In the Privy Council.

No. 102 of 1936.

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 :

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 RESPONDENT THE ATTORNEY GENERAL OF CANADA.

RECORD.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 17th day of June, 1936, answering a question referred to the said Court for hearing and consideration by Order of His Excellency the Governor General in Council, dated the 5th day of November, 1935, P.C. 3451, pursuant to the provisions of Section 55 of the Supreme Court Act, touching the constitutional validity of Section 498A of the Criminal Code enacted by Chapter 56 of the Statutes of Canada, 1935.

pp. 47–48.
pp. 36–37.
pp. 3 and 4.
p. 3, ll. 13, 14.
p. 4, ll. 1–22.

2. The question so referred to the Court was as follows :

10 "Is said section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada ? "

p. 4, ll. 34–35.

3. The full text of Chapter 56 of the Statutes of Canada, 1935, referred to in the said question, will be found in the official print thereof which is a separate document on this appeal and is attached hereto.

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4. Section 498A, as enacted by section 9 of the said Act, is in these terms:

"498A. (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount rebate or allowance 10 available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, 20 for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor."

p. 4, ll. 23-29.

5. Said section 498A was enacted, as the Order of Reference by His Excellency the Governor General in Council in terms recites, for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads which was duly presented to Parliament.

pp. 7-8.

The particular recommendations referred to are quoted in paragraph 4 30 of the factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada.

6. The relevant provisions of the British North America Act, 1867, contained in sections 91 and 92 thereof are the following:

"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 40 foregoing Terms of 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,— RECORD.

. . . . .

2. The Regulation of Trade and Commerce.

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

. . . . .

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

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

. . . . .

13. Property and Civil Rights in the Province.

20 . . . . .

15. 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.

16. Generally all Matters of a merely local or private Nature in the Province."

7. The hearing of argument took place on the 15th, 16th and 17th days of January, 1936, before Duff, C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin, JJ. Counsel for the Attorney General of Canada, as 30 well as Counsel for the Attorneys General of the Provinces of Ontario, Quebec, New Brunswick, Manitoba, British Columbia, and Saskatchewan, respectively, were heard. p. 36, ll. 25–38.

8. On the 17th day of June, 1936, as aforementioned, the Court delivered judgment and answered the question referred to the Court as follows: p. 37, ll. 7–12.

"The Court is unanimously of the opinion that as to subsections (*b*) and (*c*) the enactment is not *ultra vires*.

As to subsection (*a*), in the opinion of the Chief Justice, Mr. Justice Rinfret, Mr. Justice Davis and Mr. Justice Kerwin, the enactment is not *ultra vires;* in the opinion of Mr. Justice Cannon 40 and Mr. Justice Crocket that subsection is *ultra vires*."

9. The judgment of the majority of the Court was delivered by the Chief Justice of Canada and concurred in by Rinfret, Davis and Kerwin, JJ. Their Lordships held the provisions of section 498A to be enactments creating criminal offences in exercise of the powers vested in Parliament p. 37, ll. 22–44; p. 38; p. 39, ll. 1–29.

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in virtue of the 27th head of section 91 of the British North America Act. The prohibitions seemed to be aimed at the prevention of practices which Parliament conceived to be inimical to the public welfare; and each of the offences was declared in explicit terms to be an indictable offence. There was nothing in the circumstances or the operation of these provisions to show that Parliament was not exercising its powers under that subdivision. Whatever doubt might have previously existed, none could have remained since the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney General of Canada* (1931) A.C. 310, that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words were used in section 91, Parliament was not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law was plenary; and enactments passed within the scope of that jurisdiction were not subject to review by the Courts. 10

Their Lordships then considered the meaning of "Criminal Law" in the 27th head of Section 91 in light of the decisions. It was well settled, their Lordships concluded, that the Parliament of Canada could not acquire jurisdiction over a subject which belonged exclusively to the Provinces by attaching penal sanctions to legislation which in its pith and substance was legislation in relation to that subject in its provincial aspects alone: *In re Insurance Act of Canada* (1932) A.C. 41, 53. But they did not think any of these considerations were properly applicable to the statute before them. They thought there was no ground on which they could hold that the statute, on its true construction, was not what it professed to be: an enactment creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of Section 91. The statute being *intra vires*, they answered the interrogatory addressed to them in the negative. 20

p. 39, ll. 30–45; pp. 40–46; p. 47, ll. 1–19.

10. Separate reasons for judgment were delivered by Cannon and Crocket, JJ. respectively, holding subsection (*a*) of said section 498A to be *ultra vires* of the Parliament of Canada as being legislation involving a colourable attempt to invade the field of provincial jurisdiction, and not properly a matter of criminal law within the meaning of head 27 of section 91 of the British North America Act; but holding, on the other hand, subsections (*b*) and (*c*) to be *intra vires* of the Parliament of Canada as being genuine criminal legislation. 30

p. 39, ll. 30–45; p. 40; p. 41, ll. 1–36.

