

Privy Council Appeal No. 58 of 1931.

John Farquhar Lymburn and another - - - - *Appellants*

v.

Albert Henry Mayland and others - - - - *Respondents*

and

The Attorney-General of Canada and others - - - *Interveners*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH FEBRUARY, 1932.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by LORD ATKIN.*]

This is an appeal from the Supreme Court of Alberta in proceedings taken by the plaintiffs to challenge powers sought to be exercised by the Attorney-General of Alberta under the provisions of the Security Frauds Prevention Act, 1930 (Alberta), Statutes of Alberta 20 G.V. c. 8. Under the terms of Section 9 of that Act the Attorney-General or any delegate appointed by him has power to examine any person or company at any time in order to ascertain whether any fraudulent act as defined by the statute or any offence against the Act or the regulations has been, is being, or is about to be, committed. The Attorney-General, Mr. Lymburn, had appointed the defendant, Mr. Frawley, to hold the examination in question and Mr. Frawley had summoned the plaintiff, Mr. Mayland, to attend him for examination on an

inquiry amongst other things into items appearing in the balance sheet of the other plaintiff, Mercury Oils, Ltd., as at the 31st December, 1930. Mr. Frawley also gave notice that he intended to inquire into a transaction between Solloway Mills & Co., Ltd. and the plaintiff Mayland respecting the exchange of certain shares, and the assumption by Mayland of an underwriting agreement entered into between Solloway Mills & Co., Ltd., and Mill City Petroleum, Ltd. All the companies mentioned are incorporated under the provisions of the Dominion Companies Act.

The plaintiffs, by their statement of claim, claimed a declaration that the statute or, alternatively, Section 9, was *ultra vires* the Province, and an injunction restraining the Attorney-General and Mr. Frawley from proceeding with the examination. They gave notice of motion for an interim injunction which came before Ives J. and with the consent of the defendants was referred by him to the Appellate Division of the Supreme Court. On the 23rd April 1931 the Appellate Division made an order declaring that Section 9 of the Act had no application to the plaintiff or the three companies mentioned above, and that the defendants had no authority to proceed with the examinations and investigations referred to in the statement of claim. The reasons for the judgment were delivered by Harvey C.J. concurred in by Walsh and Clarke. JJ. The learned C.J. reviewed the statute as a whole, but founded his decision on the ground that the Provincial legislature could not delegate to the Attorney-General power to obtain information unlimited in extent inasmuch as that legislature itself was restricted in its power to obtain from a Dominion Company unlimited information, apparently because such a requirement would clash with the Dominion legislation as to companies. It was therefore held that Section 9 was not applicable to Dominion Companies; not as would appear as a matter of construction but because it was *ultra vires* in relation to such companies, though it would severably be valid as to other companies. Before the Board the attack was made on a broader ground. The whole Act was invalid so far as it related to Dominion Companies because it destroyed their status by making it impossible for them to issue their share capital. In this respect it was said the case was covered by the decision of this Board in *Attorney-General for Manitoba v. Attorney-General for Canada* [1929], A.C. 260. It was further contended that apart altogether from Dominion Companies the Act was invalid because under the colour of dealing with the prevention of fraud in share transactions it was assuming to legislate as to criminal law a class of subject reserved to the Dominion. Apart from invalidity it was further said that if the terms of the Act were examined the three Dominion Companies in question as well as the plaintiff Mayland did not carry on any business as brokers in shares: and it was only to transactions by brokers that the provisions of Section 9 applied. Their Lordships cannot accept any of these contentions.

When the framework of the Act is examined it will be found that after an elaborate definition clause it is divided into five parts. The material definitions are those of broker, which includes every person, other than a "salesman" as defined, who is engaged in the business of "trading" in securities, and "trading" includes the solicitation or obtaining a subscription to any security. "Salesman" includes every person employed by a company to trade in securities. Part I is entitled "Registration of Brokers and Salesmen," and provides in substance that no person may trade in securities unless he is registered as a broker or salesman. The prohibition is confined to "persons" which by the definition clause does not include corporations. A corporation may however, be registered in which event its officials do not need separate registration. Registration is made subject to the approval of the Attorney-General, who may direct that registration be refused for any reason which he may deem sufficient. Registered persons must enter into a personal bond and may be required to enter into a surety bond each in the sum of \$500 conditioned for payment if the registered person, amongst other events, is (in the former bond) "charged with", (in the latter bond) "convicted of" a criminal offence or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise *intra vires*, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded. Incidentally the net has been drawn so wide as to cover the issue of shares by a public company, with the result that a company cannot issue its shares to the public unless for that purpose it employs a registered broker or salesman, or unless the company itself is registered. It is said that these provisions so far as they affect Dominion Companies are *ultra vires* according to the principles adopted by this Board in *John Deere Plow Co. Ltd. v. Wharton* [1915], A.C. 330; *Great West Saddlery Co. v. The King* [1921], 2 A.C. 91; and *Attorney-General for Manitoba v. Attorney-General for Canada* (*supra*). In those cases there was a general prohibition to companies either to trade at all or to issue their capital unless the company was registered. The legislation was held *ultra vires* because the legislative powers of the province are restricted so that "the

