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No. 30 of 1949

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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 HONOURABLE W. D. EULER AND OTHERS

SALTER A. HAYDEN

Solicitor for Honourable W. D. Euler and others

GOWLING, MAC TAVISH, WATT, OSBORNE & HENDERSON

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PART I

STATEMENT OF CASE

10 By an Order of His Excellency the Governor-General in Council dated July 27, 1948 (P.C. 3365), 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?

The relevant provisions of the Dairy Industry Act are set out in the Order in Council above referred to and in the case prepared on behalf of the Attorney-General of Canada.

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PART II

SUBMISSIONS OF THE HONOURABLE W. D. EULER AND OTHERS

It will be contended on behalf of the Honourable W. D. Euler and others, that this Section 5 (a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, is beyond the legislative competence of the Parliament of Canada and is therefore invalid because:

1. It does not fall within any of the enumerated heads of Section 91 of the British North America Act, and

2. It cannot be justified under the residual power in the Parliament of Canada to make laws relating to the peace, order and good government of Canada.

3. It is not legislation with respect to Agriculture and therefore does not fall within Section 95 of the British North America Act.

4. It deals with property and civil rights in the Province falling clearly within the terms of Head 13 of Section 92 and as well Head 16 and therefore constitutes one of the subjects exclusively assigned to the Provincial Legislatures.

PART III

ARGUMENT ON THE LAW

“A”

There is no authority under Head 2 of Section 91 of the British North America Act “Regulation of Trade and Commerce” to enact Section 5(a) of the Dairy Industry Act, because:

1. The prohibition of the manufacture or sale or having in possession for sale or offering for sale in Canada of Oleomargarine, Margarine, Butterine or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream, under Section 5(a) of the Dairy Industry Act (R.S.C. 1927, Chapter 45) relates to matters in their substance purely local and provincial. They are matters relating to a particular trade.

Regulation of individual trades or trade in individual commodities (if prohibition can be called regulation, at all) is not regulation of trade and commerce under Head 2 of Section 91 of the British North America Act, and is therefore not competent to the Parliament of Canada.

See *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 A.C. 96, at p. 112 *et seq.*

30 *In re The Board of Commerce Act*, [1922] 1 A.C. 191.

The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434.

Toronto Electric Commissioners v. Snider et al., [1925] A.C. 396, at pp. 403, 406, 409, 410-412.

Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 377, at pp. 386 *et seq.*

2. "The Regulation of Trade and Commerce" under Head 2 of said Section 91 does not, by itself, enable interference with particular trades in which Canadians would apart from any such right of interference be free to engage in the Provinces.

The Citizens Insurance Co. v. Parsons, supra.

Attorney-General for Canada v. Attorney-General for Alberta et al.,
[1916] 1 A.C. 588, at pp. 595 *et seq.*

Attorney-General for Ontario v. Reciprocal Insurers, [1924] A.C. 328,
at pp. 336 *et seq.*

- 10 3. Section 5(a) of the Dairy Industry Act deals with the prohibition or prevention of trade and not regulation or governance of it. Accordingly, it is submitted it cannot be supported as legislatively competent to the Parliament of Canada to enact by relation to Head 2 of Section 91 of the British North America Act. This head implies continued existence of that which is to be regulated or governed.

Attorney-General for Ontario v. Attorney-General for Canada, [1896]
A.C. 348, at pp. 359 and 365.

Municipal Corporation of the City of Toronto v. Virgo, [1896] A.C. 88,
at p. 93.

- 20 4. The business of making butter from the fat obtained from milk or cream may have grown to great dimensions in Canada but there are many other businesses and trades that are equally, if not, more highly important in Canada which are freely transacted under Provincial authority. Express words have been used in Section 91 where it was intended to take a particular business or trade out of provincial jurisdiction. The collocation of Head 2 to these various express Heads forces the conclusion that Head 2 was intended to deal with subjects of national and general concern.

The Citizens Insurance Company v. Parsons, supra.

- 30 *Attorney-General for Canada v. Attorney-General for Alberta et al.,*
supra.

"B"

Section 5(a) of the Dairy Industry Act cannot be justified under the residual power of the Parliament of Canada relating to the peace, order and good government of Canada because:

1. (a) Margarine or oleomargarine is a wholesome and nutritious article of food. The Department of National Health and Welfare approves such views expressed in the Canadian Medical Association Journal. It is manufactured and sold and consumed throughout most parts of the World (Case, p. 4, ll. 12-36; and p. 8, ll. 1-33).

