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DOMINION OF CANADA

# Supreme Court Of Canada

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

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**FACTUM ON BEHALF OF THE ATTORNEY  
GENERAL FOR THE PROVINCE OF QUEBEC**

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## "THE CASE"

In 1886, the Parliament of Canada enacted the Act 49 Victoria, Chapter 42, entitled "An Act to prohibit the manufacture and sale of certain substitutes for butter". The preamble to this Act read as follows:—

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:—"

And section 1 being the only section of the Act provided:—

20           "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."

30           This Act became Chapter 100 of the Revised Statutes of Canada, 1886, the preamble thereto being omitted, as is usual, in the case of a revision.

In 1903 the Butter Act (3 Edward VII, Chapter 6) was enacted. It was entitled "An Act to prohibit the importation, manufacture or sale of adulterated, process of renovated butter, oleomargarine, butterine or other substitute for butter, and to prevent the improper marking of butter."

Section 5 of the said Act provided:—

40           "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."

This Act was incorporated into the Inspection and Sale Act, Chapter 85, Revised Statutes of 1906, as Part VIII thereof, entitled

“Dairy Products”. And Section 5 above quoted became Section 298 of the Inspection and Sale Act.

In 1914, Part VIII of the Inspection and Sale Act was repealed and the Dairy Industry Act was enacted as Chapter 7 of 4-5 George V. The prohibition concerning oleomargarine and other substitutes for butter was contained in Section 5 of this last mentioned Act. The Dairy Industry Act now appears in the Revised Statutes of Canada, 1927, as Chapter 45 thereof and Section 5, Paragraph (a) of the  
10 Dairy Industry Act is reproduced verbatim therein again as Section 5, paragraph (a). The provision 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;”

20 By an order bearing No. 3365, dated July 27th, 1948, His Excellency the Governor General in Council was pleased to refer the following question to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the Supreme Court Act:

“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 ?” — (Case, p. 7, lines 23, 24, 25.)

30 The report submitted to the Governor General in Council, by the Acting Minister of Justice explains the process of manufacturing margarine and oleomargarine and the differences between the two products; it further shows how the original unpalatable taste has been overcome and the lack of vitamin “A” in the vegetable oils used in the manufacture of margarine has been remedied so that “As a source of energy, margarine and butter are exactly equal.” — (Case, p. 4, lines 22, 23). The report further indicates that, during the period of December 1st, 1917 to September 30th, 1923, when the operation  
40 of Section 5 (a) of the Dairy Industry Act was suspended under the War Measures Act, large quantities of oleomargarine were manufactured and imported in Canada, — (Case, p. 6) — and that the consumption of oleomargarine reaches huge figures in many countries including the United States of America and Great Britain. (Schedule A, Case, p. 8).

It is respectfully submitted on behalf of the Attorney General for the Province of Quebec that Section 5, paragraph (a) above quoted is ultra vires, unconstitutional and invalid for the following reason:—

Because Section 5, paragraph (a) is legislation in relation to property and civil rights within the meaning of Head 13 of Section 92 of the B.N.A. Act.

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### A R G U M E N T

The competency of the provinces to legislate in relation to property and civil rights, embraces all rights arising from every kind of contracts, civil and commercial. In *Citizens Insurance Company of Canada and Parsons*, it was said by Sir Montague E. Smith:—

20       “The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, “Property and civil rights.” The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words “civil rights.”

30       The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in sect. 91.

40       It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at sect. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., “18, bills of exchange and promissory notes,” which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion parliament.”—

(Cameron P.C. Decisions, Vol. 1, pp. 267 at 278, 279; also, 7 App. Cas, p. 109).

And further:

10 “It is to be observed that the same words, “civil rights,” are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec. Sect. 8 of that Act enacted that His Majesty’s Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words “property” and “civil rights” are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.” — (Do, p. 280).

20 In the case of Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, Lord Watson made the following remarks:—

30 “But in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge v. The Queen* (9 App. Cas. 117, ante, p. 346), Lord Fitzgerald, delivering the opinion of this Board, said: “When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.”

40 The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.” —

(Cameron P.C. Decisions, Vol. 1, pp. 414 at 418; also, (1892) A.C. p. 442).

It is true that, under Head 2 of Section 91 of the B.N.A. Act, the Dominion Parliament is competent to make laws in relation to "the regulation of trade and commerce". But it is now well settled that this provision "does not comprise, in the sense in which it is used in Section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers." — (Reference re: The Natural Products Marketing Act, 1934, and its Amending Act, 1935, C.L.R. 1936, Supreme Court, pp. 398 at 410).

It is therefore within the exclusive competency of the provinces to regulate within their respective territory the trade or business of manufacturing and selling oleomargarine and margarine, and Parliament cannot invade a field which is exclusively assigned to the provinces by the simple device of legislating for the entire Dominion. — (1925, C.L.R., Supr. Court, p. 434).

Can it be said that the prohibition contained in Section 5, paragraph (a) is of the nature of a criminal enactment and, as such, comes under Head 27 of Section 91 of the B.N.A. Act ?

When inquiring whether an enactment is within the legislative competence of the Federal Parliament, as being in relation to criminal law, the Courts must ascertain "the true nature and character of the enactment; its pith and substance". And a colourable use of the Criminal Code cannot serve to disguise the real object of the legislation. — (Insurance Act of Canada, A.C. 1932, pp. 49, 51; — A.G. for Alberta and A.G. for Canada, A.C. 1939, pp. 117 at 130).

As said in *Attorney General for Ontario v. Reciprocal Insurers*:—

"It is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." — (A.C. 1924, pp. 339 at 342.)

It may be that an enactment prohibiting the manufacture and sale of poisonous or deleterious substances can properly be considered, under given circumstances, as criminal legislation. And the preamble to the original Act of 1886 (49 Victoria, Chapter 42) is no doubt an attempt to justify the legislation on that ground.

But, in view of the statements contained in the report submitted by the Acting Minister of Justice to the Governor General in Council, it is no longer open to the Federal Government to contend that oleo-  
10 margarine or margarine is injurious to health.

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For the above reasons, The Attorney General for the Province of Quebec respectfully submits that Section 5, paragraph (a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, is invalid, ultra vires and unconstitutional.

OTTAWA, September 21st., 1948.

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