

No. 102 of 1936.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of The Criminal Code, being Chapter 56 of the Statutes of Canada 1935.

BETWEEN

10 THE ATTORNEY-GENERAL OF BRITISH
COLUMBIA - - - - - *Appellant*

AND

THE ATTORNEY-GENERAL OF CANADA and
THE ATTORNEYS-GENERAL OF THE
PROVINCES OF ONTARIO, QUEBEC, NEW
BRUNSWICK, MANITOBA, ALBERTA AND
SASKATCHEWAN - - - - - *Respondents.*

Case

FOR THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

RECORD.

20 1. By Order in Council, No. P.C. 3451, dated the 5th of November 1935, the Governor-General referred to the Supreme Court of Canada the following question :—

“ Is Section 498A of the Criminal Code or any or what part or parts of the said section *ultra vires* of the parliament of Canada ?”

2. Section 498A of the Criminal Code was enacted by chapter 56 of the Statutes of Canada 1935, an official print of which accompanies the Record.

p. 37, l. 7. 3. In answer to the question submitted the members of the Supreme Court were unanimously of the opinion that Subsections (b) and (c) were *intra vires*; as legislation relating to Criminal Law.

p. 37, l. 9. 4. As to Subsection (a) their Lordships were divided. The majority, consisting of The Chief Justice and Davis, Rinfret and Kerwin JJ. were of the opinion that the Subsection was also *intra vires* as being Criminal Law. Cannon and Crocket JJ. were of the opinion that this Subsection was *ultra vires*.

5. It is submitted that the legislation deals with the subject of "property and civil rights" and of "Matters of a purely local or private nature in the Province" within the enumerated headings (13) and (16) of Section 92 of the British North America Act, and may also be supported under heading (15) of the same Section: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." 10

6. It is submitted that the Act cannot be supported as Regulation of Trade and Commerce, Section 91 (2) of the Constitution.

Citizens Insurance Co. vs. Parsons (1881) 7 A.C. 96; *Camerons Cases* Vol. I, p. 267. 20

Attorney-General Ontario vs. Attorney-General of Canada; and *Distillers and Brewers Association* (1896) A.C. 350, *Camerons Cases* Vol. I, p. 481.

Toronto Electric Commissioners vs. Snider (1925) A.C. at 409; *Camerons Cases* Vol. II at p. 373.

7. It is submitted that the Section does not come within the enumerated class of subjects (27) of Section 91, The Criminal Law. It is an attempt under the guise of Criminal Law to invade the field of property and civil rights in the Province and to deal with matters of a purely local nature. 30

8. Counsel for the Dominion has placed reliance on the definition of Criminal Law given by Lord Atkin in the case of

Proprietary Articles Trade Associations vs. Attorney-General for Canada (1931) 100 L.J. P.C. at page 90:

p 12,
ll. 37-39.

"Criminal Law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state."

9. This definition taken in its context and as a definition of Criminal Law generally is not open to challenge. It was not intended to be and cannot be supported as a definition of Criminal Law within the meaning of (27) of Section 91 of the Canadian Constitution Act. The jurisdiction of the Dominion Parliament under (27) of Section 91 is not absolute as is the jurisdiction of the Imperial Parliament.

10. This important distinction between the Imperial Parliament and the limited jurisdiction of the Canadian Parliament under (27) of Section 91 is illustrated in the following decisions :

10 11. *Rex vs. Nat Bell Liquors Ltd.* (1922) 65 D.L. R. 1 at page 31. In this case their Lordships held that Provincial Legislation enacted under Section 15 of 92 came within the definition of Criminal Law.

See also *Hodge vs. The Queen* 9 A.C. 117, *Camerons Cases* Vol. I, p. 347.

20 12. *In Re The Board of Commerce Act 1919* (1922) 1 A.C. 191 ; *Camerons Cases* Vol. II, 253 ; *Attorney-General for Ontario vs. Reciprocal Insurers* (1924) A.C. 529, *Camerons Cases*, Vol. II, 334 ; *Toronto Electric Commissioners vs. Snider* (1925) A.C. at 406 ; *Camerons Cases* Vol. II, 371. In each of these three cases the Federal Legislation enacted to provide that "acts or omissions are prohibited under appropriate penal provision by the State." Yet in each of these cases the Legislation was held to be *ultra vires* and not Criminal Law within (27) of Section 91.

13. Inasmuch as the Federal jurisdiction in matters of Criminal Law is limited and so unlike the jurisdiction of the Imperial Parliament it is necessary to keep in mind the rule laid down by the Privy Council in the *Reciprocal Insurers Case* : (1924) A.C. at page 337, *Camerons Cases* Vol. II at page 341

30 "Of course where there is an absolute jurisdiction vested in a legislature the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law making authority is of a limited or qualified character obviously it may be necessary to examine with some strictness the substance of the legislation to determine what the legislature is really doing." p. 32, li. 34-39.

14. Considering further the case relied on by the Dominion : *The P.A.T.A. vs. A. G. for Canada* 100 L.J. P.C. 84 at page 90 Lord Atkin states :—

"The substance of the Act is by Section 2 to define and by Section 32 to make criminal combines which the legislature in p. 12, li. 23-32.

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 producers consumers 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."

See also *Weidman vs. Shragge* (1912) 46 S.C.R. 1 ; *Stinson-Read 10 Builders Supply Co. vs. The King* (1929) S.C.R. 276.

15. It is submitted that in testing the jurisdiction of the Dominion under (27) of Section 91 the field of Criminal Law should be deemed to include the following :—

One : Any subject matter which was a crime by Statute or Common Law prior to 1867 ;

Two : Any subject matter relating to actions *malum per se* ;

Three : Any act or omission prohibited under appropriate penal provisions where the matter comes within one or more of the classes of subjects enumerated in Section 91 of the B.N.A. 20 Act.

Four : In cases where the matter comes within any of the classes of subjects enumerated in section 92 *when the prohibition is limited to such acts as are in the opinion of the Courts detrimental to or contrary to the public interests.*

16. It is submitted that no decision has yet held that the Dominion Parliament may declare an Act which is a matter coming within an enumerated heading of Section 92 is a crime without limiting the prohibition to cases where the Act is contrary to public welfare or against public interest.

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17. The general words of Section 91 provide that the power of the Dominion is to "make laws for the Peace, order and good Government of Canada in relation to all matters *not coming* within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

The concluding paragraph of the Section provides : "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."

18. Section 498A regulates the private and contractual rights of individuals without having regard to the welfare of the public or any attempt to limit the prohibition to actions against the public interest. The Section is in marked contrast to the provisions of Section 498.

19. It is submitted that if sanction is given to the Dominion Parliament to so legislate, it will defeat the scheme of Confederation.

20. It is submitted that the question asked by His Excellency The Governor-General should be answered to the effect that Section 498A is *ultra vires* for the following amongst other

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REASONS.

- (1) IT deals with a subject matter coming within the enumeration of classes in Section 92 of the B.N.A. Act.
- (2) IT is not a Regulation of Trade and Commerce within Section 91.
- (3) IT is not Criminal Law Legislation within the meaning of (27), Section 91.
- (4) IT is an encroachment on Provincial powers by the Dominion.
- (5) IT is an attempt to affect property and civil rights in the Province under the guise of Criminal Law.

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J. W. DE B. FARRIS.

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COLUMBIA.

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