IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT, BEING CHAPTER 14 OF THE STATUTES OF CANADA, 1935; THE MINIMUM WAGES ACT, BEING CHAPTER 44 OF THE STATUTES OF CANADA, 1935; AND THE LIMITATION OF HOURS OF WORK ACT, BEING CHAPTER 63 OF THE STATUTES OF CANADA, 1935.

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* Jan. 23, 24, 27, 29, 30, 31.
* June 17.

Constitutional law—The Weekly Rest in Industrial Undertakings Act, 25-26 Geo. V, c. 14—The Minimum Wages Act, 25-26 Geo. V, c. 44—The Limitation of Hours of Work Act, 25-26 Geo. V, c. 63—Constitutional validity—Treaty of Peace of Versailles, 1919—Art. 405 of the Treaty—League of Nations—Draft Conventions of the International Labour Conference—Approval of Treaty by Dominion Parliament—B.N.A. Act, s. 132—Property and civil rights—B.N.A. Act. s. 92.

The *Weekly Rest in Industrial Undertakings Act,* which gave effect to the Draft Convention of the International Labour Conference on that subject, applies to industrial undertakings as defined in art. 1 of the Draft Convention, and requires employers to grant a rest period of at least twenty-four consecutive hours in every seven days to all employees, with the exception of persons who hold positions of supervision or management or who are employed in a confidential capacity. The rest period is, wherever possible, to be granted to the whole staff simultaneously, and to coincide with the Lord's Day as defined by the Lord's Day Act, R.S.C. 1927, c. 123. *The Minimum Wages Act* is designed to give effect to the provisions of the Draft Convention concerning the creation of minimum wage-fixing machinery adopted by the International Labour Conference in 1928. By s. 4 (1), the Governor in Council, on the recommendation of the Minister of Labour, may create and by regulation provide for the operation, by or under the Minister, of machinery whereby minimum rates of wages can be fixed for workers in specified rateable trades. Employers and workers concerned are to be associated in the operation of such machinery in such manner as the Governor in Council may by regulation determine, but in any case in equal numbers and on equal terms. "Rateable trades" are defined in accordance with the terms of the Convention as "those trades or parts of trades (in particular, home-working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low." "Trade" includes manufacture and commerce and "worker" includes any employed person not under 16 years of age. By s. 4 (2), Minimum wages so fixed are to be binding on employers and workers concerned so as not to be subject to abatement by means of individual agreement, or, except with the general or particular authorization of the Minister, by collective agreement.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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The Limitation of Hours of Work Act gives effect to the Draft Convention of the International Labour Conference adopted in 1919, limiting hours of work in industrial undertakings as defined in article 1 of the Convention.

Held, per Duff C.J. and Davis and Kerwin JJ., that these Acts are *intra vires* of the Parliament of Canada; *per* Rinfret, Cannon and Crocket JJ., that they are *ultra vires.*

Per Duff C.J. and Davis and Kerwin JJ.—From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada. First, by virtue of section 132 of the *British North America Act,* jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion the Privy Council held, in the *Aeronautics* case and in the *Radio* case ([1932] A.C. 54 and 304) is exclusive; and consequently, under the *British North America Act,* the provinces have no power and never had power to legislate for the purpose of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92. Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia,* the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of His Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs; the effect of the two decisions above referred to is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

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The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (*a*) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (*b*) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example, as the matters dealt with by the conventions to which effect is given by the statutes now before the Court: the regulation of wages and of hours of labour.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined. (1) As touching the view advanced that the subject-matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 B.N.A. Act is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject-matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject-matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject-matter of the status in question are not within the scope of that prerogative. Legislative authority to give effect to treaties within section 132 remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation. (2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable.

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Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a statute of the province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada*, ([1924] A.C. 203).

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the provinces that the Dominion cannot, by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs 5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament.

Paragraphs 5 and 7 must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where

legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The provincial legislatures may also be competent authorities within the contemplation of paragraph 5 of that article, but it is unnecessary to decide that question for the purposes of this reference.

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

Per Rinfret J.—Apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Conference of the League of Nations, the subject-matter of these Acts is undoubtedly one in relation to which, under the Constitution of our country, the legislature in each province may exclusively make laws. It follows that, in order to support the validity of the Acts, the Attorney-General of Canada has the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation has, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The Acts cannot be supported as an exercise of the legislative powers of the Dominion either to make laws for the peace, order and good government of Canada, or for the regulation of trade and commerce, or in relation to the criminal law.

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These conventions are not treaties within the meaning of section 132 of the B.N.A. Act, such as was the case in the *Aeronautics* Reference to the Privy Council ([1932] A.C. 54); nor are they conventions belonging to that class of conventions submitted to the Privy Council in the *Radio* Reference ([1932] A.C. 304). So that the judgments of the Privy Council in those two References do not constitute authorities in support of the Dominion Government's or the Dominion Parliament's power to act alone in the performance of the obligations deriving from conventions of the present character.

Besides that, both in the *Aeronautics* and in the *Radio* references, the Privy Council, at the same time as it declared that the validity of the legislation in respect thereto could be supported as an exercise of the power derived from section 132, B.N.A. Act, or from the residuary power to make laws for the peace, order and good government of the country, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of section 91 of the B.N.A. Act, which is not the case here.

But the critical point in the present reference is whether the Draft Conventions were competently ratified—a point which was not raised nor decided in the *Aeronautics* or *Radio* references.

A very great distinction must be made between the power to create an international obligation and the power to perform it when once it has been created.

Under the distribution of legislative powers, the subject matters of the three Acts now submitted are assigned to the exclusive jurisdiction of the legislature in each province under the head "Property and Civil Rights in the Province," of section 92, B.N.A. Act. A civil right does not change its nature just because it becomes the subject matter of a convention with a foreign state. It is always the same civil right. It is not within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over such matters merely as a consequence of the fact that the Dominion Government, in regard to them, decides to enter into a convention with a foreign power. It would be directly against the intendment of the B.N.A. Act that the King or the Governor General of Canada should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the Federal Ministers who, either by themselves or through the instrumentality of the Dominion Parliament, are prohibited by the Constitution from assuming jurisdiction over these matters.

Moreover, article 405 of the Treaty of Versailles must be interpreted as requiring, in Canada, the consent and approval of the provinces before Draft Conventions of the nature of those now submitted can be properly and competently ratified by Canada as a member of the League of Nations.

In this Court, the question as to where lies the power to create an international obligation dealing with matters within the exclusive jurisdiction of the provinces is concluded by our decision on the reference *Re: Legislative Jurisdiction over Hours of Labour* ([1925] S.C.R. 505).

It follows that the Draft Conventions not having received the consent and the approval of the legislatures of the provinces, nor even of the pro-

vincial governments, were not properly and competently ratified; and the Acts adopted in relation to these Draft Conventions and allegedly for the purpose of performing the obligations arising under them are *ultra vires* of the Parliament of Canada.

Per Cannon J.—When an Act of Parliament is challenged before this Court as unconstitutional, the article of the Constitution which is invoked should be laid beside the statute which is challenged in order to decide whether the latter squares with the former. The only power of this Court is to announce its judgment upon the question. This Court neither approves nor condemns any legislative policy. Its office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution. The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. There is in this country a dual form of government, and in every province there are two governments. Our country differs from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the B.N.A. Act; but neither this Court nor the Privy Council should be called upon to legislate outside of its provisions.

The labour draft conventions in this case, binding Canada independently from the rest of the Empire, do not fall under section 132, B.N.A. Act; they were not even contemplated as feasible in 1867 when that Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92 B.N.A. Act; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject-matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the Treaty of Versailles, Canada as a federal state has only a "power to enter into convention on labour matters *subject to limitations*" and the draft conventions should have been treated as "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation. In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action"; and this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

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As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be justified by invoking some clauses of the Treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the Treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, section 7. Therefore the Parliament and the Government of Canada cannot appropriate those powers, exclusively reserved to the provinces, by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. Neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92, B.N.A. Act. Before accepting as binding any agreement under section 405 of the Treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

Per Crocket J.—The Acts passed by the Dominion Parliament embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike; and the fundamental question before this Court is whether there is any authority within the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada.

None of the draft conventions of the International Labour Conference of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of this legislation, fall within the terms of section 132 of the B.N.A. Act. Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not be said that there was any obligation for the performance of which the Parliament of Canada was empowered within the terms of section 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any province thereof, as part of the British Empire.

As regards the residuary clause of section 91, this provision can only be invoked where the real subject matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by section 92; once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of section 92, but by the saving clause in the introduction of section 91, such an enactment cannot be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limita-

tion, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by section 91.

Although the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, this fact cannot be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either section 91 or of section 92 or of section 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole.

The legislation embodied in these three statutes is legislation which the Parliament of Canada has enacted to give effect to the draft conventions of the International Labour Conference of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada were in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submission "to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." The provision of article 405 of the Peace Treaty of Versailles is clearly mandatory and not merely directory and the ratification of the conventions, upon which these three statutes purport to be founded, is null and void under the terms of that article. However, the provisions of the B.N.A. Act, not the terms of the Treaty of Versailles, should be looked at for the answers to the questions submitted on this reference concerning the constitutionality of these three statutes; and, accordingly, they are *ultra vires* of the Parliament of Canada.

REFERENCES by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following questions: Are *The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act* and *The Limitation of Hours of Work Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the questions to the Court read as follows:

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The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the following Acts contained in the statutes of Canada, 1935, namely—

The Weekly Rest in Industrial Undertakings Act, cap. 14;

The Minimum Wages Act, cap. 44; and

The Limitation of Hours of Work Act, cap. 63,

which were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada under the provisions of the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919, and to which Canada, as part of the British Empire, was a signatory, and also under certain draft conventions concerning (*a*) the application of the weekly rest in industrial undertakings, (*b*) the creation of minimum wage fixing machinery, and (*c*) the limitation of hours of work in industrial undertakings, respectively adopted by the International Labour Conference in accordance with the relevant articles of the said Treaty.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts or any of them either in whole or in part, and that it is expedient that such questions should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following questions be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act,*—

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

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

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

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

* The judgment of Duff C.J. and Davis and Kerwin JJ. was delivered by

DUFF C.J.—The validity of the legislation is attacked on various grounds which will be stated presently.

The draft convention respecting minimum wage fixing machinery was adopted by the General Council of the Labour Organization of the League of Nations on the 6th June, 1928, and a copy was communicated to Canada on August 23rd, 1928.

Resolutions declaring it to be "expedient that Parliament do approve of" the draft convention were passed by the House of Commons (on March 15th, 1935) and by the Senate (on April 2nd, 1935).

The draft convention was, under art. 7 thereof, transformed into a "convention," by the assent of two members of the Labour Organization on the 14th June, 1930. On the 12th April, 1935, the Governor General, by Order in Council, ordered on behalf of Canada that the convention "be confirmed and approved" and that "formal communication" of this confirmation and approval "be made to the Secretary General of the League of Nations." On 25th April, 1935, the formal instrument of ratification was deposited with the Secretary of the League of Nations. The statute in controversy was assented to on the 28th of June, 1935, in which there is the following preamble:

Whereas the Dominion of Canada is a signatory, as part of the British Empire, to the Treaty of Peace made between the Allied and Associated

*Reporter's note: Counsel on the argument of this Reference were the same as those mentioned at p. 365.

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Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the *Treaty of Peace Act*, 1919; and whereas by article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Convention concerning minimum wages was adopted as a Draft Convention by the General Conference of the International Labour Organization of the League of Nations in accordance with the relevant articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for minimum wages in accordance with the provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

The immediate question put in precise form is this: Is the statute which, by its preamble, recites the adoption of the draft convention by the General Conference of the Labour Organization and the ratification of that convention by Canada, constitutionally effective, without the assent of the provinces, to alter the law of those provinces by bringing that law into conformity with the stipulations of the convention so ratified: the matter of these stipulations being, *ex hypothesi,* normally, (and saving certain specific fields of legislation with which we are not concerned) a subject matter of legislation within the exclusive competence of the respective provincial legislatures under section 92 of the B.N.A. Act?

