

Atlantic Smoke Shops Limited - - - - *Appellant*
v.
James H. Conlon and others - - - - *Respondents*
The Attorney-General of Canada and others - - *Interveners*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1943

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SIMON)
VISCOUNT SANKEY
VISCOUNT MAUGHAM
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD ROMER

[*Delivered by* THE LORD CHANCELLOR]

This appeal from a judgment of the Supreme Court of Canada raises the important and difficult question whether the Tobacco Tax Act of New Brunswick, 1940 (4 Geo. VI c. 44) and the Regulations made thereunder are within the powers of the provincial legislature as constituting "Direct Taxation within the Province," or whether, on the contrary, all or any part of these provisions must be held to be *ultra vires* having regard to the distribution of legislative powers effected by the British North America Act, 1867, and to the bearing of sections 121 and 122 of the Act upon provincial taxing powers.

The New Brunswick Tobacco Tax Act is entitled "An Act to provide for imposing a tax on the consumption of tobacco", and it is necessary to set out *seriatim* sections 2 to 10 of the statute. They are as follows:—

" INTERPRETATION.

" 2. In this Act, unless the context otherwise requires—

(a) 'Consumer' or 'Consumer of Tobacco' means any person who within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

(b) 'Minister' means the Provincial Secretary-Treasurer.

(c) 'Package' means package, box, tin or other container in which tobacco is contained or sold.

(d) 'Purchaser' means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(e) 'Retail Sale' means a sale to a consumer for purposes of consumption and not for resale.

(f) 'Retail Vendor' means any person who, within the Province, sells tobacco to a consumer.

(g) 'Tobacco' means tobacco in any form in which tobacco is consumed and includes snuff.

(h) 'Vendor' includes both wholesale vendor and retail vendor.

(i) 'Wholesale Vendor' means any person who, within the Province, sells tobacco for the purpose of resale.

" LICENSES OF VENDORS.

" 3.—(1) No person shall sell any tobacco in the Province for resale unless he holds a wholesale vendor's license issued to him under authority of this Act and such license is in force at the time of sale.

(2) No persons shall sell any tobacco in the Province at a retail sale unless he hold a retail vendor's license issued to him under authority of this Act and such license is in force at the time of sale.

(3) No wholesale vendor shall sell any tobacco in the Province for resale in the Province to a person who is not a vendor duly licensed under this Act.

(4) Vendors' licenses and such other licenses as may be prescribed by the regulations shall be issued annually by the Minister upon payment of such fee or fees as may be required by the regulations. All licenses shall expire on the thirtieth day of June following the issue thereof.

(5) The Minister may cancel or suspend any license for failure to comply with any of the provisions of this Act.

" TAX ON CONSUMER.

" 4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

" 5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

" 6. The tax shall be computed to the nearest cent and one-half cent shall be considered one cent. The minimum tax payable shall be one cent.

" ABSORPTION OF TAX PROHIBITED.

" 7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.

" COLLECTION OF TAX.

" 8. The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe.

" 9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax.

" CONSUMER LIABLE TO TAX UNTIL PAID.

" 10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected."

There are thus four applications of the tax provided for by sections 4 and 5.

(a) In its main and simplest form the tax is to be paid by anyone who purchases tobacco, as defined, for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the Province. The tax amounts to 10 per cent. on the retail price charged on the sale; by Regulations made under section 20 of the Act it is to be collected by the retail vendor, who is constituted an agent of the Minister for the collection of the tax, and has to give a receipt for the tax to the customer and account to the Tobacco Tax Commissioner for the tax thus collected, subject to the allowance of 3 per cent. as remuneration.

(b) Secondly, if the purchase from the retail vendor is made by an agent acting for a principal, who desires to acquire such tobacco for his own consumption (or for the consumption of other persons at his expense), the tax is payable by the agent: it is, however, clear that if the agent has not already been put in funds by his principal, he will be entitled to be indemnified by his principal for the tax, no less than for the purchase price.

