

54. 1938

In the Privy Council.

No. 81 of 1937.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

GEORGE WALKEM SHANNON, THOMAS HEDLEY
McDONALD, and MATTHEW BLACKWOOD
McDERMID - - - - - *Appellants*

AND

10 LOWER MAINLAND DAIRY PRODUCTS BOARD *Respondents*

AND

THE ATTORNEY-GENERAL OF BRITISH
COLUMBIA - - - - - *Intervener.*

CASE FOR THE APPELLANTS.

1. This is an Appeal from a Judgment of the Court of Appeal of ^{Record.} p. 98.
British Columbia dated 10th August 1937 reversing a judgment pronounced
on 29th May 1937 by the Trial Judge (Manson J.) who had decided the case p. 93.
in favour of the Appellants.

20 2. The Appellants as Plaintiffs in the Action and with reference to a ^{pp. 2-3.}
"Milk Marketing Scheme of the Lower Mainland of British Columbia,"
a scheme approved by the Lieutenant-Governor in Council under the Natural
Products Marketing (British Columbia) Act on 27th October 1936, had
brought the action against the "Marketing Board" operating the Scheme as
Defendant to have it declared that the Act (including the Amendment
thereof passed at the first session of the Legislature in 1936) was *ultra vires*,
and that the Plaintiffs were under no obligation to comply with the orders
of the Marketing Board, and for an injunction to restrain the Board from
collecting from the Plaintiffs licence fees or other charges and from otherwise
30 or milk products.

3. The Trial Judge having declared the Act to be *ultra vires* and having ^{p. 93.}
granted a declarator and an injunction as craved, and the Court of Appeal
having recalled that judgment, the present Appeal has been brought in
order to have the judgment of the Trial Judge restored.

4. The procedure in the case both before the Trial Judge and in the Court of Appeal was complicated to some extent by amendments of the original Act—including an amendment of the Act subsequent to the issue of the Writ on 12th November 1936. But, although the effect of the successive amendments to some extent entered into the argument in both Courts, the actual decision of the Court of Appeal proceeded upon an examination of the terms and purport and effect of the Act as revised after the second amendment made on 20th November 1936 (1936 Second Session ch. 30). Prints of the Act and of the amending Acts accompany the Record.

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Record, p. 98.

5. The judgment of the Court of Appeal now appealed from was a purely formal judgment of that Court, the actual decision and opinions on the main questions which are the subject of the present Appeal having been given in separate proceedings before the Court of Appeal pursuant to sect. 3 of the Constitutional Questions Determination Act R.S.B.C. 1924 ch. 46, in the following circumstances.

App., p. 20,
et seq.

6. In the Plaintiffs' action the Marketing Board appeared as Defendant and Counsel also appeared for the Attorney-General of British Columbia. The decision of the Trial Judge in favour of the Appellants having been appealed by the Marketing Board on the ground that the judgment was against the evidence and other grounds, the Lieutenant-Governor in Council (pending the hearing of that Appeal) pursuant to sect. 3 of the Constitutional Questions Determination Act on 2nd June 1937 referred to the Court of Appeal of British Columbia the following question, viz. :—

Record, p. 95.

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App.,
pp. 20-21.

“ Is the ‘ Natural Products Marketing (British Columbia) Act Amendment Act 1936 ’ and the ‘ Natural Products Marketing (British Columbia) Act Amendment Act 1936 (Second Session) ’ or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* of the Legislature of the Province of British Columbia ? ”

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7. At the hearing before the Court of Appeal in the said Reference Counsel appeared on behalf of the Province of British Columbia, for the Marketing Board, and for a “ Producers ” Association, viz., “ The Independent Milk Producers Co-operative Association.”

8. The Certificate of Opinion of the Court of Appeal dated 9th July 1937 certified that in the opinion of the Court the Natural Products Marketing (British Columbia) Act as amended by the Natural Products Marketing (British Columbia) Act Amendment Act 1936 and the Natural Products Marketing (British Columbia) Act Amendment Act 1936 (Second Session) “ are not in any particular beyond the powers of the Legislature of the Province of British Columbia.”

