Privy Council Appeal No. 118 *of* 1929.

The Proprietary Articles Trade Association and others - - *Appellants*

v.

The Attorney-General of Canada and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JANUARY, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD MERRIVALE.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the Supreme Court of Canada on a reference by the Governor in Council under Section 55 of the Supreme Court Act. The questions submitted to the Court were :—

(*a*) Is the Combines Investigation Act R.S.C. 1927, c. 26, *ultra vires* the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent ?

(*b*) Is Section 498 of the Criminal Code *ultra vires* the Parliament of Canada, and if so, in what particular or particulars or to what extent ?

The Supreme Court answered both questions in the negative.

The appellants are The Proprietary Articles Trade Association, who had been found by a Commission appointed under the Combines Investigation Act to have been party to a combine as defined in the Act, and had been admitted to be heard on the reference under Section 55, Sub-section 4 of the Supreme Court Act. The other appellants are the Attorney-General for the Province of Quebec and the Attorney-General for the Province of

Ontario. The reference involved important questions of constitutional law within the Dominion, and their Lordships have had the assistance of full and able argument in which all the numerous relevant authorities were brought to their notice. After careful consideration of the arguments and the authorities their Lordships are of opinion that the decision of the Supreme Court is right.

In determining judicially the distribution of legislative powers between the Dominion and the Provinces made by the two famous Sections 91 and 92 of the British North America Act two principles have to be observed. First, the accepted canon of construction as to the general effect of the sections must be maintained. This is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the Provincial legislatures and enumerated in Section 92. But the Provincial powers are themselves qualified in respect of the classes of subjects enumerated in Section 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the Provincial legislatures. This almost reproduces the express words of the sections, and this rule is well settled.

The second principle to be observed judicially was expressed by the Board in 1881, "it will be wise to decide each case which arises as best they can without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." *Citizens' Assurance Company* v. *Parsons*, 7 App. Cas. at p. 109. It was restated in 1914: "The structure of Sections 91 and 92 and the degree to which the connotation of the expressions used overlap render it in their Lordships' opinion unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry." *John Deere Plow Co.* v. *Wharton* [1915] A.C. 330 at p. 338. The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached.

The claim of the Dominion is that the Combines Act and Section 498 of the Criminal Code can be supported as falling within two of the enumerated classes in Section 91, *viz.*, (2) The Regulation of Trade and Commerce, and (27) The Criminal Law except the Constitution of Courts of Criminal Jurisdiction but including the Procedure in Criminal Matters. Reliance is also placed on (3) The Raising of Money by any Mode or System of Taxation, (22) Patents of Invention and Discovery and on the

general power of legislating for Peace, Order and Good Government. The appellants, on the other hand, say that the Act and the section of the Code violate the exclusive right of the Provinces under Section 92 to make laws as to (13) Property and Civil Rights in the Province, and (14) The Administration of Justice in the Province.

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*: nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

The history of the Act and the section of the Code so far as it has been laid before their Lordships is as follows: In 1888 a select Committee of the House of Commons of Canada reported upon the existence of combinations in manufacturers, trade and insurance in Canada, and that legislative action would be justified for suppressing the evils resulting from these and similar combinations and monopolies. In 1889 Parliament passed an Act for the prevention and suppression of combinations formed in restraint of trade (52 V. c. 41), which made it a misdemeanour punishable with fine or imprisonment to be a party to a combination as defined in the Act, for this purpose sufficiently described as in restraint of trade. One may complete the history of the section by recording that in 1892 the material section of the Act of 1889 was placed in the Criminal Code as Section 520. In 1899 the wording of the definition was varied by omitting in certain phrases the words "unduly" and "unreasonably": but in 1900 the words were restored, and the section has since stood in the Criminal Code in the form then enacted and now forms Section 498 of the Criminal Code (R.S.C. 1927, c. 36), which is the section attacked.