In both the above cases the tax is payable at the time of making the purchase.

(c) If a person residing or ordinarily resident or carrying on business in New Brunswick brings into the Province such tobacco, or receives delivery of it in the Province, for his own consumption (or for the consumption of other persons at his expense), he is to report the matter to the Minister, with any invoice and other information required, and he becomes liable to pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the Province.

(d) Lastly, if such a person as is last described brings the tobacco into the Province, or receives delivery there, as agent for a principal who desires to acquire it for his own consumption (or for the consumption of other persons at his expense), the agent is put under a similar obligation to report and to pay an equivalent tax. It may be noted that in this last case the principal is not in express terms limited to a principal within the Province: this is perhaps implied, but in any event the instance of an agent within the Province acting for a principal outside can seldom occur.

A striking difference of opinion has disclosed itself in the Canadian Courts as to the validity of this taxing legislation. In the Supreme Court of New Brunswick, Chief Justice Baxter and his two colleagues, Grimmer J. and Richards J., held that the tax was valid. Applying the definition of a direct tax which was used by Lord Hobhouse in *Lambe's Case* (1887) 12 A.C. 375, and which is derived from John Stuart Mill's "Principles of Political Economy" (Book V. c. 3) as "one which is demanded from the very persons who it is intended or desired should pay it", they held that the tax in all its forms was a direct tax and within the power of the Provincial Legislature to impose. On appeal to the Supreme Court of Canada conflicting views were expressed and these need to be carefully analysed. On the first and main form of the tax, Sir Lyman Duff C.J. and Mr. Justice Davis held that the tax was not direct. The Chief Justice considered that the tax was a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser; he says that "the payment of the tax is not only a condition of legal purchase; it is an integral element in the transaction of sale and purchase passing from the purchaser to the vendor as part of the price to the purchaser". In effect, the argument is that this is a sales tax and that, being a sales tax, it is necessarily indirect. Rinfret J. and Crocket J. maintained the opposite view and agreed with the judgment of the Supreme Court of New Brunswick that the tax in all its forms was *intra vires*. Mr. Justice Kerwin took up an intermediate position; he considered that the tax in the form (a) was valid, but that the attempt to impose the tax on an agent failed as being indirect taxation. He further held that the tax in the forms (c) and (d) was also invalid as being an infringement of section 121 of the British North America Act. Mr. Justice Hudson held that the tax was valid save so far as it imposed a liability on an agent—i.e. that (a) and (c) were valid, but that (b) and (d) were not—and Mr. Justice Taschereau took the same view.

In the result, therefore, the majority of the Supreme Court of Canada decided that the tax in the forms (a) and (c) was valid, but that it was invalid in the forms (b) and (d) since these latter forms involved taxation of an agent, whereas the burden of the taxation would fall on his principal. The arguments addressed to the Board, which included arguments on behalf of the Attorney General of Canada supporting the appellant and of other interveners representing Quebec and five other Provinces supporting the respondents, ranged over all aspects of the tax, and their Lordships are requested to reach a conclusion as to the validity or non-validity of the tax in all its forms.

Their Lordships must first consider whether the tax in the form (a) is a valid exercise of provincial legislative powers. It has been long and firmly established that, in interpreting the phrase "direct taxation" in

Head 2 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as Lord Herschell said in *Brewers & Maltsters' Association of Ontario v. A.G. for Ontario* [1897] A.C. 231 at p. 236 is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's *Political Economy* was first published in 1848 and appeared in a popular edition in 1865; its author became a Member of Parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified. In addition to the definition from Mill's *Political Economy* already quoted, citation may be made of two other passages as follows: "Direct taxes are either on income or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer" (Bk. V. ch. 3.). And again, in chapter 6, in discussing the comparative merits of the two types of tax, he takes as the essential feature of direct taxation that "under it everyone knows how much he really pays".

