53, 1947

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) 10

—AND—

THE ATTORNEY-GENERAL OF CANADA
(Intervenant)

—AND—

THE ATTORNEY-GENERAL OF SASKATCHEWAN
(Intervenant)

FACTUM ON BEHALF OF THE ATTORNEY-GENERAL OF SASKATCHEWAN

PART I 20

STATEMENT OF FACTS

(1) By the Order of Reference dated September 21st, 1946, (Case page 1), passed pursuant to the Constitutional Questions Determination Act, the following question was referred to the Court of Appeal for the Province of British Columbia for hearing and consideration:

"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 30 employees employed at the Empress Hotel, and if so, to what extent?"

(2) The facts applicable to the question asked on this Reference are set out in the said Order of Reference, as follows:

"The Canadian Pacific Railway Company, a Corporation incorporated by the Statutes of the Dominion of Canada, has constructed, owns and operates lines of railway extending continuously from Saint John, New Brunswick, to Vancouver, British Columbia, and also numerous branch lines extending into and connecting with railway lines in the United States of America. The company owns and
10 operates lines of steamships plying between Vancouver and Victoria and Seattle, in the State of Washington. The said Company also leases and operates the lines of the Esquimalt and Nanaimo Railway Company, running from Courtenay to Victoria.

The lines of railway and branch lines of the said Company were by 46 Victoria, Chapter 24, Section 6 of the Statutes of the Dominion of Canada, declared to be works for the general advantage of Canada.

The said Company has further, for the purpose of its
20 lines of railway and steamships and in connection with its said business, built the Empress Hotel at Victoria, which it operates for the comfort and convenience of the travelling public. The hotel is available for the accommodation of all members of the public, as a public hotel. The said hotel caters to public banquets and permits the use of its hotel ballroom for local functions, for reward.

The property upon which the said hotel is built is not contiguous to property used by the Company for its line of railway, and is not a terminus for its railway line or steam-
30 ships.

The Company has owned and operated the said hotel for a period of thirty-eight years, and the same provides accommodation for large numbers of travellers and tourists from Canada, the United States of America and elsewhere, having five hundred and seventy-three rooms. The operation of the hotel is a means of increasing passenger and freight traffic upon the Company's lines of railway and steamships.

The Company owns and operates other hotels elsewhere
40 in Canada for like purposes.

There is a catering department in the hotel wherein the Company employs persons to prepare and serve meals.

The Company also employs hotel clerks, book-keepers and other persons to do clerical work at the hotel.

Pursuant to Section 6 of the Wartime Labour Relations Regulations being P.C. 1003 (Case page 56) passed by Governor-General in Council by Order dated March 16, 1945, (Case page 80), the War Labour Relations Board (National) certified to all parties concerned that the Canadian Brotherhood of Railway Employees and Other Transport Workers, Empress Division No. 276 and the bargaining representatives named in the order are the properly chosen bargaining representatives for the employees of the Empress Hotel, except employees specifically named in said order.

Following certification of the bargaining representatives and pursuant to the said Order-in-Council P.C. 1003 a collective agreement (Case page 85) was negotiated by the said representatives and the Company and was duly executed by the parties thereto. The said agreement became effective September 1st, 1945, for a period of one year thereafter, subject to termination on thirty days' notice in writing from either party. By the said agreement, rates of pay, hours of work, and other terms and conditions of employment of employees affected by the said agreement, are fixed for the period of the said agreement (48 hour week) (Case Page 91, line 36). No notice of termination has been given by either party to said agreement. A copy of said agreement is annexed hereto as Schedule A." (Case page 85).

(3) The alterations in the conditions of employment necessitated by the said agreement were approved by the National War Labour Board in its Order dated August 2, 1945, (Case page 82), and the consequent changes in the rates of pay brought about by the Order were approved by the same Board in Orders of April 1, 1946) (Case page 103), and May 18, 1946 (Case page 105).

