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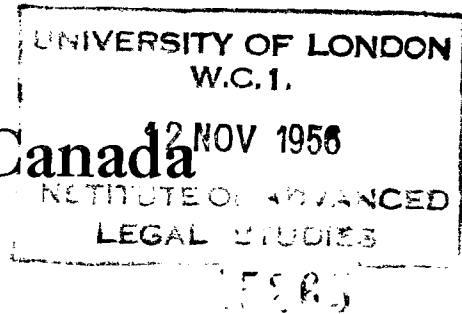
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In the Supreme Court of Canada

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 OF THE ATTORNEY GENERAL OF CANADA

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Factum of the Attorney General of Canada

PART I

STATEMENT OF THE CASE

1. By Order in Council P.C. 3365 of July 27, 1948, the following question is referred to this Court for hearing and consideration:

- 10 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 sections of the Dairy Industry Act are 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 (b) mix with or incorporate with butter, by any process of heating, soaking, rechurning, reworking, or otherwise, any cream, milk, skim-milk, butter-milk or water to cause such butter when so treated to contain over sixteen per centum of water or less than eighty per centum of milk fat;
- (c) melt, clarify, refine, re churn, or otherwise treat butter to produce ‘process’ or ‘renovated’ butter;
- (d) manufacture, import into Canada, or sell, offer, expose or have in possession for sale, any milk or cream or substitute therefor which contains any fat or oil other than that of milk;

(e) have upon premises occupied by him where any dairy produce is treated, manipulated, manufactured, or reworked, any substance that might be used for the adulteration of any such product and the presence upon any such premises of any fat or oil capable of being used for such adulteration shall be *prima facie* proof of intent so to use it.”

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“10. Any person who violates any provision of sections five or seven of this Act shall be guilty of an offence and upon summary conviction, shall be liable

10 (a) in the case of a first offence to a fine not exceeding one thousand dollars and not less than five hundred dollars;

(b) in the case of a second offence to a fine not exceeding two thousand dollars and not less than one thousand dollars; in each case together with the costs of prosecution and in default of payment of such penalty and costs, to imprisonment for a term not exceeding six months with or without hard labour, unless the said penalty and costs, with costs of enforcing the same, are sooner paid;

(c) in the case of a third or subsequent offence to imprisonment for a term not exceeding six months with or without hard labour.”

(Section 10 was repealed and re-enacted in the above form by c. 31 of the statutes of 1931.)

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PART II

SUBMISSION OF THE ATTORNEY GENERAL OF CANADA

2. The Attorney General of Canada submits that the answer to the foregoing questions should be that section 5(a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, is *intra vires* in whole as being legislation

(a) not within the legislative authority of a provincial legislature and so falling within the power of Parliament “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”;

30 (b) in relation to Criminal law;

(c) in relation to the regulation of trade and commerce;

(d) in relation to agriculture.

PART III

ARGUMENT

3. The relevant sections of the British North America Act are as follows:

10 “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,—

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2. The regulation of trade and commerce.

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

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20 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 laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

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30 “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 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.”

4. The history of Canadian legislation prohibiting the importation, manufacture and sale of margarine requires to be referred to. In 1886 Parliament enacted "An Act to Prohibit the Manufacture and Sale of certain Substitutes for Butter," (Chapter 42 of the Statutes of 1886), namely, oleomargarine, butterine or other substitute for butter. This Act read 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:

10 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."

Note that the prohibition extended only to the manufacture and sale. Importation was not prohibited.

20 In 1903 Parliament enacted "The Butter Act" being Chapter 6 of 3 Edward VII. This Act prohibited the importation, manufacture or sale of adulterated butter, oleomargarine, butterine or other substitute for butter and the improper marketing of butter. Section 5 provided as follows:

"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 provision is practically identical with section 5(a) now before the Court for consideration. Section 10 prescribed penalties.

30 The Butter Act of 1903 was incorporated into the Revised Statutes of 1906 as Part VIII of the Inspection and Sale Act (Chapter 85) entitled "Dairy Products."

In 1914 the Dairy Industry Act was enacted being Chapter 7 of 4-5 George V. It repealed Part VIII of the Inspection and Sale Act. It is now Chapter 45 of the Revised Statutes of 1927.

Factual Material re Dairy Industry

The following facts based on material furnished by the Department of Agriculture and the Federal Bureau of Statistics are relevant to the issue before the Court:

10 (i) In Canada the grazing season is comparatively short during which milk production greatly exceeds that of the non-grazing period of the year. In order to provide sufficient fluid milk to meet the requirements in the winter, it is necessary to maintain herds of dairy cattle which produce great surpluses of milk in summer over fluid milk requirements. The surplus goes into manufactured products, butter, cheese, etc.

(ii) There is a considerable movement of manufactured dairy products inter-provincially. Some provinces, notably Quebec and the Prairie Provinces, ordinarily produce more than they require for local consumption. The surplus products are exported to British Columbia, Ontario and the Maritimes which are "deficit provinces".

(iii) Butter production accounts for approximately one-third of the income of the Dairy Industry.

(iv) The cost of dairy products in Canada is excessive as compared with other countries for the reason that the herds must be stabled for half the year.