Their Lordships therefore consider that this tobacco tax in the form they have called (a) would fall within the conception of a "direct" tax, and ought so to be treated in applying the British North America Act. It is a tax which is to be paid by the last purchaser of the article, and since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it; if so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered. So regarded, it completely satisfies Mill's test for direct taxation. Indeed, the present instance is a clearer case of direct taxation than the tax on the consumer of fuel oil in *A.G. of British Columbia v. Kingcome Navigation Company* [1934] A.C. 45, for fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct. In the case of tobacco, on the other hand, the consumer produces nothing but smoke.

Mr. Pritt argued that the tax is a sales tax and that a sales tax is indirect because it can be passed on. The ordinary forms of sales taxes are undoubtedly of this character, but it would be more accurate to say that a sales tax is indirect when in the normal course it can be passed on. If a tax is so devised that (as Mill expresses it) the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a "peculiar contribution" upon the particular party selected to pay the tax, such a tax is not proved to be indirect by calling it a sales tax. Previous observations by this Board as to the general character of sales taxes or of taxes or commercial dealings ought not to be understood as denying the possibility of this exception.

There remains on this first head the question whether, notwithstanding that the tax in the form (a) is "direct" within Mill's test, it is none the less beyond the powers of the Province to impose as being in the nature of "excise" in the sense that the attempted imposition would be an alteration of the "Excise Laws" of New Brunswick which the Provincial Legislature are debarred from affecting under section 122 of the B.N.A. Act. "Excise" is a word of vague and somewhat ambiguous meaning. Dr. Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach

the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of the word is that many miscellaneous taxes, at any rate in this country, are classed as "excise" merely because they are for convenience collected through the machinery of the Board of Excise—the tax on owning a dog, for example. Their Lordships do not find it necessary in the present case to determine whether this tobacco tax in the form (a) is for any purpose analogous to an excise duty, for it is enough to accept and apply the proposition laid down on behalf of this Board by Lord Thankerton in the *Kingcome* case at p. 55 viz. "that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct and that it is none the less direct even if it might be described as an excise tax". In the course of reaching this conclusion, Lord Thankerton carefully examined the only two cases which might be thought to contain any suggestion to the contrary effect, namely, *City of Halifax v. Fairbanks' Estate* [1928] A.C. 117 and *A.G. for British Columbia v. McDonald Murphy Lumber Co.* [1930] A.C. 357, and pointed out that the customs or excise duties on commodities ordinarily regarded as indirect taxation referred to in the judgments in these two cases, are duties which are imposed in respect of commercial dealings in commodities in such a form that they would necessarily fall within Mill's definition of indirect taxes. Their Lordships are of opinion that Lord Cave's reference in his judgment in the *Fairbanks'* case (at p. 124 of [1928] A.C.) to "two separate and distinct categories" of taxes, namely, those that are direct and those which cannot be so described, should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article. With the greatest respect to the view of the Chief Justice of Canada, their Lordships are unable to take the view that a valid distinction is to be found between the directness of the tax in the *Kingcome* case and the quality of the tax in the present instance, on the ground that in the former case the tax was on every person who had consumed fuel oil, whereas the tax in the present case is on every person who buys tobacco in order to consume it. In both instances the circumstance which makes the tax direct is the same, namely, that the person who pays the tax is the person who actually bears it, and this arises necessarily from the circumstance that purchase for re-sale is not taxed. Their Lordships, therefore, conclude that the tax in form (a) is valid.

