

70, 1932

In the Privy Council.

No. 28 of 1932.



APPELLANT'S CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

LOWER MAINLAND DAIRY PRODUCTS
SALES ADJUSTMENT COMMITTEE ... (Plaintiff) Appellant,

AND

CRYSTAL DAIRY LIMITED ... (Defendant) Respondent.

CASE FOR THE APPELLANT.

1. This is an appeal from a judgment of the Court of Appeal of British Columbia, dated the 5th January, 1932, whereby the judgment of the Honourable Mr. Justice Murphy, pronounced the 26th day of September, 1931, dismissing the action, was affirmed. Record. p. 82. p. 54.

2. The action out of which this appeal arises was for a mandamus commanding the Defendant as a distributor as defined by Section 2 of the "Dairy Products Sales Adjustment Act," being Chapter 20 of the Statutes of British Columbia 1929, as amended by Section 4 of the "Dairy Products Sales Adjustment Act Amendment Act 1931," to make to the Plaintiff (an incorporated Committee duly appointed under the former Act) forthwith returns of all milk or manufactured products purchased or received by the Defendant from dairy farmers as defined by the Act and for damages. p. 1. pp. 90-92.

3. At the trial no defence was offered by the Defendant as to the admitted refusal to make returns, but the Defendant pleaded that the "Dairy Products Sales Adjustment Act" was *ultra vires* and beyond the competence of the Legislature of British Columbia for specified reasons. p. 14, l. 19. p. 5, l. 26. p. 10,

Record.

4. The "Dairy Products Sales Adjustment Act," as shown by the preamble thereto, was passed for the purpose of adjusting between the dairy-farmers in any district brought under the Act the returns received by the sale of milk in two markets open, viz., the fluid milk market and the manufactured products market, the returns from the fluid milk market being higher than from the manufactured products market.

p. 32, l. 2. 5. The chief market for fluid milk is in the district known as the Lower
p. 33, l. 11. Mainland, particularly the Cities of Vancouver and New Westminster, but
p. 35, ll. 12- during the last fifteen years there has always been a surplus of fluid milk.
22. The production is increasing each year. 10

p. 33, l. 12. 6. The surplus milk is manufactured and sold in the form of butter,
p. 34, l. 27. cheese and evaporated milk, but the price received is materially lower than
the price received in the fluid milk market.

7. The Act empowers the Lieutenant-Governor in Council upon the submission of a Petition favoured by sixty-six per cent. of the dairy-farmers present at a meeting called for that purpose to appoint a Committee, which Committee is given power to adjust between the dairy-farmers the returns received from the sale of milk on the fluid market and the sale of milk for manufacturing purposes. This adjustment is made by dividing the spread between the two prices, after receiving a return from all of the 20 dairy-farmers of the amount of milk produced and particulars of its disposition.

p. 33, l. 43. 8. The expenses of the Committee in obtaining such returns and
p. 32, l. 35. making such adjustment under the Act are met by a levy collected from the
dairy-farmers. The levy, during the operation of the Act, was one half cent
p. 45, l. 40. per pound butter-fat on each pound of butter-fat produced, the wholesale
price of milk being based on the weight of butter-fat therein. The levy of
one half cent per pound butter-fat is equal to one twenty-fifth of a cent
per quart of milk sold to the consumer.

p. 31, l. 8. 9. Twenty-five per cent. of the dairy-farmers within the territory over 30
p. 31, l. 32. which the Committee has control sell all their milk in the fluid market.
Others sell milk in both markets and a very small number sell exclusively
p. 31, l. 2. to the manufacturing market. Under the operation of the Act therefore,
about seventy-five per cent. of the farmers receive the benefit of the adjust-
ment made as against twenty-five per cent. who pay as a result of the
adjustment.

10. The question whether the Act is *ultra vires* the Legislature of British Columbia turns primarily upon the terms of the British North America Act, 1867, and more particularly upon the following sections :—

" 91. It shall be lawful for the Queen, by and with the advice and 40
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 Parlia-
 “ ment of Canada extends to all matters coming within the classes of
 “ subjects next hereinafter enumerated, that is to say :

* * * * *

10 “ (2) The regulation of trade and commerce.
 “ (3) The raising of money by any mode or system of taxation.

