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FACTUM OF APPELLANT

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant,

AND:

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

Respondent,

AND:

THE ATTORNEY-GENERAL OF CANADA

Intervenant.

FACTUM OF THE APPELLANT

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FACTUM OF THE APPELLANT

PART I.

1. This is an appeal from the judgment of the Court of Appeal for British Columbia, dated 27th March, 1947 (page 4) answering the following question referred to that Court by Order of the Lieutenant-Governor in Council dated 21st September, 1946 (pages 1-3) made pursuant to the Constitutional Questions Determination Act, Chapter 50, of the Revised Statutes of British Columbia, 1936:

> "Are the provisions of the 'Hours of Work Act' being Chapter 122 of the 'Revised Statutes of British Columbia, 1936', and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent ?"

The majority of the Court answered the question in the affirmative and stated that the whole Act applies (p. 23 l. 12). O'Halloran J.A. dissented and answered the question in the negative.

2. Speaking generally, the Act in question, as amended in 1937 (1 Geo. VI. Chapter 30) and in 1946 (10 Geo. VI. Chapter 34) fixed the maximum hours of work of all employees to which the Act is applicable and imposed penalties upon every employer who contravened the legislation. Prints of the entire statute will be available on the argument.

The Act contains the following provisions:

"3. (1.) Subject to the exceptions provided by or under this Act, the working-hours of an employee in any industrial undertaking shall not exceed eight in the day and forty-four in the week, and, subject to the said exceptions, no employer shall cause or require any employee to work, nor shall any employee work, longer than eight hours in any one day and forty-four hours in any one week.

(2.) Subject to the exceptions provided by or under this Act and to the regulations made by the Board, the working-hours of employees working on a split shift in any industrial undertaking shall be confined within twelve hours immediately following commencement of work, and, subject to the said exceptions or regulations, no employer shall cause or require the split shift of any employee to extend beyond, and no employee shall extend his split shift beyond, twelve hours immediately following commencement of work."

The amendments of 1946, speaking generally, reduced the maximum working hours per week from forty-eight to forty-four.

Employers are required to keep records and to produce such records for inspection (Section 9). The Board of Industrial Relations may examine employers' records relating to the hours of labour and may require the employer to furnish statements with regard thereto (Section 10). The Board is empowered to make regulations for carrying into effect the provisions of the Act (Section 11 (1)). The regulations shall determine exceptions that may be allowed in certain circumstances by the Board (Section 11 (2)). The regulations shall require employers to post notices with regard to working hours (section 11 (5)).

The words "industrial undertaking" are defined by section 2 as including "any establishment, work, or undertaking in or about any industry, business, trade, or occupation set out in the Schedule as contained herein or as amended from time to time by the regulations".

Under section 11, subsection (6), "the Board may, subject to the approval of the Lieutenant-Governor in Council, by regulations published in the Gazette, amend the Schedule by adding thereto or deleting therefrom the whole or any branch of any industry, business, trade, or occupation". The Board may exempt any industrial undertaking from the operation of the Act (Section 12). Penalties for non-compliance with the provisions of the Act are prescribed by Section 13.

The schedule of industrial undertakings to which the Act is applicable includes:—

"(7.) The catering industry, which includes all operations in or incidental to the preparation or to the serving, or to both preparation and serving, of meals or refreshments where the meals or refreshments are served or intended to be served in any hotel, restaurant,. . . or in any other place where food is served . . . "

"(8.) The occupation of elevator operator."

"(9.) The transportation industry, which includes all operations in or incidental to the carrying . . . other than by rail, water, or air, any goods,. . . "

"(10.) The occupation of hotel clerk, which includes the work of all persons engaged as room clerks (day or night), mail clerks, information clerks, cashiers, book-keepers, accountants, telephone operators, and any other persons employed in clerical work in hotels."

3. The statute in question in this reference is only one of several British Columbia Statutes with respect to labour relations, for example:—the Industrial Conciliation and Arbitration Act, 1 Geo. VI, Chapter 31, the Male Minimum Wage Act, R.S.B.C. 1936, Chapter 190, the Female Minimum Wage Act, R.S.B.C. 1936, Chapter 191, Annual Holidays Act 1946 Statutes, Chapter 4.