All the said Orders of National War Labour Board appear to have been made pursuant to Sections 15, 16 and 20 of "Wartime Wages Control Order, 1943" (P.C. 9384) (Case page 29).

PART II

POINTS IN ISSUE AND SUBMISSIONS

The Attorney-General of Saskatchewan submits that the question referred should be answered in the affirmative for the following reasons:

I. *The Hours of Work Act* is clearly within the legislative authority of the Province of British Columbia, being legislation dealing in its whole pith and substance with a matter which is within the legislative jurisdiction of the Province under Section 92 of the *British North America Act.*

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II. The Empress Hotel is not within the exclusive legislative authority of the Parliament of Canada under the provisions of Sections 91 (29) and 92 (10), clauses (a) and (c) of the *British North America Act,* for the reasons set out below:

(i) The Empress Hotel is not a "line of railways" within the meaning of the expression "lines of railways" as used in Section 92 (10) (a) of the *British North America Act,* nor is it a work and undertaking which connects the Province of British Columbia with any other or others of the Provinces, nor does it extend beyond the limits of the Province.

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(ii) The Empress Hotel has not been declared by the Parliament of Canada to be a work for the general advantage of Canada or for the advantage of two or more of the provinces within the meaning of Section 92 (10) (c) of the *British North America Act.*

III. The Empress Hotel, not being within the exclusive legislative authority of the Parliament of Canada under Section 92 (10), clauses (a) or (c) of the *British North America Act,* the provisions of *The Hours of Work Act* are applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees at the said hotel. *The Hours of Work Act* being intra vires the Province and of general application does not impair or destroy the status, corporate capacity or powers of the said Company with respect to its operation of the said hotel.

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IV. Even presuming that the Empress Hotel is within the exclusive legislative authority of the Parliament of Canada, being a work and undertaking belonging to a class of subjects mentioned in Section 92 (10), clauses (a) or (c)

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of the *British North America Act,* the provisions of *The Hours of Work Act* are, nevertheless, applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees at the said hotel for the following reasons:

(i) The provisions of *The Hours of Work Act* apply in the absence of competent conflicting legislation of the Parliament of Canada, being, with respect to this case, within a domain in which Provincial and Dominion legislation may overlap and in which the Provincial legislation is not ultra vires if the legislative field is clear. 10

(ii) There is no competent legislation of the Parliament of Canada which conflicts with *The Hours of Work Act* so as to deny its application to the Canadian Pacific Railway Company with respect to its employees employed in the Empress Hotel as:

(a) *the provisions of the* Wartime Labour Relations (P.C. 1003) do not conflict with *The Hours of Work Act* and can be read together with the said Act, each being applicable in its own legislative sphere, and 20

(b) Section 27A of the *Canadian National-Canadian Pacific Act,* 1933, being Chapter 33, of the Statutes of Canada, 1932-33, as enacted by Chapter 28 of the Statutes of Canada, 1947, does not conflict either with *The Hours of Work Act,* and the said Section 27A and *The Hours of Work Act* can also be read together, each being applicable in its own legislative sphere.

(iii) The subject of labour relations is within the exclusive legislative jurisdiction of the provinces and there is no authority for the proposition that the subject of labour relations may be divided in accordance with the classes of subjects enumerated in Sections 91 and 92 of the *British North America Act.* 30

V. Section 27A of the *Canadian National-Canadian Pacific Act,* 1933, cannot be considered to have any effect upon the question referred to the Court of Appeal for British Columbia in this matter as the said section is not within the legislative competence of the Parliament of Canada in so far as it purports to affect the employees of the Canadian Pacific Railway Company at the Empress Hotel. In this connection it is submitted as follows: 40

(i) The Empress Hotel is not a "line of railways" within the meaning of the expression "lines of railways" as used in Section 92 (10) (a) of the *British North America Act,* nor is it a work and undertaking which connects the Province of British Columbia with any other or others of the provinces, nor does it extend beyond the limits of the province.

