

5, 1932

No. 58 of 1931.

In the Privy Council.

ON APPEAL
FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ALBERTA.

BETWEEN—

JOHN FARQUHAR LYMBURN, and JAMES
JOSEPH FRAWLEY - (Defendants) *Appellants*

— AND —

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ALBERT HENRY MAYLAND and
MERCURY OILS LIMITED
(Plaintiffs) *Respondents*

— AND —

THE ATTORNEY-GENERAL OF CANADA,
THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO and THE
ATTORNEY - GENERAL FOR THE
PROVINCE OF QUEBEC - *Interveners.*

CASE FOR THE RESPONDENTS.

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1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta entered on the 6th day of May, 1931, whereby judgment was given in favour of the now Respondents, declaring that Section 9 of The Security Frauds Prevention Act, (Chapter 8 of the Statutes of Alberta, 1930), had no application to the Respondent Company and certain other Companies, and that the now Appellants (who are in fact the Attorney-General for the Province of Alberta, and his Solicitor) had no authority to proceed with certain examinations and investigations which they were purporting to hold under the said Act.

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2. The Appeal involves questions as to the validity of the said Act and as to its applicability, if it be valid, to the Respondents herein.

RECORD.
P. 43.
pp. 67, 68.

pp. 60-82.

RESPONDENTS' CASE.

pp. 60-82.

3. The act in question, which is hereinafter called "the Act," is set out in full in the Appendix to the Record herein. Like somewhat similar legislation in several other Provinces of Canada, it is designed to control, mainly by the registration of brokers and salesmen, certain dealings in securities, and by Part II of the Act very extensive powers of investigation are or purport to be conferred upon the Attorney-General for the Province.

pp. 67-70.

pp. 14-31.

p. 14.

4. The facts of the case are set out in two affidavits filed by the now Respondents in support of their motion for injunction, which were not contradicted by the Appellants.

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p. 14 l. 33.

p. 15 l. 13.

p. 15 ll. 5-12.

p. 21 l. 38 to
p. 22 l. 3.

5. As appears from these affidavits, the Respondent Mayland is an oil operator and a large shareholder in and a director and the President of the Respondent Mercury Oils Limited; the said Respondent Company is a large shareholder in the Company Mill City Petroleums Limited; the companies Mercury Oils Limited, Mill City Petroleums Limited and Solloway Mills and Company Limited are all companies incorporated by Letters Patent pursuant to the provisions of The Dominion Companies Act, being Chapter 27 of the Revised Statutes of Canada, 1927; the Respondent Mayland, the Respondent Mercury Oils Limited, and Mill City Petroleums Limited are not brokers nor were they ever engaged in the brokerage business; the company Solloway Mills and Company Limited was not, at the date of any of the transactions mentioned, in the brokerage business.

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pp. 15, 18-19.

6. As further appears from these affidavits, the Appellants addressed to the Respondent Mayland two formal notices purporting to be given under the authority of the Act and dated respectively the 25th February and the 4th March, 1931. The first of these notices was entitled:—

p. 15 ll. 17-22.

"In the matter of an Investigation conducted by the Attorney-General
"for the Province of Alberta under The Security Frauds Prevention Act,
"1930, into Mercury Oils Limited and Mill City Petroleums Limited."

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and by such notice the Respondent Mayland was called upon to attend at ten o'clock on the following morning,

p. 15 ll. 29-33.

"and so from day to day until the completion of the above investigation, to
"give evidence thereat and also to bring with you and produce
"all books of account, correspondence, and records of every description in
"your possession or control relating to the above matters."

The proposed investigation mentioned in the said notice was adjourned, and meanwhile the second notice above mentioned was given to the Respondent Mayland. This second notice was entitled :

pp. 18-19.

“In the matter of Section 9 of the Security Frauds Prevention Act, “being chapter 8 of the Statutes of Alberta, 1930,”

p. 18 ll. 31-2.

and the Respondent Mayland was called upon by the said notice to attend on the 16th March, 1931,

“and so from day to day until the completion of the proceedings herein, to “give evidence and also to bring with you and produce

p. 18 l. 38 to p. 19 l. 3.