20 5. *Rules of interpretation of B.N.A. Act*

Before dealing with the specific arguments in support of the legislation, one or two general observations concerning the rules of interpretation of the B.N.A. Act adopted by the courts require to be mentioned. One of these is that, if a subject matter of legislation does not fall within the enumeration contained in section 92, then it automatically falls within section 91 without any further consideration.

See,

Bank of Toronto v. Lambe (1887) 12 A.C. 575 at p. 588.

Debt Adjustment Act Reference (1943) A.C. 356 per Viscount Maugham at p. 368 and p. 371.

30 *Aeronautics Reference* (1932) A.C. 54 per Lord Sankey, L.C. at p. 77.

Radio Reference (1932) A.C. 304 per Viscount Dunedin at p. 312.

Attorney General for Ontario v. Canada Temperance Federation, (1946) A.C. 193 per Viscount Simon at p. 203.

A second rule is that in determining whether the subject matter of legislation is truly Federal or Provincial, "the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or

interests and must from its inherent nature be the concern of the Dominion as a whole then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada.”—

Attorney General for Ontario v. Canada Temperance Federation (1946)
A.C. 193 per Viscount Simon at p. 205.

6. *Section 5(a) not within Section 92 of the B.N.A. Act and therefore falls within the jurisdiction of Parliament.*

Prohibition of manufacture and sale of an article, if within the jurisdiction of a province, must fall within section 92(16) “all matters of a merely local or private
10 nature in the province.”

A.G. of Manitoba v. Manitoba Licence Holders' Association (1902) A.C.
73 at 78.

In the Local Prohibition Case (*A.G. for Ontario v. A.G. for the Dominion* (1896) A.C. 348, the Privy Council intimated that a provincial legislature may in the absence of conflicting legislation by Parliament regulate particular trades and prohibit the manufacture or sale of particular commodities, such for example as liquor, but they made it abundantly clear that the provincial legislatures would have jurisdiction only if it were shown that the act to be prohibited (manufacture)
20 a merely local matter in the province. In the Local Prohibition Case, the third question asked was “Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?” The answer furnished by the Privy Council at p. 371 was as follows:

“In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.”

Such a prohibition as is here in question is not a merely local matter in a
30 province.

A province could not prohibit importation. A province could not exclude inter-provincial transactions. Since some provinces produce more butter than they require and others less, a uniform scheme would not be adopted by all nine provinces. The province could not prohibit manufacture except for local use. The province could not prohibit importation interprovincially or otherwise. If provincial legislation alone existed, there could still be margarine manufactured in Canada for export and for interprovincial trade. So margarine would be available for substitution or adulteration and the existence of margarine factories might endanger the system now in vogue

It is submitted that a total prohibition against importation, manufacture and sale of an article of food, whether this is done for the purpose of protecting producers of another article of food or the public against imitation, adulteration or other injury or to facilitate the inspection, marketing and distribution of an article of commerce, the prohibition could not be a local matter and therefore is within the exclusive jurisdiction of Parliament. Special reliance will be placed by the Attorney General on the judgment of the Privy Council in the Canada Temperance Act Reference (1946) A.C. 193.

7. *Section 5(a) is intra vires as being legislation in relation to criminal law.*

10 The criminal law in its widest sense is reserved to Parliament by section 91(27) of the British North America Act: *Attorney General for Ontario v. Hamilton Street Railway* (1903) A.C. 524.

There is no limitation on the powers of Parliament to determine what shall or shall not be criminal. It is sufficient that Parliament has unconditionally prohibited the acts or omissions in question with sanctions to be applied by the criminal courts by way of fine or imprisonment. "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the
20 State to be crimes and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished." *Proprietary Articles Trade Association v. A.G. for Canada* (1931) A.C. 310 per Lord Atkin at 324.

Section 5(a) of the Dairy Industry Act when coupled with section 10 of that Act exemplifies true criminal law. Reliance is placed in this connection on the reported case *Rex v. Perfection Creameries Limited* (1939) 2 W.W.R. 139, in which it was held that the provision in the Dairy Industry Act that "no person shall manufacture any butter containing over 16 per centum of water or less than 80 per centum of milk fat in *intra vires* as being 'criminal law'".

30 8. *Section 5(a) is intra vires as being legislation in relation to the Regulation of Trade and Commerce.*

The Dairy Industry Act, being Chapter 45 of the Revised Statutes of 1927, as amended from time to time, is one of a very large number of Acts of Parliament relating to articles of commerce which have for their purpose the marking, packaging, grading and standards of quality of particular articles of commerce. Not only have these enactments the purpose of protecting the public against fraud but they facilitate trade. Many of these statutes find their prototypes in pre-Confederation legislation which is to be found in the consolidated statutes under the general title "Regulation of Trade and Commerce" to which reference will be made.

9. *Section 5(a) is intra vires as being legislation in relation to Agriculture.*

See Section 95 of the B.N.A. Act. As has already been indicated, the purpose of this legislation is to adopt a uniform rule throughout Canada designed to protect and secure the production of milk and milk products which branch of Agriculture, in the opinion of Parliament, would suffer under competition with butter substitutes such as oleomargarine.

10. For the above reasons, it is submitted that section 5(a) of the Dairy Industry Act is in whole *intra vires*.

F. P. VARCOE,
W. R. JACKETT,
A. J. MACLEOD.