status and powers of a Dominion Company as such cannot be destroyed" (*John Deere Plow Co.* case) and legislation will be invalid if a Dominion Company is "sterilised in all its functions and activities" or "its status and essential capacities are impaired in a substantial degree" (*Great West Saddlery Co.* case). It appears to their Lordships impossible to bring this legislation within such a principle. A Dominion Company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and may find its special activities completely paralysed as by legislation against drink traffic or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition as in the *Manitoba* case in 1929; and no reason to suppose that any honest company would have any difficulty in finding registered persons in the province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilised or its status and essential capacities impaired in a substantial degree.

Their Lordships have discussed this part of the Act because the attack of the respondents was mainly directed to it partly because it was said that the pith and substance of the Act was contained in it and that by sterilising Dominion Companies it was inseparably invalid; and partly because it was said that, even if severable so far as registration of Dominion Companies was concerned, inasmuch as inquiry could be made under Part II as to an offence against the Act, an inquiry under Part II might be directed to an alleged offence invalidly created, and therefore the inquiry provisions of Part II themselves were invalid. This brings their Lordships to the consideration of Part II, and it will be found that once the main attack on registration has failed there is little to be said against this part of the Act.

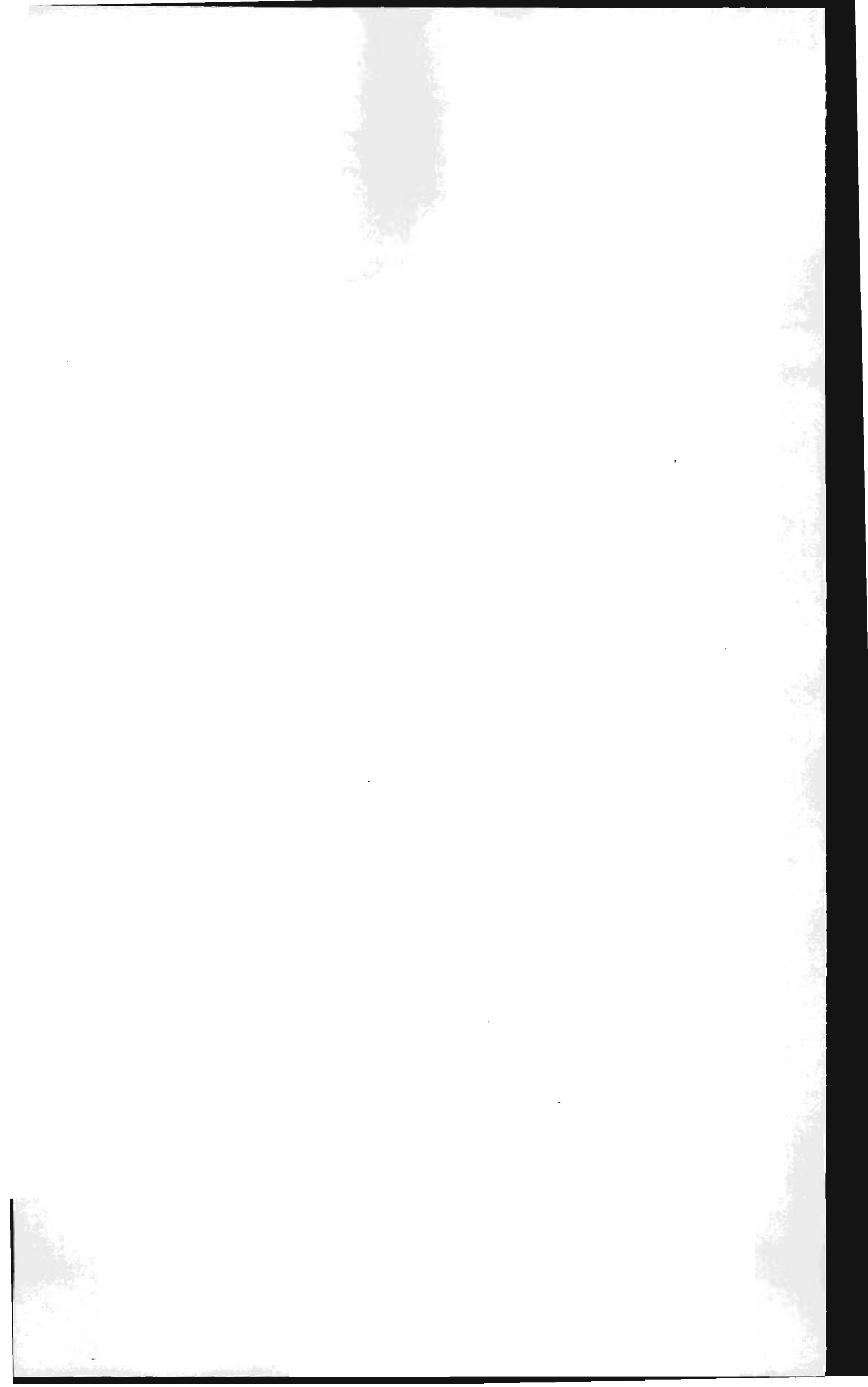
Section 9, under which the examination in dispute in these proceedings was ordered, empowers the Attorney-General or any delegate appointed by him to examine any person or company in order to ascertain whether any fraudulent act or any offence against the Act or regulations has been, is being, or is about to be committed. The definition of fraudulent act appears to be very wide, in some cases having no relation to securities or dealing in securities; and it is possible that if the question becomes relevant a limited construction would be put upon the very general terms used. But this has no bearing upon the question of validity. The examination is not confined to questions of registration, nor are the persons or companies to be examined limited to persons or companies who themselves trade in securities. It seems obvious that the object of the section would be defeated unless the powers of examination extended to persons who might have relevant knowledge, including companies and the officials of