Next comes the question whether the tax, though "direct" when the principal deals personally with the retail vendor across the counter, ceases to be "direct" if the purchase is made by an agent acting for his principal. Their Lordships have already pointed out that in this case also the person who bears the tax is really the principal, either because he has already given his agent the money to pay it or because he is bound forthwith to repay his agent for the expense incurred with his authority and on his behalf. This indemnification does not follow because there is any fresh transaction analogous to re-sale after the purchase by the agent has been made; it is part and parcel of a single transaction. The agent pays the tax for and on behalf of his principal. If indeed the agent gave the name of his principal to the vendor the contract of sale would be with the principal; if there was anything to complain of in the quality of the article it would be the principal, whether named or not, who might have a remedy against the vendor. It is said that the tax in this second form is not direct because the agent who is personally liable for the tax and has to pay it when receiving the tobacco is distinct from the principal who bears the burden of the duty. But, in their Lordships' opinion, this circumstance does not, according to the distinction laid down by Mill, prevent the tax from being a direct tax.

There is an obvious distinction between an indirect tax, like an ordinary customs or excise duty, which enters into the cost of an article at each stage of its subsequent handling or manufacture, and an impost laid upon the final consumer, as "the particular party selected to pay the tax", who produces the money which his agent pays over. This is mere

machinery, and resembles the requirement in British income tax that in certain cases A is assessed for tax which B really bears—a circumstance which does not make income tax “indirect”.

The test for indirect taxation which Mill prescribed is the passing on of the burden of a duty by the person who first pays it through subsequent transactions to future recipients in the process of dealing with the commodity, or at any rate, the tendency so to pass on the burden. Here the position is quite different. It is really the principal who in this case also both pays the tax and bears it. Their Lordships find it impossible to suppose that in applying the economic distinction which is at the bottom of Mill's contrast it would be correct to call this tax “direct” if a man bought a packet of cigarettes over the counter by putting his hand in his pocket and paying price and tax himself to the vendor, but “indirect” if he stood outside the shop and gave his wife the necessary amount to get the cigarettes and pay the tax for him.

It is argued that the decision of this Board in the *Grain Futures* case, *A.G. for Manitoba v. A.G. for Canada* [1925] A.C. 561 goes to show that a tax imposed on agents dealing in a commercial article for their principals must be indirect. Their Lordships are of opinion that the actual decision does not justify so wide and general a deduction. The tax in the *Grain Futures* case, as Lord Haldane pointed out, became a charge against the amount of the price which was to come to the seller in the world market and was thus indirect. Similar considerations governed the view taken by this Board in *Lower Mainland Dairy v. Crystal Dairy* [1933] A.C. 168; *A.G. for British Columbia v. Canadian Pacific Railway* [1927] A.C. 934; and *Rex v. Caledonian Collieries* [1928] A.C. 358. In all these instances the tax was indirect because of its tendency to affect the price paid by persons other than the taxpayer for the commodity as an article of trade. Nothing of the sort happens here. The production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco. Notwithstanding that an agent is employed, it is the principal who really finds the money for the tax and he throughout bears the burden of it—*qui facit per alium facit per se*.

Their Lordships, therefore, take the view that the tax imposed by section 4 of the Act is valid both in the form (a) and in the form (b).

For the same reasons, and apart from other considerations which apply only to section 5, Their Lordships are of opinion that the tax is valid in the forms (c) and (d). But the tax imposed by section 5 raises difficulties of a different order. It is manifest that section 5 is enacted merely as a supplementary provision, to guard against the methods of avoidance of section 4 which might otherwise remain available. At the same time, the validity of section 5 must be judged according to its terms, and if its enactment by the Provincial Legislature be beyond the powers of that Legislature, it cannot be justified on the ground that it is needed to make the whole scheme watertight. Objection is taken to the validity of section 5 on the alleged ground that it offends against two sections of the British North America Act, namely, section 121 and section 122. These sections are as follows:

“Section 121.—All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

“Section 122.—The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.”