(b) The Parliament of Canada authorized the temporary importation into and the manufacture and sale of oleomargarine in Canada by (1919) 10 George V, Chapter 24. Such manufacture in and importation of oleomargarine into Canada subject to license were permitted until August 31, 1920, and the sale and having in possession were permitted until March 1, 1921, notwithstanding anything contained in the Dairy Industry Act.

By a further Statute being (1920) 10-11 George V, Chapter 30, the Oleomargarine Act of 1919 was amended so as to extend the time for importation into and manufacture in Canada until August 31, 1921, and 10 the time for the sale of such article was extended until March 1, 1922.

By a further statute being (1921) 11-12 George V, Chapter 41, the time for importation into and manufacture in Canada of Oleomargarine was further extended until August 31, 1922, and the time for the sale of such product was extended until March 1, 1923, by amendment to The Oleomargarine Act 1919.

By further Statute (1922) 12-13 George V, Chapter 35, the time for importation into and manufacture in Canada of Oleomargarine was further extended until August 31, 1923, and the time for the sale of such product in Canada was extended until March 1, 1924, by amendment of The Oleo- 20 margarine Act, 1919.

(c) There is no evidence that the importation and manufacture of Oleomargarine throughout this period from 1919-1923 and its sale in Canada during the period 1919-1924 constituted any danger to the public safety, or that the public order and safety were endangered by this legislative permission for its importation, manufacture and sale. On the contrary it can be assumed that such importation, manufacture and sale served a useful purpose in the economic life of Canada and its people.

(d) The preamble to the original Statute of 1886, 49 Victoria, Chapter 42 under which the importation into and the manufacture and sale of 30 Oleomargarine in Canada were prohibited, stating that the "use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health" was not included in the consolidation of this Statute in the same year 1886 R.S.C., Chapter 100. This omission and the subsequent legislative permission to import into and manufacture and sell in Canada Oleomargarine are, it is submitted, conclusive on the point that the use of Oleomargarine as a substitute for butter was not regarded by the Parliament of Canada and was not then in fact injurious to health.

2. There is no matter of such unquestionable Canadian interest and importance involved in Section 5(a) of the Dairy Industry Act that the 40 Parliament of Canada may deal under its power relating to peace, order and good Government, when the matter is not within any enumerated Head of Section 91. The subject matter of Section 5(a) of the Dairy Industry Act is primarily a matter of property and civil rights. The manufacture and sale of Oleomargarine is in its very essence a matter of civil rights

and is purely local and provincial in all its aspects. This prohibition cannot, it is submitted, be said to be designed to promote public order, safety or morals, so as to make the subject matter public wrongs rather than what it is, namely, civil rights.

There is no wider and legitimate purpose to be served which would justify taking out of the exclusive authority of the Province this subject of the making and selling of Oleomargarine so that it could be said that the exercise of this power over this particular matter was incidental to the exercise of some broader, and undoubted authority of the Parliament
10 of Canada to legislate for public safety and order.

Russell v. The Queen (1882), 7 A.C. 829, at p. 838.

Attorney-General for Ontario v. Attorney-General for Canada, [1896] 1 A.C. 348, at pp. 359 *et seq.*

City of Montreal v. Montreal Street Railway, [1912] A.C. 333, at p. 343.

3. It cannot be said that the subject matter of the legislation in question lies outside all the enumerated Heads of Section 92 of the British North America Act. This is the only case, it is submitted, where, failing authority under any of the enumerated Heads of Section 91, the Parliament of Canada might have authority to legislate.

20 *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, at p. 595.

This decision was afterwards approved in *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, at p. 336.

4. There is no emergency which puts the national life of Canada in unanticipated peril.

Toronto Electric Commissioners v. Snider et al., [1925] A.C. 396, at pp. 410-412.

5. The subject matter of Section 5(a) of the Dairy Industry Act falls under Head 13 and as well under Head 16 of Section 92 of the British
30 North America Act. It does not fall under any enumerated Head of Section 91. There is nothing inherent in the subject matter of this legislation that impresses upon it a broader national character either arising out of national emergency or peril or other evil. Accordingly the residual power to make laws for the peace, order and good government of Canada cannot be invoked to give authority to the Parliament of Canada to legislate as it purports to do in Section 5(a) of the Dairy Industry Act.

Re The Natural Products Marketing Act, Reference, [1936] S.C.R. 398, at pp. 414-426.