10 “all books of account, correspondence, and records of every description in “your possession or control relating to the matters being enquired into “herein.”

7. The only intimation received by any of the Respondents as to the matters sought to be investigated was contained in a letter dated the 4th March, 1931, and written by the Appellant Frawley on behalf of the Appellant Lymburn to the Counsel for the Respondent Mayland, the relevant passages whereof are as follows :—

“By way of particulars to you, I feel bound to inform you formally “that the object of my investigation is to enquire into all phases of a certain “transaction between Solloway Mills & Company Limited and A. H. Mayland “respecting the exchange of certain shares and the assumption by Mayland “of a certain underwriting agreement entered into between Solloway Mills “& Company Limited and Mill City Petroleums Limited.

p. 17 ll. 28-39.

20 “I also purpose enquiring into an item appearing on the Mercury Oils “Limited Balance Sheet as at December, 1930. The item I refer to is one “of \$401,527.74, being investments in the shares of other companies. “Another item corollary thereto is \$129,212.46, being loss on investments.”

30 8. The Respondents resisted the proposed investigations, taking the view that they were not authorised by the Act; and it is submitted that an examination of the whole of the Act shows that they were and are right in this view. Leaving aside for the moment Part II of the Act, it will be seen that the title of the Act states that it is “An Act for the Prevention of Fraud in connection with the Sale “of Securities.” Part I deals with the registration of brokers and salesmen, and by Section 3 (3) (b) exempts :—

pp. 60-82.

“an isolated trade in a specific security by or on behalf of the owner, for “the owner’s account, where such trade is not made in the course of “continued and successive transactions of a like character nor by a person “whose usual business is trading in securities.”

pp. 67-70.

p. 60 l. 27-28.

pp. 62-67.

p. 63 ll. 17-21.

pp. 70-72.
pp. 72-73.
pp. 73-75.
pp. 67-70.

Part III deals with the auditing of accounts and the control of brokers by exchanges. Part IV deals with the regulation of trading on exchanges. Part V contains general clauses providing machinery for the enforcement of the Act. Part II, whereunder the investigation herein is purported to be justified, must, it is submitted, relate to investigations with respect to those matters that it is shown by the whole of the Act, including its title, that it is intended to cover, namely trading in securities in continued and successive sales, the business of brokers and trading on stock exchanges.

pp. 17-18. **9.** It is apparent that the first object set out in the above-quoted letter relates to a single isolated purchase by the Respondent Mayland from Solloway Mills and Company Limited of a block of shares in Mill City Petroleums Limited and the assumption by the Respondent Mayland of an underwriting agreement of Solloway Mills and Company Limited in Mill City Petroleums Limited, and that the second object of the investigation relates to investments made by an Oil Company in the conduct of its ordinary business affairs. Neither of these objects relates to persons or corporations engaged in the brokerage business by way of selling securities in continued and successive sales, or to trading on stock exchanges, and it is therefore submitted that the proposed investigations do not come within the scope of the Act. 10 20

pp. 60-82.

pp. 3-13. **10.** The Respondents tested the matter by bringing proceedings in the Supreme Court of Alberta, by Statement of Claim dated the 10th March, 1931, and gave notice of motion for an interim injunction restraining the Defendants from proceeding with the proposed investigation. The motion for the injunction was referred by order of Mr. Justice Ives to the Appellate Division of the Supreme Court and by agreement the motion was in part converted into one for final judgment in so far as the same related to the declaratory judgment which was subsequently delivered. 30

p. 14.

p. 31.

pp. 38-43. **11.** The judgment of the Court was delivered by Chief Justice Harvey and was concurred in by Mr. Justice Walsh and Mr. Justice Clarke.

p. 44 ll. 18-25. **12.** The formal judgment declared that Section 9 of the Act had no application to the Respondent Mercury Oils Limited or to Mill City Petroleums Limited and Solloway Mills and Company Limited, the companies mentioned in the Statement of Claim, and that the Appellants had no authority to proceed with the investigations and examinations referred to therein. 40

pp. 3-13.