The principal points now in controversy arise upon these contentions of the provinces:

First, that the Governor General in Council has no authority to enter into any international engagement; second, that, since the subject matter of the convention falls within the subdivision of s. 92, which relates to property and civil rights within the provinces, the assent of the provincial legislatures was an essential condition of a valid ratification under art. 405 of the Labour Part of the Treaty.

Third, that in view of the character of its subject matter, the provinces alone are competent to give the force of law to the Convention.

We shall discuss in another place (in the reasons for the answers in the Reference concerning the *Natural Products Marketing Act*) (p. 403) the contention that the Dominion, independently of her powers in respect of international obligations, possessed authority in the circumstances of the time to enact the statute under the residuary power to make laws for the peace, order and good government of Canada.

As a step preliminary to the examination of the arguments addressed to us in support of these contentions, some brief observations upon the legislative and executive authority of the Parliament and Government of Canada in respect of international agreements may be useful.

An interesting and valuable account was presented in argument of the development of Dominion status within the British Empire or the British Commonwealth of Nations. Stages in that development are marked by the Imperial War Conference of 1917, the proceedings in the negotiation, the signature and the ratification of the Treaty of Versailles and of the Fisheries Treaty of 1923, by the Imperial Conferences of 1923, 1926 and 1930, and finally by the Statute of Westminster, 1931. At the moment it is sufficient to observe—as to status—that two fundamental characteristics of it are defined in unmistakeable words in the Report of the Imperial Conference of 1926:

> * * * we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relations may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Great Britain and the Dominions (1) are united by a common allegiance to the British Crown, and (2) are "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. . .and freely associated as members of the British Commonwealth of Nations."

The possession of equality of status with Great Britain in respect of all aspects of external as well as domestic affairs is thus affirmed in language admitting of no dis-

pute as to its intent or effect. This equality of status, as the report later explains, does not necessarily imply identity of function. It does, however, indisputably involve two very definite things. In the legislative sphere (subject to the disabilities imposed expressly or by necessary implication by the B.N.A. Act, and the Statute of Westminster, and to whatever restrictions may be implicit in her position as a member of the British Commonwealth of Nations owing a common allegiance to the Crown) the legislative authority reposed in the Parliament and Legislatures of Canada is plenary and embraces the whole field of external as well as domestic matters; and, in the executive sphere, while the executive authority for Canada is vested in the King, it is exercised according to the advice of the appropriate Canadian Government, and under the control of the appropriate legislature.

As regards legislative authority, this is precisely what is evidenced by the Statute of Westminster. The statute recognizes the common allegiance to the King as the bond uniting Great Britain and the Dominions. Extra-territorial legislative authority is in apt and express terms conferred upon the Dominion Parliaments. But three declarations signalize in a striking way the fundamental dogma of equality. The first is in the preamble, and is concerned with the royal style and title and the succession to the Throne. In respect of these, the preamble declares that no alteration in the law could be made consistently with the constitutional position except with the consent of all. Then there is the declaration that no statute of the United Kingdom should have effect in any Dominion as part of its law without the consent of that Dominion. And lastly, it is declared that nothing in the Act shall be deemed to give to the Parliament of Canada power to amend the B.N.A. Act. These reservations bring into relief the sweeping character of the legislative authority which is possessed by the Parliament of Canada and Legislatures combined.

As respects the executive sphere, the statute does not explicitly speak except in its recognition of the common allegiance to the Crown as the bond of union. In that field, however, the declarations of the Imperial Conferences leave

no doubt as to the constitutional position. First, as to the Governor General. In the report of 1926 his position is defined thus:

> We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor General as His Majesty's representative in the Dominions. That position, though now generally well recognized, undoubtedly represents a development from an earlier stage when the Governor General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.
>
> In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

This declaration of 1926 is repeated in 1930:

> The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the Governor General of a Dominion is now the
>
> > representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

As to the particular matter with which we are now concerned, the authority of the Government of Canada in relation to international arrangements, the Reports of the Imperial Conferences for 1923 and 1926 contain most important declarations. In substance, in so far as they are immediately pertinent, they amount to this—the Conferences recommend that the practice initiated in connection with the Halibut Fisheries Treaty of 1923 with the United States shall be continued and that, pursuant to that practice, agreements between Great Britain and a foreign country, or a Dominion and a foreign country, shall take the form of treaties between heads of states (except in the case of agreements between governments), the responsible government being in each case the Government of Great Britain or the Government of the Dominion concerned upon whose advice plenipotentiaries are appointed and full powers granted.

The argument on behalf of some of the provinces (while conceding equality of status between the Dominions and

Great Britain in respect of such matters, and the political responsibility of the Dominion Government in respect of all treaties or agreements to which the Dominion is a party) denies the authority of the Governor General, acting on the advice of the Canadian Government, to conclude a treaty or an agreement with a foreign state. The prerogative, it is said, resides in the Crown and it is most earnestly contended that the power to exercise this prerogative has never been delegated to the Governor General of Canada or to any Canadian authority.

With reference to the Report of the Conference of 1926, which in explicit terms recognizes treaties in the form of agreements between governments (to which His Majesty is not, in form, a party), it is said that since an Imperial Conference possesses no legislative power, its declarations do not operate to effect changes in the law, and it is emphatically affirmed that, in point of strict law, neither the Governor General nor any other Canadian authority has received from the Crown power to exercise the prerogative.

The argument is founded on the distinction it draws between constitutional convention and legal rule; and it is necessary to examine the contention that, in point of legal rule, as distinct from constitutional convention, the Governor General in Council had no authority to become party by ratification to the convention with which we are concerned.

There are various points of view from which this contention may be considered. First of all, constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declarations of such a Conference. The Conference of 1926 categorically recognizes treaties in the form of agreements between governments in which His Majesty does not formally appear, and in respect of which there has been no Royal intervention. It is the practice of the Dominion to conclude with foreign countries agreements in such form, and agreements even of a still more informal character—merely by an exchange of notes. Conventions under the auspices of the Labour Organization of the League of Nations invariably are ratified by the Government of the Dominion

concerned. As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognized by the Courts as having the force of law.

Indeed, agreements between the Government of Canada and other governments in the form of an agreement between Governments, to which His Majesty is not a party, have been recognized by the Judicial Committee of the Privy Council as adequate in international law to create an international obligation binding upon Canada (*Radio Reference* (1). The Convention in question there was the Radio Telegraphic Convention of the 25th November, 1927, which was a convention between the Governments of Great Britain, Canada and other countries. The Convention was concluded "subject to ratification." The ratification was in the following form:

Whereas a Convention together with General Regulations relating to Radio Telegraphy was signed at Washington on the 25th November, 1927, by the representatives of His Majesty's Government in Canada and of other Governments specified therein, which Convention and General Regulations are word for word as follows:—

His Majesty's Government in Canada having considered the aforesaid Convention together with the General Regulations, hereby confirm and ratify the same and undertake faithfully to perform and carry out the stipulations therein contained, in witness whereof this instrument of ratification is signed and sealed by the Secretary of State for External Affairs for Canada.

Ernest Lapointe,
For the Secretary of State for External Affairs.

OTTAWA, July 12, 1928.

This ratification, it was held by the Judicial Committee of the Privy Council, was effective, and created a diplomatic obligation binding on Canada which the Parliament of Canada was competent to enforce by legislation.

(1) [1932] A.C. 304.

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Ratification was the effective act which gave binding force to the convention. It was, as respects Canada, the act of the Government of Canada alone, and the decision mentioned appears, therefore, to negative decisively the contention that, in point of strict law, the Government of Canada is incompetent to enter into an international engagement.

It is, however, essential in considering the question now before us not to lose sight of the fact that the ratification with which we are concerned on this reference is one professedly effected pursuant to a treaty obligation arising under the Treaty of Versailles; and some reference to the general features of that treaty, well known though they are, is unavoidable.

It is a treaty of peace. It is a treaty between the British Empire and foreign countries. *Prima facie,* therefore, by section 132 of the *British North America Act,* the Parliament and Government of Canada have " all powers necessary or proper for performing the obligations of Canada . . . as part of the British Empire, towards foreign countries arising under " the Treaty.

By the terms of article 405, upon ratification of a convention notified to Canada, Canada incurs an obligation to take such action as may be necessary to " make effective " the provisions of the convention. The question whether or not there has been ratification of the convention within the contemplation of the article will be considered later. The point to be emphasized here is that the obligation to " make effective " the provisions of the convention is a treaty obligation and, *prima facie,* therefore, an obligation in respect of which the Dominion Parliament is invested with the authority bestowed by section 132. The *Treaties of Peace Act,* 1919, 10 Geo. V, ch. 30, is in the following terms. It is convenient to reproduce the statute in full:

AN ACT for carrying into effect the Treaties of Peace between His Majesty and certain other Powers.

(Assented to 10th November, 1919).

Whereas, at Versailles, on the twenty-eighth day of June, nineteen hundred and nineteen, a Treaty of Peace (including a Protocol annexed thereto), between the Allied and Associated Powers and Germany, a copy of which has been laid before each House of Parliament, was signed on behalf of His Majesty, acting for Canada, by the pleni-

potentiaries therein named; and whereas, a Treaty of Peace between the Allies and Associated Powers and Austria has since been signed on behalf of His Majesty, acting for Canada, by the plenipotentiaries therein named, and it is expedient that the Governor in Council should have power to do all such things as may be proper and expedient for giving effect to the said Treaties; Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. (1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

(2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise, of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

(3) Any expense incurred in carrying out the said Treaties shall be defrayed out of moneys provided by Parliament.

2. This Act may be cited as The Treaties of Peace Act, 1919.

The Governor in Council is, by this statute, the proper authority for authorizing ratification under article 405. The Parliament of Canada, it will be observed, consists of His Majesty the King, the Senate and the House of Commons (Section 17 B.N.A. Act); and this statute, enacted pursuant to the authority of section 132, in itself empowers the Governor General in Council to exercise any prerogative concerning foreign relations in order to carry out the stipulations of the Treaty. The Governor General acts as the delegate of His Majesty as well as the agent of Parliament. *A.G.* v. *Cain* (1). Moreover, section 132 itself invests the Government of Canada, as well as the Parliament of Canada, with all powers necessary or proper for performing the obligations of Canada under a treaty within the scope of that section; and the Governor General, by his Commission, is authorized and commanded to

execute * * * all things that shall belong to his said office and to the trust We have reposed in him, according to * * * such laws as are or shall hereafter be in force in Our said Dominion. (6-7 Edw. VII, p. lv).

In virtue of section 132 of the B.N.A. Act and of the *Treaties of Peace Act,* 1919, the authority of the Governor in Council to authorize ratification, therefore, would seem *prima facie* to be indisputable.

As against this conclusion, two main objections are urged. First, it is said that the legislative authority created

(1) [1896] A.C. 542.

by section 132 has no application to matters falling exclusively within the legislative authority of the provinces under the terms of s. 92. Second, it is said that the section is limited in its operation to matters which are properly the subjects of international arrangement, and that such matters as the regulation of the rates of wages, the hours of labour and days of rest are matters of purely domestic concern which do not fall within that category.

To deal first with the second of these objections. First of all, no authority seems to indicate that such matters are excluded from the scope of the prerogative in relation to treaties. Second, the Treaty of Versailles contains, as an integral part of it, the Covenant of the League of Nations. Art. 23 of the Covenant provides *inter alia*:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(*a*) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(*b*) undertake to secure just treatment of the native inhabitants of territories under their control;

(*c*) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

* * *

The Treaty also includes Part 13 which provides for a permanent Labour Organization and section 1 of that Part is in these terms:

Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity, as well as by the desire to secure the permanent peace of the world, agree to the following: * * *

The signatories to the Treaty included almost all the organized states of the world; and the Treaty would appear, especially in view of the parts of it just quoted, to involve a declaration by all these states that matters such as those which are the subject of the convention now in question, are proper subjects for international engagements. Since the Covenant was entered into this view has been acted upon time and again by the nations of the world and it would appear to be scarcely tenable that a treaty dealing with such matters is excluded for that reason alone from the operation of section 132.