(ii) The Empress Hotel has not been declared by the Parliament of Canada to be a work for the general
10 advantage of Canada or for the advantage of two or more of the provinces within the meaning of Section 92 (10) (c) of the *British North America Act.*

(iii) The said section is not necessarily incidental or necessarily ancillary to legislation upon a class of subject enumerated in Section 91 of the *British North America Act.*

PART III

ARGUMENT

20 I. *The Hours of Work Act,* which provides maximum hours of work in certain industrial undertakings within the province, deals in its "whole pith and substance", with a matter which is within the legislative jurisdiction of the province under Section 92 of the *British North America Act,* and is therefore intra vires the province.

Section 92 reads in part as follows:

"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,—
30 13. Property and Civil Rights in the Province.
16. Generally all matters of a merely local or private Nature in the Province."

See: (1) *Union Colliery Co. of B.C. v. Bryden,* 1899, A.C. 580.

(2) *Attorney-General for Canada v. Attorney-General for Ontario et al; Reference re The Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and The Limitation of Hours of Work Act,* (1937) A.C. 326.

(3) *Reference in the Matter of Legislative Jurisdiction Over Hours of Labour,* 1925, S.C.R. 505, at Page 511.

(4) *Attorney-General for Canada v. Attorney-General for Ontario et al,* cited above, at pages 350 and 351.

(5) *Attorney-General for Canada v. Attorney-General for Ontario et al; Reference re The Employment and Social Insurance Act,* 1935; 1937 A.C. 355.

II. The Empress Hotel is not within the exclusive legislative authority of the Parliament of Canada under Sections 91 (29) and 92 (10), (a) and (c) of the *British North America Act.* These Sections read 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."

"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) . . . .

(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."

(i) The Empress Hotel is not a "line of railways" within the meaning of the expression "lines of railways" as used in

Section 92 (10) (a) above, nor is it a work and undertaking which connects the Province of British Columbia with any other or others of the Provinces nor does it extend beyond the limits of the Province.

See: (1) Lord Watson in *Canadian Pacific Railway v. Notre Dame de Bonsecours Parish,* 1899 A.C. 367 at pages 372 and 373.

The word "Railways" used in Section 92 (10) (a) above must be strictly construed and cannot include a hotel.

10 (2) *Wilson v. Esquimalt and Nanaimo Railway Co.* (1922) 1 A.C. 202, at pages 207 and 208.

Lands acquired by a Dominion Railway Company as a subsidy for aiding in the construction of the railway are not withdrawn from the legislative jurisdiction of the Province with relation to property and civil rights.

(3) Lord Atkinson in *Montreal City v. Montreal Street Railway* 1912, A.C. 333 at pages 342, 345 and 346.

Works are physical things, not services. Through traffic passing over a Provincial railway which connects with 20 a Dominion Railway is subject to the legislative jurisdiction of the Province.

(4) Duff, J. in the case of *In Re Certain Legislation of the Province of Alberta Regarding Railways,* 48 S.C.R. 9, at page 37.

Works dealt with by Section 92 (10) are things, not services.

(5) Viscount Dunedin in *In Re Radio Communication in Canada; Attorney-General of Quebec v. Attorney-General of Canada et al,* 1932, A.C. 304 at page 315.

30 The statement that works are physical things, not services, should be confined to Section 92 (10) (c). An undertaking is not a physical thing but is an arrangement under which physical things are used. A Radio receiver and transmitter and Radio waves constitute an undertaking which connects one province with another or extends beyond the limits of the Province. With respect to the Empress Hotel the physical thing is all one structure and not separate structures as in the case of a radio communication system and is all within the one province and does not 40 connect one province with another or others of the provinces.

