

In the Privy Council. ^{2,1897}

No. 32 of 1896.

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

29453

BETWEEN

THE BREWERS' AND MALTSTERS' ASSOCIATION
OF ONTARIO *Appellants,*

AND

THE ATTORNEY-GENERAL FOR ONTARIO *Respondent.*

IN THE MATTER OF CERTAIN QUESTIONS REFERRED TO THE COURT OF APPEAL
FOR ONTARIO BY HIS HONOUR THE LIEUTENANT-GOVERNOR OF ONTARIO.

Subject:—

Provincial Jurisdiction.

Brewers' and Distillers' Licenses.

RECORD OF PROCEEDINGS.

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RECORD OF PROCEEDINGS.

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Subject:—

Provincial Jurisdiction. Brewers' and Distillers' Licenses.

RECORD OF PROCEEDINGS.

In the Court of Appeal for Ontario.

In the matter of a Stated Case under 53 Victoria, chapter 13, being "An Act for expediting the decision of Constitutional and other Provincial Questions."

In the matter of "Brewers' and Distillers' Licenses in the Province of Ontario."

I, Alexander Grant of the City of Toronto, Registrar of the Court of Appeal for the Province of Ontario, humbly certify to the Queen's Most Excellent Majesty in Her Privy Council that the documents mentioned in the schedule hereto annexed comprise the Record of the proceedings in this cause.

And I further certify that the correct transcript of such Record in duplicate is hereto annexed and that an index of the same is contained in the said schedule.

And I further certify that every sheet of such Record is marked with my signature and that the seal of the Court of Appeal for Ontario is affixed hereto with the sanction of the said Court; and that the fees and expenses incurred and paid by the Appellants, the Brewers' and Maltsters' Association of Ontario, for the preparation of such transcript amounts to the sum of £10 sterling.

RECORD.

No. 1.

Certificate of the Registrar of the Court of Appeal for Ontario, verifying transcript Record, 8th June, 1896

RECORD.

No. 1.
Certificate of
the Registrar
of the Court
of Appeal
for Ontario,
verifying
transcript
Record, 8th
June, 1896
—continued.

And I further certify that the said Appellants, The Brewers' and Maltsters' Association of Ontario, have given security to the Respondent, Her Majesty the Queen, represented by the Government of the Province of Ontario upon their appeal to Her Majesty in Council by a bond executed by the said the Brewers' and Maltsters' Association of Ontario and by two sufficient sureties in the sum of \$2,000, and which bond has been allowed, as a good and sufficient bond for security to the Respondent for the costs of the appeal herein, by an order of the Honourable Mr. Justice Osler, made in chambers, and dated the sixth day of June 1896.

In witness whereof I have hereunto set my hand and affixed the seal of the 10
Court of Appeal for Ontario this eighth day of June one thousand eight hundred
and ninety-six.

(L.S.)

A. GRANT,
Regr.

(SCHEDULE ANNEXED.)

1. Type-written copy of the Stated Case, under 53 Victoria, chapter / 3 submitted by His Honour the Lieutenant-Governor in Council for the opinion of the Court of Appeal for Ontario.
2. Copy of the opinions of the several Judges before whom the Stated Case was argued.
3. Copy of certificate of judgment in the Court of Appeal for Ontario. 20
4. Copy of the bond for security on appeal to Her Majesty in Council.
5. Copy of order of the Honourable Mr. Justice Osler approving of and allowing the bond as such security, dated the sixth day of June, 1896.

 STATED CASE.

No. 2.
Stated Case,
25th May,
1895.

Copy of an Order in Council approved by his Honour the Lieutenant Governor the
25th day of May, 1895.

