

~~G.C.L. 16~~

~~No. 30 of 1949~~

31, 1950

In The Supreme Court of Canada

IN THE MATTER OF A REFERENCE AS TO THE
VALIDITY OF SECTION 5 (a) OF THE DAIRY
INDUSTRY ACT, R.S.C. 1927, CHAPTER 45.

FACTUM
ON BEHALF OF THE CANADIAN FEDERATION
OF AGRICULTURE

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12 NOV 1956

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IN THE MATTER OF REFERENCE AS TO WHETHER
SECTION 5 (a) OF THE DAIRY INDUSTRY ACT,
R.S.C. 1927, CHAPTER 45, IS ULTRA VIRES OF THE
PARLIAMENT OF CANADA, EITHER IN WHOLE OR
IN PART AND IF SO IN WHAT PARTICULAR OR
PARTICULARS AND TO WHAT EXTENT.

FACTUM ON BEHALF OF THE CANADIAN
FEDERATION OF AGRICULTURE

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PART I

STATEMENT OF CASE

1. By Order of His Excellency the Governor General in Council, dated July 27, 1948 (P.C. 3365) (Case 7), the following question was referred to the Supreme Court of Canada for hearing and consideration, pursuant to Section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35;

“Is Section 5 (a) of The Dairy Industry Act, R.S.C. 1927, Chapter 45, ultra vires of the Parliament of Canada, either in whole or in part, and if so in what particular or particulars and to what extent?”

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2. Section 5 (a) reads as follows:

“No person shall manufacture or import into Canada, or offer, sell or have in his possession for sale any oleomargarine, margarine, butterine or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.”

3. In the year 1886 the Parliament of Canada first enacted a law prohibiting the manufacture and sale of oleomargarine, butterine and other substitutes for butter. (Case 5.)

In the same year by an amendment to The Customs Act, S. of C. 1886, Chapter 37, Section 5, Subsection (b), a prohibition on importation was also enacted.

4. At the time of the passing of the Act of 1886 certain members of the House of Commons were emphatic in their condemnation of oleomargarine as to its fitness for an article of human consumption.

Darby Bergin, M.P. for Cornwall and Stormont, in Hansard, 1886, Vol. 1, Page 686 is reported to have said in speaking of the manufacture of oleomargarine in the United States:

10 “Dead cattle, dead hogs, dead horses, dead cats too, I might say are used for the production of this article, which is thrown on the market as human food.”

A little further down on the same page he said:

“These are thrown into vats which are subjected to a heat of over 300 degrees. It is contended by the parties who own those factories and make human food out of the rotten decayed carcasses, that the chemicals destroy all the diseased particles. No proof of this has ever been produced.”

20 Again in Hansard, 1886, Vol. 2, Page 1337, the same member of the House of Commons used equally strong language in condemning oleomargarine as being unfit for human food.

F. L. Ferguson, M.P. for Leeds is reported in Hansard, 1886, Vol. 2, Page 1191 as having said:

“It is notorious that a large proportion of the Illinois and Chicago hogs die of hog cholera and they are picked up along the way stations at one to one and a half cents a pound and dumped into the vats and made into oleomargarine for the American market, for the Canadian public if we permit it, and I have no doubt that the diseased germs are carried through all the processes of manufacture.”

30 From the above it would appear that at the time of the passing of the prohibitory Act of 1886 the recital to the Act declaring such substitutes for butter to be injurious to health was not without foundation.

5. Part 1 of The Dairy Industry Act, R.S.C. 1927, Chapter 45, which contains Section 5 (a) in question, attempts to set standards of purity for milk and milk products manufactured and sold in Canada.

This is done by:

- (a) Prohibiting the sale of milk below a certain standard of quality or from a diseased animal to any processing plant.
- (b) Prohibiting the import, manufacture and sale of oleomargarine or other substitutes for butter made from fats other than milk.
- (c) Prohibiting the sale or import of butter or cheese below a certain quality.

10 These prohibitory provisions are enforced by penalties which are to be found in Section 10 (b) of the Act and provide for fine and imprisonment, and in the case of a third or subsequent offence imprisonment with or without hard labor.

PART II

SUBMISSION OF THE CANADIAN FEDERATION OF AGRICULTURE

6. It will be submitted on behalf of the Canadian Federation of Agriculture that the said section is within the legislative jurisdiction of the Parliament of Canada as being:

- 20 (c) legislation in relation to a matter not coming within the classes of subjects by the British North America Act exclusively assigned to the Legislatures of the provinces, and, therefore, within the legislative jurisdiction of the Dominion Parliament.
- (b) legislation in relation to criminal law.
- (c) legislation (as to the provisions prohibiting local sales and manufacture) of a necessarily incidental or ancillary character.