(ii) The Empress Hotel has not been declared by the Parliament of Canada to be a work for the general advantage of Canada

or for the advantage of two or more of the provinces within the meaning of Section 92 (10) (c) of the *British North America Act.*

The Order of Reference (Case page 1, line 31) states that the lines of railway and branch lines of the said Company were by 46 Victoria, Chapter 24, Section 6 of the Statutes of the Dominion of Canada, declared to be works for the general advantage of Canada. The operative part of the said Section 6 reads as follows:

> "Therefore, 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." 10

Reference is made to the following points: 20

(a) Section 6 refers to "lines of railway" and includes under this description the Canadian Pacific Railway.

(b) It is the "lines of railway" and not the undertakings that have been declared to be works for the general advantage of Canada and the statement of Lord Atkinson in the Montreal Street Railway Case, cited above, as approved by Viscount Dunedin in the Radio Case, also cited above, that works under Section 92 (10) (c) of the *British North America Act* are physical things, not services, appears to be directly applicable. Considering physical things, a hotel cannot be described as a line of 30 railway. Similarly with branch lines or lines connecting with or crossing the Canadian Pacific Railway the physical things concerned are alone covered by the declaration.

(c) The declaration, with respect to branch lines, uses the words "now or hereafter" but these words are not used as to the Canadian Pacific Railway itself and the declaration must be taken to mean the Canadian Pacific Railway as it then was.

(d) At the time of this declaration the Canadian Pacific Railway was not authorized or empowered by Statute to build, own or operate hotels and the power to do so was not granted 40 until some 19 years later. See Section 8 of Chapter 52 of the Statutes of Canada, 1902.

See also:

(1) Mr. Justice Duff, as he then was, in *Luscar Collieries Limited v. N.S. McDonald,* 1925, S.C.R. 460, at page 476.

The purpose of Section 92 (10) (c) of the *British North America Act* is to enable the Dominion to assume control over specific existing works or works the execution of which is in contemplation. A declaration in general terms that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed as beneficial to the country as a whole, would be almost if not quite meaningless and could hardly have been contemplated as the basis of jurisdiction. The majority of the Court held in accordance with the view expressed by Mr. Justice Duff.

(2) *Luscar Collieries Limited v. McDonald,* 1927 A.C. 925. This was the appeal from the judgment above and it was dismissed without any expression of opinion on the matter of the purposes of Section 92 (10) (c) of the *British North America Act.* The views of Mr. Justice Duff would therefore appear to stand unimpaired.

(3) Lord Macnaghten in *Toronto Corporation v. Bell Telephone Company of Canada,* 1905, A.C. 52 at page 60.

Here the declaration declared the Act of incorporation of a particular company and the works thereunder authorized to be for the general advantage of Canada. As the works concerned were not confined within the limits of a province the declaration was held to be unmeaning. This would also appear to apply to the declaration mentioned above as to the Canadian Pacific Railway.

(4) Mr. Justice Duff in *Reference re Waters and Water-Powers,* 1929, S.C.R. 200 at page 220.

The authority created under Section 92 (10) (c) gives the Dominion power to take exclusive jurisdiction over subjects over which, otherwise, exclusive control is and would remain vested in the provinces. Exclusive jurisdiction over the Canadian Pacific Railway was not vested in any province at the time of the declaration concerned.

(5) *Hewson v. Ontario Power Company,* 36 S.C.R. 596.

A declaration under Section 92 (10) (c) is not necessary where the subject matter concerned is at the time obviously beyond the powers of the Provincial Legislature.

III. The Empress Hotel, not being within the exclusive legislative authority of the Parliament of Canada under Section

92 (10) clauses (a) or (c) of the *British North America Act,* the provisions of *The Hours of Work Act* are applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees at the said hotel. *The Hours of Work Act,* being intra vires the Province, and of general application does not impair or destroy the status, corporate capacity or powers of the said company with respect to its operation of the said hotel.

See: (1) Sir Montague Smith in *Citizens Insurance Company v. Parson,* 7 A.C. 96 at pages 113, 114 and 117.