* * * * *

“ (29) Such classes of subjects as are expressly excepted in
 “ the enumeration of the classes of subjects by this Act assigned
 “ exclusively to the Legislatures of the Provinces.

“ 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 enumer-
 “ ation of the classes of subjects by this Act assigned exclusively to the
 “ Legislatures of the Provinces.

20 “ 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 :—

* * * * *

“ (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 the
 “ following classes :—

“ (a) Lines of steam or other ships, railways, canals, telegraphs,
 “ and other works and undertakings connecting the Province with
 “ any other or others of the Provinces, or extending beyond the
 “ limits of the Province.

30 “ (b) Lines of steam ships between the Province and any
 “ British or foreign country.

“ (c) Such works, as, although wholly situate within the
 “ Province, are before or after their execution declared by the

Record.

“ Parliament of Canada to be for the general advantage of Canada
“ or for the advantage of two or more of the Provinces.

“ (11) The incorporation of companies with Provincial objects.

* * * * *

“ (13) Property and civil rights in the Province.

* * * * *

“ (16) Generally all matters of a merely local or private nature in
“ the Province.

“ 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 10
“ 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.”

pp. 49-53.

p. 49, l. 5.

p. 49, l. 32
et seq.

p. 51, l. 29.

p. 50, l. 33.

p. 51, l. 30
et seq.

11. The learned Trial Judge was of the opinion that the assessment based upon the spread between the two prices falls within the exposition of what constitutes a tax in *Lawson v. Interior Tree Fruit & Vegetable Committee* (1931), S.C.R. 357, and he was also of the opinion that this assessment was an indirect tax. He further was of the opinion for the same reason that the levy collected for the expenses of the Committee was also 20 an indirect tax. His Lordship thought that the Act created conditions which automatically result in a tendency on the part of those who pay them to pass on these imposts to the consumer, and held the Act to be *ultra vires* in its entirety.

pp. 57-59.

12. On appeal, the Honourable the Chief Justice of British Columbia was of the opinion that the assessment based upon the spread between the two prices created a tendency upon the part of the dairyman supplying milk to the fluid milk market to pass it to the consumer and that this was an indirect tax.

pp. 60-71.

p. 71, l. 3.

p. 71, l. 10.

13. The Honourable Mr. Justice McPhillips thought that the matter 30 under consideration had complex features, and whilst in his opinion there is much doubt as to whether the legislation under review is *ultra vires*, yet, in view of the controlling decisions he did not find himself at liberty to go the length of saying that the Judgment of the Court below was wholly wrong. He trusted the matters in question would have the consideration of the ultimate Court of Appeal.

14. The Honourable Mr. Justice M. A. Macdonald thought that the assessment was not a tax at all. In reference to the levy, his Lordship did not think that the levy was a tax, but he felt that on both of these points he was bound by the decision in the *Lawson* case. If the assessment was not a tax he did not think it necessarily followed that because the levy was an indirect tax the whole Act was invalid.

Record.
pp. 72-81.
p. 74, l. 37.
p. 77, l. 8.
p. 77, l. 9.
p. 80, l. 5.
p. 81, l. 38.

15. The remaining Judges of the Court of Appeal, the Honourable Mr. Justice Martin and the Honourable Mr. Justice Gallihier, concurred in dismissing the appeal, neither giving any reasons.

p. 82, ll. 19-20.

10 16. The Appellant respectfully submits that neither the assessment nor the levy is a tax at all and alternatively if wrong in this submission, that neither of them amounts to an indirect tax.

17. The Appellant, therefore, submits that this appeal should be allowed for the following, amongst other

REASONS.

1. That the assessment is not a tax.
2. That the levy is not a tax.
3. Alternatively, that if the assessment or the levy is held to be a tax, then it is a direct tax upon the dairy-farmer.
- 20 4. That the Act is purely Provincial in its objects and scope and deals only with property and civil rights in the Province.
5. That the Act deals with a matter of merely local or private nature in the Province.

R. L. MAITLAND.
FRANK GAHAN.



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BLAKE & REDDEN,
17, Victoria Street, S.W.1.