13. The reasons of the Appellate Division were stated fully by the Chief Justice. Whilst regarding certain sections of the Act (Sections 20 and 22) as *ultra vires* on the ground that they trenched on the Dominion function of "The Criminal Law, . . . including "the Procedure in Criminal matters," he thought them severable and consequently not fatal to the Act. As to Section 9, however, under which the Appellants were seeking to make the investigations in question, he took the view that, whilst the Provincial legislature might competently require certain information from Dominion Companies, a right to demand information without qualification rendered the section invalid, as

pp. 38-43.

p. 40 l. 34 to
p. 41 l. 27.p. 41 l. 28 to
p. 42 l. 6; p. 42
l. 46 to p. 43 l. 3

"An attempt to give unlimited authority to gather information when "the legislature itself has only a limited right to information."

p. 43 ll. 2-3.

The learned Chief Justice, arriving at this decision, stated that it was unnecessary to determine whether Section 9 was

p. 42 ll. 40-46.

"inapplicable to Dominion Companies on the ground that it is in a field not "open to the Province either as Company legislation into which a Provincial "Legislature may not enter, or as being closed by reason of the Dominion "having occupied it by its own legislation on the subject of investigations, "for either of which no doubt, and especially the latter, much could be "said."

14. The Respondents submit in support of the said judgment that the Act is *ultra vires* because it interferes with the status and corporate capacity of Dominion Companies. Section 3 (1) (c), it is submitted, prevents a Dominion Company from selling its shares in the Province of Alberta unless its salesman becomes registered. Under Section 8 (1) (a) such registration may be arbitrarily withheld. Under Sections 10, 11 and 12 of the Act the sale of shares may be entirely stopped even though the Company may have become registered. In the present case, certain shares were held up and registration prevented under so-called Stop Orders issued pursuant to Section 12 of the Act. This interference with the sale of shares in this action is just as drastic as the interference which was condemned by their Lordships in *Attorney-General for Manitoba v. Attorney-General for Canada*, (1929) A.C. 260. The unfettered powers for making regulations contained in Section 19, and referred to in Sections 3, 5, 6 and 8, moreover, amply cover the making of regulations which would interfere with the status and corporate powers of Dominion Companies.

p. 62 ll. 35-58.

p. 66 ll. 17-20.

pp. 68-70.

pp. 19-21.

p. 74.

pp. 62-67.

15. It is further submitted, if both the Dominion and the Province could legislate on this subject, that since the Dominion has

p. 50. legislated on the subject the Dominion legislation must prevail. By Section 120 of the Dominion Companies Act, Chapter 27, R.S.C., 1927, the Dominion Parliament has provided for the appointment of inspectors to examine into the affairs of Dominion Companies, for the examination of witnesses under oath, and for the compelling of production of documents. The inspectors report their findings to the Secretary of State for Canada. Such legislation is obviously *intra vires* of the Dominion Parliament. Assuming that the Province could also legislate on this subject, then since the Dominion has already entered the field its legislation must prevail. In "In *re* Fisheries Act", (1930) A.C.111, the law was thus stated by Lord Tomlin :— 10

"There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail."

16. It is further submitted that the Act is *ultra vires* in that it deals with Criminal law and procedure. In furtherance of this argument reference is made to Section 9 of the Act, which takes away certain privileges with respect to the production of documents; to Section 12 (c), which contemplates the investigation being used for criminal proceedings; to Section 14, which deals with a matter covered by Section 231 (a) of The Criminal Code; to Section 20, which creates a new offence respecting "fraudulent acts" and seeks to supplement the Criminal Code; to Section 21, which shows that it is intended that use may be made of the Act for obtaining discovery in criminal cases; and to Section 22, which provides for the arrest of offenders against similar statutes in other Provinces. It is therefore submitted, if one examines the "pith and substance" of the Act, that it is a statute which relates to criminal law and procedure and is therefore not within the powers of the Provincial Legislature. 20 30

p. 67.
p. 69.
pp. 72-73.
p. 84.
p. 74.
p. 75.
p. 75.

pp. 60-82. 17. It is further submitted that the Act is *ultra vires* in that it is not confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it. Illustrations of the fact that the Act interferes with transactions not having their beginning and end within the Province of Alberta are the Stop Orders above mentioned, which interfered with the delivery of shares which had been dealt in generally throughout Canada and on the Stock Exchange of Vancouver in British Columbia. 40

pp. 19-21.