The Committee of Council respectfully recommend that pursuant to the provisions of 53 Victoria, chapter 13, being "An Act for expediting the decision of Constitutional and other Provincial Questions" the following questions be referred to the Court of Appeal for hearing and consideration. 30

1. Is sub-section 2 of section 51 of the Liquor License Act, Revised Statutes of Ontario, chapter 194, requiring every brewer, distiller or other person duly licensed by the Government of Canada as mentioned in sub-section 1 to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province a valid enactment?
2. Has the Legislature of Ontario power either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction to require brewers, distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors, to take out licenses to sell the liquors manufactured by them and to pay a license 40
fee therefor?

3. If so must one and the same fee be exacted from all such brewers, distillers and persons? RECORD.

Certified

J. LONSDALE CAPREAL

Asst. Clerk Executive Council.

In the Court of Appeal for Ontario.

Tuesday the fourteenth day of January 1896.

In the matter of a Stated Case under 53 Victoria, chapter 13, being "An Act for expediting the decision of Constitutional and other Provincial Questions."

10 In the matter of "Brewers' and Distillers' Licenses in the Province of Ontario."

This is to certify that the following questions

1. Is sub-section 2 of section 51 of the Liquor License Act, Revised Statutes of Ontario, chapter 194, requiring every brewer distiller or other person duly licensed by the Government of Canada as mentioned in sub-section 1 to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province a valid enactment?
- 20 2. Has the Legislature of Ontario power either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction to require brewers distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors to take out licenses to sell the liquors manufactured by them and to pay a license fee therefor?
3. If so must one and the same fee be exacted from all such brewers distillers and persons?—

submitted to this Court under the above named Act having come on for argument on Thursday the seventh day of November last past in presence of Counsel, as well for the Attorney-General of Ontario as for The Brewers' and
30 Distillers' Association who appeared pursuant to the direction of the Court in that behalf this Court was pleased to direct that the questions submitted should stand over for judgment, and the same having come on this day for judgment

This Court was pleased to answer questions Nos. 1 and 2 in the affirmative And question No. 3 in the negative.

(Sgd.)

A. GRANT

Regr.

RECORD.

No. 4.
Reasons for
Judgment.

Hagarty,
C.J.O.

In the Court of Appeal for Ontario.
In the matter of Brewers' and Distillers' Licenses.
Memorandum of the Opinions of the Judges.

Hagarty, C.J.O.

I think that the questions submitted are covered by our decision in *Regina v. Halliday*, 21 A.R., 42, and I have nothing to add to what is there stated.

Burton, J.A. Burton, J.A.

When this case was argued I had not had an opportunity of considering the judgment of this Court in the *Halliday* Case, 21 App. R. 42, and I desired also to consider how far I was bound by that decision in answering questions submitted 10 by the Lieutenant-Governor in Council under the 53 Vict, c 13, and I desired, therefore, that the case should stand over for a short time. I have now considered the questions submitted and am of the opinion that the two first should be answered in the affirmative and the third in the negative.

As to the reasons for this decision, I cannot profitably add to those given by my Brother Osler in *Halliday's* case as to the two first questions, and as to the third, it being once conceded that the power to license exists, there can be nothing unreasonable in making the license fee larger or smaller having relation to the extent of the business.

Osler, J.A. Osler, J.A.

20

If we are sitting as a court our decision in *Regina v. Halliday*, 21 A.R. 42, answers the first and second questions. As to the third, without cavilling at its form and reserving my right to form a different opinion after argument should the point hereafter arise in a real litigation, it must be answered for the present in the negative, assuming the Act to be *intra vires*, the Legislature being supreme in its own province.

If we are not sitting as a court, I refer to the judgment in the above case as substantially answering the first and second questions.

MacLennan, J.A. MacLennan, J.A.

I am of opinion that the first two of these questions should be answered in 30 the affirmative and the third in the negative.

We had the question of the validity of subsection two of the said section 51 under consideration in the case of *Regina v. Halliday*, 21 A.R. 42, and we then determined that it was valid, and that decision is binding upon us in the present case.

