

In the Privy Council.

No. 103 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 the Natural Products Marketing Act, being Chapter 57 of the Statutes of Canada 1934, and its amending Act, The Natural Products Marketing Act Amendment Act, being Chapter 64 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 AND SASKATCHEWAN *Respondents.*

CASE FOR THE ATTORNEY-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada whereby, in answer to 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, the Court gave their unanimous opinion that the Natural Products Marketing Act 1934 and as amended by an Act of 1935 is *ultra vires* of the Parliament of Canada.

Record.
p. 56.
p. 4, l. 13.
pp. 3-4.
p. 57, l. 26.

2. The general outline of the Act as amended is as follows :—

(A) By Section 2—

“marketing” is defined as including buying and selling, shipping for sale or storage and offering for sale.

“natural product” is defined as including animals, meats, eggs, wool, dairy products, grains, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber and such other natural product of agriculture and of the forest, sea, lake or river and such articles of food or drink wholly or partly manufactured or derived from any such product, and 10 such article wholly or partly manufactured or derived from a product of the forest as may be designated by the Governor-in-Council.

“regulated product” means a natural product to which a scheme approved under the Act relates, but does not include—

(i) in case the said scheme relates only to the product of a part of Canada, such product in so far as it is produced outside that part of Canada ;

(ii) in case the said scheme relates only to the product marketed outside the Province of production, such product 20 in so far as it is marketed within the Province of production ;

(iii) in case the said scheme relates only to the product exported, such product in so far as it is not exported.

(B) Section 3 authorises the Governor-in-Council to establish a Dominion Marketing Board to regulate the marketing of natural products.

(C) Section 4 deals in detail with the very wide functions and powers of the Board, the general character of which is set out in Sub-section 1 (A) as being to regulate the time and place at which, and to designate the agency through which, the regulated produce shall 30 be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class.

(D) Section 5 provides for the approval by the Governor-in-Council of any scheme for marketing natural products to which a representative number of persons engaged in the production or the marketing of such products have agreed provided that the Governor is satisfied that the principal market of the product is outside the Province of production or that part of the product may be exported. Subsection 5 40 details the matters to be stated in every scheme.

(E) Section 6 gives to an approved scheme the force of law.

(F) Section 9 empowers the Minister administering the Act to propose a scheme for the marketing or the regulation of the marketing of a natural product in inter-provincial or export trade whenever he is satisfied that the trade and commerce in such product is injuriously affected by marketing conditions through the lack of a local board.

(G) Section 10 provides for authorising a provincial marketing board or agency to exercise the functions of a local board, provided the scheme relates to an area of production within the limits of a single province.

(H) Section 11 empowers the board to exercise powers conferred on it by provincial legislation and to authorise the local board to exercise any such power.

10 (I) Section 12 authorises the Governor-in-Council to regulate or restrict the importation into Canada of any natural product which enters Canada in competition with a regulated product or to regulate or to restrict the exportation from Canada of any natural product.

(J) Part II of the Act provides for investigation into all matters affecting the cost of products and creates and provides for the prosecution of acts unduly enhancing prices or restraining or injuring trade or commerce.

(K) Section 26 provides that if any provisions are *ultra vires* of the Parliament of Canada the other provisions shall stand as if independently enacted.

20 121 **3.** The British North America Act provides in Sections 91, 92, 95 and as follows :—

“ 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
 “ foregoing Terms of this Section, it is hereby declared that (not-
 “ withstanding anything in this Act) the exclusive Legislative Authority
 30 “ of the Parliament of Canada extends to all Matters coming within
 “ the Classes of Subjects next hereinafter enumerated; that is to
 “ say :—

* * * * *

“ (2) The Regulation of Trade and Commerce.

“ (3) The raising of Money by any Mode or System of Taxation.

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“ (6) The Census and Statistics.

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“ (12) Sea Coast and Inland Fisheries.

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

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Record.

“ 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. 10

* * * * *

“ (16) Generally all Matters of a merely local or private Nature in the Province.

