

54, 1938

# In the Privy Council.

No. 81 of 1937.

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## ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

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BETWEEN:

GEORGE WALKEM SHANNON, THOMAS HEDLEY  
McDONALD, and MATTHEW BLACKWOOD McDERMID,  
(Plaintiffs) Appellants,

AND

LOWER MAINLAND DAIRY PRODUCTS BOARD,  
(Defendant) Respondent,

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,  
Intervenant.

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## CASE FOR THE INTERVENANT, THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

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1. This is an appeal from a judgment of the Court of Appeal of British Columbia delivered on the 10th day of August, 1937, dissolving an injunction order made against the defendant by the Honourable Mr. Justice Manson in the Supreme Court of British Columbia on the ~~22nd~~<sup>29th</sup> day of May, 1937.

2. The defendant Board was a board created under the provisions of the "Natural Products Marketing (British Columbia) Act," Ch. 38 of the Statutes of British Columbia, 1934, as amended by Ch. 34 of the Statutes of 1936.

3. Pursuant to the provisions of these enactments, "A scheme" was formulated to regulate the marketing of milk and milk products produced in a described area of the Province, being the area of the Lower Fraser Valley and vicinity, which included the City of Vancouver. This scheme was published in The British Columbia Gazette by the authority of the Lieutenant-Governor in Council and the Order in Council set up the defendant Board of three members. 10

4. The Act of 1934 was enacted in its original form to provide for Provincial marketing boards to act provincially and also in co-operation with Federal marketing boards established under the provisions of the Dominion Marketing Act. See sections 4, 5, 6, and 7.

5. In November, 1935, His Excellency the Governor-General in Council submitted to the Supreme Court of Canada a question pursuant to the provisions of section 55 of the Supreme Court Act touching the constitutional validity of the Federal Natural Products Marketing Act, 1934, and its amending Act of 1935. 20

6. The Supreme Court of Canada by Judgment dated the 17th day of June, 1936, declared these Acts to be beyond the competence of the Federal Parliament.

7. This Judgment was subsequently upheld by the Privy Council.

8. The 1936 amendment of the British Columbia Marketing Act, 1934, being Chapter 34, was assented to April 1st, 1936. This Act was passed after judgment had been reserved by the Supreme Court of Canada and in contemplation of the possibility of the Federal Act being declared to be *ultra vires*. It provided that its provisions would come into operation on a day to be proclaimed by the Lieutenant-Governor. The Federal Act was 30 declared to be *ultra vires* by the Supreme Court on June 17th, 1936, and, on the following day, Chapter 34 was proclaimed.

9. The effect of this amendment was to change the 1934 Act into one to be operative within the Province independently of any Federal Act and standing on its own feet. Section 4 was repealed and the following section was substituted therefor:—

"4. (1.) The purpose and intent of this Act shall, from the time  
 "of the coming into operation of this section, be to provide for the  
 "effective regulation and control in any respect or in all respects of  
 "the marketing of natural products within the Province, including 40  
 "the prohibiting of such marketing in whole or in part.

“(2.) The Lieutenant-Governor in Council may from time to time establish, amend, and revoke schemes for the regulation of the marketing of 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 regulate, control, or prohibit the marketing of any natural product.

“(3.) Any scheme may relate to the whole of the Province or to any area within the Province, and may relate to one or more natural products or to any grade or class thereof.

“(4.) The method by which the members of any marketing board are to be chosen, whether by appointment or election, or partly the one and partly the other, may be set out in the scheme the board is authorized to administer.”

10 10. Section 4A was added, which gave to the Lieutenant-Governor in Council authority to vest in any provincial board certain specified additional powers. *See also* section 6.

11. The defendant Board after Chapter 34 of 1936 became operative promulgated various orders for the purpose of regulating the marketing of milk and its products within the area of their jurisdiction. These orders required all persons engaged in the production, processing, manufacturing, or marketing of milk within the area to register with and obtain licences from the defendant and to pay licence fees to the defendant.

12. The plaintiffs alleged themselves to be persons within the area engaged in the production, processing, manufacturing, or marketing of milk.

13. They brought an action in the Supreme Court asking for a declaration “that the Natural Products Marketing (British Columbia) Act and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, are *ultra vires* of the Legislature of the Province of British Columbia ” and for an injunction.

14. At the trial various orders made by the Board were put in evidence. There was no issue, however, as to whether these orders exceeded the authority of the Act. The only issue was the validity of the Act itself. *See* Record, pages 24 and 25.