Turning to the contention that matters ordinarily falling, as subjects of legislation, within section 92 of the B.N.A. Act are excluded from the ambit of Dominion authority under section 132, it may be said at once that such a view would run counter to well established practice as well as to judicial authority. The Dominion Parliament has, in fact, exercised the powers vested in it for performing obligations arising under such treaties by legislating in relation to matters which otherwise would have fallen within the domain of property and civil rights within the several provinces, and of controlling the management and disposal of the public lands and other property of the Provincial Governments. A signal instance is the statute of 1911 which gave statutory effect to the agreements of the International Waterways Treaty of January 11, 1909 (1911 1-2 Geo. V, ch. 28). By s. 2 of that statute,

the laws of Canada and of the several provinces thereof are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada.

It is not necessary to particularize the terms of the Treaty, but, obviously, the treaty deals with matters that, but for s. 132, would indisputably have come, at the date of the statute (1911) within the exclusive spheres of the provincial legislatures.

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Then there is the Japanese Treaty Act (Stats. of Can. 1913, 3-4 Geo. V, ch. 27) which gave statutory effect to the treaty of the 3rd April, 1911, with Japan. By the second section, it is declared that the treaty shall have the force of law in Canada. The first four paragraphs of the first article of the Treaty are these:

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 country—

1. Shall, in all that relates to travel and residence, be placed in all respects on the same footing as native subjects.

2. 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.

In 1921, by ch. 49 of the statutes of that year, the legislature of British Columbia passed a statute giving legislative force to certain Orders in Council intended to put into effect a resolution of the legislature of 1902 by which it was resolved

that in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

This statute of 1921 was challenged in respect of the competence of the legislature to enact it, and it came before the Judicial Committee in two cases,—*Brooks-Bidlake* v. *A.G. for B.C.* (1) and *A.G. for B.C.* v. *A.G. for Canada* (2). By the decision in the first of these cases, it was held that, as respects Chinese, the statute was valid as an exercise of the functions of the provincial legislature under sec. 92(5) and sec. 109 of the B.N.A. Act in regulating the management of the property of the province, and in determining whether a grantee or licensee of that property should or should not employ persons of certain races; and that its validity was not affected by the circumstance that exclusive legislative authority respecting naturaliza-

(1) [1923] A.C. 450. (2) [1924] A.C. 203.

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tion and aliens is vested in the Parliament of Canada by head no. 25 of section 91.

The legislation being valid as regards Chinese, as an exercise of the legislative authority of the province under sections 92 and 109, it was held in the second of the above mentioned decisions to be invalid as regards Japanese, that is to say, the subjects of the Emperor of Japan, because it conflicted with the Japanese Treaty Act. In the absence of the Japanese Treaty and the statute giving it the force of law throughout Canada, the legislation would have been operative in respect of Japanese as well as Chinese, but the powers of the Dominion under section 132, were held to be sufficient to enable the Dominion to lay down a rule, in conformity with its obligations under the Japanese Treaty, which the provincial legislature thereby became incompetent to infringe or disregard by the exercise of powers which otherwise it would undoubtedly have possessed under the sections mentioned of the Confederation statute.

The scope and effect of section 132 came again before the Judicial Committee of the Privy Council for consideration in two cases in the year 1932: first, the *Aeronautics* case (1), and, second, the *Radio* case (2). Each of these cases arose out of a reference to this Court, by the Governor General in Council.

In the first case, the first question submitted was as follows:

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

That question was unanimously answered in this Court in the negative. The Judicial Committee answered it in the affirmative; and the parts of their Lordships' judgment which specially relate to that interrogatory are in these words:

> There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.
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> * * *

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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In their Lordship's view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder.

* * *

It is therefore obvious that the Dominion Parliament, in order duly and fully to "perform the obligations of Canada or of any Province thereof" under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose (1).

In the second of these cases, the *Radio* case (2), Lord Dunedin, speaking for the Board, observed, with reference to the *Aeronautics* case (3).

For this must at once be admitted, the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the *British North America Act*. * * *

The tenor of these observations is hardly compatible with the notion that the authority to legislate under s. 132 does not apply to matters which, but for that section, would have fallen within the exclusive legislative jurisdiction of the provinces under other enactments of the B.N.A. Act. The power to legislate for the perform-

(1) [1932] A.C. 54, at 73, 74, 76, 77. (2) [1932] A.C. 304.
(3) [1932] A.C. 304, at 311.

ance of obligations under treaties within that section is reposed exclusively in the Dominion Parliament, their Lordships declare, and, as their Lordships imply, the language is general and the power in no way depends upon the condition that the matters with which the obligation is concerned shall be matters in respect of which Parliament is invested with jurisdiction under section 91 or any other section of the B.N.A. Act. This view of these observations is confirmed by a perusal of the judgment of Lord Dunedin, delivered on behalf of the Judicial Committee in the *Radio* case (1) the second of the cases above mentioned. Beginning at p. 311 (2), he says:—

For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows:

> 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.

And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.

Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words the argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent

(1) [1932] A.C. 304.

(2) [1932] A.C. 304, at 311.

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to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power 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." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

* * *

The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

His Lordship proceeds to observe that the view expounded in this passage " is destructive of the view urged by the province as to how the observance of the international convention should be secured."

It seems hardly open to dispute that their Lordships intended to lay down that international obligations, which are strictly treaty obligations within the scope of s. 132, as well as obligations under conventions between governments not falling within s. 132, are matters which, as subjects of legislation, cannot fall within s. 92 and, therefore, must fall within s. 91; and since they do not fall within any of the enumerated subjects of section 91, they are within the ambit of the Dominion power to make laws for the peace, order and good government of Canada. That seems to be the effect of what is said, because, at pp. 311 and 312, their Lordships dealt with the contention, advanced on behalf of the provinces, that legislative authority to deal with and give effect to the convention is vested, as regards matters falling within the enumerated heads of s. 91, in the Dominion Parliament; but that, as regards matters which would normally fall within s. 92, such authority is vested in the provincial legislatures. The contention is rejected, and rejected for the reasons given in the passage quoted, viz., that such matters, as the subjects of an international convention, are matters which

concern the Dominion as a whole and, therefore, exclusively within the competence of the Dominion Parliament.

It is, at this point, important to emphasize these two things: First, that by the combined effect of the judgments in the *Aeronautics* case (1) and the *Radio* case (2), the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive; and, moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary.

It was at one time supposed that s. 132 was the sole source of authority for Parliament in respect of the enforcement of international obligations, as regards matters which, otherwise, would fall within s. 92, and, at the same time, would not fall within any of the enumerated heads of section 91: that, for the purpose of ascertaining the ambit of that authority, one must look to the scope of s. 132 (and the conditions under which that section operates): and that from the language employed it was a legitimate inference that the jurisdiction did not arise until there was a treaty obligation in existence within the contemplation of the section. Four of the judges of this Court who took part in the judgment in the *Aeronautics* case (3) expressed that view.

Moreover, it was supposed that, as regards matters normally falling within s. 92, the provinces might legislate for the purpose of giving effect to an international obligation. In the *Aeronautics* case (1), the members of this Court were unanimously of the opinion that, as regards such matters, the jurisdiction of the Parliament of Canada was not exclusive, even though paramount.

It is now plain (as a result of these two decisions of 1932) that the provinces have no jurisdiction to legislate for the performance of such obligations, whether they be obligations within s. 132 or whether they be outside that section and within the scope of the general power to make laws for the peace, order and good government of Canada. Such obligations, we repeat, it is now settled, are not

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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matters within the subjects of s. 92 or the enumerated subjects of s. 91.

It has been contended in respect of Dominion jurisdiction in relation to international matters, under section 132, as well as under the residuary clause (as pointed out in the judgment of Duff J. on the Reference relating to the employment of aliens (Japanese Treaty, 63 S.C.R. 330)) that there are certain fundamental terms of the arrangement upon which the B.N.A. Act was framed which it is difficult to suppose Parliament could in any case disregard; and that it is a necessary inference to be drawn from the B.N.A. Act as a whole as regards such terms that the Dominion cannot, without, at all events, the assistance of the Provinces, legislate in contravention of them, even in the exercise of its authority over international relations. It is not necessary to deal with this contention; it is sufficient to say that the statutes under discussion do not deal with matters excluded from Dominion jurisdiction by any such principle.

We now turn to a consideration of article 405 and, before discussing the text of that article, it may be desirable to recall what has been said with regard to the scope of legislative authority vested in the Parliament of Canada and the legislatures of the provinces combined. Subject to the reservations mentioned, the ambit of that legislative authority would appear to embrace any action of the Government of Canada in entering into international arrangements either directly, by way of agreements between governments or otherwise without the intervention of His Majesty, or, in the case of treaties between heads of states, by plenipotentiaries appointed by His Majesty on the advice of the Canadian Government; and, generally speaking, the conduct of external affairs by that Government. As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a province represent the Crown in respect of relations with foreign governments. The Canadian executive, again, con-

stitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.

As the subject of agreements with foreign countries is not one of the subjects embraced within section 92, or within any of the enumerated heads of section 91, it follows that the authority must rest upon the residuary clause from which Parliament derives its power to make laws for the peace, order and good government of Canada; and it follows from what has already been said that this power is plenary. It is for the Parliament of Canada to determine the conditions upon which such agreements shall be entered into as well as the manner in which they shall be performed and this may be done by antecedent legislation or by legislation taking effect *ex post facto*. These propositions are, indeed, corollaries of the proposition that the power is plenary.

As regards League of Nations matters, the following passage from the last edition of Anson's Law and Customs of the Constitution seems to state the position accurately:

> (1) In all League of Nations matters each of the Dominions (except Newfoundland) is quite independent of the United Kingdom. Its representatives at the League Assembly are not accredited by the King on the advice of the Secretary of State for Foreign Affairs, but by the Governor General on the advice of his ministers, and they act independently of the British Empire or other Dominion delegates; consultation is, of course, possible but is by no means necessary. Moreover, the Dominions are eligible for seats on the Council, despite the permanent representation thereon of the British Empire in which the Dominions are included. Canada was elected to membership in 1927, then the Irish Free State in 1930, and the Commonwealth in 1933.
>
> (2) The Dominions are in like manner autonomous in relation to the Labour Organization of the League. Further, conventions arrived at under its auspices are ratified by Order of the Governor General in Council, not by the King, on the advice of the Secretary of State. (pp. 87, 88.)

As regards all these matters, it has never been doubted that it is the executive of Canada which represents Canada or that the executive is entirely under the control of Parliament.

The draft convention now in question was, as we have seen, brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of it, and the legislation now in question was passed for the

purpose of giving legislative effect to the stipulations, the operative clauses of the statute being preceded by a preamble in which it was recited that the draft convention has been ratified by Canada. The propriety of this procedure is questioned on the ground that, under the special provisions of art. 405, and especially those of paragraphs 5 and 7 of the article, the draft conventions should have been submitted to the provincial legislatures.

There can, of course, in view of what has been said, be no dispute that the procedure followed, if we put aside the provisions of art. 405, was the usual and the proper procedure for entering into agreements with foreign governments. The Governor General in Council is exclusively invested with the executive authority to assent to an agreement, in the form of an agreement between Governments, with the Government of a foreign state. The Parliament of Canada is the legislative body that is exclusively invested with authority to legislate in respect of the creation of obligations through the instrumentality of such agreements. It is the legislative body exclusively invested with power to legislate for giving effect to such obligations. The course of the proceedings, prior to ratification, in which the convention was approved by resolutions of the Senate and the House of Commons respectively, was in accord with the settled general practice of the Canadian Parliament in the ratification of such agreements; and the statute which, in its preamble, declares that the convention has been ratified by Canada, in itself, would constitute sanction by legislative act of that ratification. Executive and legislative authority combined, each playing its appropriate part, according to the usual procedure, in the creation of the obligation and in the enactment of legislation to give effect to it.

