

31, 1950

# In the Privy Council.

No. 30 of 1949.  
UNIVERSITY OF LONDON  
W.C.1.  
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INSTITUTE FOR ADVANCED  
LEGAL STUDIES

## ON APPEAL

FROM THE SUPREME COURT OF CANADA.

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IN THE MATTER of a Reference as to the validity of Section 5(a) of  
the Dairy Industry Act, Revised Statutes of Canada, 1927,  
Chapter 45.

BETWEEN

THE CANADIAN FEDERATION OF AGRICULTURE - - *Appellant*

AND

THE ATTORNEY GENERAL OF QUEBEC,  
THE CANADIAN ASSOCIATION OF CONSUMERS,  
L'ASSOCIATION CANADIENNE DES ELECTRICES,  
The Honourable W. D. EULER and  
THE ATTORNEY GENERAL OF CANADA - - - - *Respondents*

# CASE FOR THE RESPONDENT, The Honourable W. D. EULER

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CASE FOR THE  
HONOURABLE W. D. EULER

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## CASE FOR THE RESPONDENT, The Honourable W. D. EULER

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1. This is an Appeal by Special Leave from a Judgment of the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Locke J.J.A.) dated the 14th December, 1948, by which Judgment a majority of the members of the Supreme Court of Canada declared that Section 5(a) of the Dairy Industry Act insofar as that section prohibited the manufacture, offer, sale or possession for sale of the goods mentioned in that section was *ultra vires* of Parliament, the Chief Justice and Kerwin J. dissenting.

Record  
pp. 9-10,  
pp. 69-70.

2. By Order of Reference of His Excellency the Governor General in Council dated 27th July, 1948, the following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the Supreme Court Act:

Record  
p. 5, l. 3,  
*et seq.*

30 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?

3. Section 5(a) of the Dairy Industry Act provides as follows:

“5. No person shall

(a) manufacture, 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.”

Record  
p. 2, ll. 4-8.

4. The terms “margarine” and “oleomargarine” are sometimes used interchangeably but there is a distinction between these products. Margarine is a straight vegetable oil compound, while oleomargarine contains in addition an animal fat, usually beef fat.

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Record  
p. 3, l. 4.  
*et seq.*

5. The first legislation enacted by the Parliament of Canada relevant to oleomargarine was in 1886, being “An Act to prohibit the Manufacture and Sale of certain substitutes for Butter” (Statutes of Canada, 1886, ch. 42). This Act and the preamble thereto reads as follows:

“Whereas the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No oleomargarine, butterine or other substitute for butter, 20  
manufactured from any animal substance, other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.”

p. 3, l. 14.

In the consolidation of the Statutes of Canada of 1886, this preamble was not carried forward and the above sec. 1 constituted the entire Act (R.S.C. 1886, ch. 100).

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Record  
p. 3, l. 17.

6. In 1903, the Parliament of Canada passed The Butter Act (Statutes of Canada, 1903, ch. 6). Notwithstanding that the legislation of 1886 prohibiting manufacture and sale was still in force, there was included in The Butter Act the following section:

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

The Butter Act of 1903 made no reference to either of the 1886 Statutes.

Record  
p. 3, l. 19.

7. In the consolidation of the Statutes of Canada of 1906, The Butter 40  
Act of 1903 was incorporated into Part VIII under the heading “Dairy Products” of an Act entitled “The Inspection and Sale Act” (R.S.C. 1906, ch. 85). Section 5 of The Butter Act of 1903 was carried forward in identical language as sec. 298 in the consolidation of 1906 (R.S.C. 1906, ch. 85, sec. 298).

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

8. Part VIII of The Inspection and Sale Act was repealed by 4 and 5 Geo. V, ch. 7, the "Dairy Industry Act, 1914". This Act of 1914 was entitled an "Act to regulate the manufacture and sale of dairy products and to prohibit the manufacture or sale of butter substitutes". Section 5(a) of the 1914 Act, which reads as follows: Record  
p. 3, l. 22.

10 "5. No person shall:—

(a) manufacture, 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."

reproduced the substance of Section 298 of The Inspection and Sale Act and margarine was for the first time expressly mentioned.

