

31, 1950

No. 30 of 1949.

# In the Privy Council.

UNIVERSITY OF LONDON W.C.1.
17 NOV 1950
INSTITUTE OF ADVANCED LEGAL STUDIES

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**ON APPEAL**  
*FROM THE SUPREME COURT OF CANADA.*

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30701

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*

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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

OF THE ATTORNEY-GENERAL OF CANADA.

RECORD.

20 1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 14th day of December, 1948, upon a reference to that Court by His Excellency the Governor General in Council pursuant to s. 55 of the Supreme Court Act for hearing and consideration of a question as to the validity of s. 5 (a) of the Dairy Industry Act. p. 69.  
p. 9.

2. The question was referred to the Supreme Court of Canada by an order made by His Excellency the Governor General in Council on the 27th day of July, 1948, and reads :— p. 1.

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 ? " p. 5.

CASE FOR THE ATTORNEY-GENERAL OF CANADA

3. Section 5 (a) of the Dairy Industry Act reads 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 ; . . .”

4. The relevant provisions of the British North America Act, 1867, are :—

“ 91. It shall be lawful for the Queen, by and with the Advice 10  
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 (not-  
withstanding 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,— 20

\* \* \* \* \*

2. The Regulation of Trade and Commerce.

\* \* \* \* \*

27. The Criminal Law, except the Constitution of Courts of  
Criminal Jurisdiction, but including the Procedure in  
Criminal Matters.

\* \* \* \* \*

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.

92. In each Province the Legislature may exclusively make 30  
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.

\* \* \* \* \*

16. Generally all Matters of a merely local or private Nature  
in the Province.

\* \* \* \* \*

95. In each Province the Legislature may make Laws in  
relation to Agriculture in the Province, and to Immigration into the  
Province ; and it is hereby declared that the Parliament of Canada  
may from Time to Time make Laws in relation to Agriculture in  
all or any of the Provinces, and to Immigration into all or any of 40

the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.”

5. The manufacture and sale of butter substitutes was first prohibited in Canada by chapter 42 of the Statutes of 1886 which reads as follows:—

“ An Act to prohibit the Manufacture and Sale of certain substitutes for Butter.

(Assented to 2nd June, 1886.)

10 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, 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.”

This Act was reproduced as chapter 100 of the Revised Statutes of 1886, the preamble being omitted as is usual in the case of such a revision.

6. The Butter Act, 1903, was enacted by chapter 6 of the Statutes of 1903. It was entitled “ An Act to prohibit the importation, manufacture or sale of adulterated, process or renovated butter, oleomargarine, butterine or other substitute for butter, and to prevent the improper marking of butter.” Section 5 of The Butter Act, 1903, reads as follows:—

30 “ 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 Act also created other offences and contains provisions for enforcement and punishment.

7. Chapter 100 of the Revised Statutes of 1886 and The Butter Act, 1903, were consolidated with four other statutes in Part VIII of The Inspection and Sale Act, chapter 85 of the Revised Statutes of Canada, 1906. Upon the Revised Statutes coming into force, the statutes consolidated were repealed by the Revised Statutes of Canada, 1906, Act, chapter 43 of the Statutes of 1907 and s. 7 of that Act provided that “ the said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, . . . ”

8. The Dairy Industry Act, 1914, chapter 7 of the Statutes of 1914, which repealed Part VIII of The Inspection and Sale Act, contains the following provision :—

“ 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 ; ”

This Act, which was entitled “ An Act to regulate the manufacture and sale of Dairy products and to prohibit the manufacture or sale of butter substitutes,” also created certain other offences and contains provisions for their punishment and for enforcement. 10

p. 3, l. 34.

9. By an order in council made under the War Measures Act on 23rd October, 1917, the operation of s. 5 (a) of the Dairy Industry Act was suspended and, by chapter 24 of the Statutes of 1919 (2nd session) and annual amendments, provision was made for the manufacture and importation of butter substitutes until 31st August, 1923, and for the sale thereof until March, 1924.

10. The Dairy Industry Act, 1914, was consolidated with two other statutes as chapter 45 of the Revised Statutes of Canada, 1927. Section 5 of chapter 65 of the Statutes of 1924 provided that the statutes so consolidated should stand repealed from the day on which the Revised Statutes came into force and s. 8 of that Act provided that the Revised Statutes shall not “ be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed.” 20

11. Section 5 (a) of the Dairy Industry Act, 1914, appears as s. 5 (a) of the Dairy Industry Act in the Revised Statutes of 1927, and is the provision which was the subject matter of the reference to the Supreme Court of Canada herein. 30

p. 9.

12. The argument of the reference took place in the Supreme Court of Canada on the 5th, 6th, 7th and 8th days of October, 1948. Counsel appeared for the Attorney-General of Canada, the Attorney-General of Quebec, The Canadian Association of Consumers, The Canadian Federation of Agriculture, The Honourable W. D. Euler and L'Association Canadienne Des Electriques.

p. 9.

13. On the 14th day of December, 1948, judgment was delivered by the Supreme Court of Canada certifying the opinions in respect of the question referred to the Court as follows :—

p. 10.