App., p. 21,
l. 13.

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9. The Members of the Court of Appeal (Archer Martin C.J.B.C., A. E. McPhillips, J.A., and M. A. Macdonald J.A.) on the above constitutional question were unanimous. Their Opinions are printed in the Appendix hereto. The formal judgment of the Court of Appeal in the present action was in conformity with that decision and the Oral Reasons for Judgment were expressed in the following terms:—

App. pp. 20-56.
Record, p. 97.

“ We feel there is nothing for us to do under these circumstances but to hold that the injunction cannot stand and the Appeal will have to be allowed. That is our opinion.”

10 10. The Reasons for Judgment of the Trial Judge in the present action (Manson J.) are contained in the Opinion delivered by him in a similar case decided by him on the same day (28th May 1937), viz., *Hayward and Others v. B. C. Lower Mainland Dairy Products Board*. The Opinion of Manson J. in that case is also printed in the Appendix.

Record, p. 92.
App., pp. 1-20.

20 11. The complications already referred to, not only in relation to the proceedings in the Actions but to the amendments of the Act in relation to successive Schemes thereunder, afford additional grounds, as the Appellants humbly submit, for challenging the judgment of the Court of Appeal. But in the first place it is submitted that the judgment appealed from should be set aside as erroneous in law, on the ground that the decision of the Court of Appeal to the effect that the Act was *intra vires* was pronounced in error, and is not merely inconsistent with the provisions of the British North America Act 1867 but in clear conflict with decisions of the Judicial Committee in similar cases which in law are not distinguishable.

30 12. A summary of the terms of the Provincial Act now under consideration and the closely related “ Dominion Act ” (the latter Act having already been held to be *ultra vires* by a recent decision of the Judicial Committee) and of the alterations made by amendment prior to the issue of the Writ in the present action will be found in the Opinion of Manson J. in the case of *Hayward*. But as the decision of the Court of Appeal proceeded upon an examination of the Act after the second amendment (1936 Second Session) and as the Court of Appeal held that the Act so amended “ in no substantial particular differs from the Acts that preceded it,” it will be convenient for present purposes to refer to the terms and effect of the principal sections of the (Provincial) Act as contained in the Revised Statutes of British Columbia, brought into force “ on from and after the 30th day of June 1937,” Ch. 165, Vol. II.

App., p. 31,
l. 9.
App., p. 21,
l. 22.

40 13. To indicate the general scope and purpose of the legislation challenged as *ultra vires*, it may be sufficient, under reference to the

provisions of the Act in its original form and of the amendments thereof, to quote the terms of section 4 and excerpts from sect. 4A after the amendment of 20th November 1936 :—

“ 4. (1) The purpose and intent of Part I of this Act is to provide for the control and regulation in any or all respects of the transportation packing storage and marketing of natural products within the Province, including the prohibition of such transportation packing storage and marketing in whole or in part ;

“ (2) The Lieutenant-Governor in Council may from time to time establish amend and revoke Schemes for the control and regulation within the Province of the transportation packing storage and marketing of any natural products, and may constitute marketing boards to administer such schemes and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation packing storage and marketing of any natural products within the Province and to prohibit such transportation packing storage and marketing in whole or in part.”

“ 4A. Without limiting the generality of any of the other provisions of this Act the Lieutenant-Governor in Council may vest in any provincial board any or all of the following additional powers :—

“ (a) To regulate the time and place at which and to designate the agency through which any regulated product shall be packed stored or marketed . . .

* * * * *

“ (c) To require any or all persons engaged in the production packing transporting or marketing of the regulated product to register with and obtain licences from the board.