9. Chapter 45 of the consolidation of the Statutes of Canada of 1927 entitled the "Dairy Industry Act" in substance reproduces the provisions of the 1914 Statute, but also consolidates therewith the provisions of "The Milk Test Act" (9-10 Edward VII, ch. 59) and "The Dairy Products Act" (11-12 Geo. V, ch. 28). This is the Act which contains the present Section 5(a), the subject matter of this reference. Record  
p. 3, l. 34,  
et seq.

10. Notwithstanding the prohibition which has existed since 1886 with respect to oleomargarine, butterine or other substitutes for butter manufactured from any animal substance other than milk, and additionally since 1914 with respect to margarine,

(a) by Order-in-Council P.C. 3044 dated October 23rd, 1917, and made under the authority of the War Measures Act, the operation of Section 5(a) of the Dairy Industry Act was suspended; and

30 (b) after the War of 1914-1918, by Chapter 24 of the Statutes of Canada, 1919 (2nd Session), an Act entitled "The Oleomargarine Act, 1919", provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and the sale thereof until 1st March, 1921; and

(c) by annual amendments the permissions contained in The Oleomargarine Act were extended to August 31st, 1923, in the case of manufacture and importation and to March 1st, 1924, in the case of sale.

40 During the period December 1st, 1917, to September 30th, 1923, 31,063,839 lbs. of oleomargarine were manufactured and 20,858,411 lbs. imported. pp. 3 & 4.

11. Oleomargarine and margarine have been accepted as articles of food in most of the major countries of the world, and as a source of energy margarine and butter are exactly equal. Record  
p. 5,  
p. 2, l. 37.

12. By the Judgment of the Supreme Court of Canada dated the 14th day of December, 1948, the opinion of the majority (The Honourable Mr. Record  
pp. 9-10.

Justice Taschereau, The Honourable Mr. Justice Rand, The Honourable Mr. Justice Kellock and The Honourable Mr. Justice Estey) was that Section 5(a) of the Dairy Industry Act was *ultra vires* of Parliament insofar as the prohibition of manufacture, offer, sale or possession for sale of the goods mentioned therein was concerned. The Honourable Mr. Justice Locke was of the opinion that Section 5(a) of The Dairy Industry Act was wholly *ultra vires* of Parliament. The Chief Justice and The Honourable Mr. Justice Kerwin (dissenting) were of the opinion that Section 5(a) of The Dairy Industry Act was *intra vires* of Parliament.

Record  
pp. 9-10.

p. 31, l. 27.  
p. 48, l. 45.  
p. 56, l. 32.  
p. 37, l. 45.  
p. 42, l. 28.  
p. 49, l. 28.  
p. 57, l. 40.  
p. 36, l. 9.  
p. 42, l. 1  
*et seq.*  
p. 51, l. 4.  
p. 59, l. 28.  
p. 34, l. 12.  
p. 40, l. 35.  
p. 41, l. 3.  
p. 46, l. 40.  
p. 62, l. 27.  
p. 33, l. 33.  
p. 43, l. 12.  
p. 53, l. 31.  
p. 60, l. 13.  
p. 61, l. 28.  
p. 37, l. 15.  
p. 43, l. 6.  
p. 53, l. 38.  
p. 62, l. 35.

13. The Honourable Mr. Justice Taschereau, The Honourable Mr. Justice Rand, The Honourable Mr. Justice Kellock and The Honourable Mr. Justice Estey of the majority of the Court found that Section 5(a) of The Dairy Industry Act was *ultra vires* the Parliament of Canada as to manufacture and sale but *intra vires* as to importation; their opinion was that Section 5(a) of The Dairy Industry Act was legislation in respect of property and civil rights within the meaning of Head 13 of Section 92 of the British North America Act; that the said section was not competent Dominion legislation governing the regulation of Trade and Commerce under Head 2 of Section 91 of the British North America Act; that the said section was not a valid exercise by the Dominion of its powers to legislate with respect to the Criminal Law under Head 27 of Section 91 of the British North America Act; that the preamble to the original Act of 1886 had no longer any foundation in fact; that no element of public health was involved which would justify the legislation as competent legislation of Parliament under the opening words of Section 91 of the British North America Act; that the subject matter of the legislation was not unquestionably of such Canadian interest and importance and had not attained such dimensions or was of such national concern as to give to Parliament a jurisdiction validly to enact it under the opening words of Section 91 of the British North America Act; and that the legislation was not legislation in relation to agriculture under Section 95 of the British North America Act.

Record  
p. 38, l. 44.  
p. 44, l. 15.  
p. 54, l. 46.  
p. 64, l. 17.