companies whose securities might be or be about to be the subject of dealings with the public. The provisions of this part of the Act may appear to be far reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. There appears to be no reason for excluding Dominion Companies from the inquiries of the Attorney-General under this section; and no inconsistency between this legislation and the powers of inquiry under the Dominion Companies Act made on application of members of a company and for a limited purpose viz., the investigation of the affairs of the company. Their Lordships are unable to agree with the view which was adopted by the Appellate Division that in respect of the subject matter under discussion the legislature of the province has only a limited right to require information.

Part III of the Act provides for the appointment of auditors to audit the accounts of brokers and to advise the executive committees of stock exchanges in the province. There appears to be no ground for disputing the validity of these provisions.

Part IV by Section 14 contains a provision making it an offence for a broker in certain transactions for customers to place beyond his control securities he may be carrying for customers, and Sections 15 and 16 provide for the necessary records of such transactions. The penal provisions of Section 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 and 21 G.V. c. 11 (Canada), Section 5, which now presumably occupies the field so far as the criminal law is concerned. The substantive provisions of the section avoiding the impugned transaction at the option of the customer and the provisions of the other sections of this part cannot be attacked. Part V has general provisions which need not be noticed except as to the argument of the respondents founded on the words of Section 20 which provide *inter alia* that any person who does any fraudulent act not punishable under the provisions of the Criminal Code of Canada shall be liable to fine and imprisonment. It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of fraudulent act above referred to it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable. In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion Companies. The provisions therefore of Part II of the Act appear to be competent provincial enactments dealing with Property and Civil Rights and have to be obeyed by

persons subject to them. In the result the order of the Appellate Division must be set aside and the motion must be dismissed. The respondents must pay the costs here and below. In the Court below the appellants agreed that if the Court decided in favour of the plaintiffs the motion should be treated as the hearing of the action and that final judgment should be given accordingly. There appears to be no such agreement by the respondents in the event that has happened. Presumably they will so agree, but in the meantime their Lordships can only say that the judgment for the plaintiffs should be set aside with the consequences already stated, and the action continue in the Supreme Court, and they will humbly advise His Majesty accordingly.



In the Privy Council.

JOHN FARQUHAR LYMBURN AND ANOTHER

v.

ALBERT HENRY MAYLAND AND OTHERS.

DELIVERED BY LORD ATKIN.

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