“ (1) The prohibition of importation of the goods mentioned in the section is *intra vires* of Parliament. 40

Locke J. finds Section 5 (a) of the Dairy Industry Act to be *ultra vires* while expressing no opinion as to the power of Parliament to ban importation by appropriate legislation.

(2) The prohibition of manufacture, offer, sale, or possession for sale of the goods mentioned is *ultra vires* of Parliament, the Chief Justice and Kerwin J. dissenting."

14. The Chief Justice of Canada was of opinion that the Dairy Industry Act is legislation under s. 95 of the British North America Act so far as it relates to the subject matter agriculture and that it also falls within the ambit of Head 27 of s. 91 of the British North America Act extending to "The Criminal Law . . ." He was further of opinion that s. 5 (a) must be upheld under s. 91 (2) of the British North America Act as being law in relation to the "Regulation of Trade and Commerce." Finally, after referring to *Attorney-General for Ontario v. Canada Temperance Federation* [1946] A.C. 193, he suggested that the Dairy Industry Act was good legislation under the opening part of s. 91 and said, in addition, that the national character of the legislation emphasizes very clearly the fact that it does come under s. 91 (2) and under s. 95.

15. The Honourable Mr. Justice Kerwin adopted the principles laid down in *Proprietary Articles Trade Association v. Attorney-General of Canada* [1931] A.C. 310, followed in *In the matter of a Reference re section 498 of the Criminal Code* [1937] A.C. 368, and said "there is no ground on which it may be held that the legislation here in question, on its true construction, is not what it professes to be, that is, 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." With reference to the argument "that the recital in the original Act of 1886 no longer states correctly the present position of margarine or oleomargarine," he said that, granting this to be so and presuming that, by force of the several Acts dealing with the various revisions of the statutes, the recital is no longer in force, other reasons may have influenced Parliament in enacting the relevant statutes including s. 5 (a). He referred to *Attorney-General for Ontario v. Canada Temperance Federation* [1946] A.C. 193 as showing that, once it be concluded that this is true criminal legislation, "the incorrectness of the recital in the original statutes has no bearing."

16. The Honourable Mr. Justice Taschereau was of opinion that the manufacture, possession or sale of margarine or oleomargarine constitutes the exercise of well defined civil rights the regulation of which has been left to the provinces by the Fathers of Confederation. He found here no exceptional circumstances such as would justify the Federal Parliament in making laws essentially within the jurisdiction of the provinces. He said that, even if the products in question were a danger to health, he did not believe that the Federal Parliament could regulate them, but if such a danger had ever existed it had completely disappeared and, he said, it is the duty of the courts to inquire if circumstances which justified Parliament in acting continue to subsist. Here he said the presumption in favour of the conditions continuing had been rebutted. He was of opinion that s. 5 (a) was not good criminal legislation because Parliament cannot,

- p. 37. on the pretext of legislating in relation to a criminal matter, encroach upon the provincial domain. He rejected the contention that the legislation was either legislation in relation to agriculture under s. 95 or legislation in relation to Regulation of Trade and Commerce under s. 91 (2). He was, however, of opinion that s. 5 (a) was *intra vires* insofar as it prohibited importation either under s. 91 (2) or under the residuary power and he held that the provision prohibiting importation was severable from the rest of the section. He was further of opinion that s. 5 (a) was not necessarily incidental to the Dairy Industry Act and that it was severable therefrom.
- pp. 37-8.
- pp. 41-2. 17. The Honourable Mr. Justice Rand said that "public peace, 10 order, security, health, morality" are the "ordinary though not exclusive ends" served by the criminal law and that they do not appear to be the object of s. 5 (a). "That object," he said, "is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces." He said that to forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular trade within the provinces. Consequently, he also rejected the contention that s. 5 (a) was 20 valid under s. 91 (2). Finally he said that it was not legislation related to Agriculture or to a matter not coming within any of the classes of subjects enumerated in s. 92. He held, however, that the prohibition of importation was valid legislation in relation to trade and commerce and that it was severable from the remainder of the section.
- pp. 42-3.
- pp. 43-4.
- pp. 46-7. 18. The Honourable Mr. Justice Kellock held that margarine and oleomargarine were dealt with as part of the regulation of the dairying industry "with no element of public health involved." He said that "interference by the Dominion in the way of prohibiting the carrying on of a particular business by the inhabitants of a province, except upon 30 terms laid down by the Dominion, is an interference with civil rights in the province, a subject, committed to the provincial legislatures under Section 92 (13)." He held that the legislation here in question goes beyond the general regulation of Trade and Commerce and fails as an attempt to regulate a particular trade or business. He further held that s. 91 (27) of the British North America Act afforded no support for s. 5 (a). "Once it is determined that the real object of legislation is to advance the interests of one business or trade by prohibiting another," in his opinion, it cannot be said "that the legislation is to be justified as a genuine determination by Parliament to suppress commercial activities 40 in the public interest." He said that s. 5 (a) is not true legislation in relation to Agriculture. He held however that the provisions in the section with reference to importation were severable and valid.
- pp. 48-9.
- p. 49.
- pp. 50-1.
- p. 53.
- p. 56.
- p. 59.
- p. 60. 19. The Honourable Mr. Justice Estey held that the section was legislation in relation to property and civil rights and was not competent Dominion legislation within the meaning of s. 91 (2). He said that, as the legislation did not disclose that the prohibitions were enacted "in the public interest," it was not good criminal legislation within s. 91 (27). His opinion was that s. 5 (a) was a direct prohibition of the exercise of

civil rights within the province and that it could not be supported on the basis that the dairy industry was a matter of national concern nor on the basis that it was in relation to Agriculture within s. 95. He agreed that the prohibition of importation was valid and severable.

p. 62.

pp. 63-4.

