

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 ATTORNEY-GENERAL OF NEW BRUNSWICK.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 17th June, 1936, answering a question referred to the Court for hearing and consideration by order of His Excellency the Governor-General in Council, dated the 5th November, 1935, pursuant to the provisions of Section 55 of the Supreme Court Act. Record
p. 36
pp. 3-4.
2. The order of reference sets out in full Section 498A of the Criminal Code, which was introduced into the Criminal Code by Chapter 56 of the Statutes of Canada, 1935, and referred to the Court the following question :— pp. 3-4.
- 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, l. 34
3. The Court were unanimously of opinion that Sub-sections (b) and (c) were *intra vires*, but were divided in opinion on the validity of Sub-section (a). The Right Honourable the Chief Justice of Canada (Sir Lyman P. Duff)

Record. and the Honourable Justices Rinfret, Davis, and Kerwin held Sub-section (a) to be *intra vires* but the Honourable Justices Cannon and Crocket were of opinion that it was *ultra vires*.

4. The relevant provisions of the British North America Act, 1867, are printed in the factum of the Attorney-General of Canada.

5. This Respondent respectfully submits that the purpose and effect of Section 498A is to interfere in contractual rights by attaching penal consequences to a contract by any person engaged in trade, commerce or industry which gives a purchaser more favourable terms than is available to competitors of the purchaser. The whole object of the section is to compel persons so engaged to make their contracts in conformity with the principle of dealing equally with all buyers and of not seeking to crush competition, however local the trade, commerce or industry and however local the competition affected by sales at low prices and even although such competition might constitute in a particular locality a serious evil. In pursuing such an object the Parliament of Canada, in this Respondent's submission has legislated in matters which under heads 13, 15 and 16 of Section 92 of the British North America Act are assigned exclusively to the provincial legislatures. If the true nature and character of Section 498A is to restrict contractual rights, and prescribe principles to which those engaged in trade, commerce or industry must conform in their transactions and sales then, as laid down by the Judicial Committee, in the *Reciprocal Insurers Case* reported in [1924] Appeal Cases page 328 at page 342—

“the Parliament of Canada cannot, by purporting to create penal sanctions under Section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such procedure, it could exert no legal authority, and . . . if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.”

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p. 36, l. 25
p. 36

6. Argument was heard by the Supreme Court on the 15th, 16th and 17th January, 1936, and judgment was given on the 17th June, 1936.

pp. 37-39.
p. 37, l. 42-
p. 38, l. 2.
p. 38, ll. 3-8.
p. 38, ll. 9-19.
p. 38, l. 20-
p. 39, l. 18.
p. 39, ll. 18-
22.

7. The Chief Justice gave the reasons of the majority of the Court who saw no good reason for denying the authority of Parliament under head 27 of Section 91, to pass the enactments, which were prohibitions of practices conceived by Parliament to be inimical to the public welfare. The authority of Parliament is not confined to acts which a Court of Law considers in their own nature criminal. Head 27 must be read subject to some qualification on the ordinary sense of the words, and must be construed to leave room for provincial penal legislation under Section 92. It must also be construed in accordance with the well-settled principle that the Dominion cannot acquire jurisdiction over an exclusively provincial subject by attaching penal sanctions to legislation which in pith and substance is legislation on such a subject in its provincial aspects alone. The majority of the Court, however, did not think these considerations applicable to Section 498A.

8. Mr. Justice Cannon in his reasons for judgment pointed out that Section 498A injects a term into every contract of sale by a person engaged in trade, commerce or industry, and that thereby *prima facie* Parliament has legislated in a matter of civil rights. The learned judge then dealt with the characteristics of a crime and held paragraph (a) of Section 498A not to be criminal legislation as it has in view the protection of the individual competitors of a vendor, not the maintenance of public order or the promotion of the public weal. The logical sanction would be to give the aggrieved competitor a recourse in damages, and the penalty is only a colourable attempt to invade the provincial field. Paragraphs (b) and (c) on the other hand, are, in his opinion, genuine criminal legislation and so *intra vires* of the Parliament of Canada.

9. In his reasons for judgment Mr. Justice Crocket said that legislation which, though inserted in the Criminal Code, deals with matters exclusively committed to provincial jurisdiction and is not criminal in its essence, is invalid. This principle is established by the decisions in the *Board of Commerce Case* reported in [1922] 1 Appeal Cases page 191, and the *Reciprocal Insurers Case* reported in [1924] Appeal Cases page 328, and nothing in the judgment in *Proprietary Articles Trade Association v. Attorney-General of Canada* [1931] Appeal Cases page 310 detracts from the authority of these decisions. The later case shows on the contrary that the substance of the legislation in question must be carefully considered to determine whether it is genuine criminal legislation or, under the guise of criminal legislation, is an encroachment on provincial jurisdiction. The Courts are not concerned with the wisdom of legislation but it is their clear duty to scrutinise its quality and character. The learned judge then stated that having examined Section 498A he had concluded that Sub-sections (b) and (c) deal with an intent to cause injury and might reasonably be considered criminal legislation. In marked contrast the purpose and effect of Sub-section (a) is purely economic and involves the control of such exclusively provincial subjects as contracts of sale. Sub-section (a) describes an act which lacks every element of criminal law. In the learned judge's opinion it is not genuine criminal legislation, but a colourable attempt to encroach on provincial authority, and so *ultra vires* of the Parliament of Canada.

10. This Respondent respectfully submits that the judgment of the Supreme Court was wrong and should be reversed and that the whole of Section 498A of the Criminal Code should be declared *ultra vires* of the Parliament of Canada for the following amongst other

REASONS.

1. Because the subject matter of Section 498A is not criminal law within the meaning of Head 27 of Section 91 of the British North America Act.
2. Because the subject matter of Section 498A is not within the other enumerated heads of Section 91.

3. Because the subject matter of Section 498A inasmuch as it deals with contracts of sale and other civil rights in the Provinces is within the exclusive legislative competence of the provincial legislatures.
4. Because Section 498A is legislation on matters of a merely local or private nature in the Provinces with which the provincial legislatures are alone competent to deal and in respect of which the provincial legislatures have exclusive authority to impose punishment.
5. For the other reasons given by Mr. Justice Cannon and ¹⁰ Mr. Justice Crocket for holding Section 498A Sub-section (a) to be *ultra vires* of the Parliament of Canada.

JOHN B. McNAIR.
FRANK GAHAN.



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