4. The Appellant has for a long period of time operated a world-wide transportation system consisting of its transcontinental railway, ocean steamships crossing the Atlantic and the Pacific, coastal steamships on the Pacific, inland steamships on the Great Lakes and on the lakes and rivers of British Columbia, a transcontinental telegraph system with cable connections to most parts of the world, a hotel system consisting of a chain of hotels across Canada, an express business extending to the principal countries of the world, air line services connecting various parts of Canada, and bus and truck services in various provinces of Canada (p. 10 l. 25 and p. 1 et seq.).

The chain of hotels which is an integral part of the transportation system consists of—the Empress Hotel at Victoria, the Chateau Lake Louise, the Banff Springs Hotel, the Emerald Lake Chalet and other mountain lodges, the Palliser Hotel at Calgary, the Saskatchewan Hotel at Regina, the Royal Alexandra Hotel at Winnipeg, the Devil's Gap Lodge at Kenora, the Royal York Hotel at Toronto, the Chateau Frontenac at Quebec, the Digby Pines at Digby, N.S., the Cornwallis Inn at Kentville, N.S., the Algonquin Hotel at St. Andrews, N.B. and the McAdam Hotel at McAdam, N.B.

5. The hotel chain has been developed by the Appellant as an integral and necessary part of its transportation system for the comfort and convenience of the travelling public and with a view to the advancement and increase of its business both passenger and freight (p. 2 l. 11).

6. The Appellant has owned and operated the Empress Hotel since its construction by the Company 39 years ago. The property upon which the hotel is built is conveniently located to serve the travelling public and is located in the immediate vicinity of the Railway Company's docks at Victoria. The hotel has 573 rooms and provides accommodation for large numbers of travellers and tourists from Canada, the United States and elsewhere, and its operation is a means of increasing passenger and freight traffic upon the Company's railway and steamships (p. 2 l. 7).

The Appellant maintains in the Empress Hotel, as it does in all of its hotels across Canada, a catering department employing a considerable number of persons engaged in the preparation and serving of meals to guests of the hotel (p. 2 l. 16). The Company also employs hotel clerks, mail clerks, information clerks, cashiers, bookkeepers, accountants, telephone operators and other clerks, also elevator operators (p. 2 l. 18).

All employees of the Railway Company at the Empress Hotel are entitled to free transportation on the Company's railway. These employees are also governed by and enjoy the same pension rules and privileges as other em-
10 ployees of the Canadian Pacific Railway Company.

7. The hours of work and other working conditions of the Appellant's employees at the Empress Hotel have been provided for in a collective bargaining agreement negotiated and signed by the bargaining representatives of such employees and the Appellant (p. 85). This agreement has been entered into and made binding under the authority of Dominion legislation to which reference will be made later. The agreement became effective September 1st, 1945, for a period of one year and thereafter subject to termination on thirty days' notice in writing from either party (p. 85 l. 9). No such notice of termination has been given by either party, and the agreement continues in full
20 force and effect (p. 2 l. 38). It provides, inter alia, that the employees shall work a 48-hour week (p. 91 l. 29).

8. The submission of this Appellant will be that its hotel system, including the Empress Hotel, is an integral part of its works and undertaking, and is thus excluded from provincial legislative jurisdiction by subsection 10 (a) of Section 92 of the British North America Act, and also by virtue of a declaration of the Parliament of Canada made under subsection 10 (c) of Section 92; further, that legislation such as that in question is exclusively within Dominion competence as a matter of general concern to the whole of Canada, and further, that the Provincial legislation in question has been
30 superseded by Dominion legislation.

9. The question referred to the Court of Appeal was answered by the majority in the affirmative, O'Halloran J.A. dissenting.