To revert to the Act, in 1897 by Section 18 of the Customs Tariff Act of that year the Governor in Council was authorised to empower any Judge to hold an inquiry as to whether with regard to any article of commerce there existed any combination to unduly enhance (the split infinitives are throughout the work of the legislature) the price of such article or otherwise to unduly promote the advantage of the producers at the expense of the consumers. The Judge was empowered to compel the attendance of witnesses, and the production of documents. Upon his report the Governor in Council was empowered to reduce or withdraw any customs duty which facilitated such a combination. The powers conferred by this section appear to be the germ from which have sprung the more elaborate powers conferred by more

recent Acts. In 1904 by the Inland Revenue Amendment Act (4 Ed. VII, c. 17), the Minister of Inland Revenue was empowered to withdraw from a manufacturer any excise licence in case of a sale or consignment by him of goods under restrictive conditions as there defined. In 1907 by the Customs Tariff Act of that year, the power of the Governor in Council to appoint a Judge to inquire into the existence of combinations was enlarged : and his power to deal with any customs duty facilitating such combination was extended to cases where the existence of a combination appeared as a result of a judgment of any of the Courts. In 1910 the Combines Investigation Act (9 and 10 Ed. VII, c. 9) was passed. It made more elaborate provision for an investigation into the existence of trade combinations and provided additional remedies It contained a definition of " combine " in very general terms. An investigation was to be ordered by a Judge on application by persons interested. When ordered the investigation was to be held by a Board of three Commissioners appointed *ad hoc*, who were armed with large powers of obtaining evidence. Their report was to be published. If any person was reported to have been guilty of doing the acts already prohibited in Section 520 of the Criminal Code and continued so to offend after the report, he was to be guilty of an indictable offence and liable to a penalty not exceeding $1,000 a day for each day the offence continued. The Governor in Council's power to reduce or withdraw Customs duty was reaffirmed : and if a patent was used so as to unduly assist a combination it was made liable to revocation.

In 1919 were passed two Acts of some importance in this history, inasmuch as they have both been held by this Board to have been *ultra vires* the Dominion Parliament. The first is the Board of Commerce Act (9 & 10 Geo. V, c. 37). Under this Act, a permanent Board of three Commissioners was set up which was to be a Court of Record. The Board might sit anywhere in Canada, and either in public or *in camera*. Its duties were to have charge of the general administration of the contemporaneous Act, the Combines and Fair Prices Act of 1919 (which is the second Act above referred to), and to investigate or make orders as it might be empowered by either Act, or from time to time by the special direction of the Governor in Council. It had power to make future, contingent or conditional orders, either final or interim : and its orders could be enforced by being made a rule of Court, either of the Exchequer Court or any superior Provincial Court. Any order might be reviewed and varied or rescinded by the Governor in Council : and there were provisions by which questions of jurisdiction and questions of law could be brought by way of appeal before the Supreme Court of Canada. Large powers of securing the attendance of witnesses and the production of documents were given to the Board.

The second Act of 1919, above referred to, is the Combines and Fair Prices Act (9 & 10 Geo. V, c. 45), with the administration

of which the Board of Commerce, as above constituted, was specially charged. The Act was divided into two parts, Combines and Fair Prices. A combine was defined as having only reference to such combines as thereafter defined as had, in the opinion of the Board of Commerce, operated, or were likely to operate "to the detriment of or against the interest of the public, consumers, producers, or others," and subject to such qualification was defined in terms which appear to be substantially wider than those in the Act of 1910, or in the Criminal Code, and include fixing a common price, or enhancing the price or cost of articles and lessening competition within any particular district, or generally, in production, sale or supply. The first part, dealing with combines, empowered the Board to restrain and prohibit the formation and operations of combines. For this purpose, the Board, of its own initiative, or a Commissioner, on application, could order an investigation into the existence of a combine. The Board itself held the necessary inquiry, and if of opinion that a combine existed could order the person or persons complained of to desist from the acts forming part of the operations of the combine. Disobedience constituted an indictable offence and exposed the party guilty to a penalty not exceeding $1,000 a day. Whenever, in the opinion of the Board, such an offence had been committed, the Board had power to remit the record to the Attorney-General of the Province where it had been committed with a recommendation to prosecute, but no prosecution was to be commenced for such an offence or under Section 498 of the Code without the written authority of the Board. The powers of the Governor in Council to reduce customs duties and the power of the Court to revoke patents in cases of combines, were re-enacted. The second part, dealing with fair prices, was restricted to the control of necessaries of life defined in the Act as staple and ordinary articles of food, clothing and fuel, including the material of which they might in part be manufactured, and such other articles as the Board might prescribe. In respect of such articles, no person was to accumulate or withhold from sale any amount in excess of what was necessary for the consumption of his household or the ordinary purposes of his business: and any excess was to be offered for sale at prices not higher than were reasonable or just. The Board were directed to inquire into and restrain and prohibit any breach of the Act, or the making of unfair profits on necessaries of life. An unfair profit was to be deemed to be made when the Board declared that it had been made. Elaborate powers of inquiry, and of ordering statistical returns were entrusted to the Board. The Board might make declarations as to the guilt of any person concerned, and might order or prohibit the doing or omission of any act connected with the offence. Disobedience to such orders was an indictable offence, subject to a continuing penalty not exceeding $1,000 a day, or to imprisonment for a term not exceeding two years. Similar provisions to those in Part I were enacted as to prosecutions.