The third question was not in terms decided in the *Halliday* case; but I think it is involved in that decision, for the power to require a license to be taken must include the power to determine the fee to be exacted in each particular case, and to make it, for example, bear some proportion to the extent of the licensee's business.

40

Know all men by these presents that we, the Brewers' and Maltsters' Association of Ontario, Albert Winslow of the town of Port Hope, Ontario, brewer, and Eugene O'Keefe of the City of Toronto, Ontario, brewer, are jointly and severally held and firmly bound unto Her Majesty the Queen, represented by the Government of the Province of Ontario, in the penal sum of two thousand dollars, for which sum well and truly to be paid we bind ourselves and each of us by itself and himself, our and each of our successors and assigns, heirs, executors and administrators respectively, firmly by these presents.

RECORD.
No. 5.
Appellants'
Bond on
Appeal, 26th
May, 1896.

Sealed with our seals and dated this twenty-sixth day of May in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the said The Brewers' and Maltsters' Association of Ontario, the appellant, alleges that in the giving of judgment upon certain questions referred to Her Majesty's Court of Appeal for Ontario manifest error hath intervened, therefore it desires to appeal from the said judgment to Her Majesty in Her Majesty's Privy Council;

Now the condition of this obligation is such that if the said The Brewers' and Maltsters' Association of Ontario do and shall effectually prosecute such appeal and pay such costs and damages as shall be awarded in case the judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force and effect.

ALBERT WINSLOW,
President. } (The Brewers' and Maltsters'
E. O'KEEFE, Secy. Treasr. } Association of Ontario.)

ALBERT WINSLOW (Seal.)
E. O'KEEFE (Seal.)

Witness:—R. RICHARDSON.

In the Court of Appeal for Ontario.

In the matter of certain questions referred to the Court of Appeal for Ontario by His Honour the Lieutenant-Governor in Council.

No. 6.
Affidavits of
Sureties
annexed to
Appellants'
Bond, 1st
June, 1896.

I, Albert Winslow of the Town of Port Hope in the Province of Ontario, brewer, make oath and say:—

1. That I am a resident inhabitant of Ontario and am a householder in the said town of Port Hope, and that I am worth the sum of two thousand dollars over and above what will pay my debts.

And, I, Eugene O'Keefe, of the City of Toronto in the County of York and Province of Ontario, brewer, make oath and say:—

1. That I am a resident inhabitant of Ontario and am a householder in the

RECORD. said City of Toronto and am worth the sum of two thousand dollars over and above what will pay my debts.

No. 6.
Affidavits of
Sureties
annexed to
Appellants'
Bond, 1st
June, 1896
—continued.

The above-named deponent Albert Winslow was sworn before me on the first day of June, 1896.

M. S. MERCER,
A Commissioner &c.

ALBERT WINSLOW.

The above-named deponent Eugene O'Keefe was sworn before me on the first day of June, 1896.

M. S. MERCER,
A Commissioner &c.

E. O'KEEFE.

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No. 7.
Order
allowing
Appellants'
Bond and
Appeal to
Her Majesty
in Council,
6th June,
1896.

In the Court of Appeal for Ontario.
Before the Honorable Mr. Justice Osler.

Saturday the 6th day of June, 1896.

In the matter of a Stated Case under 53 Victoria chapter 13 being "An Act for expediting the decision of Constitutional and other Provincial Questions."

In the matter of Brewers' and Distillers' licenses in the Province of Ontario.

Upon the application of The Brewers' and Maltsters' Association of Ontario, in presence of the Attorney General for Ontario; upon hearing read the bond filed on the 2nd day of June 1896 by the applicants upon their proposed appeal to the 20 Privy Council, and the proceedings herein, and upon hearing what was alleged by counsel aforesaid;

It is ordered that the said bond be and the same is hereby allowed as good and sufficient security upon the said appeal, and that the appeal of the said The Brewers' and Maltsters' Association of Ontario to the said Privy Council be and the same is hereby allowed.