When the scheme of Canadian Federation is considered as a whole, the purpose and effect of these two sections seem plain enough. Previous to the date of Federation, each Province was a separate unit raising part of its revenue by customs duties on certain commodities imported from outside—it might even be from another Province. One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence section 121, supplemented by section 123, established internal free trade from 1st July, 1867, which was the date proclaimed for the Union. It was not, however, practicable to abolish Provincial customs entirely on that date. Ordinary Customs and Excise are, as Mill's treatise shows, the classical examples of indirect taxation and thus fell thenceforward within the exclusive legislative competence of the Dominion Parliament. But until the Dominion had imposed

and collected sufficient taxes on its own account, it was desirable to continue to gather in the revenue arising from the customs and excise laws of the Provinces (with the exception of inter-provincial import duties), though it would appear from section 102 of the British North America Act that after Federation the proceeds passed into the Consolidated Revenue Fund of the Dominion. A Dominion Tariff has long since been enacted and the Customs and Excise Laws of the different Provinces have been brought to an end by Dominion legislation.

The question, therefore, on this part of the case, which has to be determined is whether section 5 of the New Brunswick Act is invalid as amounting to an attempt by the Province to tax in disregard of the restrictions contained in sections 121 and 122 of the Constitution. If section 5 purports to impose a duty of customs, it is wholly invalid: and if it denies free admission of tobacco into New Brunswick, it is invalid so far as this refers to tobacco manufactured in another Province of Canada.

Their Lordships have reached the conclusion that section 5 does not impose a customs duty, and they adopt the reasoning on this point of Rinfret J. and Crocket J. The argument to the contrary is the argument that failed in the *Kingcome* case (*ubi supra*). Lord Thankerton pointed out the distinction in his judgment in that case when he said (at p. 59 of [1934] A.C.)—"Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted." Here the tax is not imposed on the commodity as such at all, and is not imposed on anyone as a condition of its lawful receipt. The "particular person" from whom the tax is exacted is the recipient in the province only if he is the prospective smoker. And, as Lord Hobhouse said in *Bank of Toronto v. Lambe*, 12 A.C. 575 at p. 584, "any person found within the province may legally be taxed there if taxed directly." Their Lordships agree with the majority of the Supreme Court that this is not a duty of customs.

Similar considerations dispose of the contention that, as applied to the recipient of tobacco manufactured in another province, the tax offends section 121. Here again it is important to remember the special feature of the tax that it is imposed as a direct tax on the consumer. Section 121 was the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal Ltd. v. A.G. for Alberta* 62 S.C.R. 439, where the question arose whether the Parliament of Canada could validly prohibit the importation of intoxicating liquor into those Provinces where its sale for beverage purposes was forbidden by provincial law. The meaning of section 121 cannot vary according as it is applied to Dominion or to Provincial legislation, and their Lordships agree with the interpretation put upon the section in the *Gold Seal* case. Duff J. held that "the phraseology adopted, when the context is considered in which the section is found, shows that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any Province of the Union." Anglin J. said: "The purpose of that section is to insure that articles of the growth, produce or manufacture of any Province shall not be subjected to any customs duty when carried into any other Province." Mignault J. described the purpose of the section as being to secure that admission of the articles described should be "without any tax or duty imposed as a condition of their admission". These considerations make it clear that if section 5 of the Tobacco Tax Act is not obnoxious to section 122 of the B.N.A. Act, it is also free from objection on the score of section 121.

That the tax is taxation within the Province is, their Lordships think, clear for the reasons given by Taschereau J.

Their Lordships will humbly advise His Majesty that the appeal fails and that the Tobacco Tax Act, 1940, is in all respects a valid exercise of the powers of the Legislature of the Province of New Brunswick. The order of the Supreme Court must therefore be varied by omitting the words "with the exception of the provisions thereof making the agent liable for the tax." The appellant must pay the respondents' costs of the appeal. The interveners will of course bear their own costs.

In the Privy Council

ATLANTIC SMOKE SHOPS LIMITED

v.

JAMES H. CONLON AND OTHERS
THE ATTORNEY-GENERAL OF CANADA
AND OTHERS

DELIVERED BY THE LORD CHANCELLOR

Printed by His Majesty's STATIONERY OFFICE PRESS
DRURY LANE, W.C.2.

1943