and a grant of authority in the form of section 7, does not imply any direction requiring the donee to act under the power. The subject was very fully discussed in the well known case of Julius v. The Bishop of Oxford, 5 App. Cas. 514, at page 235. Lord Selborne observes upon the question whether an enforceable duty arose to exercise a power admittedly conferred by statute, that in general such a question must be solved from the context of the particular provision and from the general scope and objects of the enactment conferring the power.

Looking first at the section itself, it is impossible to suppose that the authority vested in the Minister to grant leases was not a discretionary one, and prima facie at all events, the same must be said with regard to the authority to grant licenses. Is there anything, then, in the context, that is to say in the parts of the Act which are in pari materia with section 7, or in the subject matter of the legislation, which requires us to imply the existence of a legal duty incident upon the Minister? Before turning to the particular regulations now before us, it should be noted that section 45, which empowers the Governor-in-Council to make regulations, expressly authorises in subsection C, the prohibition of fishing except under the authority of leases or licenses. This enactment, in so far as it relates to leases or licenses by the Minister, seems to contemplate leases or licenses under section 7, and the particular regulations now in question (subsection 3 of section 14, paragraphs A and B of subsection 1 of section 14 and subsection 7 of section 24) were probably passed in execution of this specific authority. At all events, there seems to be no reason to doubt that a license under the authority of sec. 7 would constitute a sufficient warrant to exempt the holder of it from the prohibitions enacted by the regulations in question.

There is nothing in the terms in which these provisions are expressed, nor, as far as I have been able to discover, in the terms of the regulations, pointing to a conclusion that the authority of the Minister is not a permissive one. Are there reasons, then, arising from the character of the subject matter, sufficiently potent to require us to hold that the Minister is under a duty to grant licenses to those who apply for them?

Speaking broadly, every subject of His Majesty is entitled to exercise the right of fishing in tidal waters in British Columbia, and a statutory enactment which in a reasonable view of it might expose such rights to oppressive or arbitrary or capricious restrictions would receive a jealous scrutiny in any Court called upon to enforce it. But on the other hand, the authority to grant leases, given by section 7, necessarily involves some restriction of the public right, that is to say, the exclusion of the public as a whole, from the waters in which the exclusive right of the lessee prevails, and in the case of leases for nine years and less, the

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discretion to grant them is vested in the Minister; and so with regard to exclusive licenses. As to leases and exclusive licenses, the Minister's power is of course necessarily discretionary. You cannot, self-evidently, have two leases or exclusive licenses operating in the same locus at the same time and affecting the same kinds of fish, and as no two localities are exactly the same, there is necessarily, not only a limitation in respect of numbers, but discrimination as between parties to whom applications are granted. And of course, in cases where a competition occurs, one applicant is unavoidably favoured at the expense of all the rest. The natural inclination of Parliament against favouritism, to this extent at all events, yielded to considerations which must have appeared to be sufficient.

As to non-exclusive licenses, I can discover nothing in the subject matter which dictates an inference, that, as regards these, the authority of the Minister is of a different order. There is a power of cancellation, given to the Minister in the case of licensees, who offend against the law. It seems difficult to suppose, if, in point of law, a discretion was not vested in the Minister to refuse an application for a license, that provision would not have been made empowering him to refuse, in cases in which he was satisfied, for any reason, that the applicant was not a fit person to receive a license from the point of view of a Government department concerned with the observance or enforcement of enactments or regulations governing fisheries.

The authority of the Minister to grant leases, would appear to embrace the right to determine the stipulations of the lease, including the enaction and the terms, clauses of re-entry and forfeiture. I see no reason why it should be supposed that the Minister would not be entitled to insist upon special stipulations, as to the methods by which fish should be caught. The same with regard to exclusive licenses. As to non-exclusive licenses, I should suppose that the regulations contemplate at least the possibility of special provisions as to special areas, and as to the kinds of fishing permitted. Where a license is granted for fishing with nets or other apparatus, I should suppose that the license ought to define in some way, the instruments permitted and the manner and conditions in which such instruments are to be employed, and there would appear to be some reason to think, although we have not been favoured with any explanations on the point, that, as regards such licenses, some sort of discretionary authority would almost be necessary, in order to secure, with any degree of confidence, the purpose of the regulation.

