Privy Council Appeal No. 73 of 1928.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

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

v.

The Attorney-General of British Columbia and others - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DARLING.
LORD TOMLIN.
LORD THANKERTON.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD TOMLIN.]

This is an appeal from a judgment dated the 28th May, 1928, of the Supreme Court of Canada. The appellant is the Attorney-General of the Dominion of Canada. The respondents are the Attorneys-General of the Provinces of British Columbia, Quebec and Ontario and the fishermen of Japanese origin in the Province of British Columbia.

By an Order of His Excellency the Governor-General in Council, dated the 19th October, 1928, and made pursuant to the provisions of Section 60 of the Supreme Court Act three questions as to the constitutional validity of certain sections of the Fisheries Act, 1914, and as to the interpretation of those sections and of certain Regulations made under that Act were referred to the Supreme Court for hearing and consideration.

The judgment complained of embodies the conclusions of the Supreme Court upon the questions referred. The questions were as follows :—

" (1) Are Sections 7A and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent *ultra vires* of the Parliament of Canada ?

" (2) If the said provisions of the Fisheries Act, 1914, or either of them be *intra vires* of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia ?

" (3) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council, under the authority of Section 45 of the Fisheries Act, 1914), respecting licences to fish, viz., subsection 3 of Section 14 ; paragraph (*a*) or (*b*) of Subsection 1 of Section 15 or paragraph (*a*) of Subsection 7 of Section 24 of the said Regulations, or under said Section 7A or 18 of the said Act (if these sections or either of them be *intra vires* of the Parliament of Canada) has :—

(*a*) Any British subject resident in the Province of British Columbia, or

(*b*) Any person so resident who is not a British subject,

upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject ot not ? "

The Supreme Court held that the sections mentioned in the first question were *ultra vires* the Parliament of the Dominion, and that in view of this conclusion the second question and so much of the third question as related to the impugned sections required no answer. As to the remainder of the third question a majority of the Court held in effect that under the Regulations there was no discretion in the Minister to grant or refuse a licence to a qualified person.

In order to answer the first question it is necessary to examine the extent of the respective legislative powers of the Parliament of the Dominion and of the Provincial Legislatures. These powers rest upon the British North America Act, 1867. Part VI of the Act is entitled " Distribution of Legislative Powers " and includes Sections 91 and 92.

Section 91 is headed " Powers of the Parliament," and provides as follows :—

" 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."

There then follows an enumeration of 29 subjects, including : (1) The Public Debt and Property ; (2) the Regulation of Trade and Commerce ; (3) the raising of money by any mode or system of Taxation ; (10) Navigation and Shipping ; (12) Sea Coast and Inland Fisheries ; and (29) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces. The section then concludes with these words :—

> "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."

Section 92 is headed "Exclusive Powers of Provincial Legislatures," and provides that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next therein enumerated. There follows an enumeration of 16 subjects, including (2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes ; (10) Local Works and Undertakings other than such as are of certain classes mentioned therein ; (13) Property and Civil Rights in the Province, and (16) generally all matters of a merely local or private nature in the Province.

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated :—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in Section 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by Section 92 (*see Tennant* v. *Union Bank of Canada* [1894], A.C. 31).

(2) The general power of legislation conferred upon the Parliament of the Dominion by Section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in Section 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion (*see Attorney-General of Ontario* v. *Attorney-General of the Dominion* [1896], A.C. 348).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in Section 91 (*see Attorney-General of Ontario* v. *Attorney-General of the Dominion*

[1894], A.C. 189, and *Attorney-General of Ontario* v. *Attorney-General of the Dominion* [1896], A.C. 348).

(4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail (*see Grand Trunk Railway of Canada* v. *Attorney-General of Canada* [1907], A.C. 65).

The impugned sections of the Fisheries Act, 1914, are in the following terms :—

> "7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar (1917 c. 16).
>
> "18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a licence from the Minister (1–2 Geo. V., C. 9, s. 2).
>
> "(2)—(*a*) The annual fee for a salmon cannery licence shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (*salmo rivularis*) packed in such cannery during the continuance in force of the licence. The said twenty dollars shall be paid before the licence is issued, and the remainder of the licence fee shall be paid as the Minister may from time to time by regulation prescribe. (1924, Chap. 43, 14–15 Geo. V.).
>
> (*b*) The annual licence fee for a salmon-curing establishment shall be :—
>
> Fifty cents on each ton, or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons ;
>
> Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons.
>
> One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons ;
>
> One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons (12–13 Geo. V., c. 24, s. 1)."

The appellant seeks to support the validity of these sections *first* upon the ground that their subject matter is one within the subjects of express enumeration in Section 91, and *secondly* upon the ground that they consist of provisions necessarily incidental to effective legislation upon an enumerated subject.