The majority judgment written by Robertson, J.A. and concurred in by Sloan C.J.B.C., Smith and Bird, J J.A. stated that there is no doubt that the "lines of railway" operated by the Appellant are under the exclusive jurisdiction of the Dominion by virtue of ss. 10 of s. 92 of the British North America Act (p. 20 l. 4). In their opinion, however, any such federal legislation must "strictly relate to railway-lines" subject to such legislation as is necessarily incidental to effective Dominion legislation (p. 20 l. 12). Their view appeared

to be that "lines of railways" are "primarily the right-of-way and the rails" (p. 21 l. 36). They did not suggest this to be their entire meaning. They thought that whatever is absolutely necessary for the physical use of the railway is to be treated as part of the line of railway. It would not, in their opinion, include the Empress Hotel (p. 22 l. 1). On the question of the ancillary and overlapping fields their finding was that there was no Dominion legislation other than procedural provisions (p. 22 l. 35).

O'Halloran J.A., in his dissenting judgment, was of the opinion that the Empress Hotel is an integral link in the world chain of railway and steamship services and an essential part of the "works and undertakings" of the Canadian Pacific Railway Company (p. 10 l. 25). In his view, the expression "such works" in clause (c) of Head 10 of Section 92, would include the Empress Hotel (p. 11 l. 38). In his judgment the fixing of the hours of work and working conditions throughout a Dominion-wide railway and steamship service and system such as the Canadian Pacific is in substance a matter of railway and steamship management and not a matter of civil rights within each of the several provinces and therefore falls within the exclusive jurisdiction of the Dominion Parliament (p. 15 l. 32). He was also of the opinion that the fixing of the hours of work of a Dominion-wide undertaking such as the Canadian Pacific is not a matter of local or provincial concern but falls within the sole competence of the Dominion Parliament (p. 16 l. 11). He therefore answered the question in the negative.

PART II.

10. The Appellant respectfully submits that the judgment of the majority of the Court of Appeal is erroneous in the following respects:

1. In answering in the affirmative the question submitted by the Lieutenant-Governor in Council.

2. In not finding that legislation with respect to the hours of work of the Appellant's employees at the Empress Hotel is exclusively within the jurisdiction of the Dominion.

3. If the legislation with respect to the hours of work of the Empress Hotel employees is not exclusively within the jurisdiction of the Dominion, in not finding that it is superseded by Dominion legislation.

PART III.

11. The Parliament of Canada has exclusive jurisdiction over the works and undertaking of the Canadian Pacific Railway Company. Its hotels, including the Empress Hotel at Victoria, constitute an integral part of such works and undertaking. The hours of work of the employees engaged in the operation of such works and undertaking, including those at the Empress Hotel, are within such exclusive jurisdiction.

12. The parts of Sections 91 and 92 of the British North America Act relied upon by the Appellant are as follows:

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

. . . . . .

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

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

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

. . . . . .

10. Local Works and Undertakings other than such as are of the following Classes:—

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

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

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

13. Though the legislation in question does not relate solely to employees of hotels owned and operated by railways within Dominion jurisdic-

tion, it is the pith and substance of the legislation in relation to the subject under consideration that must be examined in order to determine its validity in relation to such subject. The legislation will be ultra vires in relation to the hours of work of Empress Hotel employees if, in relation to that subject, it is in pith and substance within the exclusive jurisdiction of the Dominion.

It is immaterial whether the subject is specifically mentioned in the legislation as in *Union Colliery v. Bryden (1899) A.C. 580*, or whether the legislation is generally inclusive as in *Attorney-General for Manitoba v. Attorney-General for Canada (1929) A.C. 260*. In the latter case Lord Sumner said at p. 268:

> "Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose."

See also: *Canadian Pacific Railway Company v. Attorney-General for Saskatchewan (1947) 2 W.W.R. 909.*

14. If, as the Appellant submits, its works and undertaking including its hotels come within the class of subjects excluded from provincial jurisdiction by clauses (a) and (c) of Head 10 of Section 92, they are wholly withdrawn from provincial jurisdiction and are within the exclusive jurisdiction of the Dominion.

In *Attorney-General for Alberta v. Attorney-General for Canada (1943) A.C. 356*, Viscount Maugham said at p. 370:—

> " . . legislation coming in pith and substance within one of the classes specially enumerated in s. 91, is beyond the legislative competence of the provincial legislatures under s. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation. . . . . "

See also: *Attorney-General for Canada v. Attorney-General for Quebec (1947) A.C. 33 at p. 43.*

Section 2 (21) of the present Railway Act R.S.C. 1927 Chapter 170 defines "railway" as meaning—

> "any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway".