On behalf of the provinces it is said that, granting all this, these proceedings are nevertheless affected with invalidity because they do not conform to the procedure prescribed in article 405 which requires the draft convention, antecedently to ratification, to be brought before

> the authority or authorities within whose competence the matter lies for enactment of legislation or other action;

and, therefore, it is argued, requires that, in the application of the article to Canada, the competent authorities to

which the draft convention must be submitted include the provincial legislatures.

Paragraphs 5 and 7 of article 405 are in these words:

Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

* * *

In the case of a draft convention the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

In considering the contention of the provinces that the competent authorities within the intendment of these paragraphs include the provincial legislatures, it is necessary that the paragraphs be read together. The "Competence" postulated is to enact legislation or to take other "action" contemplated by the article.

The seventh paragraph imposes upon members two conditional obligations; an obligation, upon the consent of the competent authority or authorities, to ratify; and an obligation, upon the like consent after ratification, "to make effective the provisions of (the) convention" within their territorial jurisdiction. Both these obligations are treaty obligations and the "action," legislative or other, by the competent "authority or authorities" which is contemplated by paragraph 5 would seem clearly to include the second of these obligations, if not both of them.

As concerns the second obligation, the answer to the question, What is the constitutional agency responsible for discharging it? would appear to be dictated by section 132 which is once again quoted verbatim:

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

The power to perform the obligations of the Treaty to make the provisions of the convention effective, in so far as it requires legislative action, is by this section vested

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primarily in the Parliament of Canada. In so far as it requires executive action, it is vested in the Government of Canada. The judgments of the Judicial Committee of the Privy Council in the *Aeronautics* case (1) and the *Radio* case (2) constrain us to hold that jurisdiction to legislate for the purpose of performing the obligation—for bringing the law of the Canadian provinces into harmony with the provisions of the convention, for example—resides exclusively in the Parliament of Canada; and, by parity of reasoning, if not, indeed, as an obvious logical consequence of that proposition, jurisdiction resides, in so far as executive action is required, exclusively in the Government of Canada.

There can be no possible doubt, therefore, that the Parliament of Canada is at least one of the authorities before which the draft convention must be brought in the performance of the duty imposed upon Canada by paragraph 5. The question whether, by force of the *Treaties of Peace Act,* 1919, the Governor General in Council is empowered to act as the agent of Parliament in this respect was not discussed and is of no importance, since the assent of both Houses of Parliament and of the Governor General in Council was admittedly given.

The question remains: Are the provincial legislatures also comprehended under the phrase "authority or authorities within whose competence the matter lies, for the enactment of legislation or other action?"

At one time we thought that, since by s. 92 the jurisdiction, speaking generally, to legislate in relation to the subjects dealt with by the draft convention would, in the absence of any international agreement and of legislation by the Parliament of Canada under s. 132, fall within the exclusive legislative jurisdiction of the provinces, the provincial legislatures might fairly be said to be included within this description. But we have been forced to the conclusion above expressed that the "legislation or other action" contemplated by paragraph 5 is "action" concerning making "effective the provisions of the convention," and, perhaps, also, action concerning ratification. That seems to me to be the plain reading of this article; and

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

where you have authorities (the Parliament and Government of Canada) which are exclusively invested with the power to take legislative and executive measures for the performance of international obligations, we can see no escape from the conclusion that such are the authorities designated by these paragraphs.

We were at one time much influenced by the consideration of the importance of obtaining the assent of the provincial legislatures, which would naturally be more conversant with the conditions prevailing in their respective provinces and more capable of estimating the difficulties of giving effect to a given convention therein than the Parliament of Canada could be expected to be; but such considerations, we have been forced to conclude, cannot justify a refusal to give effect to what seems to be the true construction of this article.

Upon the true construction, the provincial legislatures, it seems to me, after a prolonged examination of the question in all its bearings, are not authorities competent to enact legislation or to take executive action for the purposes contemplated by paragraph 5; that is to say, either for making "effective the provisions of the convention," or for ratification.

It will appear, however, from the observations which immediately follow that it is strictly not necessary to decide the question we have just dealt with. My view as to the validity of the legislation can be rested upon another ground.

Mr. Rowell contends as follows:

General authority to bind Canada by adherence to an international convention containing the substance of the stipulations of that in question is vested in the Government of Canada, and a general authority to legislate for giving effect to any obligation arising from such adherence is vested in the Parliament of Canada: the Parliament of Canada, moreover, is the legislative body which has power to legislate for Canada in relation to the creation, as well as the enforcement, of international obligations: ratification of a convention, therefore, it is argued, which has been authorized by the Government of Canada with the assent of the Houses of Parliament, and in respect of which

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legislation has been enacted recognizing the ratification and providing for the enforcement of the stipulations of the convention, is one which is diplomatically binding on Canada.

The duty of the member, Canada, under art. 405, to submit the draft convention to the competent authorities is a duty committed to the Government of Canada. It is committed to the Government of Canada by the *Treaties of Peace Act,* 1919, a statute indisputably within the jurisdiction of the Dominion under s. 132 of the B.N.A. Act. By that statute, the Governor General in Council, as we have seen, is entrusted with the performance of that duty. It is the same authority (the Governor General in Council) who is also entrusted, by force of the same statute, with the duty of ratifying the draft convention upon the assent of the competent authorities. Ratification by the Governor General in Council would seem to imply a representation that the conditions of the authority to ratify have been fulfilled.

By the *Treaties of Peace Act,* 1919, Parliament, that is to say, the King in Parliament, imposed upon the Governor General in Council the responsibility of passing such Orders in Council and doing such acts as to him might appear necessary for carrying out and giving effect to the provisions of the Treaty. Moreover, the statute now under consideration expressly by its preamble declares that the convention has been ratified by Canada. The Governor in Council, in authorizing the ratification, spoke as the agent of Parliament as well as the representative of His Majesty the King. The ratification was accepted by Parliament as a ratification binding upon His Majesty for Canada. It has all the force, therefore, of a ratification authorized by the King in Parliament. Considering the sweeping character of the legislative authority reposed in Parliament and the legislatures combined, and the scope of the powers which consequently devolve upon Parliament in respect of matters outside the provincial sphere (which matters include the creation as well as the enforcement of international obligations), it would seem that Canada could not be more solemnly committed as to the validity of the ratification in question as a ratification under art. 405.

Some reference is necessary to the answers given to the interrogatories addressed to this Court in 1925 on a reference in relation to one of the conventions now under consideration—the convention relating to Hours of Labour (1). We do not enter upon a systematic examination of that decision. The view expressed in the preceding pages as to the effect of the judgments of the Judicial Committee (2) (3) and its bearing upon the construction of article 405 require us to consider afresh the question of the "competence" of the provincial legislatures in so far as it is relevant within the meaning of art. 405 in the light of those decisions. We have already expressed the view that, in effect, they negative the "competence" of the provincial legislatures in the pertinent sense. The view expressed in the last preceding paragraph is, obviously, of course, not affected by what was decided in 1925.

The result is that "*The Minimum Wages Act*" is valid.

In substance, the foregoing reasoning govern the decision as to the answers to the interrogatories touching the validity of the statutes relating to *Weekly Rest in Industrial Undertakings* and the *Limitation of Hours of Work*, which are, therefore, also valid.

To summarize:—

From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada.

First, by virtue of section 132 of the *British North America Act,* jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion, the Privy Council held, in the *Aeronautics* case (2) and in the *Radio* case (3) is exclusive; and consequently, under the *British North America Act,* the provinces have no power and never had power to legislate for the purpose

(1) [1925] S.C.R. 505. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92.

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

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

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (*a*) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (*b*) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example (as the provinces argue), as the matters dealt with by the conventions to which effect is given by the statutes now before us: the regulation of wages and of hours of labour.

The claim of Parliament to authority to execute legislative changes in the law of the provinces in such matters naturally arouses concern and misgiving among the authorities charged with responsibility touching the status and rights of the provinces.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined.

(1) As touching the view advanced that the subject matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject matter of the statutes in question are not within the scope of that prerogative. The question whether the language of section 132 is, by necessary implication, subject to some restriction in order to preserve unimpaired radical guarantees evidenced by the B.N.A. Act as a whole is mentioned in the next succeeding paragraph. Legislative authority to give effect to treaties within section 132

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remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster, in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation.

(2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country, Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in Section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable;

Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning

the Japanese Treaty was held to be valid and to nullify a statute of the Province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1).

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the Provinces that the Dominion cannot by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs

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

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5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 are as follows:

> Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
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> * * *
>
> In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

These paragraphs must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The question whether the provincial legislatures are also competent authorities within the contemplation of paragraph 5 would appear to be necessarily determined by the consideration that we are constrained by the decisions of the Judicial

Committee of the Privy Council (1), already referred to, to hold that the authority of Parliament in this matter is exclusive and that the provincial legislatures are not competent to legislate for giving effect to the provisions of any international convention. * * * Strictly, however, important as this question of the "competence" of the provincial legislatures in the sense of article 405 is, it is unnecessary to decide it for the purposes of this reference; as will appear from what immediately follows.

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

That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

The answer to the three interrogatories addressed to this Court under this Order of Reference is, therefore, the statutes being *intra vires* in each case in the negative

(1) [1932] A.C. 54 and 304.

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RINFRET, J.—For the purpose of giving answers to the questions referred to the Court by His Excellency the Governor General in Council concerning *The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act* and *The Limitation of Hours Act,* it is well to bear in mind that, apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Office of the League of Nations, the subject-matter of these legislations is undoubtedly one in relation to which, under the Constitution of our Country, the legislature in each province may exclusively make laws.

It follows that, in order to support the validity of the Acts, the Attorney-General of Canada had the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation had, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The written submission of the Attorney-General of Canada, as it was made to this Court, was that the Acts were within the legislative power of the Parliament of Canada in their entirety in virtue of

(1) its exclusive legislative power under sec. 132 of the *British North America Act;*

(2) its general power, conferred by sec. 91 of the said Act, to perform the obligations of Canada under the several draft conventions duly ratified by Canada as a Member of the International Labour Organization;

(3) its general power to make laws for the peace, order and good government of Canada;

(4) its exclusive legislative authority in relation to the regulation of trade and commerce;

(5) its exclusive legislative authority in relation to the criminal law.

It will only be necessary to consider the provisions contained in numbers 1 and 2 of the submission, for it seems to be evident that the subject-matter of the Acts is not criminal law (and the point was not pressed at the argument).

As for the contention that the legislation may be supported as an exercise of the general power conferred by sec. 91 to make laws for the peace, order and good government of Canada, or of the exclusive legislative authority in relation to the regulation of trade and commerce, the discussion, both comprehensive and exhaustive of the extent of those powers made by my Lord the Chief Justice in his reasons on the Reference concerning *The Natural Products Marketing Act* (p. 403) relieves me of the necessity of examining these contentions here, for, to my mind, they establish conclusively that the Dominion Parliament cannot rely on these powers in support of the validity of the legislation under submission.

It will only be necessary, therefore, to scrutinize the arguments put forward by the Dominion Government that the Acts are valid as an exercise of the power "necessary or proper for performing the obligations of Canada, or any province thereof . . . towards foreign countries, arising under the Draft Conventions duly ratified by Canada as a Member of the International Labour Organization."

Part XIII of the Treaty of Versailles is entirely devoted to labour questions. Under it, a permanent organization is established for the promotion of the objects set forth in that part. The original members of this organization are the original members of the League of Nations. Canada is such a member.

The permanent organization consists of a General Conference of the representatives of the members and an International Labour Office controlled by a Governing Body.

Meetings of the General Conference are held from time to time at which the Conference adopts proposals taking the form either (*a*) of a recommendation to be submitted to the members for consideration with a view to effect being given to it by national legislation or otherwise, or (*b*) of a draft international convention for ratification by the members.

The procedure is that, after the recommendation or draft convention has been identicated by the President and the Director of the Conference and after it has been deposited with the Secretary General of the League of Nations, the

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Secretary General is to communicate a certified copy to each of the members.