“ (d) To fix and collect yearly halfyearly quarterly or monthly licence fees from any or all persons producing packing transporting storing or marketing the regulated product ; and for this purpose to classify such persons in groups and fix the licence fees payable by the members of the different groups in different amounts . . .

* * * * *

“ (f) To require full information relating to the production . . . and marketing of the regulated product from all persons engaged therein . . .

“ (g) To fix the price or prices . . . ; and may fix different prices for different parts of the Province :

* * * * *

“(j) To use in carrying out the purposes of the scheme and
 “ paying the expenses of the board any moneys received by the
 “ board.

“(k) To make such orders rules and regulations as are deemed
 “ by the board necessary or desirable to control and regulate
 “ effectively the transportation packing storage or marketing of
 “ the regulated product and to amend or revoke the same.”

14. To emphasise the very wide and vague and, as the Appellants
 humbly submit, the practically unrestricted powers, that would or could
 10 be entrusted to and exercised by marketing boards—standing the decision
 now under Appeal—the Appellants further refer to the definition clause of
 the Act and particularly to the following terms as there defined :—

“ Marketing includes buying and selling, shipping for sale or
 “ storage and offering for sale : and in respect of a natural product
 “ includes its transportation in any manner by any person.”

“ ‘ Natural product ’ means any product of agriculture or of the
 “ forest sea lake or river and any article of food or drink wholly or
 “ partly manufactured or derived from any such product.”

20 “ ‘ Regulated product ’ means any natural product the regula-
 “ tion of the marketing of which is provided for in any scheme
 “ approved or established under this Act.”

15. Professing to act under the authority of the said Act in its
 original form the Lieutenant-Governor in Council on 21st November 1934
 authorised the establishment of a Scheme to be known as the “ Milk
 Marketing Scheme of the Lower Mainland of British Columbia.” A print
 of the Scheme accompanies the Record.

16. Thereafter on October 27th 1936 professing to act under the
 authority of the Act as amended by the Amending Act of 1st April 1936
 the Lieutenant-Governor in Council authorised the establishment of a
 30 second Scheme also entitled the “ Milk Marketing Scheme of the Lower
 Mainland of British Columbia,” a print whereof accompanies the Record.

17. The Board (the Respondents) acting under the second “ Milk
 Marketing Scheme ” having sought to exercise authority thereunder over
 the Appellants, and in particular by compelling them as a condition of
 being allowed to trade as producers or otherwise in the milk trade to
 register with and obtain licences from the Board and pay licence fees to
 the Board and comply with rules and orders issued by the Board, the
 Appellants were compelled to take proceedings against the Board in the
 action now under Appeal—the Writ being issued on November 12th 1936
 40 in the terms already outlined. Record, p. 2.

18. The course of the action and the contentions of the Appellants are shown in the Record of Proceedings in the case and in the Opinion of the Trial Judge (Manson, J.) in the case of *Hayward*—to which the Appellants respectfully refer. The Trial Judge decided in favour of the Appellants on various grounds and *inter alia* the following, viz. :—

1st that the Act involved an interference with inter-provincial and external trade as distinguished from provincial trade ; and so contravened the provisions of the British North America Act ;

2nd that the provisions in the Act for the exaction and application of the licence fees by sect. 4A of the Act (as amended 10 1936 Second Session) authorised taxation and indirect taxation not warranted under the British North America Act, sect. 92.

The Appellants humbly submit that on both grounds the judgment of the Trial Judge was well-founded, and that the Act constitutes a clear violation of the said provisions of the British North America Act, and that its terms would cover drastic interference with Dominion trade and commerce and impositions amounting to indirect taxation both in the guise of licence fees and in other forms.

19. The question whether the Act is *ultra vires* the Legislature of British Columbia turns primarily upon the terms of sects. 91 and 92 20 of the British North America Act 1867 and more particularly the following provisions :—

“ Sect. 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 Legislature
 “ 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 (notwithstanding anything in this 30
 “ 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 :—

“ (2) the regulation of trade and commerce ;

“ (3) the raising of money by any mode or system of
 “ taxation.