. . Section 5 (16) of The Consolidated Railway Act, 1879, 42 Vict. Chapter 9, is as follows:

> "The expression 'the Railway' shall mean the railway and the works by the Special Act authorized to be constructed."

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A special Act of significance in this case is the Canadian Pacific Railway Act 1902, 2 Edward VII Chapter 52. It is clear from Section 8 (quoted in par. 16 of this Factum) that it was the intention of Parliament that any hotel or restaurant constructed pursuant to the Act should form part of the railway and of the works and undertaking of the Canadian Pacific Railway Company.

15. It is submitted that the Empress Hotel and other hotels of the Appellant are included in the term "Railways" found in Section 92, 10 (a).

The use of the word "Railways" in subsection 10 (a) after the introductory words "works and undertakings" and the subsequent use of the words "and other Works and Undertakings" in the same clause demonstrate that the term "Railways" is used in a comprehensive sense to embrace the whole of the works and undertakings of such "Railways".

16. That the term "Railways" in Section 92-10 (a) has long been regarded as having a comprehensive meaning is demonstrated by the scope of the legislation enacted by the Dominion in relation to that class of subject.

For example, the first Railway Act after Confederation (The Railway Act, 1868 – 31 Victoria, Chapter 68) contained the following provisions:

"7. The Company shall have power and authority:

. . . . . .

8. To erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the Railway;

. . . . . .

10. To construct, and make all other matters and things necessary and convenient for the making, extending and using of the Railway, in pursuance of this Act, and of the Special Act;

Another example will be found in "The Canadian Pacific Railway Act, 1902" (2 Edward VII. Chapter 52), which contains the following provision:—

"8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway, and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient."

The provisions of Section 7 (8) and (10) of the Railway Act of 1868 quoted above were broad enough to include the construction and operation of hotels and indicate that from the time of Confederation hotels were regarded as an integral part of "Railways". The growing importance of the Appellant's hotels was given emphasis by the legislation of 1902, when definite limitations were put upon the powers of the Company with regard to such hotels. It is to be noted that such limitations required the Canadian Pacific's hotels to be located at points or places along its railway or at points of call of any of its steamships. Parliament was thus making it clear that thereafter such hotels must be so located as to form an integral part of the Appellant's railway system.

It is also to be observed that when Parliament in 1933 directed the two major railways to adopt co-operative measures, the hotel systems of both were included as part of the respective railway undertakings.

See "The Canadian National-Canadian Pacific Act, 1933" (23-24 Geo. V. Chapter 33) Sections 3 (e), (g) and (j) and 16.

17. It is submitted with deference that Robertson J.A. erred in his view (p. 20 l. 4) that in relation to railways, clause 10 (a) of Section 92 should be read as "Lines of Railways". "Lines of" in that clause apply only to "Steam or other Ships". If the expression "Railways" is to be qualified by the words "Lines of", likewise the word "Canals" should be so qualified. It would seem inappropriate to couple the words "Lines of" with the word "Canals".

The word "Railways" must be read in connection with the words "Works and Undertakings" and must thus be given a much broader meaning than the mere right of way, the rails and what is on the right of way.

18. *Lancashire and Yorkshire Railway Company v. Liverpool Corporation (1915) A.C. 152* to which reference is made by Robertson J.A. (p. 22 l. 10) is not, it is submitted, a guide to the meaning of the expression "Railways" in the British North America Act. The words, in the Liverpool Corporation Act, "land used . . . only . . . as a railway . . . for public conveyance", obviously must receive a much more restricted meaning. This decision dealt with the interpretation of an exemption provision of a rating or taxing act. Such exemptions should be construed strictly.

In re Canadian Pacific Railway Company and Rural Municipality of Lac Pelletier (1944) 3 W.W.R. 637, (also referred to by Robertson J.A. – p. 22 l. 19) is also inapplicable for the same reasons.