14. The Honourable Mr. Justice Taschereau, The Honourable Mr. Justice Rand, The Honourable Mr. Justice Kellock and The Honourable Mr. Justice Estey were of opinion insofar as the prohibition of importation was concerned that Parliament was acting distributively and not with the intention that either all or none of the prohibitions contained in Section 5(a) of The Dairy Industry Act should come into force.

Record  
p. 67, l. 19.  
p. 65, l. 21.

p. 66, l. 43.

p. 67, l. 41.

15. The Honourable Mr. Justice Locke, who found Section 5(a) of The Dairy Industry Act to be wholly *ultra vires* of the Parliament of Canada was of opinion that the "legislation admittedly affected civil rights and interfered with controlled and regulated the exercise in every one of the provinces of the civil rights of the people"; that the preamble to the original legislation was no longer true; that the legislation was not for the protection of the general health of the Dominion; that the legislation "was not in pith and substance criminal legislation" and "to sustain it as such would be to permit the Dominion to invoke Heading 27 of Section 91 in aid of a clear encroachment upon the Provincial field"; that the legislation could not be supported under Head 2 of Section 91 of the British North

America Act as being legislation for the regulation of trade and commerce; and that the legislation was not legislation in relation to agriculture. He was also of opinion that the prohibition of importation in Section 5(a) of The Dairy Industry Act was “merely ancillary to the main prohibitions contained in it and as they are beyond the powers of Parliament the prohibition of importation must fall with the rest”.

16. The Chief Justice, who found Section 5(a) was *intra vires* of Parliament, was of opinion that it was competent legislation of Parliament in relation to Agriculture under Section 95 of The British North America Act; that the legislation was also legislation regulating trade and commerce under Head 2 of Section 91 of The British North America Act, and that the said Section 5(a) was a valid exercise by Parliament of its power to legislate in relation to criminal law under Head 27 of Section 91 of The British North America Act.

17. The Honourable Mr. Justice Kerwin also found Section 5(a) to be *intra vires* of Parliament on the sole ground that the legislation was “an enactment creating a criminal offence in exercise of the powers vested in Parliament in virtue of the 27th head of Section 91 of The British North America Act”.

18. This respondent respectfully submits that this appeal be dismissed and that the judgment of the majority of the Supreme Court of Canada be affirmed for the following among other

#### REASONS

(a) Because the legislation in question falls within the exclusive powers committed to the Provincial Legislatures under Section 92 of The British North America Act and particularly Heads 13 and 16 thereof.

(b) Because the legislation in question does not fall within any of the enumerated Heads of Section 91 of The British North America Act.

(c) Because the legislation in question since it “prohibits” rather than “regulates” and deals with individual trades or trade in individual commodities is not legislation regulating trade and commerce within the meaning of Head 2 of Section 91 of The British North America Act.

(d) Because the legislation in question, though in form criminal is not in pith and substance in relation to criminal law within the meaning of Head 27 of Section 91 of The British North America Act and is therefore not competent Dominion legislation under that Head.

(e) Because the preamble to the original enactment of 1886 has no foundation in fact and Parliament has, since at least 1903, been legislating without reference to the statement contained in the preamble of 1886 and without incorporating such a statement of fact or similar statement of fact in all subsequent legislation.

(f) Because the legislation in question was not enacted for the protection of the general health of the public and any basis from the standpoint of public health which may have existed for the legislation of 1886 has been removed and subsequent legislation is legislation dealing with the production of and trade in articles of food.

(g) Because the preamble to the enactment of 1886 did not apply to margarine and in subsequent legislation including the legislation in question no element of the protection of public health is stated by preamble or otherwise. So far as margarine is concerned, there has never been involved any element of the protection of public health, and in the legislation of 1914 both margarine and oleomargarine were expressly dealt with on the same basis.

(h) Because the dairy industry has not attained such dimensions, is not of such national concern and is not of unquestionably national interest and importance as to give to the Dominion a jurisdiction to 10 enact the legislation in question under the opening words of Section 91 of The British North America Act relating to the peace, order and good government of Canada.

(i) Because the legislation in question is not legislation in relation to agriculture within the meaning of Section 95 of The British North America Act.

(j) Because the judgments of the majority of the Supreme Court of Canada are right.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

SALTER A. HAYDEN

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J. W. BLAIN