11. Cannon, J. after examining the characteristics of criminal as distinguished from civil proceedings, said he had concluded that subsection (*a*) of said section 498A did not fill the requirements of criminal legislation inasmuch as it had in view only the protection of the individual competitors of the vendor, not the maintenance of public order or the promotion of the public weal. It dealt exclusively with the civil law, and the only logical sanction to enforce the stipulation in favour of an aggrieved competitor would be to give him against the discriminating vendor a recourse in damages for compensation of any damage resulting from a refusal to sell 40

to him at the same price goods of like quality and quantity. The penalty imposed only amounted to a colourable attempt to invade the provincial field.

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Subsections (*b*) and (*c*), on the other hand, were genuine criminal legislation according to the criteria referred to.

p. 41, ll. 37–46; pp. 42–46; p. 47, ll. 1–19.

12. Crocket, J. upon a review of the relevant decisions, stated that he could not agree to the proposition that the jurisdiction of Parliament in relation to criminal law was plenary and that enactments passed within the scope of that jurisdiction were not subject to review by the Courts, if
10 by that it was meant to say that the Courts had no right to review the quality and character of any legislation which Parliament chose to place in the Criminal Code. Once it was determined that any such legislation was in reality of a criminal character, the Courts of course, would not presume to consider its wisdom or unwisdom, but in his opinion it was not only their right, but their clear duty to scrutinize any enactments which were inserted in the criminal code for the purpose of deciding whether they were or were not of such a quality or character as could properly be described as criminal law within the meaning of section 91(27). Having examined the three subsections of Sec. 498A of the Criminal Code he had concluded that
20 subsections (*b*) and (*c*) alleged offences which might reasonably be held to be of a criminal character, inasmuch as both required a specific intent to destroy competition or to eliminate a competitor—a thing which in the end was bound to operate to the detriment or against the interest of the public. The essential ingredient of the offence, as described in each of these subsections, was the intent to cause injury to the public or to an individual. They both, therefore, presented on their face the characteristic feature of crime, viz : the intent to do wrong. In this respect they were in marked contrast with subsection (*a*), which purports to make it a crime for anyone to be a party to any transaction of sale, which discriminated to his knowledge
30 against the competitors of the purchaser in that any discount, rebate or allowance was granted to the purchaser, over and above any discount, rebate or allowance available at the time to any such competitors in respect of a sale of goods of like quality or quantity. No intent to destroy competition or to eliminate an individual competitor was required. On the contrary its apparent object was to prevent the granting of discounts, rebates or allowances to large scale purchasers of manufactured and all other goods for any reason whatever and to make the price of commodities uniform, as far as possible, and by this expedient to raise the retail price throughout the country and thus deprive the great mass of the consuming population
40 of the benefit of real competition in trade. Such a policy might be desirable and beneficial to a particular class of the population, for its purpose and effect was purely economic and involved the virtual control by Parliament of such subjects as contracts of sale, which the B. N. A. Act had assigned to the exclusive jurisdiction of the Provincial Legislatures, which, in his judgment, were in a much better position to deal with such subjects as matters of local and provincial concern than the federal Parliament. In

RECORD.

his opinion subsection (*a*) described an act which lacked every element of what is ordinarily associated with criminal law, either in the minds of lawyers or laymen. It described a thing which was neither civilly nor morally wrong in itself under the cloak of discrimination. He had no hesitation in saying that in his opinion it was not genuine criminal legislation and that, dealing as it did with a subject matter of such a character, its incorporation in the Criminal Code should be held to be a mere colourable attempt on the part of Parliament to encroach upon the legislative authority of the provinces.

13. The Attorney General of Canada submits that the answer to the question referred to the Court given by Cannon and Crocket, JJ. is, so far as concerns subsection (*a*) of said Section 498A, wrong, and that the answer to the said question given by the Chief Justice and concurred in by Rinfret, Davis and Kerwin, JJ. is right, for the reasons set out in the judgment of the learned Chief Justice and also for the reasons set out in the factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada and that the said question should be answered, without qualification, in the negative for the reasons aforementioned, and for the following among other

pp. 7–18.

REASONS

1. Because Section 498A of the Criminal Code is legislation in relation to criminal law, Parliament having genuinely determined that the commercial activities and practices defined in the said section should be suppressed in the public interest.
2. Because in the Dominion Trade and Industry Commission Act, 1935, 25-26 Geo. V, c. 59, which became law at the same time, it is declared that the practices and activities defined under Section 498A are detrimental to the public interest.
3. Because in the report of the Royal Commission on Price Spreads upon which the legislation was founded, the Commission clearly dealt with the practices prohibited in Section 498A from the standpoint of the public interest.
4. Because the offences defined, prohibited and punished by Section 498A are commercial and trade offences, and the enactment is, therefore, designed to regulate trade and commerce generally throughout the Dominion in respect of the matters with which it deals, and is accordingly competent to the Parliament of Canada under head 2 of Section 91 of the British North America Act, 1867.

N. W. ROWELL.
L. S. ST. LAURENT.
C. P. PLAXTON.

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CASE FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA.

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