7. *Relevant provisions of the British North America Act*—The relevant provisions of the British North America Act, 1867, 30 Victoria, Cap. 3. appear to be as follows:

- 30 s. 91. It shall be lawful for the Queen, by and with the advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of subjects by this Act assigned

exclusively to the Legislatures of the Provinces; and for greater Certainty but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

27. The Criminal law; except the Constitution of Courts of Criminal Jurisdiction but including the Procedure in Criminal Matters.

10 And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

s. 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,—

13 Property and Civil Rights in the Province.

20 16 Generally all matters of a merely local or private nature in the Province.

s. 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.

s. 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.

30 8. *Governing principles of interpretation.* — In the interpretation of the foregoing provisions of the British North America Act, the following propositions relative to the competence of the Parliament of Canada and of the Provincial Legislatures respectively, were laid down by the Judicial Committee of the Privy Council in *Attorney-General for Canada, vs. Attorney-General for British Columbia* (1930) A.C. 111 at 118, and reaffirmed in the case of *In re Regulation and control of Aeronautics in Canada* (1932) A.C. 54 at 71 and 72, as having been established by the decisions of that Board:—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon mat-

ters assigned to the provincial legislatures by s. 92; see *Tennant v. Union Bank of Canada* (1894) A.C. 31.

10 (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion see *Attorney-General for Ontario v. Attorney-General for the Dominion* (1896) A.C. 348.

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: See *Attorney-General of Ontario v. Attorney-General for the Dominion* (1894) A.C. 189; and *Attorney-General for Ontario v. Attorney-General for the Dominion* (1896) A.C. 348.

20 (4) There can be a domain in which provincial and Dominion Legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion Legislation must prevail; see *Grand Trunk Ry. of Canada v. Attorney-General of Canada* (1907) A.C. 65. *Attorney-General for Ontario v. Attorney-General for Canada*, 1894, A.C. 189 at 201.

30 To these propositions may be added the following principles relative to the scheme of self-government for Canada provided by the British North America Act and the nature and scope of the legislative powers confided to the Dominion Parliament by s. 91:—

(a) “The powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada”: *Attorney-General for Ontario v. Attorney-General for Canada* (1912) A.C. 571 at 581. See also pages 583, 584; *Bank of Toronto v. Lambe* 12 A.C. 575 at 587; and “whatever is not thereby (the B.N.A. Act) given to the Provincial Legislature rests with the Parliament.” *Bank of Toronto v. Lambe*, 12 A.C. 575 at 588.

40 (b) The powers so conferred endow the Dominion Parliament and the Provincial Legislatures within their respective spheres with “authority as plenary and as ample . . . as the Imperial Parliament in

the plenitude of its power possessed and could bestow”: *Hodge v. The Queen*, 9 A.C. 117 at 132; *In re The Initiative and Referendum Act* (1919), A.C. 935 at 942; *Croft v. Dunphy* (1933) A.C. 156 at 163 and 164: and “It is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered”; *Union Colliery Company of British Columbia v. Bryden* (1899) A.C. 580 at 585.

10 (c) “But while the courts should be jealous in upholding the charter of the Provinces as enacted in s. 92, it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the provinces as members of a constituent whole”: *The Aeronautics Reference* (1932) A.C. 54 at 70 and 71.

20 (d) “Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State”: *Croft v. Dunphy* (1933) A.C. 156 at 163.

30 (e) “The true test must be found in the real subject matter of the Legislation. If it is such it goes beyond local or Provincial concern or interests must from its inherent nature be the concern of the Dominion as a whole, (as, for example in the *Aeronautics Case* (3) and the *Radio Case* (4)), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures.” *Attorney-General of Ontario v. Canadian Temperance Federation*, 1946, A.C. 193 at 205.

Russell v. The Queen, 1883, 7 A.C. 829 at 839.

Sir Montague Smith gave as an instance of valid Dominion Legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease.

40 9. “*Pith and Substance of legislation as a whole of controlling importance.*—In determining whether the section in question can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada.

10 “The Courts must ascertain the ‘true nature and character’ of the enactment: *Citizens’ Insurance Co. v. Parsons* (1881) 7 A.C. 96. *Union Colliery Co. v. Bryden* 1899) A.C. 580, and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be ‘scrutinized in its entirety’: *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91 at 117”: *Attorney-General for Ontario v. Reciprocal Insurers* (1924) A.C. 328 at 337”: *Attorney-General for Ontario v. Canadian Temperance Federation*, 1946 A.C. 193 at 205.

