Privy Council Appeal No. 81 *of* 1937

George Walkem Shannon and others - - - - *Appellants*

v.

Lower Mainland Dairy Products Board - - - *Respondents*
and the Attorney General of British Columbia (*Intervener*)

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1938.

Present at the Hearing:

THE LORD CHANCELLOR (LORD MAUGHAM)
LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN

[*Delivered by* LORD ATKIN]

This is an appeal from a decision of the Court of Appeal for British Columbia reversing a decision of Manson J. who had given judgment in the action in favour of the plaintiffs, the present appellants. The appellants were dairy farmers carrying on their business in the Province of British Columbia and were affected by a Milk Marketing Scheme approved by the Lieutenant-Governor in Council under the Natural Products Marketing (British Columbia) Act, Chapter 34, of the Statutes of 1936. The scheme set up the Lower Mainland Dairy Products Board (the defendants) and in the action the plaintiffs claimed a declaration that the Act was *ultra vires* of the Legislature of the Province: and that the plaintiffs were under no obligation to obtain licences from the defendants or comply with any of their demands: and further claimed an injunction to restrain the defendants from interfering with them. In the proceedings the Attorney-General for the Province intervened, and he alone was represented as respondent before this Board. The learned trial Judge decided in favour of the plaintiffs. The Court of Appeal reversed his decision following judgments they had delivered on a reference to them by the Lieutenant-Governor in Council asking whether the Act in question was *ultra vires* of the Legislature of the Province. Having answered the question in the negative they without further discussion allowed the appeal. The legislative history of the impugned statute is as follows. In November, 1934, the Legislature of British Columbia passed an Act entitled the Natural Products Marketing (British Columbia) Act

providing that the Lieutenant-Governor in Council might constitute a British Columbia Marketing Board and arming the Board with powers to act in co-operation and conjointly with the Dominion Marketing Board constituted under the Dominion Act, the Natural Products Marketing Act, 1934. In November, 1935, the Governor-General in Council had referred to the Supreme Court of Canada the question whether the Dominion Act was *ultra vires* of the Dominion Legislature. On 17th June, 1936, the Supreme Court held in re *The Dominion Natural Products Marketing Act,* 1934, [1936] S.C.R. 398, that it was *ultra vires* and their decision was affirmed by this Board on 28th January, 1937 [1937] A.C. 377. Meantime, in April, 1936, the Legislature of British Columbia had amended the Provincial Act of 1934, which now is in the form enacted in the Revised Statutes of British Columbia, 1936, c. 165, together with an additional clause as to severability enacted in an Amendment Act of 1937, c. 41. It is not necessary to set out all the provisions of the Act in question, but reference should be made to the following definitions. "'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."

Section 4 (1) of the Act provides, "The purpose and intent 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." The scheme of the Act is to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board to establish or approve schemes for the control and regulation within the province of the transportation, packing, storage and marketing of any natural products, to constitute marketing boards, to administer such schemes, and to vest in those boards any powers considered necessary or advisable to exercise those functions. In particular the Lieutenant-Governor in Council may vest in any marketing board the powers, 4 (2) (*d*), to fix and collect yearly, half-yearly, 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 into groups and fix the licence fees payable by the members of the different groups in different amounts, and to recover any such licence fees by suit in any Court of competent jurisdiction.

Section 4 (2) (*j*). To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

The attack on the Act was made on these grounds:—

1. That it encroaches on the class of subjects enumerated in section 91 (2) of the B.N.A. Act, 1867. The regulation of trade and commerce.