I do not see any reason for holding that the Minister might not refuse all licenses to fish for salmon, for example, with a particular kind of instrument, either generally or in a particular district. And it would, I think, be a singular thing if there were no discretion to refuse a license to employ a particular kind of instrument to a person who was known to have systematically abused his privilege by violating the Act or the regulations.

One consideration seems to be of importance. The donee of the power in this case is a Minister of the Crown, accountable first of all to the Crown, that is to say, to the Government as a whole, and then to Parliament, for the execution of his powers. The subject is not susceptible of extended discussion; but such examination as I have made of the statute and such attention as I have given to the subject matter have not disclosed good reasons why the political sanctions under which the Minister acts, should not in the view of the Legislature, have been regarded as quite adequate in themselves to insure an administration of the Act in good faith, with an eye to the public

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Order in Council granting Special leave to appeal to His Majesty in Council.

In the Privy Council.

No. 15.
Order in Council granting special leave to appeal to His Majesty in Council, 30th July 1928.

At the Court at Buckingham Palace.

The 30th day of July, 1928.

Present:

THE KING'S MOST EXCELLENT MAJESTY.

Lord President:
Earl of Onslow.

Chancellor of the Duchy of Lancaster:
Mr. Davidson.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 24th day of July 1928 in the words following viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of the Dominion of Canada in the matter of a reference as to the constitutional validity of certain sections of the Fisheries Act 1914 setting forth that the Petitioner desires to obtain special leave to appeal to Your Majesty in Council from the Judgment of the Supreme Court dated the 28th May 1928 answering questions referred to the Court for hearing and consideration by Order of His Excellency the Governor-General in Council dated the 19th October 1927 pursuant to the provisions of Section 60 of the Supreme Court Act touching the legislative competence of the Parliament of Canada to enact certain provisions for the control and regulation by a licensing system of fish canneries throughout Canada and particularly of salmon canneries or salmon-curing establishments in the Province of British Columbia operated for commercial purposes and also the interpretation of certain provisions of the Special Fishery Regulations for the Province of British Columbia upon the question whether the Minister of Marine and Fisheries has a discretionary authority to grant or refuse licences to fish or to operate a fish or salmon cannery in the Province of British Columbia; that the questions so referred were:- (1) Are Sections 7a and 18 of the Fisheries Act 1914 or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada; (2) If the said provisions of the Fisheries Act 1914 or either of them be intra vires of the Parliament of Canada has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land and if so is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia? (3) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of Section 45 of the Fisheries Act 1914) respecting licences to fish viz. subsection 3 of Section 14; paragraph (a) or (b) of subsection 1 of Section 15 or paragraph (a) of subsection 7 of Section 24 of the said Regulations or under said Sections 7a or 18 of the said Act (if these Sections or either of them be intra vires of the Parliament of Canada) has (a) any British subject resident in the Province of British Columbia or (b) any person so resident who is not a British subject upon application and tender of the prescribed fee the right to receive a licence to fish or to operate a fish or salmon cannery in that Province or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject or not? That on the hearing of argument before the full Court (composed

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Council.

No. 13. Order in Council granting special leave to appeal to His Majesty in Council, 30th July 1928-- continued.