18. It is further submitted that in any event the Appellants should not be allowed to proceed with their investigations because no notice has been given to the Respondents of the alleged wrongful acts. An examination of the various notices to attend and the letter from the Appellant Frawley will show that no information has been given to the Respondents with respect to what fraudulent act or offence against the Act or the regulations has been, is being, or is about to be committed. The letter from the defendant Frawley gives no information as to in what respect the transactions referred to are alleged to be improper. As a result the Respondents cannot reasonably answer any case that is seemingly made out against them. When it is remembered that the investigator can make important findings of fact with relation to fraud which are subsequently taken as *prima facie* evidence in other proceedings and to which under the Act publicity may be given by advertisement, the importance of enabling the accused properly to defend themselves becomes apparent. It is submitted that the failure to give notice of the alleged wrongful act which it is proposed to investigate is such a violation of the fundamental principles of natural justice that the Appellants should be restrained from proceeding with the investigation until such information is furnished.

pp. 4-7.

p. 7.

19. It is further submitted that before submitting the Respondents to the ignominy of an investigation the Appellants, or one of them, must be satisfied of the *prima facie* existence of a fraudulent act or other breach of the Act and that it appears from the material that this is not so. By reason of the indirect motive which is alleged in Paragraphs 13 to 16 of the Statement of Claim and Paragraph 24 of the affidavit of Biggs the Respondents are, it is submitted, entitled to an interim injunction restraining the Appellants from proceeding with the investigations until the disposition by trial of the questions raised by these paragraphs.

pp. 9-10.

p. 22.

20. It is further submitted that the action has been properly brought. The Appellants may quite properly be sued, as they were in this case, in their personal capacity and not as officers of the Crown, and in any event may be sued as officers of the Crown for a declaratory judgment. Section 18 of the Act is not applicable in a case where there is a complete absence of jurisdiction.

21. The Respondents humbly submit that the judgment appealed from is right and should be affirmed, and that this Appeal should be dismissed, for the following amongst other

REASONS.

1. Because the Security Frauds Prevention Act, if and in so far as it purports to authorise the investigations in question herein, is *ultra vires* of the Provincial Legislature inasmuch as
 - (a) it interferes with the status and corporate capacity of Dominion Companies;
 - (b) "the field is not clear" but is occupied by Dominion legislation;
 - (c) it deals with Criminal Law and procedure; 10
 - (d) it is not confined to property and civil rights within the Province, nor directed solely to matters of a merely local or private nature within the Province.
2. Because on its true construction the Security Frauds Prevention Act does not authorise the proposed or any investigations in the circumstances of this case.
3. Because the proposed investigations are being carried on contrary to the principles of natural justice in that no notice of the wrongful acts being examined into has been given to the Respondents.
4. Because neither of the Appellants has satisfied himself 20 of the existence of any fraudulent act or other breach of the statute before initiating the proceedings.
5. Because this action has been properly brought against the Appellants.
6. Because the judgment of the Supreme Court and the reasons given therefor are right.

D. N. PRITT.

S. J. HELMAN.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE
SUPREME COURT OF ALBERTA.

BETWEEN :

JOHN FARQUHAR LYMBURN, and
JAMES JOSEPH FRAWLEY
(Defendants) *Appellants*

— AND —

ALBERT HENRY MAYLAND and
MERCURY OILS LIMITED
(Plaintiffs) *Respondents.*

— AND —

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL FOR THE
PROVINCE OF ONTARIO and THE
ATTORNEY GENERAL FOR THE
PROVINCE OF QUEBEC - *Interveners.*

CASE FOR THE RESPONDENTS.

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