It was held in this case that provincial legislation under Section 92 (13) of the *British North America Act,* property and civil rights, providing statutory conditions as to contracts of insurance relating to property in the province was binding upon Dominion Companies as it did not interfere with the constitution or status of such companies and was of general application. 10

The Hours of Work Act likewise provides statutory conditions to the contract of employment and does not interfere with the constitution or status of Dominion companies and is of general application being applicable in the same manner to all hotels and many other industrial undertakings. 20

(2) Sir Montague Smith in *Colonial Building and Investment Association v. Attorney-General of Quebec,* 9 A.C. 157 at page 166.

A Dominion company incorporated to deal in land and buildings can only do so according to the laws of the Province in which it is operating, relating to the acquisition and tenure of land. The Dominion confers capacity on the company but its business is regulated by the laws of the province. 30

(3) Viscount Haldane in *John Deere Plow Co. v. Wharton,* 1915, A.C. 330 at pages 340 and 341.

The status and powers of a Dominion company, as such, cannot be destroyed by provincial legislation but such powers cannot be exercised in contravention of the laws of the province restricting the rights of the public in the province generally.

(4) Mr. Justice Duff in *Attorney-General for Ontario v. Reciprocal Insurers,* 1924, A.C. 328 at pages 345 and 346.

Nothing in Section 91 of the *British North America Act* removes Dominion companies from the circle of action which the Act has traced out for the provinces. Provincial statutes 40

of general operation on the subject of civil rights prima facie affect them.

(5) Lord Atkin in *Lymburn v. Mayland,* 1932, A.C. 318 at pages 324, 325 and 326.

A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and may find its special activities completely paralyzed thereby. Dominion companies are subject to provincial legislation as to property
10 and civil rights.

(6) Lord Macnaghten in *Attorney-General for Manitoba v. Manitoba Licence-Holders Association,* 1902, A.C. 73 at page 79.

Legislation on matters which are substantially of local or private interest in a province is not ultra vires the province because it interferes with the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

(7) Viscount Dunedin in *In re The Insurance Act of*
20 *Canada,* 1932, A.C. 41 at page 45.

(8) *Rex v. Arcadia Coal Company Ltd.* 1932, 1 W.W.R. 771, at pages 779, 787, 788 and 791.

Provincial legislation of general application with relation to contracts as to miners' wages was held not to affect the status and powers of a Dominion corporation and was, therefore, intra vires the province and binding upon such a corporation. This decision appears to be directly applicable to the decision of the question referred to the British Columbia Court of Appeal herein. (Case Page 3).

30 (9) *Great West Saddlery Company v. R.,* 1921, 2 A.C. 91.

IV. Even presuming that the Empress Hotel is within the exclusive legislative authority of the Parliament of Canada, being a work and undertaking belonging to a class mentioned in Section 92 (10), clauses (a) or (c) of the *British North America Act,* the provisions of *The Hours of Work Act* are, nevertheless, applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees at the said hotel for the following reasons:

(i) The provisions of *The Hours of Work Act* apply
40 in the absence of competent conflicting legislation of the Parliament of Canada being, with respect to this case, within a domain in which Provincial and Dominion legislation

may overlap and in which the Provincial legislation is not ultra vires if the field is clear.

See: (1) Lord Dunedin in *Grand Trunk Railway v. Attorney-General for Canada*, 1907, A.C. 65 at page 68.

(2) *Attorney-General for Canada v. Attorney-General for British Columbia*, 1930, A.C. 111 at page 118.

(3) Viscount Maugham in *Attorney-General for Alberta v. Attorney-General for Canada and others*, 1943, A.C. 356 at page 370.

The doctrine of overlapping legislative powers is again set out in this case. If legislation by a province is within Section 92 of the *British North America Act* and is only incidental or ancillary to one of the classes of subjects enumerated in Section 91, then the Provincial legislation is competent unless or until the Dominion Parliament chooses to occupy the field by legislation. 10

(4) Mr. Justice Duff in *Reference re Legislative Jurisdiction over Hours of Labour*, 1925, S.C.R. 505, at page 511 (cited above).