Attorney-General of Canada and Counsel were also heard for the Provinces of Ontario Quebec and British Columbia and by Special Order of the Court on behalf of a Committee representing all the fishermen of Japanese origin in the last-mentioned Province as a class of persons interested: that on the 28th May 1928 the Court delivered judgment unanimously answering the first and second questions as follows:
Question No. 1.--The answer as to both Sections 7a and 18 is entirely in the affirmative. Question No.2.--In view of the preceding answer, this question requires no answer: that as to Question No. 3 the majority of the Court (the Chief Justice Newcombe Rinfret and Lamont JJ.) gave the following answer:-"As to each of the specified regulations viz. subsection 3 of Section 14 paragraphs (a) and (b) of subsection 1 of Section 15 and paragraph (a) of subsection 7 of Section 24 any British subject resident in the Province of British Columbia, who is not otherwise legally disqualified has according to the true interpretation of these clauses, the right to receive a licence, if he submit a proper application and tend the prescribed fee. As to any person resident in the Province of British Columbia who is not a British subject he is not eligible for a licence of the character described in subsection 3 of Section 14 it being expressly declared by that subsection that "no other than a British subject shall be eligible for such licence." And none of the other licences in question shall as provided by paragraph (b) of subsection 1 of Section 15 be granted to any person unless he "is a British subject resident in the Province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries inasmuch as Sections 7a and 18 are held to be ultra vires': that the minority of the Court (Duff Mignault and Smith JJ.) answered this question as follows:--
'The Minister has a discretionary authority to grant, or refuse, such licence to any person who is a British subject resident in the Province of British Columbia, or is a returned soldier in His Majesty's Canadian Navy or Army overseas':
And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 28th May 1928 or for such further and other Order as to Your Majesty in Council may appear fit:

"The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and on behalf of the Attorneys-General of the Provinces of Quebec and British Columbia Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 28th day of May 1928:

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Govern-

Source: Nikkei National Museum, 2010-4-3-9-100
www.nikkeimuseum.org

ment of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

APPENDIX OF STATUTES.

No. 14.

Extracts from the Fisheries Act, 1914 (4-5 George V., Chapter 8 and Amending Acts passed in 1917, Chap. 16; in 1918, Chap 22; in 1919, Chap. 52; in 1922, Chaps. 23-24; and in 1924, Chaps 43-44).

An Act respecting Fisheries and Fishing.

License to operate fish cannery.

7a. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar. (1917, c. 16).

License in B.C. for salmon canneries.

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a license from the Minister. (1-2 Geo. V, c. 9, s. 2).

License fee for salmon cannery decreased.

"(2) (a) The annual fee for a salmon cannery license shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans or the equivalent thereto, of sockeye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmon rivularis) packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid as the Minister may from time to time by regulation prescribe." (1924, Chap. 43, 14-15 Geo. V.).

License fees for salmon curing establishments.

(b) The annual license fee for a salmon curing establishment shall be:-

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;

Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons;

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season when the total quantity of dry-salted salmon put up in one season exceeds fifty tons. (12-13 Geo.V. c. 24, s. 1.)

Section 45. The Governor in Council may make regulations,-

(a) for the better management and regulation of the sea-

Source: Nikkei National Museum, 2010-4-3-9-101
www.nikkeimuseum.org

IN THE PRIVY COUNCIL. No. 73 of 1928.

On Appeal from the Supreme Court of Canada.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA - - - Appellant

And

THE ATTORNEYS-GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - - - - - - - - - Respondents.

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.
for Appellant.

GARD, LYELL & CO.,
47, Gresham Street, E.C.2.

for Attorney General of British Columbia.

BLAKE & REDDEN,
17, Victoria Street, S.W.1

for Attorneys Gneral of Quebec and Ontario.

KAYS & JONES,
37, Norfolk Street,
Strand, W.C.2

for Fishermen of Japanese origin in British Columbia.

Source: Nikkei National Museum, 2010-4-3-9-102
www.nikkeimuseum.org

IN THE PRIVY COUNCIL.

No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT 1914.

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And

THE ATTORNEYS GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

SUPPLEMENTAL APPENDIX OF STATUTES.

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Source: Nikkei National Museum, 2010-4-3-9-103
www.nikkeimuseum.org

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT 1914.