The Fisheries Act, 1914, is "An Act respecting Fisheries and Fishing," and contains a body of legislation regulating the fishing industry, and so far as it regulates that industry admittedly within the powers of the Dominion Parliament, inasmuch as sea coast and inland fisheries, is one of the subjects enumerated in Section 91.

The appellant contends in the first place that the subject "Sea Coast and Inland Fisheries," covers such matters as the regulation of fish cannery or curing establishments either ashore or afloat, and that the imposition of a licensing system upon such establishments is therefore justified.

It is to be observed that by Section 2 of the Fisheries Act, 1914, "fishery" in that Act means and includes the area, locality, place or station in or upon which a pound, seine, net, weir, or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance and also the pound, seine, net, weir or other fishing appliance used in connection therewith.

It may well be that this definition is not an apt one to apply to the words "Sea Coast and Inland Fisheries" in Section 91 of the British North America Act, 1867. The appellant, however, seeks for the word "Fisheries" in the latter Act a definition of such amplitude that it will include the operations carried out upon the fish when caught for the purpose of converting them into some form of marketable commodity. He supports his contention by referring to fishery legislation prior to 1867 affecting territories now part of the Dominion, pointing out that in this legislation there are to be found numerous provisions relating to the curing and marketing of fish, and he urges that the British North America Act, 1867, must be construed in the light of the earlier legislation, and that the word fisheries must be given such a meaning as is wide enough to include at any rate the operations affected by the impugned sections.

Their Lordships are of opinion that the appellant's contention in this respect is not well founded. The fact that in earlier fishery legislation raising no question of legislative competence matters are dealt with not strictly within any ordinary definition of "fishery" affords no ground for putting an unnatural construction upon the words—Sea Coast and Inland Fisheries. In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries."

It was but faintly urged by the appellant that the matter was covered by any other of the enumerated subjects in Section 91. The raising of money by any mode or system of Taxation was admitted not to be applicable, and their Lordships are unable to see that any other enumerated subject under Section 91 applies.

The second point made by the appellant is that the licensing of fish canning and curing establishments is necessarily incidental to effective legislation under the subject "Sea Coasts and Inland Fisheries."

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister

should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordships' judgment *prima facie* fall under the subject "Property and Civil Rights in the Province," included in Section 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships' opinion covered directly or incidentally by any of the subjects enumerated in Section 91. It is not suggested that they are of national importance and have attained such dimensions as to affect the body politic of the Dominion.

In their Lordships' judgment, therefore, the impugned sections deal with matters not within the legislative competence of the Parliament of the Dominion and cannot be supported.

Having regard to the view which their Lordships take of the first question the second question requires no answer.

It remains to deal with the third question.

So far as this question deals with the sections which are the subject of the first question it now requires no answer. That part of it, however, which deals with certain provisions of the Special Fishery Regulations for the Province of British Columbia must be considered. The validity of these provisions is not attacked, their construction only is in question.

The following are the terms of these provisions :—

"Section 14.—*Herring or Pilchard.*

"(3) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a licence from the Minister to authorise his operation of the said drag-seine or purse-seine ; and no other than a British subject shall be eligible for such licence. The fee for such licence shall be one dollar.

"Section 15.—*Leases or Licences.*

"(1)—(*a*) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under licence from the Minister is prohibited ; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under licence from the Minister.

"(*b*)—No licence shall be granted to any person, company or firm unless such person is a British subject resident in the Province or is a returned soldier, who has served in His Majesty's Canadian Navy or Army

overseas, or to such company or firm unless it is a Canadian company or firm or is authorised by the Provincial Government to do business in the province.

"Section 24.—*Salmon.*

"(7)—(*a*) No one shall fish for salmon for commercial purposes by means of trolling, except under licence from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a licence."

The question here is one of construction. Do the regulations rightly interpreted, give to the Minister any discretion in granting or refusing a licence where it is applied for by a qualified person.

The regulations in question affect both public and private rights of fishing. There is no express provision for withholding a licence where a qualified applicant submits a proper application and pays the small prescribed fee, and in their Lordships' judgment, there is nothing in the language of the regulations giving rise to a necessary implication that the Minister has a discretion to grant or withhold the licence. Their Lordships agree with the answer which the majority of the Supreme Court gave to the third question.

In the result, therefore, the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

In accordance with the usual practice there will be no costs of the appeal as between the appellant and the respondent Attorneys-General, but the respondent fishermen will have their costs of the appeal.

(38307/1343) Wt. 26969/77 26-48-3 50 9/49 L. & B.

In the Privy Council.

THE ATTORNEY-GENERAL OF CANADA

v.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA AND OTHERS.

DELIVERED BY LORD TOMLIN.

Printed by
Lowe & Brydone Printers Limited, London, N.W.10

1929.