20 10. *The Act is legislation for the Peace, Order and Good Government of Canada.*—It is submitted that Section 5 (a) of The Dairy Industry Act, R.S.C. 1927, Chapter 45, is, in its pith and substance legislation (the objects and scope of which are still general, viz. to promote health by means of a uniform law throughout the Dominion) in respect of precautions taken to secure the health of the inhabitants of Canada in aspects and for purposes which lie outside of and transcend the scope of the classes of matters assigned exclusively to the Provinces. The said Act is, therefore, within the legislative competence of the Dominion Parliament in the exercise of its residuary power to make laws for the peace, order and good Government of Canada.

Russell v. Queen 1882 A.C. 829 at 839.

Gallagher v. Lynn 1937 A.C. 863 at 869. Approved in *Shannon v. Lower Mainland Dairy Board*, 1938 A.C. 708 at 719 and 720.

Re Natural Products Marketing Act, 1936, S.C.R. 398 at 415.

30 *Lower Mainland and Shannon v. Attorney-General for British Columbia*, 1938 A.C. 708.

Attorney-General for Ontario v. Attorney-General of Canada, 1896, A.C. 348.

Attorney-General for Ontario v. Canadian Temperance Federation, 1946 A.C. 193 at 205.

Again in *Attorney-General of Manitoba and Manitoba Licence Holders’ Association*, 1902 A.C. 73 at 77.

Lord MacNaghten said:

“It is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the General authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada.”

Nor can the competence of Parliament be affected by the contention that oleomargarine is no longer injurious to health or of doubtful food value. When the original oleomargarine Act was enacted in 1886 oleomargarine was deemed injurious to health and it was with the object of protecting the public health that that Act was enacted. It is submitted under such conditions the residuary clause of 91 enabled the Parliament of Canada to legislate. If so the repeal of that Act and its replacement by the present Section 5 (a) of the Dairy Industry Act does not affect the competence of the Parliament of Canada, which alone must determine when an enactment shall become ineffective.

Attorney-General of Ontario v. Canadian Temperance Federation,
1946 A.C. 193 at 207.

No question can arise as to the right of Parliament to prohibit the import or manufacture or sale of oleomargarine or other substitutes for butter in either inter-Provincial and export trade. The only question which can arise is as to the right of the Parliament of Canada to legislate with reference to local sales or manufacture within the bounds of a Province for sale within that Province. But such control is asserted only for the purpose of insuring the attainment of the central object of the Act, namely, the effective control of milk and milk products in the interests of public health of the inhabitants of Canada. The legislation is not legislation in relation to, notwithstanding it may incidentally affect property and civil rights in the Province, nor is it legislation in relation to a matter of merely local nature in the Province.

Gold Seal Ltd. v. Attorney-General for Alberta, (1921) 62
S.C.R. 424 at 460.

Per Duff, J.

“The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation ‘in relation to’ civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation ‘in relation to’ the subject matter of ‘property and civil rights’ within the Provinces, within the meaning of Section 92 of the

British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.”

Russell v. Queen, 7 A.C. 829 at 840.

The object of Section 5 (a) is not to regulate retail transactions or local manufacture, but to abolish.

Attorney-General of Ontario v. Attorney-General for Canada, 1896. A.C. 348 at 363.

10 “The object of the Canadian Temperance Act, 1886 is not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every Provincial area in which its enactments have been adopted by a majority of local electors.”

11. *Criminal Law—Section 5 (a) is an Act in relation to Criminal Law.*

The provisions of Section 10 (b) of The Dairy Industry Act, Chapter 45, R.S.C. 1927, make it a criminal offence to violate any of the provisions of Section 5 (a).

20 Attorney-General for Ontario v. Hamilton Street Railway, 1903, A.C. 524 at 528 and 529.

Proprietary Articles Trade Association v. Attorney General for Canada, 1931, A.C. 310 a 323.

Lord Atkin said:

“If Parliament genuinely determines the commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes.

And at P. 324:

30 “Criminal Law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state.”

Attorney-General for British Columbia v. Attorney-General for Canada, 1937, A.C. 368 at 375.

Lord Atkin said:

“There is no other criterion of “wrongness” than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.”

It will therefore be submitted on behalf of the Canadian Federation of Agriculture that Section 5 (a) of The Dairy Industry Act, Chapter 45, R.S.C. 1927, is not, nor is any part thereof, ultra vires of the Parliament of Canada and that the question referred to this Honourable Court should, accordingly be answered, without qualification, in the negative.

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