And then, under article 405,

> Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
>
> In the case of a recommendation, the Members will inform the Secretary-General of the action taken.
>
> In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.
>
> If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.
>
> In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

The draft conventions here, by the Dominion Parliament, made the basis of the legislation now submitted to the Court were adopted by the General Conference of the International Labour Organization under the provisions just mentioned.

It should be stated, only for the purpose of accuracy, that, notwithstanding the fact that the proposals were adopted at the first session of the International Labour Conference, at its first annual meeting (29th October-29th November, 1919), it was not until 1935—and, therefore, sixteen years later—that the Dominion Government and the Federal Parliament undertook to take any action in regard to them and to enact legislation in order to carry them out.

Under article 405 just quoted, a Member undertook to bring a recommendation or a draft convention before the authority or authorities within whose competence the matter lies—

> within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances

to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference.

This was not done; but it is claimed that the provision is directory only and that no consequence can follow from the fact that the delay prescribed in the order had long since expired when the Dominion Government took action and the Dominion Parliament undertook to pass this legislation.

In the meantime, however, a fact, to my mind of very great importance, had taken place.

On November 6, 1920, an Order in Council was passed on the report of the then Minister of Justice dealing in part with the obligations of the Dominion of Canada as a Member of the International Labour Conference with relation to the Draft Conventions or Recommendations which may from time to time be adopted by the Conference, so that appropriate legislative and other action may be taken to give effect to them. The opinion expressed by the Minister upon this point was set forth in the Order in Council. That opinion was

that the provisions of the Labour Part of the Treaty of Versailles do not impose any obligation on the Dominion of Canada to enact into law the different draft conventions or recommendations which may from time to time be adopted by the Conference.

The obligation as set forth is simply in the nature of an undertaking on the part of each Member to bring the recommendations or draft conventions before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action.

In the opinion of the Minister

the Government's obligation would be fully carried out if the different conventions and recommendations are brought before the competent authority, Dominion or Provincial, accordingly as it may appear, having regard to the scope and objects, the true nature and character of the legislation required to give effect to the proposals of the conventions and recommendations respectively that they fall within the legislative authority of the one or the other.

This Order in Council of the 6th November, 1920, also embodied the Minister's opinion upon the question whether the provisions of the Draft Convention limiting the hours of work in industrial undertakings came within the legislative competence of the Parliament of Canada or of the provincial legislature.

The Minister reported that the proposals of this Convention

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involve legislation which is competent to Parliament in as far as Dominion works and undertakings are affected, but which the provincial legislatures have otherwise the power to enact and apply generally and comprehensively.

Notwithstanding the view expressed in the Order in Council of November 6, 1920, as doubt existed in certain quarters as to the jurisdiction of the federal and provincial authorities respectively, the Committee of the Privy Council of Canada, upon a report dated the 23rd December, 1924, from the Minister of Justice, considered it expedient that the question as to the respective powers of the Parliament of Canada and of the provincial legislature in relation to the enactment of the legislation required to give effect to the provisions of the said Draft Convention should be judicially determined; and accordingly the following questions were then referred to the Supreme Court of Canada:—

(1) What is the nature of the obligations of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may be from time to time adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?

(2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention (The Limitation of the Hours of Work Act) in whole or in part lies before whom such draft convention should be brought, under the provisions of Article 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?

(3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada?

The answers of the Court and the reasons for those answers are reported (1).

To the first question, the answer was that

The obligation is simply in the nature of an undertaking to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

(1) [1925] S.C.R. 505.

To the second question, the answer was

Yes, in part.

A reference to the reasons will show that the Court was unanimously of opinion that

Under the scheme of distribution of legislative authority in the *British North America Act,* legislative jurisdiction touching the subject-matter of this convention is, subject to a qualification to be mentioned, primarily vested in the provinces. * * * This general proposition is subject to this qualification, namely, that as a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government.

* * *

It is necessary to observe, also, that as regards these parts of Canada which are not included within the limits of any province, the legislative authority in relation to civil rights generally, and to the subject-matter of the convention in particular, is the Dominion Parliament.

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The answer to the third question was:—

The subject-matter is generally within the competence of the legislatures of the provinces, but the authority vested in these legislatures does not enable them to give the force of law to provisions such as those contained in the draft convention in relation to servants of the Dominion Government, or to legislate for these parts of Canada which are not within the boundaries of a province.

The answer to the fourth question was:—

The Parliament of Canada has exclusive legislative authority in those parts of Canada not within the boundaries of any province, and also upon the subjects dealt within the draft convention in relation to the servants of the Dominion Government.

The conclusion of the unanimous judgment of this Court in the matter was that

the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The convention should also be brought before the Lieutenant-Governor of each of the provinces for the purpose of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the province in relation to the subject-matter of the convention.

The reference made in 1925 went no further and, therefore, the opinion then given may be regarded as binding upon this Court, except in so far as it may have been superseded by subsequent pronouncements of the Privy Council in the *Reference concerning the regulation and control of Aeronautics in Canada* (1), and the *Reference concerning the regulation and control of Radio communication in Canada* (2).

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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On the points that we are now discussing I find it impossible to distinguish between *The Limitation of the Hours of Work Act,* which was the subject-matter of the reference of 1925 to this Court (again submitted in the present reference) and *The Weekly Rest in Industrial Undertakings Act,* or *The Minimum Wages Act.*

These conventions are not treaties within the meaning of sec. 132 of the B.N.A. Act, more particularly as the word was understood at the time of the adoption of the Act by the Imperial Parliament. Moreover, they are not treaties between the Empire and Foreign Countries in respect of which "obligations of Canada or of any province thereof as part of the British Empire towards foreign countries" might have arisen. Consequently, sec. 132 in terms does not apply to these conventions.

It was decided, however, by the Privy Council on the *Radio* Reference (1), that certain class of conventions, of which Canada as a dominion was one of the signatories, not being mentioned explicitly in either sec. 91 or sec. 92 fell within the general words at the opening of sec. 91 assigning to the Parliament of the Dominion the power 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 their Lordships "in fine, though agreeing that the convention was not such a treaty as is defined in s. 132, thought that it comes to the same thing."

Both in the *Aeronautics* Reference (2) and in the *Radio* Reference (1), however, the Privy Council, at the same time as it declared that the validity of the legislation could be supported as an exercise of the powers derived from sec. 132 or from the residuary power to make laws for the peace, order and good government of Canada, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of sec. 91 of the B.N.A. Act, radio, moreover, belonging to such class of subjects as were expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces (91-29).

(1) [1932] A.C. 304, at 312. (2) [1932] A.C. 54.

I will have to make further observations on this point later on.

Another remark to be made in connection with the aeronautics and radio judgments in the Privy Council is that, in the former case, their Lordships were dealing with a treaty convention under sec. 132, and, in the latter case, they were dealing with a convention of a character quite different from those under submission and of which they said that it " comes to the same thing as a treaty."

It would seem to me, therefore, that these two decisions are not authorities upon the question of wherein lies as between the Parliament of Canada and the Legislatures of the Provinces the powers necessary or proper for performing the obligations of Canada or of any province thereof arising out of conventions adopted by the International Labour Conference.

But on the present reference, as I view it, it is not necessary for this Court to enter into the discussion of this last point.

Whether treaty or convention, the questions under consideration in the *Aeronautics* (1) and the *Radio* (2) references were concerned with the validity of legislation enacted for the purpose of performing obligations arising as a result of international agreements already made and the validity whereof was not disputed.

In those references, the question whether the treaty or convention had been properly and competently signed, adopted or ratified was not in question, either in this Court or in the Privy Council.

Now, with deference, I make a very great distinction between the power to create an international obligation and the power to perform it when once it has been created.

We may leave aside the aeronautics and radio decisions, which were concerned merely with the validity of laws enacted for the purpose of performing foreign obligations, because in the present case what we have mainly to consider is the power to create foreign obligations. On that particular point, that is to say: on that point of where lies the power to create an international obligation, the only decision so far is the judgment of this Court on the refer-

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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ence In the matter of legislative jurisdiction over hours of labour (1). I fail to find anything in the subsequent judgments of the Privy Council superseding what was said unanimously by this Court on that subject. The authority, in my humble opinion, is as conclusive as it can be, since that reference was concerned with one of the draft conventions on which the Attorney General of Canada now seeks to rely in support of the validity of the legislation now submitted to us, and since no substantial distinction in the pertinent sense can be made between the draft convention then under consideration and the two other conventions dealing with *The Weekly Rest* and *The Minimum Wages*. With deference, I think the decision of 1925 (1) is certainly binding on this Court and that, as a consequence, it must follow that the obligation of Canada with respect to these draft conventions is simply to bring them before the authority within whose competence the matter lies for the enactment of legislation or other action, or, in the premises, before the legislatures of the provinces, except for the provisions of those draft conventions in relation to servants of the Dominion Government, or in relation to those parts of Canada which are not within the boundaries of a province.

Let it be granted that under the scheme of the *British North America Act* the provinces of Canada were " federally united into one Dominion "; that the Act provides for one nation, not for several nations; that the provinces have no status in international law, they are not States and are not recognized as such. Let it be conceded from these premises that the Government of Canada is the proper medium for all international relations and that " for international purposes, it should be regarded as a unity" (Keith on Responsible Government in the Dominions, 1909, pp. 134-135). It seems to me that, having regard to the fundamental spirit of the Constitution, a distinction must necessarily be drawn between the competency to discharge international obligations and the competency to enter into them.

While it is, no doubt, perfectly true that " overwhelming convenience—under the circumstances amounting to necessity " (Anglin C.J.C. in the *Radio* Reference) (2), dic-

(1) [1925] S.C.R. 505. (2) [1931] S.C.R. 541, at 545, 546.

tates the answers that the performance of obligations, both federal and provincial, arising out of international agreements must be left exclusively to the jurisdiction of the Dominion Parliament, I fail to see the same necessity with regard to the power to create these foreign obligations. When once they have been undertaken, Canada is in honour bound to perform them; but there is no necessity, nor even obligation, to undertake them. If the effect of the undertaking is that a subject of legislation within the exclusive jurisdiction of the province will thereby be transferred from that jurisdiction to the jurisdiction of the Dominion Parliament, I consider it to be within the clear spirit of the British North America Act that the obligation should not be created or entered into before the provinces have given their consent thereto. In the particular case that we are now considering, it is my humble view that such was the effect of the judgment of this Court in the matter of the Reference of 1925 (1). Such, it seems to me with respect, was the interpretation put by this Court upon the pertinent clause of article 405 of the Treaty of Peace.

Under the distribution of legislative powers, Property and Civil Rights in the Province were ascribed to the exclusive jurisdiction of the legislature in each province.

A civil right does not change its nature just because it becomes the subject-matter of a convention with foreign States. It continues to be the same civil right. When once the convention has been properly adopted and ratified, it is, no doubt, transferred to the federal field for the enactment of laws necessary or proper for performing the obligations arising under the convention. That is, as I understand it, the effect of the decisions of the Privy Council on the *Aeronautics* (2) and *Radio* (3) References. But before the international obligation has been properly and competently created, the civil right under the jurisdiction of the provinces is always the same civil right, and I cannot see where the Dominion Parliament in the *British North America Act* finds the power to appropriate it for the purpose of dealing with it internationally without having previously secured the consent of the provinces.

In the present cases, we are dealing with *Weekly Rest in Industrial Undertakings*, *Minimum Wages* in ordinary con-

(1) [1925] S.C.R. 505. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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tracts of employment and *Limitation of Hours of Work*, matters which are fundamentally of the competence of the legislatures in each province. But in order to put the point more forcibly, let us assume that the subject matter of the convention was education, a subject in relation to which "in and for each province the legislature may exclusively make laws" (Sec. 93). Can it be said that it would be within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over that very essential subject as a consequence of the fact that the Dominion Government would decide in regard to it to make a convention with a foreign power?

It might be objected that education would not be regarded as the proper subject matter of a treaty or an international convention as these arrangements are generally understood. Until comparatively recently, neither could it be said that questions affecting *The Weekly Rest in Undertakings, The Minimum Wages* or *The Limitation of Hours of Work* would be considered as proper subjects for international conventions.