19. The works and undertaking of the Canadian Pacific Railway Company are not divisible into segments, some under Dominion and some under Provincial jurisdiction. Stations, inland steamships, docks, stockyards, hotels may be local "works" geographically, in that they are physically located in

one Province, but they are in fact integral parts of a single work and undertaking.

In *Toronto Corporation v. Bell Telephone Company of Canada (1905) A.C. 52*, Lord Macnaghten said at p. 59:

> "It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."

20. It is submitted that O'Halloran J.A. has given the Empress Hotel its proper place in the railway system of the Appellant. (Case p. 10 l. 25 to p. 11 line 5).

Reference is also made to the judgment of Macdonald J.A. in *C.P.R. v. Attorney-General for Saskatchewan, 1947, 2 W.W.R. p. 909.*

21. If there is any question as to whether hotels are such an integral part of the railway as to come within clause 10(a) of Section 92, the hotels have been included, it is submitted, in the works of the Company declared under clause 10(c) to be for the general advantage of Canada and are thus within the exclusive jurisdiction of Parliament.

This has been accomplished by legislation to which reference will now be made.

22. The Consolidated Railway Act of 1879, 42 Vict. Chap. 9, defined the expression "the Railway" as meaning "the railway and the works by the Special Act authorized to be constructed" (Sec. 5 (16)).

The Canadian Pacific Railway Company was incorporated in 1881 by Special Act of the Parliament of Canada (44 Vict. Chap. 1) and by Letters Patent under the Great Seal of Canada in the form set out in Schedule A. of the Act. The Consolidated Railway Act of 1879 is incorporated into the Special Act of 1881. (Clause 17 of Schedule A.)

The present Railway Act, R.S.C. 1927 Chap. 170, Section 2 (28) defines "Special Act" as meaning any act "which is enacted with special reference to

such railway, whether heretofore or hereafter passed, and includes (a) all such Acts . . . "

The present Railway Act is to be construed as incorporate with the Special Act (Section 3 (a)) and is made applicable to Canadian Pacific Railway Company by Section 5.

Special Acts pertinent to the present argument include "The Canadian Pacific Railway Act, 1902", 2 Edw. VII. Chap. 52, which contains the following provision:

> "8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient."

Another "Special Act" is "The Canadian National-Canadian Pacific Act, 1933" 23-24 Geo. V. Chap. 33. This is the act directing that co-operative measures be taken by Canada's two major railways.

That Act contains the following:

> "3. In this Act, unless the context otherwise requires,—
>
> . . . . . .
>
> (f) 'Pacific Company' means the Canadian Pacific Railway Company;
>
> (g) 'Pacific Railways' means the Pacific Company as owner, operator, manager and otherwise and all other companies which are elements of the Pacific Company's transportation, communication and hotel system, which system shall be deemed to include railway, express, automobile, aeroplane, inland and coastal steamship, telegraph, cable, radio and hotel companies, and, limited as hereunder and not otherwise than as so limited, the respective undertakings of the Pacific Company and of such other companies, but such undertakings shall be deemed not to include or to relate to manufacturing, mining, dealing in land, operating any ocean marine service or the like or anything ancillary;"

The legislation referred to above demonstrates that hotels are included in the railway of the Canadian Pacific Railway Company, and further, that the present Railway Act applies to such hotels.

The declaration now in force making the railway of the Canadian Pacific Railway Company a work for the general advantage of Canada pursuant to Head 10 (c) of Section 92 of the B.N.A. Act will be found in the present Railway Act, in the following terms:

"6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to . . .

(c) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada . . . ; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

It will thus be seen that the hotels of the Company are included in what has been declared to be a work for the general advantage of Canada.

23. That the Appellant's hotels are included in the work declared to be for the general advantage of Canada may be demonstrated apart altogether from the Special Acts of 1902 and 1933 to which reference has been made in paragraph 22 hereof.

It is to be noted that by Section 6 (c) of the present Railway Act every railway now owned or operated by a Company wholly or partly within the legislative authority of the Parliament of Canada "shall be deemed and is hereby declared to be a work for the general advantage of Canada".