In this case Mr. Justice Duff specifically refers to the application of the doctrine of overlapping powers with respect to Provincial legislation which affects Dominion railways. 20

(5) Viscount Haldane in *Workmen's Compensation Board v. Canadian Pacific Railway Company*, 1920, A.C. 184 at page 191.

Provincial legislation which provides a statutory condition of the contract of employment between an employee and the Canadian Pacific Railway Company is intra vires the province. This appears directly applicable to the matter of *The Hours of Work Act* which likewise provides a statutory condition of the contract of employment. 30

(6) Mr. Justice Duff in *Sincennes-McNaughton Lines Limited v. Joseph Bruneau*, 1924, S.C.R. 168 at page 173.

(7) Mr. Justice Duff in *McColl v. Canadian Pacific Railway Company*, 1923 A.C. 126 at pages 134 and 135.

(8) *Canadian Southern Railway Company v. Jackson*, 17 S.C.R. 316.

(9) Lord Watson in *Canadian Pacific Railway v. Notre Dame de Bonsecours Parish*, 1899, A.C. 367, (cited above), at pages 372 and 373. 40

(10) Mr. Justice MacDonald in *Canadian Pacific Railway Company et al v. Attorney-General for Saskatchewan,* 1947, 2 W.W.R. 909 at page 916.

In this case Mr. Justice MacDonald suggests that the remarks of Viscount Maugham in *Reference re the Debt Adjustment Act of Alberta,* 1943 A.C. 356, to the effect that legislation which in pith and substance deals with one of the enumerated subjects of Section 91 of the *British North America Act* is ultra vires the province whether the Dominion Parliament has legislated or not, conflicts with the statement of the Law of Mr. Justice Duff in the *Reference re Legislative Jurisdiction Over Hours of Labour,* 1925, S.C.R. 505 at page 511, cited above. He also suggests a similar conflict with the decision in *Union Colliery Company of B.C. v. Bryden,* 1899, A.C. 580.

With deference it is submitted that there is no conflict, the doctrine of overlapping powers only being applicable to provincial legislation which in pith and substance deals with a class of subject enumerated not in Section 91 but in Section 92 of the *British North America Act. The Hours of Work Act* dealing in pith and substance with a subject under Section 92, the principle of the Alberta Debt Adjustment and Union Colliery Cases does not apply, whereas the doctrine of overlapping powers does apply.

A similar reference was made by Mr. Justice MacDonald to the case of *Quebec Light and Power Company v. Beauport,* 1945, S.C.R. 16. Again it is submitted, however, that had the province legislated as to tolls on the company's bus line, its legislation would have been dealing in pith and substance with a matter under Section 91, the undertaking of the company having been declared to be a work for the general advantage of Canada, and the doctrine of overlapping powers would not have been applicable thereto.

(11) *Ladore v. Bennett,* 1939, A.C. 468.

Provincial legislation which in pith and substance deals with a matter under Section 92 and which incidentally affects "Interest" under Section 91, is intra vires.

(12) *Day v. City of Victoria,* 1938, 4 D.L.R. 345.

This case was decided on the same principle as that in *Ladore v. Bennett* cited above.

(13) *Board of Trustees of Lethbridge Northern Irrigation District et al v. Independent Order of Foresters,* 1940, A.C. 513.

In this case it was held the provincial legislation in pith and substance dealt with "Interest" and was, therefore, ultra vires.

(14) *In the Matter of a Reference as to the Validity of Section 31 of the Municipal Districts Act Amendment Act,* 1943, S.C.R. 295 at pages 302 and 317.

This case followed the same principle as that of the *Ladore* and *Day* cases, cited above.

(ii) There is no legislation of the Parliament of Canada which conflicts with *The Hours of Work Act* so as to deny its application to the Canadian Pacific Railway Company with respect to its employees employed in the Empress Hotel. 10

(a) Reference should first be made to the *Wartime Labour Relations Regulations* (P.C. 1003) (Case page 56). It is submitted that the said Regulations do not conflict with *The Hours of Work Act,* and that the said Regulations and Act can be read together, each being applicable in its own legislative sphere.