The treaty-making power is the prerogative of the Crown. In ordinary practice, it is exercised on the recommendation of the Crown's advisers.

In Canada, the practice has grown gradually to enter into international conventions through the medium of the Governor in Council. It does appear that it would be directly against the intendment of the *British North America Act* that the King or the Governor General should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament are prohibited by the Constitution from assuming jurisdiction over these matters.

I would like to conclude with the words of Lord Watson, in the *Maritime Bank* case (1):

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

(1) [1892] A.C. 437, at 441.

It follows from all that I have said that, in my opinion, the draft conventions upon which is based the legislation now submitted to us have not been properly and competently ratified, that they could not be so ratified without the consent of the legislature in each province, both by force of the *British North America Act* and upon the proper interpretation of article 405 of the Treaty of Versailles; and that, for that reason, the Acts now submitted are *ultra vires* of the Parliament of Canada.

CANNON J.—When an Act of Parliament is challenged before this Court as unconstitutional, our duty is to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. Our only power is to announce our considered judgment upon the question. This Court neither approves nor condemns any legislative policy. Our delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or contravention of the provisions of the Constitution. Having done so, our duty ends.

The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. It hardly seems necessary to reiterate that ours is a dual form of government; that in every province there are two governments. We differ radically from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

It must also be borne in mind that the attainment of a prohibited end may not be accomplished under the pretext of the exercise of powers which are granted. We may accept as established doctrine that any provision in an Act of Parliament ostensibly enacted under power granted by the constitution not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the provincial jurisdiction is invalid and cannot be enforced.

Nor can it help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Parliament may ignore constitutional limitations upon its own powers and usurp those reserved to the provinces.

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Until recently there was no suggestion of the existence of any such power in the Federal Parliament. The opinion of the framers of the Constitution, the decisions of the courts and the writings of commentators, deny to the Federal Parliament the authority whereby every provision and every fair implication from the B.N.A. Act may be subverted, the autonomy of the provinces obliterated and the Dominion of Canada converted into a central government exercising uncontrolled police power in every province, superseding all local control or regulation of the affairs of the province. It was never suggested that any power granted by the constitution to Parliament, or necessarily implied, could be used for the destruction of self-government in the provinces. It never occurred to any of the commentators that the general welfare of the Dominion might be served by obliterating the constituent provinces. It seems to be contended that, under the residual power for peace, order and good government, Parliament has power to tear down the barriers, to invade the provincial jurisdiction and to impose Legislative Union for the whole of Canada, subject to no restriction, save such as are self-imposed.

That the provinces agreed only to a Federal Union appears abundantly by a perusal of what was said by Sir J. A. Macdonald, then Attorney General of Upper Canada, before the Canadian Parliament sitting in the city of Quebec on the 6th February, 1865

The third and only means of solution for our difficulties was the junction of the provinces either in a Federal or a Legislative Union. Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favour by her people. We

found too, that though their people speak the same language and enjoy the same system of law as the people of Upper Canada, a system founded on the common law of England, there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as political organizations, as we observed in the case of Lower Canada herself. Therefore, we were forced to the conclusion that we must either abandon the idea of union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved. So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable, even for the Maritime Provinces. Because, although the law of those provinces is founded on the common law of England, yet every one of them has a large amount of law of its own—colonial law framed by itself, and affecting every relation of life, such as laws of property, municipal and assessment laws; laws relating to the liberty of the subject, and to all the great interests contemplated in legislation; we found, in short, that the statutory law of the different provinces was so varied and diversified that it was almost impossible to weld them into a Legislative Union at once. Why, sir, if you only consider the innumerable subjects of legislation peculiar to new countries, and that every one of those five colonies had particular laws of its own, to which its people have been accustomed and are attached, you will see the difficulty of effecting and working a Legislative Union, and bringing about an assimilation of the local as well as general laws of the whole of the provinces. We in Upper Canada understand from the nature and operation of our peculiar municipal law, of which we know the value, the difficulty of framing a general system of legislation on local matters which would meet the wishes and fulfil the requirements of the several provinces.

The whole scheme of Confederation, as propounded by the Conference, as agreed to and sanctioned by the Canadian Government, and as now presented for the consideration of the people and the Legislature, bears upon its face the marks of compromise. Of necessity there must have been a great deal of mutual concession.

As I stated in the preliminary discussion, we must consider this scheme in the light of a treaty.

The Conference having come to the conclusion that a legislative union, pure and simple, was impracticable, our next attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union. And I am strong in the belief that we have hit upon the happy medium in those resolutions, and that we have formed a scheme of government which unites the advantages of both, giving us the strength of a legislative union and the sectional freedom of a federal union, with protection to local interests.

I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the General Parliament as contradistinguished from those reserved to the local legislatures; but any honourable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies. As a matter of course, the

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General Parliament must have the power of dealing with the public debt and property of the Confederation. Of course, too, it must have the regulation of trade and commerce, of customs and excise. The Federal Parliament must have the sovereign power of raising money from such sources and by such means as the representatives of the people will allow. It will be seen that the local legislatures have the control of all local works; and it is a matter of great importance, and one of the chief advantages of the Federal Union and of local legislatures, that *each province will have the power and means of developing its own resources and aiding its own progress after its own fashion and in its own way. Therefore, all the local improvements, all local enterprises or undertakings of any kind, have been left to the care and management of the local legislatures of each province.*

The criminal law too—the determination of what is a crime and what is not and how crime shall be punished—is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces—that what is a crime in one part of British America, should be a crime in every part—that there should be the same protection of life and property as in another. It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own,—that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

Although, therefore, a legislative union was found to be almost impracticable, it was understood, so far as we could influence the future, that the first act of the Confederate Government should be to procure an assimilation of the statutory law of all those provinces, which has, as its root and foundation, the common law of England. But to prevent local interests from being over-ridden, the same section makes provision, that, while power is given to the General Legislature to deal with this subject, *no change in this respect should have the force and authority of law in any province until sanctioned by the Legislature of that province.*

Sir George Etienne Cartier closed his speech by stating:

So if these resolutions were adopted by Canada, as he had no doubt they would, and by the other Colonial Legislatures, the Imperial Government would be called upon to pass a measure which would have for its effect to give a strong central or general government and local governments, which would at once secure and guard the persons, the properties and the civil and religious rights belonging to the population of each section.

The *British North America Act,* in its preamble, says:

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 Principle to that of the United Kingdom:

Articles 3 and 4 provided for the proclamation of the Dominion, composed of four provinces Ontario, Quebec, Nova Scotia and New Brunswick; which preserved their identity and never ceased at any time to form distinct and separate governments. The provinces created, by their union, a new power; but it is impossible to say that they owe to it their existence. On the contrary, the provinces created the Dominion.

Lord Carnavon, in the House of Lords, on the second reading of the B.N.A. Act, said:

A legislative union is under existing circumstances impracticable. The Maritime Provinces are ill-disposed to surrender their separate life, and to merge their individuality in the political organization of the general body. It is in their case, impossible, even if it were desirable, by a stroke of the pen to bring about a complete assimilation of their institutions to those of their neighbours. Lower Canada, too, is jealous, as she is deservedly proud, of their ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding she retains them.

Chief Justice Dorion, who had taken part, as a member of the legislature, in the Confederation debates, gave the following opinion quoted at page 143 of volume III of La Thémis:

There is no difference between the powers of the local and Dominion legislatures within their own sphere. That is the powers of the local legislature within its own sphere are co-extensive with the powers of the Dominion government within its own sphere. The one is not inferior to the other. I find that the powers of the old legislature of Canada is extended to the local legislatures of the different provinces. We have a government modelled on the British constitution. We have responsible government in all provinces, and these powers are not introduced by legislators, but in conformity with usage. It is founded on the consent and recognition of those principles which guide the British constitution. I do not read that the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them, some of them are given to the local legislatures, but I find none of them curtailed.

In substituting the new legislation to the old, the new legislature has, in all those things which are special to the province of Quebec, all the rights of the old legislature, and they must continue to remain in the province of Quebec, as they existed under the old constitution.

And Sandborn, J., said:

The *British North America Act* of 1867 was enacted in response to the petition of the provinces of Canada, Nova Scotia and New Brunswick, as stated in the preamble of the Act, to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. The powers of legislation and representative government upon the principle of the British constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been

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conceded to Canada and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late province of Lower Canada was constituted a separate province by the Act of 1791, with a governor, a legislative council and a legislative assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters no powers that had been conceded were intended to be taken away by the *British North America Act* of 1867, and none, in fact, were taken away, as it is not the wont of the British government to withdraw constitutional franchises once conceded. This Act, according to my understanding of it, distributed powers already existing to be exercised within their prescribed limits, to different legislatures constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the respective provinces, in a certain sense, the powers of the federal parliament were derived from the provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The provinces of Quebec and Ontario are by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the Act, these provinces are recognized as having previous existence and a constitutional history upon which the new fabric is based. Their laws remain unchanged, and the constitution is preserved. The offices are the same in name and duties, except as to the office of lieutenant-governor, who is placed in the same relation to the province of Quebec, as that which the governor general sustained to the late province of Canada. I think it would be a great mistake to ignore the past government powers conferred upon and exercised in the province now called Quebec, in determining the nature and privileges of the legislative assembly of this province.

The procedure recommended by the Imperial Conferences in 1926 and 1930 regarding legislation or international agreements by one of the self-governing parts of the Empire which may affect the interests of other self-governing parts, i.e. previous consultation between His Majesty's ministers in the several parts concerned, should be applied by the central and provincial governments specially before ratifying any international agreement—not falling under Section 132 of the B.N.A. Act. The only direct legislative authority expressly given to the Parliament and Government of Canada concerning foreign affairs is found in this section and is limited to the performance of the obligations of Canada or any province thereof arising under treaties between the Empire as a whole and a foreign country. The Imperial Parliament saw to it that Imperial interests would be protected by federal legislation. But to pass legislation—affecting the provinces—to ratify a treaty or agreement by Canada alone—under an evolution which came to pass since Confederation—with a foreign power, previous

consultations between the federal and provincial self-governing parts of our Confederation seem to me logical and the only way to preserve peace, order and good government in Canada and save the very roots of the tree to which our constitution has been compared. In order to grow, if it be a growing instrument, it must keep contact with its native soil—and draw from the constituting provinces new force and efficiency.

The provinces agreed to this principle of Legislative Union and the Imperial Parliament granted it to a central Parliament strictly within the ambit of 91; any legislation by this Parliament attempting to legislate uniformly for the whole of Canada on any subject exclusively retained by the provinces and within the natural and obvious meaning of section 92 must, in my opinion, be *prima facie,* considered as *ultra vires* of the Dominion.

The additions by some decisions to the powers of the Dominion in emergency cases must be applied, if at all, with the greatest caution. In the words of Sir John MacDonald, " the scheme must be considered in the light of a treaty " not to be lightly interfered with by way of commentary and gloss.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the Act; but neither this Court nor the Privy Council should be called upon to legislate in the matter by treating the constitution as a growing tree confided to their care. We have nothing to do with the growth or with the making of the law in constitutional matters. The Imperial Parliament alone can change what they enacted—or add to it. New branches to acquire the force of law, must be embodied in the statute, not in judgments or commentaries.

The above considerations may be applied, *mutatis mutandis,* to all the acts referred to us for consideration, but I would add a few words with respect to the three acts based on the so-called Geneva Labour Conventions mentioned in Order in Council 3454, being chapters 14, 44 and 63 of the statutes of 1935.

Such labour conventions binding Canada independently from the rest of the Empire do not fall under 132; they were not even contemplated as feasible in 1867 when the

B.N.A. Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the Provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the treaty of Versailles, Canada as a federal state, has only a "power to enter into convention on labour matters *subject to limitations*" and the draft convention should have been treated as a "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation.

In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action."