Between

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA - - - - - Appellant

And

THE ATTORNEYS GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA - Respondents.

SUPPLEMENTAL APPENDIX OF STATUTES.

No. 1.

THE FISHERIES ACT 1914 (as amended).

4-5 George V. Chap. 8.

AN ACT respecting FISHERIES and FISHING.

-•-•-•-•-•-•-•-•-

FISHERY LEASES AND LICENSES.

Fishery leases and licenses. If for more than nine years.

7. The Minister, may wherever the exclusive right of fishing does not already exist by law, issue or authorise to be issued fishery leases and licenses for fisheries and fishing whereseever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor in Council, R.S., S. 8.

License to operate fish cannery.

7a. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar (1917 c. 18).

License in B.C. for Salmon canneries.

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a license from the Minister (1-2 Geo. V. C. 9. S. 2).

License fee for salmon cannery decreased.

(2) (a) The annual fee for a salmon cannery license shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis) packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid to the Minister may from time to time by regulation prescribe. (1924, Chap. 45, 14-15 Geo. V.)

Source: Nikkei National Museum, 2010-4-3-9-104
www.nikkeimuseum.org

(b) The annual license fee for a salmon-curing establishment shall be:- License for salmon curing establishment.

Fifty cents on each ton, or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;
Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons.
One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons;
One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons (12-13 Geo. V., c. 24, s. 1).

NOTE:--These sections are now represented by sections 7, 8 and 19 of the existing Fisheries Act (1927 R.S.C. Chap.73).

No. 2.

SPECIAL FISHERY REGULATIONS FOR THE PROVINCE OF BRITISH COLUMBIA.

Section 14.--Herring or Pilchard.

(3) If the Captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

Section 15.--Leases or Licenses.

(1) (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon, herring or pilchard fishing except under license from the Minister.

(b) No license shall be granted to any person company or firm unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian Company or Firm or is authorized by the Provincial Government to do business in the province.

Section 24.--Salmon.

(7) (a) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license.

Source: Nikkei National Museum, 2010-4-3-9-105
www.nikkeimuseum.org

No. 3.

THE BRITISH NORTH AMERICA ACT, 1867.

30 and 31 Victoria Chapter 3.

An Act for the Union of Canada, Nova Scotia, and New Brunswick and the Government thereof; and for Purposes connected therewith.

(29th March 1867.)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in Principal to that of the United Kingdom.

AND WHEREAS such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire.

AND WHEREAS on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

AND WHEREAS it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

BE IT THEREFORE ENACTED AND DECLARED by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I.--PRELIMINARY.

1. This Act may be cited as The British North America Act, 1867.

-.- -.- -.- -.-

VI.--DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:-

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign

Source: Nikkei National Museum, 2010-4-3-9-106
www.nikkeimuseum.org

14. Currency and Coinage.
15. Banking Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalisation and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
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 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:- Subjects of exclusive Provincial Legislation.

1. The Amendment from time to time, notwithstanding anythingin this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:-

(A) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings, connecting the Province with any other or others of the Provinces, or

Source: Nikkei National Museum, 2010-4-3-9-107
www.nikkeimuseum.org

(B) Lines of Steam Ships between the Province and any British or Foreign Country.

(C) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnisation of Marriage in the Province.

13. Property and Civil Rights in the Province.

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.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

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

-.- -.- -.-

XI.--ADMISSION OF OTHER COLONIES.

Power to admit Newfoundland, etc. into the Union.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

No. 4.

TERMS AND CONDITIONS under which the COLONY OF BRITISH COLUMBIA ENTERED INTO UNION WITH THE DOMINION OF CANADA.

At the Court at Windsor.

The 16th day of May 1871.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.

His Royal Highness Prince Arthur.

Source: Nikkei National Museum, 2010-4-3-9-108
www.nikkeimuseum.org

Lord Privy Seal.
Earl Cowper.
Earl of Kimberley.