In Section 2 (21) of the present Act, railway is defined as meaning "any railway which the Company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway".

The pertinent words in the above definition are:

"means any railway which the company has authority to construct or operate, and includes all . . . property real or personal and works connected therewith, and also any . . . other structure which the company is authorized to construct . . . "

By the Act of 1881 (Sec. 17) The Consolidated Railway Act, 1879, is incorporated into the Charter of the Canadian Pacific Railway Company.

The Act of 1879 contains the following provision:

"7. The Company shall have power and authority,—

. . . . . .

8. To erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the railway;

. . . . . .

10. To construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act."

Under the above powers the Appellant constructed and operated many of its well known hotels across Canada.

Reference is now made to the provisions of certain statutes to demonstrate that the Appellant's railway, which includes its hotels, has been declared to be a work for the general advantage of Canada. The first of such declarations was made in 1883 in an Act (46 Vict. Chap. 24) to amend "The Consolidated Railway Act, 1879". Section 6 of the amending Act was in part as follows:

" . . . it is hereby declared, that the said lines of railway, namely: the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North-Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, are works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any one of them, is a work for the general advantage of Canada."

In this connection it may be noted that Robertson, J.A. in his judgment (page 20 line 40) says, "It is to be observed that it is only the 'lines of railway' of the Company, not its undertaking, which have been declared to be for the general advantage of Canada; . . . " This is inaccurate in saying "it is only the 'lines of railway' ". The present Railway Act, by Section 6 (c), provides that "every railway" therein referred to, and which would include the railway of the Appellant "shall be deemed and is hereby declared to be a work for the general advantage of Canada".

Similar declarations in The Railway Act, R.S.C. 1886, Chap. 109, Sec. 121, and in The Railway Act of 1888, 51 Vict. Chap. 29, Sec. 306, were not made in respect of "lines of railway" but were made in respect of the railways referred to in those Acts. The difference above mentioned was referred to by MacDonald, J.A. in *Canadian Pacific Railway Company v. Attorney-General for Saskatchewan* (1947) 2 W.W.R. Page 909 at 922.

It will thus be seen that, apart altogether from the Special Acts specifically mentioning hotels (see paragraph 22 hereof), the Appellant's hotels are included in the work declared to be for the general advantage of Canada.

24. Although a railway within Dominion jurisdiction may in certain respects be subject to provincial legislation, the Parliament of Canada has exclusive jurisdiction to provide for the management of such railway.

In *C.P.R. v. Notre Dame de Bonsecours (1899) A.C. 367* Lord Watson said at p. 372:

"Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company."

In re Alberta Railway Act (1913) 48 S.C.R. p. 9 Duff J. said at p. 38:—

"In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority."

25. The fixing of hours of work is part of management. "Management" is defined in the Oxford Dictionary as, inter alia, "The action or manner of managing (see the vb.)." The verb "manage" is defined in the same dictionary as, inter alia, "To control the affairs of (a household, institution, state, etc.)."

Certainly, the hours of work of employees is essential to the control of the affairs of the works and undertaking of the Appellant.

26. Jurisdiction over personnel is as essential to the operation of the railway as control of the physical works. The management of employees, including control of their working hours, is a necessary part of the management of "railways".

In re Railway Act Amendment, 1904 (36 S.C.R. 136), Taschereau, C.J., said at p. 141:

"The exclusive jurisdiction of Parliament over federal railways must include the power to enlarge or restrict their rights and duties in the administration of their various roads so as to make them uniform all through the Dominion. It is certainly expedient, not to say more, that upon such railways the relations between the corporation and its employees should be governed by the same rules all over the Dominion . . . "

The hours of work of the various classes of the Appellant's employees should not vary province to province but should be uniform throughout the Dominion. This is particularly so in an undertaking such as a railway where some employees work in more than one province. In the case of its hotel employees, the company transfers some of them from one hotel to another to take care of seasonal fluctuations in business. For example, some employees at the Palliser in Calgary and the Saskatchewan in Regina will be found at the mountain hotels during part of the summer and at the Empress for part of the winter.