20. The Honourable Mr. Justice Locke was of opinion that s. 5 (a) is not in pith and substance criminal legislation or trade and commerce legislation. He regarded it as a matter of a merely local or private nature in the province and beyond the jurisdiction of Parliament. He did not consider it to be legislation in relation to Agriculture. He was of opinion that the prohibition of importation could not be severed from the remainder of the section.

p. 66.

p. 67.

p. 68.

21. Each of the learned judges of the Supreme Court of Canada, except the Chief Justice and Mr. Justice Kerwin, erred, it is submitted, in one or more of the following particulars—

(A) by regarding s. 5 (a) as a law directed at oleomargarine and margarine whereas it is a prohibition of the manufacture, importation and sale of all butter substitutes ;

20 (B) by regarding s. 5 (a) as a law in relation to property and civil rights in the Provinces whereas it does not create any rule of law in relation to either " property " or " civil rights " as such but rather prohibits absolutely certain acts and visits them with penal consequences ;

(C) by regarding s. 5 (a) as a regulation of a particular trade or occupation or a particular kind of business in the Provinces whereas the provision provides no regulation of any trade, occupation or business ; and

30 (D) by regarding s. 5 (a) as a law in relation to a matter of a merely local or private nature in the Provinces whereas the matter of the Act is clearly neither " merely . . . private " nor " merely local."

22. A prohibition of the manufacture and sale of butter substitutes is not a law in relation to property or civil rights in the Provinces. A provincial legislature can only prohibit the manufacture and sale of an article under s. 92 (16) of the British North America Act, that is, by a law in relation to a matter of a merely local or private nature in the Provinces.

40 23. Section 5 (a) of the Dairy Industry Act is not a law in relation to a matter of a merely local or private nature in the Provinces. A provincial legislature can only enact a law prohibiting manufacture if it be shewn that the manufacture was carried on under " such circumstances and conditions as to make its prohibition merely a local matter within the Provinces." That has not been shewn in the case of butter substitutes. Clearly the prohibition of butter substitutes is, in Canada, a matter of national and not of merely local concern.

24. Section 5 (a) is valid. It is a criminal law. It is a law in relation to the general regulation of Trade and Commerce and in relation

to Agriculture. Moreover, it is a law in relation to a matter not coming within any of the classes assigned exclusively to the legislatures and is, therefore, within the legislative powers assigned to the Federal Parliament.

25. The Attorney-General of Canada submits that the answer to the question submitted to the Supreme Court of Canada for hearing and consideration is that s. 5 (a) of the Dairy Industry Act is not *ultra vires* of the Parliament of Canada either in whole or in part for the following amongst other

## REASONS

- (1) BECAUSE s. 5 (a) and the appropriate penal provision 10  
are a law made in relation to "The Criminal Law"  
under s. 91 (27) of the British North America Act.
- (2) BECAUSE s. 5 (a) and the appropriate penal provision are  
a law made in relation to a matter not coming within the  
classes of subjects by the British North America Act  
assigned exclusively to the legislatures of the provinces  
and, therefore, validly enacted under s. 91 thereof.
- (3) BECAUSE s. 5 (a) and part or all of the other provisions  
in the Dairy Industry Act that were enacted by the  
Dairy Industry Act 1914 are a law made in relation to 20  
"The Criminal Law" under s. 91 (27) of the British  
North America Act.
- (4) BECAUSE s. 5 (a) and part or all of the other provisions  
in the Dairy Industry Act that were enacted by  
the Dairy Industry Act 1914 are a law made in  
relation to a matter not coming within the classes of  
subjects by the British North America Act assigned  
exclusively to the legislatures of the provinces and,  
therefore, validly enacted under s. 91 thereof.
- (5) BECAUSE s. 5 (a) and part or all of the other provisions 30  
in the Dairy Industry Act are a law made in relation  
to "The Regulation of Trade and Commerce" and,  
therefore, validly enacted under s. 91 (2) of the British  
North America Act.
- (6) BECAUSE s. 5 (a) and part or all of the other provisions  
in the Dairy Industry Act are a law made in relation  
to Agriculture and, therefore, validly enacted under s. 95  
of the British North America Act.
- (7) BECAUSE there is a presumption that the legislation is  
valid. 40
- (8) BECAUSE of the reasons given by the Chief Justice of  
Canada and Mr. Justice Kerwin in the Supreme Court  
of Canada.

F. P. VARCOE,  
W. R. JACKETT.  
FRANK GAHAN.

**In the Privy Council.**

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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.

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