Privy Council Appeal No. 103 of 1920.

In the Matter of the Board of Commerce Act and the Combines and Fair Prices Act, 1919.

The Attorney-General of Canada - - - - - *Appellant*

v.

The Attorney-General of Alberta and others - - - *Respondents*

AND

The Attorney-General of Quebec and another - - - *Interveners*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
VISCOUNT CAVE.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from the Supreme Court of Canada, before which were brought, under statute, questions relating to the constitutional validity of the Acts above mentioned. As the six judges who sat in the Supreme Court were equally divided in opinion, no judgment was rendered. The Chief Justice and Anglin and Mignault, JJ., considered that the questions raised should be answered in the affirmative, while Idington, Duff and Brodeur, JJ., thought that the first question should be answered in the negative and that therefore the second question did not arise. These questions were raised for the opinion of the Supreme Court by a case stated under Section 32 of the Board of Commerce Act, and were: (1) Whether the Board had lawful authority to make a certain order; and (2) Whether the Board had lawful authority to require the Registrar, or other proper authority of the Supreme Court of Ontario, to cause the order, when issued, to be made a rule of that Court.

The order in question was to the effect that certain retail dealers in clothing in the City of Ottawa were prohibited from charging as profits on sales more than a certain percentage on cost which was prescribed as being fair profit. The validity of this order depended on whether the Parliament of Canada had legislative capacity, under the British North America Act of 1867, to establish the Board and give it authority to make the order.

The statutes in question were enacted by the Parliament of Canada in 1919, and were to be read and construed as one Act. By the first of these statutes, the Board of Commerce Act, a Board was set up, consisting of three commissioners appointed by the Governor-General, which was to be a Court of Record. The duty of the Board was to be to administer the second of the two statutes in question, the Combines and Fair Prices Act, called the Special Act. It was to have power to state a case for the opinion of the Supreme Court of Canada upon any question which, in its own opinion, was one of law or jurisdiction. It was given the right to inquire into and determine the matters of law and fact entrusted to it, and to order the doing of any act, matter, or thing required or authorised under either Act, and to forbid the doing or continuing of any act, matter or thing which, in its opinion, was contrary to either Act. The Board was also given authority to make orders and regulations with regard to these, and generally for carrying the Board of Commerce Act into effect. Its finding on any question of fact within its jurisdiction was to be binding and conclusive. Any of its decisions or orders might be made a rule or order or decree of the Exchequer Court, or of any Superior Court of any province of Canada.

The second statute, the Combines and Fair Prices Act, was directed to the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and enhancement of the prices of commodities. By Part I the Board of Commerce was empowered to prohibit the formation or operation of combines as defined, and, after investigation, was to be able to issue orders to that effect. A person so ordered to cease any act or practice in pursuance of the operations of a combine, was, in the event of failure to obey the order, to be guilty of an indictable offence, and the Board might remit to the Attorney-General of a province the duty of instituting the appropriate proceedings. By Part II the necessaries of life were to include staple and ordinary articles of food, whether fresh, preserved, or otherwise treated, and clothing and fuel, including the materials from which these were manufactured or made, and such other articles as the Board might prescribe. No person was to accumulate or withhold from sale any necessary of life, beyond an amount reasonably required for the use or consumption of his household, or for the ordinary purposes of his business.

Every person who held more, and every person who held a stock-in-trade of any such necessary of life, was to offer the excess

amount for sale at reasonable and just prices. This, however, was not to apply to accumulating or withholding by farmers and certain other specified persons. The Board was empowered and directed to inquire into any breach or non-nobservance of any provision of the Act, and the making of such unfair profits as above referred to, and all such practices with respect to the holding or disposition of necessaries of life as, in the opinion of the Board, were calculated to enhance their cost or price. An unfair profit was to be deemed to have been made when the Board, after proper inquiry, so declared. It might call for returns and enter premises and inspect. It might remit what it considered to be offences against this part of the Act to the Attorney-General of the province, or might declare the guilt of a person concerned, and issue to him orders or prohibitions, for breach of which he should be liable to punishment as for an indictable offence.

The above summary sufficiently sets out the substance of the two statutes in question for the present purpose.

In the first instance the Board stated, for the opinion of the Supreme Court of Canada, a case in which a number of general constitutional questions were submitted. That court, however, took the view that the case was defective, inasmuch as it did not contain a statement of concrete facts, out of which such questions arose. Finally, a fresh case was stated containing a statement of the facts in certain matters pending before the Board, and formulating questions that had actually arisen. These related to the action of certain retail clothing dealers in the city of Ottawa. An order was framed by the Board which, after stating the facts found, gave directions as to the limits of profit, and a new case was stated which raised the questions already referred to.

Under these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact the statutes in question.

The second of these statutes, the Combines and Fair Prices Act, enables the Board established by the first statute to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the provinces of Canada, as the Board may consider to be detrimental to the public interest. The Board may also restrict, in the cases of food, clothing and fuel, accumulation of these necessaries of life beyond the amount reasonably required, in the case of a private person, for his household, not less than in the case of a trader for his business. The surplus is in such instances to be offered for sale at fair prices. Certain persons only, such as farmers and gardeners, are excepted. Into the prohibited cases the Board has power to inquire searchingly, and to attach what may be criminal consequences to any breach it determines to be improper. An addition

of a consequential character is thus made to the Criminal Law of Canada.

The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in war time. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of Section 91 of the British North America Act, confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in Section 92, untrammelled by the enumeration of special heads in Section 91. It may well be that the subjects of undue combination and hoarding 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 overriding importance as to amount to what lies outside the heads in Section 92, and is not covered by them. The decision in *Russell* v. *The Queen* (7 A. C. 829) appears to recognise this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the 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 regulation 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 would be one falling within Section 92. Nor do the words in Section 91, the Regulation of Trade and Commerce, if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under Section 92. In the case of Dominion companies their Lordships in deciding the case of *John Deere Plow Company* v. *Wharton* (1915 A. C. 330, at p. 340), expressed the opinion that the language of Section 91 (2) could have the effect of aiding Dominion powers conferred by the general language of Section 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power

in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the provinces. This result was the outcome of a series of well-known decisions of earlier dates which are now so familiar that they need not be cited.

For analogous reasons the words of head 27 of Section 91 do not assist the argument for the Dominion. It is one thing to construe the words "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the provincial legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion Criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that Section 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and civil rights in the provinces exclusively conferred on their legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be *ultra vires* for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for everyday life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them

individually, and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local provincial undertakings for meeting provincial requirements of social life.

Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by Section 91. They find confirmation of this view in Section 41 of the Board of Commerce Act, which enables the Dominion Executive to review and alter the decisions of the Board. It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either Section 92 or Section 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class, of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognised in earlier decisions, such as that of *Russell* v. *The Queen*, both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada, that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures. It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the argument at the Bar for the Attorney-General for Canada. But even this consideration affords no justification for interpreting the words of Section 91 (2) in a fashion which would, as was said in

the argument on the other side, make them confer capacity to regulate particular trades and businesses.

For the reasons now given their Lordships are of opinion that the first of the questions brought before them must be answered in the negative. As a consequence the second question does not arise.

They will humbly advise His Majesty to this effect. There should be no costs of these proceedings, either here or in the Supreme Court of Canada.

In the Privy Council.

THE ATTORNEY-GENERAL OF CANADA

v.

THE ATTORNEY-GENERAL OF ALBERTA AND OTHERS (*Respondents*) AND THE ATTORNEY-GENERAL OF QUEBEC AND ANOTHER (*Interveners*).

DELIVERED BY VISCOUNT HALDANE.

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