On appeal from the judgment In re Railway Amendment Act 1904 (supra), sub nom *Grand Trunk Railway Company of Canada v. Attorney-General of Canada (1907) A.C. 65*, Lord Dunedin said at p. 68:

"It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out

of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all intra familiam, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."

27. It was contended against the Appellant in the Court below that labour relations legislation is in relation to the subject of "property and civil rights" and therefore not within the jurisdiction conferred upon Parliament by Head 10 of Section 92. It is submitted, with respect, that such contention is wholly unsound. Support for the Appellant's submission on this point is found in the judgment of O'Halloran, J.A. (p. 16 l. 11).

If, however, Parliament has not exclusive jurisdiction in relation to the hours of work of the Appellant's employees by virtue of Section 92, 10 (a) or (c), then it has exclusive jurisdiction under its general powers "for the peace, order and good government of Canada". If the subject matter of the legislation is more than a matter of local or provincial concern and must from its very nature be the concern of the whole country, the exclusive jurisdiction of the Dominion with regard thereto is well established.

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This principle has recently been affirmed in *Attorney-General for Ontario and Others v. Canada Temperance Federation and Others (1946) A.C. 193.* In that case Viscount Simon said at p. 205:

"... The true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example in the AERONAUTICS case ((1932) A.C. 54) and the RADIO case ((1932) A.C. 304), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In RUSSELL v. THE QUEEN (7 App. Cas. 829), Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

It is to be noticed that the Board in SNIDER'S case ((1925) A.C. 396) nowhere said that RUSSELL v. THE QUEEN (7 App. Cas. 829) was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not."

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28. Section 72 of the Railway Act, R.S.C. 1927, Chapter 170, provides that every railway company incorporated under a Special Act shall be vested with all such powers, privileges and immunities as are necessary to carry into effect the intention and objects of this Act and of the Special Act. The Appellant was incorporated under a Special Act ((1881) 44 Vict. Chap. 1) and comes within the above provision.

Section 7 of the Schedule to the incorporating Act requires the Appellant to efficiently maintain, work and run the Canadian Pacific Railway forever.

The efficient operation of the transportation system of this Appellant is of general concern to the Dominion. It is a subject upon which uniformity of legislation is desirable and efficient operation can only be assured by uniform conditions of employment throughout the entire system. If the various provinces had jurisdiction to legislate with respect to wages, hours of work, holidays, etc., of this Appellant's employees, it would seriously interfere with the efficient operation of the integrated transportation system of the Appellant.

29. Even if the subject matter of the legislation in question is within one of the heads enumerated in Section 92, it is nevertheless necessarily incidental to effective legislation by the Dominion on a subject enumerated in Section 91 and the Provincial legislation is superseded because, as will be demonstrated, the Dominion has occupied the field.

Attorney-General for Canada v. Attorney-General for British Columbia (1930) A.C. 111 at 118;

Attorney-General for Alberta v. Attorney-General for Canada (1943) A.C. 356 at 370;

Attorney-General for Canada v. Attorney-General for Quebec (1947) A.C. 33 at 43.

Reference will now be made to the legislation by which the Dominion has occupied the field.

30. Under Order-in-Council P.C. 1003 dated 17th February, 1944 (p. 56) the Wartime Labour Relations Board was established by the Dominion. This Order-in-Council was passed under the authority of the War Measures Act, R.S.C. 1927, Chapter 206, and continued in effect under the National Emergency Transitional Powers Act, 9 George VI. (1945, 2nd Session) Chapter 25, by Order-in-Council P.C. 7414 (p. 101) and further continued in effect by (1947) 11 George VI. Chapter 16.

The said Order provided inter alia for the application of the regulations contained in the Order to Dominion railways and to works declared to be for the general advantage of Canada (Sec. 3); for the election by the employees of bargaining representatives (Sec. 5); for the certification of such bargaining representatives by the Board (Sec. 6), with the provision that a collective

agreement negotiated by such representatives "shall be binding on every employee in the specified unit of employees" (Sec. 8); for the negotiation of collective agreements by employers and such bargaining representatives (Sections 4 (3); 10 (1) and (2)), and requiring every party to a collective agreement and every employee upon whom a collective agreement is made binding to do everything he is by the collective agreement required to do and to abstain from doing anything he is required not to do (Sec. 10 (5)); requiring every person, trade union or employers' or employees' organization to whom an order is issued or who is required to do or abstain from doing anything by or pursuant to the Wartime Labour Relations Regulations to obey such order or do or abstain from doing such thing as required; and provides penalties for a breach of the regulations (Sections 38 to 44 inclusive).