To my mind, this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be jusified by invoking some clauses of the treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, sec. 7. It is not admissible that the Parliament and the Government of Canada could appropriate these powers, exclusively reserved to the provinces,

by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. The framers of our constitution, and the Privy Council by their recent judgments in the *Radio* (1) and *Aeronautics* (2) cases never intended to plant in its bosom the seeds of its own destruction. If such interference with provincial rights by way of international agreements is admitted as *intra vires* of the central government, we may as well say that we have in Canada a confederation in name, but a legislative union in fact. Uniformity is not in the spirit of our constitution. We have not a single community in this country. We have nine commonwealths, several different communities. This is the fact embodied in the law. It may be wise or unwise, according to the preferences and predilection of every one, but this is the basis of our constitution. Diversity is the basis of our constitution. The federative system was adopted in order to give to the provinces their autonomy and to secure, specially in Quebec, the rights to their own customs as crystallized in their civil law. No gloss or commentary to be found in judicial pronouncements can alter the constitution of this country. It is a written document which can be amended or added to, only by legislation. No usage or judge made law can be invoked, no practice can be introduced to change the division of powers as set forth in 91 and 92, however desirable or opportune it may seem. If amendments are needed and asked for, they should be granted by the Imperial Parliament.

In 1867, it was found necessary in order to achieve confederation, to give us a federal form of government, more cumbersome and more expensive though it be, on account of the superior liberty it gives to the people.

This cannot be changed by the indirect way of a labour convention, in furtherance of some pious wish of the treaty of Versailles, at a time when its binding authority and wisdom is universally contested; and, albeit, many years after notification to Canada of these particular so-called draft conventions. The King's prerogative has not been used to do away with the statutory rights of His Canadian subjects.

These are not references to an international tribunal; we are not called upon to determine, in the absence of

(1) [1932] A.C. 304.
(2) [1932] A.C. 54.

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foreign powers, what effect such a ratification by the Canadian government might have in the international field. But Canada is not an independent sovereign state, and the Parliament of Canada is *not a Parliament of unlimited authority. Every Parliament in Canada—not only the Parliament of the Dominion, but also the legislature in each province—is necessarily of limited authority, because it has not been given and does not possess the wide, the plenary authority over the whole field of legislation which is possessed by the Parliament of Great Britain or of an independent sovereign state.* Upon the union—upon the creation, not of one Parliament for Canada, but of one central Parliament and four provincial legislatures, each of them—the central Parliament just as much as the others —had limits to its jurisdiction, by the necessity of the case. That affords at once a very strong reason why no one of these parliaments should have jurisdiction over the Constitution of any other of them.

In 1867, when the agreement for entering into this Union was under discussion and being arrived at by the provinces, they wanted to create, and they did create by their agreement and by the statute which followed upon their agreement, a Parliament which was to have a limited jurisdiction, and no power to amend its Constitution.

These are some of the reasons why foreign powers, when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92. Before accepting as binding any agreement under section 405 of the treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

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fundamental question before us, therefore, is: Can any authority be found within the four corners of the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada?

In my opinion none of the draft conventions of the International Labour Organization of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of all this legislation, fall within the terms of s. 132 of the B.N.A. Act. That section provides:—

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

The powers granted by this section are strictly limited to the performance of obligations towards foreign countries arising under treaties between the Empire and such foreign countries. Unquestionably the section does not embrace obligations arising under any form of convention or agreement entered into by the Government of Canada with the Government of any other country within the Empire, nor does it contemplate or suggest any form of convention or agreement with the Government of any foreign country other than a treaty in the true sense of the term. As Lord Dunedin pointed out in the *Radio* case (1), the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and the only class of treaty, which would bind Canada, was thought of as a treaty by Great Britain, that is to say, as I understand the reference, a treaty concluded by the Crown in the exercise of its prerogative as the sovereign of a single indivisible Empire on the advice of its constitutional advisers, the Imperial Government of Great Britain. Only by the exercise of this supreme authority could any treaty obligation be imposed on Canada or any other Dominion or dependency of the British Empire towards foreign nations within the intendment of the B.N.A. Act. The executive government and authority of and over Canada were expressly declared by s. 9 of the B.N.A. Act "to continue and be vested in the Queen," s. 2 having already declared that the

(1) [1932] A.C. 304.

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provisions of the Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland. There can hardly be a doubt that in the minds of the Fathers of Confederation and the framers of the B.N.A. Act the British Empire was visualized only as a single unit and not as a collection or commonwealth of separate nations, each of equal status with the United Kingdom of Great Britain and Ireland, with authority to conclude either treaties, or conventions analogous to treaties, on its own account with any foreign government. For my part I am unable to comprehend how any international convention, to which Canada in its new status, whatever that status may actually be, purports to become a party as a separate government, or any obligation resulting therefrom, can possibly be brought within the terms of s. 132—much less a mere draft convention, such as those of the International Labour Organization of the League of Nations. To my mind there is nothing which the judgment of the Judicial Committee in the *Radio* case (1) has more decisively settled than this: that if the Government of Canada by its own plenipotentiaries enters into an international convention with the Government of any other country, whether British or foreign, s. 132 cannot be relied upon as empowering the Parliament of Canada to enact legislation for the carrying out of any obligation arising under such a convention, and that, if such legislative power exists at all, it must be found, either under the enumerated heads of s. 91 or the introductory words of that section, the so-called residuary clause.

Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, which I do not think it is, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not, in my judgment, be said that there was any obligation, for the performance of which the Parliament of Canada was empowered within the terms of s. 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any

(1) [1932] A.C. 304.

province thereof, as part of the British Empire. The obligation arose directly from a so-called international convention, purporting to have been ratified by Canada as a separate and distinct Government—an idea which is wholly incompatible with the conception of the Dominion of Canada as constituted by the B.N.A. Act.

As regards the residuary clause of s. 91, this empowers the Parliament of Canada

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

It will be seen at once that this provision can only be invoked where the real subject-matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by s. 92. To meet this obvious and formidable difficulty the learned counsel for the Dominion brought forward the much canvassed double aspect principle, by which, as I understand it, a matter, though it relates in one aspect and in some circumstances to a class of subjects, which is exclusively assigned by s. 92 to the legislative jurisdiction of the provinces, may nevertheless in another aspect and in other circumstances assume such nation-wide importance as to completely lose its original and normal identity within the purview of s. 92, and thus become at any time a matter falling within the general residuary clause of s. 91.

It was strongly argued that hours of work and the standard of wages and of living had attained such importance as subjects of legislation in Canada as to affect the body politic of the Dominion as a whole and thus to justify the Parliament of Canada in dealing with them in that aspect as matters demanding the intervention of Dominion legislation "for the peace, order and good government of Canada," notwithstanding that the general authority to make laws so plainly excludes all subject-matters coming within the scope of s. 92.

No doubt there have been pronouncements in the Privy Council which lend much colour to this argument, but I do not think that they can properly be interpreted as going to such a length as is now contended for. The learned Chief Justice has discussed very fully in dealing with the reference on the *Natural Products Marketing Act* (p. 403) the argument which was put forward in behalf of the

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Dominion in this regard and I feel that I can add nothing to what he has said. There is certainly no authoritative decision to the effect that, once it is seen that the real subject-matter of a legislative enactment pertains in all its predominant characteristics to the regulation and control of civil rights in the provinces, it can rightfully be transferred to the legislative jurisdiction of the Parliament of Canada in virtue of the introductory words of s. 91 as a matter of legislation "for the peace, order and good government of Canada" in disregard of the plain and all important proviso that such jurisdiction may be exercised only in relation to matters "not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces." I cannot refrain from reiterating these cogent observations of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1):

> To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

These observations, it seems to me, present a conclusive answer to the argument which has been so strongly urged upon us in reference to the so-called double aspect principle. They demonstrate at least that the mere fact that Dominion legislation concerning any particular matter may be stated to be for the general advantage of Canada, or that the subject of the legislation has become as much a matter of national as of provincial concern to the several provinces, is not sufficient to remove that subject from the sphere of s. 92, to which in its normal and domestic aspect it primarily belongs, and transfer it to the jurisdiction of the Parliament of Canada under s. 91. It is true that local works and undertakings may be 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, and that, when Parliament makes such a declaration with respect to any such local work or undertaking, it may

(1) [1896] A.C. 348.

lawfully legislate in relation to it, but that is in virtue of the exceptions which are expressly made in enumerated head, no. 10, of s. 92, and the consequent application of enumerated head, no. 29 of s. 91 to such a work or undertaking.

Nor do I think that any authoritative decision can rightly be interpreted as warranting the conclusion that, once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of s. 92, but by the saving clause in the introduction of s. 91, such an enactment can possibly be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limitation, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by s. 91.

It may be that in the event of the peace, order and good government of Canada as a whole being so menaced by some outstanding national peril as to render the intervention of the Dominion Parliament necessary as the only adequate means of meeting such an emergency, the Courts will not shrink from holding that such an emergency constitutes a subject-matter of legislation which is quite outside the purview of s. 92 and the limitation which the saving clause of s. 91 imposes on the general authority of the Parliament of Canada to make laws for the peace, order and good government of the country as a whole, but, apart from such considerations, I question very much if there has been any really conclusive judicial recognition of the double aspect principle relied upon. If there be any such conclusive authority, to which we are bound to give effect in this case, then, as was suggested by the Attorney General of Ontario, the provinces may as well bid adieu to s. 92, reinforced by the saving limitation in the residuary clause of s. 91, as the unassailable charter of their legislative rights.

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I entirely concur in the opinion of the learned Chief Justice that there is nothing in the judgment in the *Aeronautics* case (1) of 1931 to indicate that the Lords of the Privy Council intended to detract from the judicial authority of decisions in the *Combines* case (2) and *Snider's* case (3), and that we are bound by those decisions, as well as the decision in the *Fort Frances* case (4), to hold that the legislation now in question, considered apart from the question of the performance of obligations arising out of binding international conventions, as distinguished from treaties proper within the meaning of s. 132, cannot be supported as legislation enacted for the peace, order and good government of Canada under the introductory clause of s. 91.

This brings me to a consideration of the further question as to whether the ratification by the Government of Canada of such draft international labour conventions as those of the General Conference of the International Labour Organization of the League of Nations, which themselves imposed no obligation of any kind upon the Government of Canada or any other government represented in that organization to give legislative effect or even to assent to any of them, can itself have the effect of vesting in the Parliament of Canada legislative jurisdiction which otherwise it would not possess under the B.N.A. Act.

It is said that we must now take it as settled by the decisions in the *Aeronautics* (1) and *Radio* (5) cases that international conventions and all obligations arising therefrom are matters which fall within the general authority of Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the legislatures of the provinces. If this means that, once the Government of Canada has concluded a convention with the Government of any other country, whether within or without the British Empire, that fact itself operates to exclude the subject-matter of the convention from s. 92, regardless of the fact that that subject-matter admittedly up to the time of the conclusion of the convention came within one or more of the classes of subjects exclusively assigned by that section to the legislative jurisdiction of

(1) [1932] A.C. 54.
(2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.
(4) [1923] A.C. 695.
(5) [1932] A.C. 304.

the provinces, I do not think that either of these cases, upon which counsel for the Dominion have so much relied, can properly be said to have laid down any such principle.

As to the *Aeronautics* decision (1), the legislation, which the Judicial Committee there considered, was s. 4 of the *Aeronautics Act,* c. 3, Revised Statutes of Canada, which reproduced with an amendment the provisions of the *Air Board Act,* c. 11 of the statutes of Canada (1919). Lord Sankey L.C., who delivered the judgment of the Board, explained that the *Air Board Act* was enacted by the Parliament of Canada in 1919 with a view to performing her obligations as part of the British Empire under a convention relating to the Regulation of Aerial Navigation, which was signed by the representatives of the allied and associated powers in the Great War, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922, and at the time of the hearing was in force between the British Empire and seventeen other nations. "By article 1," he said,

> the high contracting parties recognize that every Power (which includes Canada) has complete and exclusive sovereignty over the air space above its territory; by article 40, the British Dominions and India are deemed to be States for the purpose of this Convention.