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“ 95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

* * * * *

“ 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

4. This Respondent respectfully submits that the Natural Products Marketing Act as amended, down to Section 12, constitutes an attempt on the part of the Parliament of Canada to regulate particular trades in the Provinces. Under decisions of the Judicial Committee it is well established that such regulation is within the exclusive jurisdiction of the Provinces under Section 92 of the British North America Act. In this Respondent's submission jurisdiction is not transferred from the Provinces to the Dominion by the provision that Dominion regulation is conditioned on the principal market being out of the Province or some part of the product being exported. As regards the remainder of the Act this Respondent submits that it is so bound up with invalid provisions that it is impossible to sever the Act, and that therefore the Act as a whole should be declared to be *ultra vires* of the Parliament of Canada.

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5. The Court, consisting of the Right Honourable the Chief Justice of Canada (Sir Lyman P. Duff) and the Honourable Justices Rinfret, Cannon, Crocket, Davis and Kerwin, heard argument on the 3rd and 4th p. 57, l. 7.

February, 1936, but the Appellant did not file a factum and was not heard on the argument. On the 17th June, 1936, the Court gave judgment, unanimously holding the Act to be *ultra vires* of the Parliament of Canada. Record. p. 55, ll. 7-20. pp. 56-57.

6. The reasons for the Court's judgment were given by the Chief Justice. He discussed first the attempt to justify the Act as the regulation of trade and commerce. The provisions of Sections 3, 4 and 5 were not the regulation of trade and commerce in the sense ascribed to those words by binding decisions, but the argument that recent cases manifest a changed view made it desirable to review the decisions. This the Chief Justice did, pointing out that although the decision in *Parson's case* reported in 7 Appeal Cases, page 96, at page 112, was that legislative authority to regulate trade and commerce does not contemplate the regulation of the contracts of a particular trade or business in a single Province, the judgment suggests that the authority does not extend to the unlimited regulation of particular trades and occupations. The judgment, however, does not exclude the regulation of external trade or the power to legislate for matters otherwise within exclusive provincial authority when such legislation is necessarily incidental to the regulation of trade and commerce. Later authorities which held the Dominion unable to legislate for a licensing system in a particular trade, or for a local work and undertaking, did not suggest that trade in a particular commodity so far as it is external or inter-provincial is not within the Dominion's exclusive regulative authority. These cases show the necessity of distinguishing between what is national in its scope and concern, and what in each province is private or local. The Dominion may subject trade in a particular commodity to regulation through customs duties, but may not establish a local licensing system for the liquor trade. The result is that the regulation of trade and commerce does not comprise, in the sense in which it is used in Section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while on the other hand, it does embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers. Regulation auxiliary to a valid Dominion measure is also authorised. The Chief Justice then considered a possible Dominion jurisdiction in relation to general trade and commerce and general regulations of trade applicable to the whole Dominion. Applying the established principles for construing Sections 91 and 92, he examined Section 4 (1) of the Act in question, which dealt with matters hitherto considered to be within provincial authority. On the other view provincial authority would be restricted to an extent inconsistent with the decided cases. Parliament cannot acquire jurisdiction in local and provincial trade by legislating at the same time respecting external and inter-provincial trade, and committing the regulation of both classes of trade to the same authority. The Act regulates dealings in particular commodities or classes of commodities and is not a general regulation of trade or the regulation of general trade and commerce. The Act cannot be supported consistently with *Snider's*

pp. 57-74.
p. 57,
ll. 38-44.
p. 58,
ll. 1-28.
p. 58,
ll. 29-38.
p. 58, l. 39-
p. 59, l. 49.
p. 59,
ll. 49-51.
p. 59, l. 51-
p. 60, l. 7.
p. 60, l. 8-
p. 61, l. 43.
p. 61, l. 44-
p. 62, l. 16.
p. 62,
ll. 17-25.
p. 62,
ll. 26-30.
p. 62,
ll. 31-36.
p. 62, l. 36-
p. 63, l. 28.
p. 63, l. 29-
p. 64, l. 3.
p. 64,
ll. 4-13.
p. 64,
ll. 14-18.
p. 64, l. 19-
p. 65, l. 6.