2. That it also encroaches on 91 (3). The raising of money by any mode or system of taxation.

3. That without constitutional authority it delegates legislative power to the Lieutenant-Governor in Council.

1. It is sufficient to say upon this point that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the province, and are therefore within the sovereign powers granted to the legislature in that respect by section 92. Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. There is no such restriction in the Act, and the limited construction would probably cause difficulty if it were sought at some future time to co-operate with a valid Dominion scheme. But the Act is clearly confined to dealings with such products as are situate within the province. It was suggested that "transportation" would cover the carriage of goods in transit from one province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that "transportation" is confined to the passage of goods whose transport begins within the province to a destination also within the province. It is now well settled that the enumeration in section 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province. *Citizens Insurance Company of Canada* v. *Parsons* [1881] 7 A.C. 96. Re *The Dominion Natural Products Marketing Act*, 1934 (*supra*). And it follows that to the extent that the Dominion is forbidden to regulate within the province, the province itself has the right under its legislative powers over property and civil rights within the province. The appellants did not dispute that there was a *bona fide* intention by the province to confine itself to its own sphere, but they contended that in fact whatever the intention the province had in fact encroached upon the Dominion sphere. If they could have established that contention they would have been in a stronger position. In this respect their Lordships desire to quote a passage from the opinion of Lord Atkin in the House of Lords in *Gallagher* v. *Lynn* [1937] A.C. 863, at p. 869, which was cited by Martin C.J., and which it will be convenient to bring into the line of authority on constitutional cases arising in the Dominions:—

> "My Lords, the short answer to this is that this Milk Act is not a law 'in respect of' trade, but is a law for the peace, order, and good government of Northern Ireland 'in respect of' precautions taken to secure the health of the inhabitants of Northern Ireland, by protecting them from the dangers of an unregulated supply of milk. These questions affecting limitation on the legislative powers of subordinate parliaments, or the distribution of powers between parliaments in a federal system, are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian parliaments. It is well established, by *Russell* v. *The Queen*, 7 App.

> Cas. 829, that you are to look at the ' true nature and character of the legislation . . . the pith and substance of the legislation.' If, on the view of the Statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorised field. The legislation must not, under the guise of dealing with one matter, in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., by a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed ' in respect of ' the forbidden subject. In the present case, any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, are that it is an Act to protect the health of the inhabitants of Northern Ireland, and, in those circumstances, though it may incidentally affect trade with county Donegal, it is not passed ' in respect of ' trade, and is therefore not subject to attack on that ground."

The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the province, and it is therefore *intra vires* of the province.

2. The second objection made to the Act was that it provided for the raising of money by a mode or system of taxation which is one of the class of subjects reserved to the Dominion by section 91 (3). The contention is directed to the power to impose licence fees which may be vested in provincial boards by the Lieutenant-Governor in Council under section 5 (*d*) of the British Columbia Act. The answer made was that the legislation was valid under the powers given to the province to legislate as to the following classes of subjects (section 92 (2)) " direct taxation within the province in order to the raising of a revenue for provincial purposes," (section 92 (9)) " shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes," (section 92 (13)) " property and civil rights in the province," or, finally, (section 92 (16)) " matters of a merely local or private nature in the province." Their Lordships do not consider it necessary to support this legislation by reference to section 92 (2). Without deciding the matter either way they can see difficulties in holding this to be direct taxation within the province. But on the other grounds the legislation can be supported. If regulation of trade within the province has to be held valid the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But if licences are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes. On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff J., took a

somewhat narrow view of the provincial powers under section 92 (9) in *Lawson* v. *Interior Tree Fruit and Vegetable Committee* [1931] S.C.R. 357, at p. 363, where he says, " on the other hand, the last-mentioned head authorises licences for the purpose of raising revenue and does not, I think, contemplate licences which in their primary function are instrumentalities for the control of trade, even local or provincial trade." It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And if licences for the specified trades are valid their Lordships see no reason why the words " other licences " should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference, viz., that they are fees for services rendered by the province or by its authorised instrumentalities under the powers given by section 92 (13) and (16). The Chief Justice refers to fees on land registration: and mining and prospecting certificates. Another example might be the exaction of market tolls on the establishment of a new market. On these grounds the attack upon the Act based on the powers to exact licence fees must be held to fail.

3. The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament: and it is unnecessary to try to enumerate the innumerable occasions in which legislatures both Provincial and Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act. Martin C.J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he there said.

For these reasons the appeal fails and should be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

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In the Privy Council

GEORGE WALKEM SHANNON
AND OTHERS

v.

LOWER MAINLAND
DAIRY PRODUCTS BOARD
AND THE ATTORNEY GENERAL
OF BRITISH COLUMBIA

DELIVERED BY LORD ATKIN

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