See: (1) Chief Justice Sloan of the British Columbia Court of Appeal in *In Re Constitutional Questions Determination Act, Reference re Application of Hours of Work Act to Metalliferous Mines,* 1947, 1 W.W.R. 841 at page 844. (Case page 7). 20

(2) Mr. Justice MacDonald of the Saskatchewan Court of Appeal in *Canadian Pacific Railway Company et al v. Attorney-General for Saskatchewan,* 1947, 2 W.W.R. 909, (cited above), at pages 918, 919 and 920.

In this case Mr. Justice MacDonald expresses disagreement with the judgment of Chief Justice Sloan in the *Metalliferous Mines Case* as to the said Regulations (P.C. 1003). Mr. Justice MacDonald states that while P.C. 1003 lays 30 down procedure for the certification of bargaining representatives and the negotiation of collective agreements, the provision that a collective agreement shall be binding on employees is not a matter of procedure. In this connection it is submitted with deference that even though the said Regulations do not entirely deal with procedural matters, none of the provisions of the Regulations are in conflict with *The Hours of Work Act* and it is only in the event of such a conflict being established that it can be contended that *The Hours of Work Act* is superseded by the said Regulations. 40 The point is not whether the said Regulations are procedural or substantive in nature but whether the provisions of the Regulations are in conflict with the provisions of *The Hours*

of Work Act. The Regulations do not deal with the limitation of hours of work.

(3) *The Wartime Wages Control Order,* 1943, (P.C. 9384) (Case page 29). See in particular Subsection 2 of Section 23 as added to the said section by Order in Council P.C. 348 (Case page 45.)

(4) *Workmen's Compensation Board v. Canadian Pacific Railway,* 1920, A.C. 184, cited above.

This is just another instance wherein the Provincial statute imposed statutory conditions to the contract of employment.

(b) Reference should also be made to Section 27A of the *Canadian National-Canadian Pacific Act,* 1933, being Chapter 33 of the Statutes of Canada, 1932-33, as enacted by Chapter 28 of the Statutes of Canada, 1947.

Section 27A reads 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 representatives 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.

(2) Nothing in this section shall affect the operation of any other Act of the Parliament of Canada or regulations thereunder."

Section 3 of the said Act contains the following definitions:

"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."

It is to be noted that Section 27A provides that the hours of work of employees of hotel companies operated by the Canadian Pacific Railway Company shall be such as are agreed upon by the company and representatives of the employees. This appears to be identical with the provision in P.C. 1003 that similar agreements covering among other matters, hours of work, shall be binding upon the employees and other parties thereto.

As with P.C. 1003 it is submitted that no conflict exists between Section 27A and *The Hours of Work Act* and the two can be read together, each applicable in its own legislative sphere. The same reasoning applies as is outlined in (a) above with respect to P.C. 1003.

(iii) The subject of labour relations is within the exclusive legislative authority of the Provinces and should not be divided in accordance with the classes of subjects in Sections 91 and 92 of the *British North America Act.*

See: Mr. Justice Doull of the Nova Scotia Supreme Court in *Re Lunenburg Sea Products Ltd., re Zwicker,* 1947, 3 D.L.R. 195 at pages 207 and 208, and the authorities mentioned therein.

V. Section 27A of the *Canadian National-Canadian Pacific Act,* 1933, cannot be considered to have any application to the question referred to the Court of Appeal for British Columbia in this matter as the said Section is not within the legislative competence of the Parliament of Canada in so far as it purports to affect the employees of the Canadian Pacific Railway Company at the Empress Hotel.

In this connection it is submitted as follows:

(i) The Empress Hotel is not a "line of railway" within the meaning of the expression "lines of railways" as used in Section 92 (10) (a) of the *British North America Act,* nor is it a work or undertaking which connects the Province of British Columbia with any other or others of the provinces, nor does

it extend beyond the limits of the province. In connection with this submission see the authorities referred to under clause (i) of submission II above.