Lord Chamberlain.
Mr. Secretary Cardwell.
Mr. Ayrton.

WHEREAS by the "British North America Act, 1867" provision was made for the Union of the Provinces of Canada, Nova Scotia, and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of British Columbia, to admit that Colony into the said Union on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

AND WHEREAS by Addresses from the Houses of the Parliament of Canada and from the Legislative Council of British Columbia respectively, of which Addresses copies are contained in the Schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit British Columbia into the Dominion of Canada, on the terms and conditions set forth in the said Addresses.

AND WHEREAS Her Majesty has thought fit to approve of the said terms and conditions. It is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament, that from and after the twentieth day of July, One thousand eight hundred and seventy one, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore recited Addresses. And, in accordance with the terms of the said Addresses relating to the Electoral Districts in British Columbia for which the first election of members to serve in the House of Commons of the said Dominion shall take place, it is hereby further ordered and declared that such Electoral Districts shall be as follows:-

"New Westminster District" and the "Coast District" as defined in a public notice issued from the Lands and Works Office in the said Colony on the Fifteenth day of December One thousand eight hundred and sixty nine, by the desire of the Governor, and purporting to be in accordance with the provisions of the thirty-ninth clause of the "Mineral Ordinance 1869" shall constitute one district, to be designated "New Westminster District," and return one member.

"Cariboo District" and "Lillooet District," as specified in the said public notice, shall constitute one district, to be designated "Cariboo District," and return one member.

"Yale District" and "Kootenay District," as specified in the said public notice, shall constitute one district, to be designated "Yale District," and return one member. Those portions of Vancouver Island known as "Victoria District," "Esquimalt District," and "Metchosin District" as defined in the official maps of those districts which are in the Land Office, Victoria, and are designated respectively "Victoria District Official Map, 1858," "Esquimalt District Official Map, 1858," and "Metchosin District Official Map, A.D. 1858" shall constitute one district, to be designated "Victoria District," and return two members.

All the remainder of Vancouver Island, and all such islands adjacent thereto as were formerly dependencies of the late Colony of Vancouver Island, shall constitute one district, to be designated [illegible]trict," and return one member.

Source: Nikkei National Museum, 2010-4-3-9-109
www.nikkeimuseum.org

Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) ARTHUR HELPS.

THE TERMS OF UNION.

1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the Union.

2. British Columbia not having incurred debts equal to those of the other Provinces now constituting the Dominion, shall be entitled to receive, by half-yearly payments, in advance, from the General Government, interest at the rate of five per cent per annum on the difference between the actual amount of its indebtedness at the date of the Union and the indebtedness per head of the population of Nova Scotia and New Brunswick (27.77 dollars) the population of British Columbia being taken at 60,000.

3. The following sums shall be paid by Canada to British Columbia for the support of its Government and Legislature, to wit, an annual subsidy of 35,000 dollars, and an annual grant equal to 80 cents per head of the said population of 60,000 both half-yearly in advance; such grant of 80 cents per head to be augmented in proportion to the increase of population, as may be shown by each subsequent decennial census until the population amounts to 400,000, at which rate such grant shall thereafter remain, it being understood that the first census be taken in the year 1881.

4. The Dominion will provide an efficient mail service, fortnightly, by steam communication, between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers.

5. Canada will assume and defray the charges for the following services:-

A. Salary of the Lieutenant-Governor;
B. Salaries and allowances of the Judges of the Superior Courts and the County or District Courts;
C. The charges in respect to the Department of Customs;
D. The Postal and Telegraphic Services;
E. Protection and encouragement of Fisheries;
F. Provision for the Militia;
G. Lighthouses, Buoys and Beacons, Shipwrecked crews, Quarantine and Marine Hospitals, including a Marine Hospital at Victoria;
H. The Geological Survey;
I. The Penitentiary.