Record. *case* reported in [1925] Appeal Cases, page 396, nor is this conclusion affected by the *Aeronautics and Radio References* reported in [1932] Appeal Cases, page 54 and page 305, where the subject matters of the legislation and regulations have no sort of resemblance to the subject matter of the Act. Legislation necessarily incidental to the exercise of Dominion powers may trench on subjects reserved to the Provinces, but the sweeping regulation of local trade by the Act is not necessarily identical to the regulation of external or inter-provincial trade or both combined, and requires the co-operation of the provincial legislatures.

7. The Chief Justice then turned to the contention that the Act is valid under the power to make laws for the peace, order and good government of Canada, urged in support of six statutes referred to the Court. The language of the British North America Act in Sections 91, 92 and 94 (which omits Quebec from the provision for the uniformity of the provincial laws relative to property and civil rights) plainly and explicitly declares that property and civil rights are not assigned to the Parliament of Canada under the initial words of Section 91. It is settled by decisions of the Judicial Committee that the phrase "property and civil rights" is used in the largest sense, subject to the limitations expressed or implied in the enumerated heads of Sections 91 and 92. The legislation referred affects civil rights in every Province, but matters normally comprised within Section 92 may, in extraordinary circumstances, acquire aspects of such paramount significance as to take them outside that section. The Chief Justice then considered the *Ontario Liquor Licence Case* reported in [1896] Appeal Cases, page 348 and pointed out the carefully guarded language at page 492, relied on in support of the contention, and the difficulty, in the language and on the authorities, of applying the construction contended for to many of the heads of Section 92. The application of the principle stated in such carefully guarded language was a delicate and difficult task as is shown by the history of *Russell v. The Queen* reported in 7 Appeal Cases, page 829. Only in one case, the *Fort Frances case*, reported in [1923] Appeal Cases, page 695, has the Judicial Committee held that matters *ex facie* civil rights in a Province had by exceptional circumstances come within Dominion jurisdiction, and the *Board of Commerce Act case* reported in [1922] 1 Appeal Cases, page 191, and *Toronto Electric Commissioners v. Snider*, reported in [1925] Appeal Cases, page 396, showed the reluctance of the Courts to give effect to the argument in normal conditions. The *Aeronautics Reference*, reported in [1932] Appeal Cases, page 54, does not mark a new departure, though with the *Radio Reference* reported in the same volume, page 304, the decision shows that international agreements, not falling within Section 132, are within the general authority of Section 91 because not within the enumerated heads of Section 92. The authorities bound the Court to reject the argument, and to declare the Act *ultra vires* of the Parliament of Canada.

8. This Respondent respectfully submits that the judgment of the Supreme Court was right and should be affirmed for the following amongst other

REASONS

1. Because the subject matter of the Act is not within any of the enumerated heads of Section 91 of the British North America Act.
2. Because the Act deals with property and civil rights and matters of a merely local and private nature in the Provinces.
- 10 3. Because the subject matter of the Act is within the enumerated heads of Section 92 of the British North America Act, and so not within the power of Parliament to legislate for the peace order and good government of Canada.
4. Because the Act trenches on matters within the exclusive legislative jurisdiction of the Provinces not incidentally to the exercise of Dominion powers but by the regulation of individual trades and trades in individual commodities and classes of commodities which are entirely local and of purely local concern.
- 20 5. Because the Act regulates both external and inter-provincial trade and purely local trade, and such regulation requires the co-operation of the Parliament of Canada and of the provincial legislatures.
6. Because the provisions of the Act regulating external and inter-provincial trade cannot be severed from the provisions regulating individual trades within the Provinces.
7. For the other reasons given by the Chief Justice.

JOHN B. McNAIR.

FRANK GAHAN.



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BLAKE & REDDEN,
17, Victoria Street, S.W.1.