The Lord Chancellor then stated some of the principal obligations undertaken by Canada as part of the British Empire under the stipulations of the convention. Some of these undoubtedly affected civil rights in the provinces. The real grounds of the decision appear in the following passage, which I reproduce from p. 77 (1):

> To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the *British North America Act* vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

(1) [1932] A.C. 54.

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As Viscount Dunedin, who sat in the *Aeronautics* case (1), pointed out in delivering the judgment of the Board in the *Radio* case (2) three or four months later, the leading consideration in the judgment of the Board in the earlier case was that the subject fell within the provisions of s. 132 of the B.N.A. Act. Apart from this, however, and the character of the Aerial Navigation Convention, it is clear that

> the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7 and (that) it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion.

and further,

> the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion,

also influenced their Lordships.

Whichever one of the different reasons assigned by the Board for the decision may have been regarded by their Lordships as the predominating reason, it seems to me that the judgment cannot, in any view, be interpreted as definitely laying down the principle that obligations arising out of all conventions between governments, not falling within the terms of s. 132 of the B.N.A. Act, are matters, which, as subjects of legislation, cannot fall within s. 92, regardless of the form and character of the conventions themselves, and regardless also of whether they wholly or predominantly deal with matters which otherwise would unquestionably fall within one or more of the classes of subjects which that section reserves exclusively for the provincial legislatures. That their Lordships did not intend to lay down any uniform rule of such far-reaching consequences is shown by the following passage from the judgment itself:—

> Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process *the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.*
>
> To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the *British North America Act,* which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. *Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.*

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. *The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.*

Nor do I think that the *Radio* case (1) goes to the length which has been suggested. On the latter reference the legislation considered was the *Radiotelegraph Act,* R.S.C., 1927, c. 195, and the regulations made thereunder, the validity of which the Dominion sought to support on the ground that it was necessary to make provision for performing the obligations of Canada under the Radiotelegraph convention, as well as upon the ground that it was enacted by reason of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interest.

This convention was the outcome of a meeting of representatives of about 80 countries, including the Dominion of Canada, held in Washington in November, 1927, to settle international agreements on the subject of radiotelegraph communication. The representatives of Canada had been appointed by the Privy Council of Canada with the approval of the Governor General, and the convention was actually signed by these representatives of Canada with the other signatories as plenipotentiaries of the countries named as the high contracting parties. By article 2 the contracting governments undertook to apply the provisions of the convention in all radio communication stations established or operated by the contracting governments, and open to the international service of public correspondence, and also to adopt or to propose to their respective legislatures the measures

(1) [1932] A.C. 304.

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necessary to impose the observance of the provisions of the convention and the regulations annexed thereto upon individual persons and enterprises authorized to establish and operate radio communication stations and international service, whether or not the stations are open to public correspondence.

The Board, while holding that this convention was not a treaty within the meaning of s. 132 of the B.N.A. Act, did no doubt decide that it was a convention by which Canada must be deemed to have been as firmly bound as if had been entered into as a formal treaty with foreign governments, and that Canada as a whole was amenable to the other signatory powers for the proper carrying out of the convention, for the reason apparently, as Lord Dunedin pointed out in the passage quoted by the learned Chief Justice from the Board's judgment (1) that Canada as a Dominion is one of the signatories to the convention. It is nowhere suggested in the judgment that either the fact of the Government of Canada being a signatory to the convention by its duly accredited plenipotentiaries or the fact of the Government of Canada having afterwards formally ratified the convention, clothed the Parliament of Canada with any legislative authority beyond that which flows from the provisions of the B.N.A. Act.

The point of the reference to the subject of international conventions and the changes in the status of the Government of Canada in relation to the Imperial Government was, as I take it, to show that the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and that consequently the subject of international conventions could not be expected to be mentioned explicitly in the Imperial statute in either ss. 91 or 92. "The only class of treaty," said Lord Dunedin,

which would bind Canada was thought of as a treaty by Great Britain and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91, which assigned to the Government of the Dominion the power to make laws "for the peace, order and good govern-

(1) [1932] A.C. 304, at 312.

ment 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." In fine, though agreeing that the convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing,

that is to say, as I understand it, that the fact of international conventions not having been specifically named in s. 92 among the classes of subjects in relation to which the Provinces are authorized to exclusively make laws, that subject necessarily falls within the residuary clause of s. 91 as a matter "not coming within" any of the classes of subjects enumerated in s. 92. This no doubt may, as their Lordships suggest, amount to the same thing as if the Radiotelegraph convention were in fact such a treaty as is defined in s. 132 in the sense that from the Dominion standpoint it makes no practical difference whether the Parliament of Canada derives its power to enact legislation for the carrying out of the stipulations of an international convention from the provisions of s. 132 or from the fact that the legislation is treated as a matter which does not come within the classes of subjects specified in s. 92, and must therefore fall within the residuary clause of s. 91. I do not think, however, that their Lordships intended to lay it down as an infallible rule for the interpretation of either s. 92 or of the residuary clause of s. 91 itself that the fact that a matter demanding legislative action is not mentioned explicitly in s. 92 decisively excludes it from such a comprehensive class of subjects as is specified in no. 13 of that section —Property and Civil Rights.

The rest of the judgment shows that in addition to the fact of the Government of Canada being a signatory to the convention the Board considered the scope of its stipulations to see whether in their main features they dealt with a subject matter which in reality fell within any of the classes of subjects specified in s. 92, or whether they did not predominantly relate to classes of subjects set out in the enumerated heads of s. 91. Discussing the argument of the province that the convention did not touch the consideration of interprovincial broadcasting, Lord Dunedin says that much the same might have been said as to aeronautics, as it was quite possible to fly with-

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out going outside the province, yet that was not thought to disturb the general view, and that

> the idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the provinces as regards the subject.

Again, His Lordship says:

> But the question does not end with the consideration of the convention. Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91.

Their Lordships held that broadcasting fell within the excepted matters as being an undertaking connecting one province with another, and extending beyond the limits of the province and therefore came within enumerated head 29 of s. 91. "Once it is conceded," he went on to say,

> as it must be, keeping in view the duties under the convention, that the transmitting instrument must be, so to speak, under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts each independent of the other.

Their Lordships, moreover, held that broadcasting fell within the description of "telegraphs," which subject is excepted from "local works and undertakings," specified in s. 92 (10), and therefore takes its place in 91 (29). In conclusion, Lord Dunedin said:

> As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley—namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "property and civil rights" or within "matters of a merely local or private nature."

It appears, therefore, to me that, while one of the grounds of the decision in the *Radio* case (1) was the form and nature of the convention itself, the basis of the decision, as put in the judgment itself, was "the pre-eminent claims of s. 91," which, I take it to refer to the fact that the subject matter of that convention fell under one of the enumerated heads of s. 91, viz: no. 29. For that reason the authority of Parliament in relation to the subject matter of the convention and of the legislation would override the legislative authority of the provinces in relation thereto, not

(1) [1932] A.C. 304.

because of the residuary clause in the introduction of that section, but in virtue of the declaration 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

set forth in the 29 enumerated heads of that section, and the closing words of s. 91 as well that,

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.

This, as I read the judgment, is the fundamental basis of the decision. Read in this light, it may truly be said to get back to the words of the B.N.A. Act itself and the object with which it was passed, and thus to avoid the danger to which the Board itself so pointedly called attention in the *Aeronautics case* (1) a few months earlier, of the provisions of such a great constitutional charter being so extended or whittled down in the process of judicial interpretation as the years go on as to impose a new and different contract upon the federating bodies than that upon which the whole structure of confederation was erected.

While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, I do not think that this fact can be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either s. 91 or of s. 92 or of s. 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole. The original division of legislative power as between the two fields, Dominion and provincial, has remained inviolate to this day, so far as the Imperial Parliament is concerned. The Statute of Westminster itself provides by s. 7 (1) that,

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> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the B.N.A. Act (1867 to 1930) or to any order, rule or regulation made thereunder.

And by s.s. (3) thereof that,

> The powers conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

Seeing that s. 92 so unequivocally assigns all "matters coming within the classes of subjects" enumerated therein to the exclusive jurisdiction of the provincial legislatures, and that the residuary clause of s. 91 is so unequivocally limited to "matters not coming within the classes of subjects" assigned exclusively to the provincial legislatures, I cannot understand how in a controversy as to which of the two legislative fields any particular matter belongs we can look at it otherwise than in its normal aspect within the intendment of these two sections as a subject of legislation, either for the Parliament of Canada or for the provincial legislatures. In such a controversy the primary duty of the Court is to determine whether the real subject matter of the legislation relates to one or more of the classes of subjects which the Act exclusively assigns to the provincial legislatures.

Surely it was never within the contemplation of the Act that the Courts in determining this question should disregard the normal aspect of any matter in its relation to any of these classes of subjects, or that, because through the instrumentality of the Government of Canada in the exercise of its executive authority and functions, it should become the subject matter of an international convention, it should thereby cease to have any relationship to any of the classes of subjects, which the Act has defined as the exclusive prerogative of the legislatures of the provinces and should henceforth be looked at solely from an international point of view. For my part I find it quite impossible to accept such a proposition. If we are not bound by the *Aeronautics* and *Radio* decisions (1) to hold that legislation, which admittedly is directly aimed at the regulation and control of such matters as contracts of employment in respect of the limitation of the hours of labour and the rates of wages in all the provinces alike,

(1) [1932] A.C. 54 and 304.

is legislation relating to a matter which falls to the Parliament of Canada under the residuary clause of s. 91, simply because it has become a matter of national as well as of provincial concern, I can see no logical reason why we are bound to hold that such legislation exclusively vests in the Dominion simply because it relates to a matter which the federal executive has chosen to make a subject matter of an international convention. Both reasons are in my judgment alike irreconcilable with the clear intendment of s. 92 and the residuary clause of s. 91.

As to the suggestion that the fact that s. 92 makes no explicit mention of international conventions necessarily excludes the subject from the ambit of that section and places it in that of the residuary clause, this also in my opinion is wholly inadmissible as being contrary to the plain wording of both sections. Incontrovertibly the residuary clause itself limits the authority of the Dominion Parliament to make laws for the peace, order and good government of Canada to matters, which do not come within *the classes of subjects* assigned exclusively by the Act to the legislatures of the provinces. No matter, which does come within any of these classes of subjects, can legitimately be brought within the operation of the residuary power. There is but one test for determining its application or non-application to any given subject-matter, viz: Does the matter come within any of the classes of subjects, which the Act has assigned exclusively to the legislatures of the provinces? And for the reasons already discussed the given matter must be looked at in its relationship, not to any outside country, but in its relationship to the classes of subjects definitely marked out as the exclusive legislative field of the provinces. The words of the enactment are "matters not coming within the classes of subjects" assigned exclusively to the provinces—not "matters not explicitly mentioned in s. 92." Manifestly many matters may not be explicitly mentioned in the classes of subjects assigned to the provinces and yet unquestionably come within those classes of subjects, particularly such wide and comprehensive classes of subjects as nos. 13 and 16: Property and Civil Rights and "Generally, all matters of a merely local or private nature."

It seems to me that nothing could be more surely calculated to undermine the whole structure of the confederation compact as expressed in the B.N.A. Act in relation to the distribution of legislative power between the Dominion and provincial legislatures than the adoption of such a guide as has been suggested for the interpretation of these all important sections, 91 and 92. It would strip the legislative charter of the provinces of every vestige of permanency and stability and leave it at all times subject to the will and pleasure of the federal executive.

The legislation embodied in these three statutes is admittedly legislation which the Parliament of Canada would never have ventured to enact but for the draft conventions of the International Labour Organization of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada was in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submission " to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." It was argued that this provision of article 405 was merely directory. I think its language is clearly mandatory, and that the ratification of the conventions, upon which these three statutes purport to be founded is null and void under the terms of article 405 of the Treaty of Versailles itself. It is, however, to the provisions of the B.N.A. Act, not to terms of the Treaty of Versailles, that we must look for the answers to the questions submitted to us on this reference concerning the constitutionality of these three statutes. In my opinion they are all wholly *ultra vires* of the Parliament of Canada, for the reasons above stated.