31. Pursuant to Section 6 of P.C. 1003, the Wartime Labour Relations Board by Order dated March 6th, 1945 (page 80) certified to all parties concerned that the Canadian Brotherhood of Railway Employees and Other Transport Workers, Empress Division 276 and the bargaining representatives named in the Order were the properly chosen bargaining representatives for the employees of the Empress Hotel, except the employees specifically named in the Order.

32. As pointed out in paragraph 7 of the Factum, an agreement has been entered into between the bargaining representatives of such employees and the Appellant (p. 85) which became effective 1st September, 1945, and is still in effect. The agreement provides inter alia that the employees shall work a forty-eight hour week (p. 91 l. 29).

33. It is submitted that the Court of Appeal erred in holding that P.C. 1003 deals with procedural matters only. It clearly deals with matters of substance. The correct view of the Order-in-Council, it is submitted, has been expressed by Macdonald, J.A., in the Saskatchewan case, (1947) 2 W.W.R. 909 at 919.

34. Apart altogether from P.C. 1003, the matter of hours of work of the Appellant's employees, including its hotel employees, is fully covered by Section 27A, of Canadian National-Canadian Pacific Act (1947) 11 Geo. VI. Chapter 28, reading as follows:

> "27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representa-

tives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport."

The agreement above referred to has been filed in the Office of the Minister of Transport.

Under the Canadian National-Canadian Pacific Act, 1933, 23-24 Geo. V. Chapter 33, "Pacific Railways" by the definition Section 3 (g) includes the Appellant's hotel system.

10 35. Parliament has also legislated on the subject by Sections 287 (j) and Section 290 (g) and (h) of the Railway Act, R.S.C. 1927, Chapter 170.

36. In the Court of Appeal Robertson, J.A., referred to "*In the Matter of Legislative Jurisdiction over Hours of Labour*" (*1925 S.C.R. 505 at 511*). The observations of Duff, J., at the page referred to were obiter and in any event the learned Judge did not have before him such an issue as is raised in the present Reference.

That all matters relating to the management of a Dominion railway are not in any respect within provincial jurisdiction appears to have been the view of Duff, J., in *In Re Alberta Railway Act, (1913), 48 S.C.R. p. 9 at p. 37*, where he said:

20 "The works dealt with by section 92 (10) are, as Lord Atkinson observed in the judgment in CITY OF MONTREAL v. MONTREAL STREET RAILWAY CO. ((1912) A.C. 333), 'things not services'. Some of them at all events (railways and telegraph lines, for example) are things of such a character that for many purposes they must be treated as entireties. The observations of his Lordship in the judgment just mentioned suggest that as far as possible they should be so regarded when considered as subject-matter of legislation. In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority."

30 Even if the judgment of Duff, J., in the Hours of Labour Case of 1925 is to be interpreted as meaning that the Province has legislative jurisdiction in relation to hours of labour of Dominion railway employees so long as such legislation has not been enacted by the Dominion, the present legislation must fail because the Dominion has legislated.

37. It is respectfully submitted that the question referred to the Court of Appeal should be answered in the negative.

38. Notice has been given that on the hearing of this appeal, the Respondent will bring in question the validity of "An Act to Amend the Canadian National-Canadian Pacific Act, 1933" 11 Geo. VI. Chapter 28 (referred to in paragraph 34 hereof) and will submit that the said statute is ultra vires insofar as it purports to affect the hours of work and other terms and conditions of employment of the employees of Canadian Pacific Railway Company at the Empress Hotel. For the reasons already given, it is submitted that the foregoing legislation is clearly within the competence of Parliament.

All of which is respectfully submitted.

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