And such further charges as may be incident to and connected with the services which, by the "British North America Act of 1867" appertain to the General Government, and as are or may be allowed to the other Provinces.

6. Suitable pensions, such as shall be approved of by Her Majesty's Government, shall be provided by the Government of the Dominion for those of Her Majesty's servants in the Colony whose position and emoluments derived therefrom would be affected by political changes on the admission of British Columbia into the Dominion of Canada.

7. It is agreed that the existing Customs Tariff and Excise Duties shall continue in force in British Columbia until the Railway from the Pacific Coast and the system of Railways in Canada are connected, unless the Legislature of British Columbia should sooner decide to accept the tariff and excise laws of Canada. When customs and excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares, merchandizes in British Columbia, or in the other

Source: Nikkei National Museum, 2010-4-3-9-110
www.nikkeimuseum.org

Provinces of the Dominion, those goods, wares, and merchandizes may, from and after the Union, be imported into British Columbia from the Provinces now composing the Dominion, or from either of those Provinces into British Columbia on proof of payment of the customs or excise duties leviable thereon in the Province of exportation, and on payment of such further amount (if any) of customs or excise duties as are leviable thereon in the Province of importation. This arrangement to have no force or effect after the assimilation of the tariff and excise duties of British Columbia with those of the Dominion.

8. British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation to be increased under the provisions of the "British North America Act, 1867."

9. The influence of the Dominion Government will be used to secure the continued maintenance of the Naval Station at Esquimalt.

10. The provisions of the "British North America Act, 1867" shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia, in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.

11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of Union, of the construction of a Railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such Railway within ten years from the date of the union.

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said Railway, a similar extent of public lands along the line of Railway, throughout its entire length in British Columbia, not to exceed, however, Twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and, provided further, that until the commencement, within two years as aforesaid from the date of the union, of the construction of the said Railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said Railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of 100,000 Dollars per annum, in half-yearly payments in advance.

12. The Dominion Government shall guarantee the interest for ten years from the date of the completion of the works, at the rate of five per centum per annum, on such sum, not exceeding £100,000 sterling, as may be required for the construction of a first class Graving Dock at Esquimalt.

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by [illegible] a policy as liberal as that hitherto

Source: Nikkei National Museum, 2010-4-3-9-111
www.nikkeimuseum.org

pursued by the British Columbia Government shall be continued by the Dominion Government after the union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

14. The constitution of the Executive Authority and of the Legislature of British Columbia shall, subject to the provisions of the "British North America Act, 1867" continue as existing at the time of the union until altered under the authority of the said Act, it being at the same time understood that the Government of the Dominion will readily consent to the introduction of Responsible Government when desired by the inhabitants of British Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the Colonies, to amend the existing constitution of the Legislature by providing that a majority of its members shall be elective.

The union shall take effect according to the foregoing terms and conditions on such day as Her Majesty by and with the advice of Her Most Honourable Privy Council may appoint (on Addresses from the Legislature of the Colony of British Columbia and of the Houses of Parliament of Canada) in the terms of the 146th Section of the "British North America Act, 1867," and British Columbia may in its Address specify the Electoral Districts for which the first election of members to serve in the House of Commons shall take place.

Source: Nikkei National Museum, 2010-4-3-9-112
www.nikkeimuseum.org

IN THE PRIVY COUNCIL. No. 73 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

Between

THE ATTORNEY GENERAL OF THE DOMINION OF CANADA

And

THE ATTORNEYS GENERAL OF THE PROVINCES OF BRITISH COLUMBIA, QUEBEC AND ONTARIO AND THE FISHERMEN OF JAPANESE ORIGIN IN THE PROVINCE OF BRITISH COLUMBIA.

SUPPLEMENTAL APPENDIX OF STATUTES.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.
Solicitors for the Appellant.

Source: Nikkei National Museum, 2010-4-3-9-113
www.nikkeimuseum.org