And it is further ordered that the costs of this application be costs in the cause.

A. GRANT,
Regtr. 30

In the Privy Council.

No. 32 of 1896.

*On Appeal from the Court of Appeal
for Ontario.*

BETWEEN

THE BREWERS' AND MALTSTERS'
ASSOCIATION OF ONTARIO . *Appellants,*

AND

THE ATTORNEY-GENERAL FOR
ONTARIO *Respondent.*

RECORD OF PROCEEDINGS.

S. V. BLAKE,

17, Victoria Street,

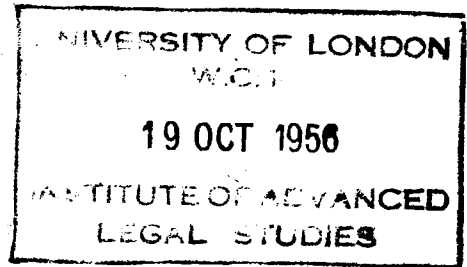
Agent for Appellants.

FRESHFIELDS & WILLIAMS,

5, Bank Buildings,

Solicitors for Respondent.

Judgment.



29456

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Brewers and Maltsters Association of Ontario v. The Attorney-General for Ontario, from the Court of Appeal for the Province of Ontario; delivered 6th February 1897.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[Delivered by Lord Herschell.]

This is an appeal from a judgment of the Court of Appeal for the Province of Ontario upon certain questions referred by the Lieutenant Governor in Council pursuant to the provisions of the 53rd Victoria chapter 13.

The questions referred were the following:—

- (1.) Is Sub-section 2 of Section 51 of the Liquor Licence Act Revised Statutes of Ontario chapter 194 requiring every brewer distiller or other person duly licensed by the Government of Canada as mentioned in Sub-section 1 to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province, a valid enactment?
- (2.) Has the Legislature of Ontario power either in order to raise a revenue for provincial purposes or for any other

object within provincial jurisdiction to require brewers distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors to take out licenses to sell the liquors manufactured by them and to pay a license fee therefor?

- (3.) If so, must one and the same fee be exacted from all such brewers distillers and persons?

The present appeal relates only to the answers given to the first two questions submitted.

The enactment the validity of which is in question requires every brewer and distiller to obtain a license to sell wholesale within the province. The license fee is imposed "in order to the raising of a revenue for provincial purposes." It is a uniform fee of \$100 in all cases.

The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-sections of Section 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of Sub-section 2 or that the license is comprised within the term "other licenses" in Sub-section 9.

The question what is "direct taxation" within the meaning of Sub-section 2 does not come now before this Board for consideration for the first time. In the case of the *Bank of Toronto v. Lambe*, L.R. 5 App. Ca. 575, it was necessary to put a construction on those words. The Legislature of Quebec had imposed a tax on every Bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or

place of business. The question at once arose, was this "direct taxation" ? It was contended that the tax was not direct but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before your Lordships by the learned Counsel for the Appellants in the present case were then pressed upon this Board in vain. The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of Sub-section 2.

Their Lordships are quite unable to discover any substantial distinction between the case of *The Bank of Toronto v. Lambe* and the present case. So far as there is any difference it does not seem to them to be favourable to this appeal.

Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act.

The definition referred to is in the following terms:—"A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs."

In the present case as in Lambe's case their Lordships think the tax is demanded from the

very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

It was argued that the provincial Legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.

The view which their Lordships have expressed is sufficient to dispose of this appeal. But their Lordships were not satisfied by the argument of the learned Counsel for the Appellants that the license which the enactment renders necessary is not a license within the meaning of Sub-section 9 of Section 92. They do not doubt that general words may be restrained to things of

the same kind as those particularised but they are unable to see what is the *genus* which would include "shop saloon tavern" and "auctioneer" licenses and which would exclude brewers' and distillers' licenses.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The Appellants must pay the costs of the appeal.