“C”

1. Section 5(a) of the Dairy Industry Act is not legislation relating to Agriculture under Section 95 of the British North America Act. The subject matter of this Section 5(a) is not Agriculture but an article of trade. Oleomargarine is a manufactured article, the major portion of the ingredients of which are processed products of Agriculture. The prohibition of the manufacture and sale of Oleomargarine is not legislation in relation to Agriculture. It is an attempted regulation of a trade by prohibiting or preventing such being carried on and is not in any sense a law for the
10 encouragement or support of Agriculture.

The King v. Eastern Terminal Elevator Company, [1925] S.C.R. 434, at p. 457.

Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited, [1933] A.C. 168.

“D”

The subject matter of Section 5(a) of the Dairy Industry Act, properly falls under Head 13 of Section 92 of the British North America Act and as well under Head 16 of said Section 92 because :

1. It deals with a particular trade, namely, the manufacture and sale
20 of Oleomargarine in the Province and therefore trenches on the authority of the Province to legislate in relation to civil rights in the Province. There is nothing in any of the enumerated Heads of Section 91 to give authority over this subject to the Parliament of Canada. There is no wider and legitimate purpose to be served that would subordinate the purely local character of this trade in the manufacture and sale of Oleomargarine to a higher over-riding national purpose as in the case of establishing a uniform system of legislation prohibiting the liquor traffic throughout Canada.

2. The business of insurance has been held to be primarily within the legislative authority of the Province under Section 92. Yet it is a business
30 of great proportions operating and affecting people in every province in Canada.

Attorney-General for Canada v. Attorney-General for Alberta et al., [1916] 1 A.C. 588, at pp. 595-596.

Attorney-General for Ontario v. Reciprocal Insurers, [1924] A.C. 328, at p. 336.

In re The Insurance Act of Canada, [1932] A.C. 41.

3. The matter of undue combinations and hoarding and the evils of profiteering were held to be within Head 13 of Section 92 in the *Board of Commerce Case*, [1922] 1 A.C. 191, at pp. 197, 198 and 201, a case which

involved the validity of *The Combines and Fair Prices Act* (1919) 9-10 George V, Chapter 45.

Viscount Haldane at p. 197 says "it may well be such subjects are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and over-riding importance as to amount to what lies outside the Heads in Section 92 as is not covered by them. . . . but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference on such a scale as the
 10 Statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulations and restriction of their civil rights have in general been exclusively confided and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject matter to be dealt with in the case
 20 would be one falling within Section 92".

4. The subject matter of employer and employee relationships in industrial disputes was held to be clearly in relation to property and civil rights in the Provinces and not to be within the competence of the Parliament of Canada in the case of *Toronto Electric Commissioners v. Snider et al.*, [1925] A.C. 396, at p. 403.

The issue in this case was the validity of the Industrial Disputes Investigation Act of 1907 of Canada and the decision was against its validity. At page 406 Viscount Haldane lays down briefly the construction authoritatively put upon Sections 91 and 92 by the more recent decisions of the
 30 Judicial Committee. The basis of the decision is stated at page 412.

5. The business of the operation of fish canneries has been held to be beyond the competence of the Parliament of Canada and that the manufacturing or processing operations carried out upon fish, when caught, for the purpose of converting them into some form of marketable commodity, are the subject of regulation by the Provinces under the Head of property and civil rights.

Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111, at p. 118, Lord Tomlin sets down four propositions for determining the competence of Dominion Legislation.

40 6. The business of controlling and regulating grain under the Canadian Grain Act was held to be regulation in respect to a trade and so not within the competence of the Parliament of Canada.

The King v. Eastern Terminal Elevator Company, [1925] S.C.R. 434, at p. 457.

The regulation of the sale of milk has been held to be within the authority of the Provinces.

Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited, [1933] A.C. 168.

7. The Natural Products Marketing Act of 1934 Canada providing for the establishment of a Dominion Marketing Board with powers of regulating the time and place at which, and the agency through which, natural products
10 to which an approved scheme related, should be marketed by any person at any time was adjudged *ultra vires* of the Parliament of Canada in

Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 377, at p. 386.

and in the same case in the Supreme Court of Canada reference is made to the Judgment of Duff, C.J., [1936] S.C.R. at page 412 *et seq.*, and the Summary at page 426.

Their Lordships of the Judicial Committee in *The Labour Conventions Case*, [1937] A.C. 353, "agree with and adopt what was said by Duff, C.J., in *The Natural Products Marketing Act* ([1936] S.C.R. 398, at pp. 414 *et seq.*).
20 They consider that the law is finally settled by the current of cases cited by the Chief Justice of the Supreme Court of Canada on the principle declared by him.