Their Lordships have dealt at some length with the provisions of the Acts of 1919, inasmuch as the appellants relied strongly on the judgment of the Board, in *re The Board of Commerce Act*, 1919, reported in [1922] 1 A.C. 191, which held both Acts to be *ultra vires*. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute. The judgment above referred to was given in November, 1921, and on June 13, 1923, there was passed the Combines Investigation Act, 1923 (13 & 14 Geo. V, c. 9), which repealed the two Acts of 1919 and enacted provisions which were substantially those of the present Act. The Act of 1923 was revised in 1927 and appears substantially in the original form in the revised Act—The Combines Investigation Act (R.S.C., 1927, c. 26). By this Act "combines" are defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which "are mergers, trusts or monopolies so-called" or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce." By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a Registrar of the Combines Investigation Act. The Registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the Registrar and a Commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The Registrar is to report the result of any inquiry to the Minister, and every Commissioner is to report to the Registrar who is to transmit the report to the Minister. Any report of a Commissioner is to be made public unless the Commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity.

By Section 32 "Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years' imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine

within the meaning of this Act. (2) No prosecution for any offence under this section shall be commenced otherwise than at the instance of the Solicitor-General of Canada or of the Attorney-General of a Province." By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction and appropriate penalties are imposed.

Under a group of Sections, 29–31, entitled "Remedies" powers are given as in previous Acts for the Governor in Council to reduce customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price of any article. Power is given to the Minister to remit to the Attorney-General of a Province any returns made in pursuance of the Act or any report of the Registrar, or any Commissioner; and if no action is taken thereon by the Attorney-General of the Province, the Solicitor-General (representing the Dominion) may take the appropriate action.

In their Lordships' opinion Section 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the Criminal Law including the Procedure in Criminal Matters" (Section 91, 27). The substance of the Act is by Section 2 to define, and by Section 32 to make criminal, combines which the Legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense" (*Attorney-General for Ontario* v. *Hamilton Street Railway* [1903], A.C. 524). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality — unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal

jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe, J., that the passage in the judgment of the Board in the *Board of Commerce* case to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of " criminal law " colourably and merely in aid of what is in substance an encroachment. The Board considered that the Combines and Fair Prices Act of 1919 came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights. The judgment of the Board arose in respect of an order under Part II of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders ; to compel surplus articles to be sold at prices fixed by the Board ; to regulate profits ; to exercise their powers over articles produced for his own use by the householder himself ; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation ; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either Commissioner or Registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence ; but if the main object be *intra vires*, the enforcement of orders genuinely authorised and genuinely made to secure that object are not open to attack.

It is, however, not enough for Parliament to rely solely on the powers to legislate as to the Criminal Law for support of the whole Act. The remedies given under Sections 29 and 30 reducing customs duty and revoking patents have no necessary connection with the Criminal Law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given

respectively under 91 [3] and affirmed by s. 122 the raising of money by any mode or system of Taxation and under 91 [22] Patents of Invention and Discovery. It is unfortunately beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopolies under any system of patents.

The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under 91 [2] for "The Regulation of Trade and Commerce." Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce* case under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the Statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.

If then the legislation in question is authorised under one or other of the heads specifically enumerated in Section 91, it is not to the purpose to say that it affects Property and Civil Rights in the Provinces. Most of the specific subjects in Section 91 do affect Property and Civil Rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to 92 [14], the administration of justice in the Province, even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated.

Their Lordships are of opinion that the Supreme Court of Canada were right in answering both questions in the negative, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE PROPRIETARY ARTICLES TRADE ASSOCIATION AND OTHERS

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY LORD ATKIN.

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