15. In order to understand the various judgments in this action it is necessary to refer to contemporary proceedings.

16. Mr. Justice Manson gave judgment in this action May 29th, 1937. On the same day he had already given a written decision in the case of Hayward *et al.* against the defendant Board. Hayward was a dairy-farmer carrying on business in the area and he too had brought an action challenging the validity of the provincial legislation and seeking to restrain the operations of the Board by injunction.

17. Following these judgments of Mr. Justice Manson, the Lieutenant-Governor in Council, by Order in Council dated June 2nd, 1937, submitted to the Court of Appeal, pursuant to the "Constitutional Questions Determination Act," the following question:—

"Is 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), or any of the provisions thereof, and in what particular or particulars and to what extent, *ultra vires* of the Legislature of the Province of British Columbia?"

18. The Court of Appeal answered this question in the negative by Judgment delivered on July 8th.

19. When the present case came before the Court of Appeal on August 10th the Court simply followed its decision in the Constitutional Question reference case.

20. It is to be noted that the above-quoted question refers to a further amendment of the Marketing Act in the "Second Session" of 1936. The Writ in the present action was issued November 12th, 1936. The amendment of the Second Session, being Chapter 30, was enacted November 20th, 1936. This Act is in two parts. Part II. was never proclaimed and was in effect repealed by the operation of the present Act, Ch. 165 of the Revised Statutes of British Columbia, 1936, in which Part II. is not found. Part I. of Ch. 30 of the Second Session made some amendments to the Act of the First Session, but does not affect the substance of the legislation.

21. The grounds of attack against the validity of the legislation are to be found in the judgment of Mr. Justice Manson in *Hayward's Case* (1937) 2 W.W.R. 401. The reasons are summarized as follows:—

*One:* The British Columbia Act, 1934, was intended to be complementary to the Federal legislation which has since been declared 30 invalid. The provisions of the two Statutes were interlocking or overlapping. The Provincial Act deals in a "sweeping way" with interprovincial and external trade. Consequently the Provincial Act of 1934 was also invalid. Being invalid it cannot be revived by the amendments of 1936, even if these amendments cure the defects of the original act.

*Two:* The Legislature has set up only a skeleton Act. It has delegated its powers to the Lieutenant-Governor in Council and to the Board. The Legislature has not the power to so delegate its powers.

*Three:* The Act as amended still purports to deal with interpro- 40 vincial trade. That this is the intent is strengthened by the continuance in the Act of the reference to the Dominion Act.

*Four:* The licence fees imposed by the Board pursuant to the p. 31. Act are indirect taxes and so *ultra vires*.

22. All these points are dealt with and answered seriatim in the Reasons for Judgment of Mr. Justice Macdonald in the Court of Appeal in the Constitutional Questions Case (1937) 3 W.W.R. 273.

23. In addition particular reference is made to the Amendment to the Marketing Act, 1937, Ch. 41.

24. In this connection reference is also made to the following Australian cases:—

*The King vs. Vizzard* (1933) 50 C.L.R. 30, 56, 70;

*Willard v. Rawson* (1933) 48 C.L.R. 316, 326;

10 *Newcastle S.S. Co. vs. A.G. for Commonwealth* (1921) 29 C.L.R. 357, 368;

and to an article on “Separability and Separability Clauses” in the Harvard Law Review, November, 1937, page 76.

See also:

*Attorney-General for British Columbia vs. Attorney-General Canada* 106 L.J.P.C. 66

and

*Toronto City Corporation v. York Township and the Attorney-General for Ontario* (1938) 1 All England Reports 601.

20 25. In considering the legislation in relation to Trade and Commerce, reference is made to the Judgment of Duff, C.J., in the Marketing Case (1936) S.C.R. 403, approved by the Privy Council 106 L.J.P.C. at page 65.

26. The Attorney-General of British Columbia submits that the Marketing Legislation of the Province is valid and that this appeal should be dismissed for the following, among other

## REASONS

1. The Act of 1934 was not *ultra vires*.

2. If it were *ultra vires*, the Legislature had power to amend and 30 cure the defects in the legislation, which was done by the Act of 1936.

3. The Legislature had full power to delegate to the Lieutenant-Governor and the Board the powers so delegated. The Legislature cannot abdicate but, short of abdication, has the fullest power of delegation.

4. The legislation deals only with property and civil rights within the Province and does not relate to extra-provincial trade.

5. Any doubt about the scope of the legislation is cured by the enactment of 1937. Even if any provision is too wide, it must be upheld within the area of its validity.

6. The licence fees imposed are direct taxation and, in any event, are within the provisions of section 92 (9) of the British North America Act.

7. The legislation does not trench on the Federal field of the regulation of Trade and Commerce, section 91 (2) of the B.N.A. Act.

J. W. deB. FARRIS.

*W. B. FARRIS*

*WILFRID BARTON*

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