8. The regulation of particular trades or businesses in the Provinces was held *intra vires* of the Provincial Legislature in the case of *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, in which the British Columbia Natural Products Act was held valid.

9. In a series of cases beginning with the Natural Products Marketing Board decisions there has been established the validity of the Provincial exercise of power over such things as natural products and dairy products.

30 *Reference re Natural Products Marketing (British Columbia) Act*, [1937] 4 D.L.R. 298.

Gallagher v. Lynn, [1937] A.C. 863.

Rex v. Simoneau, [1936] 1 D.L.R. 143, in which the Quebec Dairy Products Act providing for a minimum price for the sale of milk and for its distribution was held to be valid.

Rex v. Brodsky, [1936] 1 D.L.R. 578, held *ultra vires* the regulations made under the Dominion Livestock and Livestock Products Act, R.S.C.

(1927), Chapter 120, requiring dealers in eggs to mark, label or tag the egg containers with correct grade, etc., of the eggs.

10. The true test of this legislation must be found by determination of the true nature and character of the legislation. What is the real subject matter of the legislation? Must it from its inherent nature be the concern of the Dominion as a whole?

Attorney-General for Ontario v. Canada Temperance Federation, [1946] A.C. 193.

Russell v. The Queen (1882), 7 A.C. 829, at p. 838.

10 This question is put very concisely by Clement in "The Law of the Canadian Constitution", 3rd Edition, 1916, at page 689:

20 "If it were once conceded that the parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest upon the false assumption that those matters also concern the regulation of trade and commerce in a large Canadian sense, there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures. Is the subject one as to which there is a real community of interest as between two or more or all of the Canadian provinces or is it a mere matter of similarity of conditions? If the former, federal legislation is competent and paramount; if the latter, the right to local autonomy entitles each province to deal with its local conditions as it sees fit and differently, it may be, from every other province."

30 It will therefore be seen that mere similarity of conditions, even in important matters, is not to be taken as establishing community of interest (*Re Insurance Act*, 1910, [1913] 48 S.C.R. at 304, per Duff, J.). Diversity of treatment, if thought desirable, is of the essence of local provincial autonomy. A mere desire for uniformity is not enough to warrant federal legislation. Real community of interest in a large Canadian sense, as distinguished from mere similarity of conditions in the different provinces, must exist. As was said by Anglin, J., in *Re Insurance Act*, 1910, [1913] 48 S.C.R. at 310:

40 "When a matter primarily of civil rights has attained such dimensions that it 'affects the body politic of the Dominion' and has become 'of national concern' it has in that aspect of it not only ceased to be 'local and provincial' but has also lost its character as a matter of 'civil rights in the province' and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the 'peace, order and good government' provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount."

11. The manufacture and sale of Oleomargarine is no more a matter which affects the "body politic" of Canada than are such matters as fish canning, milk distribution and egg marketing which have been held to be outside Dominion competence.

12. The lack of an adequate supply of butter cannot be said to arise from the lack of a supply of milk but rather from the application of 50 per cent. of the milk production to other uses. The adaptability of certain regions to particular phases of agriculture and the development of products of agriculture, including milk and butter production and the regulation of trade
10 in the products thereof is a matter of local concern in each Province. Provincial legislative authority is adequate to regulate the manufacture and sale of butter substitutes such as Oleomargarine and any possible evils inherent therein. There is no over-riding problem of national concern or peril that would justify Dominion interference in this field of provincial jurisdiction.

13. Argument has not been particularly addressed to the matter of importation also prohibited by Section 5(a) of the Dairy Industry Act. This submission is primarily concerned with the matter of manufacture and sale in Canada. The prohibition of importation of Oleomargarine in this
20 context may not be valid but there can be no question as to the authority of the Parliament of Canada to legislate in relation to trade with other countries. The question, therefore, of the validity of the prohibition of importation is not too material to this submission. Nevertheless it is suggested that in the context it is obviously used in an attempt to tie together under the apparent validity of import prohibition the added factors of prohibition of manufacture and sale in Canada. This, it is submitted, cannot legally be justified.

For the above reasons and for such other reasons as may be advanced on the argument at the hearing of this Reference, it is submitted that the
30 answer to the question referred to must be in the affirmative at least to the extent that it prohibits the manufacture and sale of Oleomargarine in Canada.

SALTER A. HAYDEN

of Counsel for

the Honourable W. D. Euler and others