* * * * *

“ (29) Such classes of subjects as are expressly excepted
 “ in the enumeration of the classes of subjects by this Act
 “ assigned exclusively to the Legislatures of the Provinces. 40

“ 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.”

“ Sect. 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 :—

10 “ (2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

* * * * *

“ (10) Local works and undertakings other than . . .”
(works of certain specified classes).

* * * * *

“ (13) Property and civil rights in the Province.

* * * * *

“ (16) Generally all matters of a merely local or private nature in the Province.”

20 **20.** The Appellants refer to the wide and general terms of the Natural Products (British Columbia) Act and to the examination thereof by the Trial Judge in support of their contention that the Act is *ultra vires* on the grounds *inter alia* that its provisions are an infringement of above quoted provisions of sect. 91 of the British North America Act and of the exclusive legislative authority of the Parliament of Canada in relation to (1) the regulation of trade and commerce and in particular inter-provincial and external trade and commerce as contrasted with legislation relating to “ Property and Civil Rights in the Province ” or to “ matters of a merely local or private nature in the Province ” ; and (2) the raising of money by any mode or system of taxation. The Appellants in that connection
30 respectfully refer to the interpretation and application of the said sections of the British North America Act in judgments of the Judicial Committee and of the Supreme Court of Canada and in particular to the following cases, viz. : *Attorney-General for British Columbia v. Attorney-General for Canada and Others* [1937] A.C. 377 ; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited* [1933] A.C. 168 ; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, 1931, Can. S.C.R. 357 ; and *The King v. Caledonian Collieries Ltd.* [1928] A.C. 358.

40 **21.** The Trial Judge, as an additional ground of judgment, took exception to the sweeping and complicated method of legislation by reference and “ delegation ” under the Act, by which the Provincial Legislature
App., p. 7,
I. 44.
professed to “ delegate ” authority—amounting in the view of the Trial

Judge to “legislative” authority—to the Lieutenant-Governor in Council and through him to Provincial “Marketing Boards” acting in co-operation or conjunction with or under instructions from the Dominion Legislature or “Dominion Marketing Boards.” While the Appellants on that aspect of the case do not adopt in its entirety the reasoning of the Trial Judge, they humbly submit that the attempt in the Act to combine Provincial with Dominion legislation, and under cover of a nominal delegation of authority to the Lieutenant-Governor in Council to delegate legislative authority in Provincial affairs to the Dominion Legislature and to Dominion and Provincial Marketing Boards acting “conjointly” is unwarranted 10 and unconstitutional. They further submit that those and other features of the original Act rendered it invalid, and that the invalidity was not cured by the successive amendments referred to.

22. The Appellants therefore submit that the Appeal should be allowed for the following amongst other

REASONS.

- (1) BECAUSE the legislation is in substance legislation in relation to the regulation of trade and commerce within the meaning of section 91 (2) of the British North America Act 1867. 20
- (2) BECAUSE the legislation covers and is in substance concerned with the regulation of export and inter-provincial trade and contravenes the provisions of the British North America Act 1867, and particularly sections 91 and 92 thereof.
- (3) BECAUSE the legislation authorises the imposition of licence fees and other charges constituting the raising of money by indirect taxation and contravenes the provisions of the British North America Act 1867 section 91 (3). 30
- (4) BECAUSE the legislation does not relate merely to Property and Civil Rights in the Province, or to matters of a merely local or private nature in the Province.
- (5) BECAUSE the legislation is beyond the competence of the Provincial Legislature.
- (6) BECAUSE the decision of the Court of Appeal on the question referred and their judgment in the action under Appeal are unsound and contrary to law.

ARTHUR P. DUFFES.

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LOWER MAINLAND
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BOARD - - - - *Respondents*

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GENERAL OF BRITISH
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CASE FOR THE APPELLANTS.

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17 Victoria Street, S.W.1.