(ii) The Empress Hotel has not been declared by the Parliament of Canada to be a work for the general advantage of Canada or for the advantage of two or more of the provinces within the meaning of Section 92 (10) (c) of the *British North America Act*. In connection with this submission see the authorities referred to under clause (ii) of submission II above.

10 (iii) Section 27A is not necessarily incidental or necessarily ancillary to legislation upon a class of subject enumerated in Section 91 of the *British North America Act* in so far as it purports to apply to hotels of the Canadian Pacific Railway Company.

See: (1) Mr. Justice Duff in *Gold Seal Limited v. The Attorney-General of* Alberta, 62 S.C.R. 424 at page 460.

Section 27A is not legislation in relation to a class of subject enumerated in Section 91 of the *British North America Act* which incidentally "affects" civil rights within the province but it is legislation directly "in relation to" 20 civil rights in the province.

(2) Mr. Justice Duff in *Reference re Waters and Water Powers,* 1929, S.C.R. 200 at pages 216, 218 and 219.

It is not the intention of the *British North America Act* that the powers assigned exclusively to the provincial legislatures should be absorbed in those given to the Dominion Parliament. The Dominion under Section 91 in the exercise of its exclusive powers relating to railways is not entitled to appropriate to itself a field of jurisdiction belonging exclusively to the provinces. A distinction must be drawn 30 between legislation affecting provincial rights and legislation conceived with the purpose of intervening in a legislative field which is exclusively competent to the provinces.

(3) *Lord Atkinson in Montreal City v. Montreal Street Railway,* 1912, A.C. 333 at pages 344, 345 and 346.

In this case it was contended that it was necessarily incidental to the exercise by the Dominion Parliament of control over the traffic of a federal railway that it should also have power to exercise control over the through traffic 40 of a provincial railway. The Board of Railway Commissioners had power under the Railway Act to compel federal

railway companies to enter into agreements for receiving and forwarding traffic of all kinds and it was contended that this power should extend to the through traffic over the provincial railway. It was held, however, that as long as it is reasonably probable that the provincial companies will enter voluntarily into such agreements or will be coerced to enter them by the provincial Legislature which controls them, it is not necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that it have such power and any such power would constitute an invasion of the rights of the Provincial Legislature. As to the through traffic carried over a federal line it can be controlled by the Parliament of Canada and as to the through traffic carried over a provincial line it can be controlled by the provincial Legislature and the federal and provincial railways can be compelled by these two Legislatures to enter into any necessary agreements. It cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as "through traffic".

(4) Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia and others*, 1930, A.C. 111, at pages 121 and 122.

In this case it was contended that the licensing of fish canning and curing establishments is necessarily incidental to effective legislation by the Dominion Parliament under the subject of "Sea Coast and Inland Fisheries". It was held that even if inspection of such establishments was necessary to ensure against the taking of unfit fish or fish out of season or to obtain statistical information it did not follow that a system of licensing was a necessity. It was not obvious that such a licensing system was necessarily incidental to effective fishery legislation.

(5) The dissenting judgment of Mr. Justice Duff in *B.C. Electric Railway Co. v. V.V. and E. Railway and Navigation Co.*, 48 S.C.R. 98 at pages 102 and 125.

Mr. Justice Duff's reasons were favourably commented upon by the Judicial Committee of the Privy Council on the appeal, 1914, A.C. 1067 at page 1076, and the majority judgment in the Supreme Court was reversed.

For the above reasons and for such other reasons as may be advanced on the argument at the hearing of this appeal, it is submitted on behalf of the Attorney-General for Saskatchewan that the question referred to the Court of Appeal for the Province of British Columbia must be answered in the affirmative and that the said Court of Appeal was right in so holding.

All of which is respectfully submitted.

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of Counsel for the Attorney-General
10 of Saskatchewan.