Privy Council Appeal No. 103 *of* 1936

The Attorney-General of British Columbia - - - - *Appellant*

v.

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

In the matter of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Natural Products Marketing Act, 1934, *and its amending Act The Natural Products Marketing Act Amendment Act,* 1935,

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1937

Present at the hearing:

LORD ATKIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT (Master of the Rolls).
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

This is an appeal from the Supreme Court on a reference by the Governor-General in Council dated 5th November, 1935, raising the question whether the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, is *ultra vires* of the Parliament of Canada. The Supreme Court unanimously answered the question in the affirmative.

The Act consists of two parts. The first provides for the establishment of a Dominion Marketing Board whose powers include powers to regulate the time and place at which and the agency through which natural products to which an approved scheme relates shall be marketed and to determine the manner of distribution and the quantity, quality, grade or class of the product that shall be marketed by any person at any time and to prohibit the marketing of any of the regulated products of any grade, quality or class.

There are other regulatory powers which need not be further specified. A scheme to regulate the marketing of a natural product is initiated by a representative number of persons engaged in the production or marketing of the natural product. It can be referred by the appropriate Minister to the Board and if they approve the scheme as submitted or amended by them and it is further approved

by the Minister the Governor-General in Council may approve the scheme. It is essential that the Governor-General in Council shall be satisfied either that the principal market for the natural product is outside the province of production or that some part of the product produced may be exported. The latter provision makes it clear that the regulation may apply to marketing transactions in natural products which have nothing to do with foreign export or inter-provincial trade. If the Minister is satisfied that trade and commerce in a natural product are injuriously affected by the absence of a scheme prepared as above he may himself propose a scheme for approval of the Governor in Council. The Governor in Council is given power by order or regulation to regulate or restrict importation into Canada of a natural product which enters Canada in competition with a regulated product: and to regulate or restrict the exportation from Canada of any natural product. Part II contains provision for the appointment by the Minister of a Committee who may be entrusted with the duty of investigating all matters connected with the production or marketing of natural or regulated products for the purpose of ascertaining the charges made in distribution of a natural or regulated product. The receipt against the interest of the public of an excessive charge is made an indictable offence and there are provisions for the trial of such offences.

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the province, and have no connection with inter-provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the province, and if not brought within one of the enumerated classes of subjects in section 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of section 91, namely The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-provincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the province. In his judgment the Chief Justice says:—

> " The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. , Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King v. Eastern Terminal Elevators* (1925) S.C.R. 434)."

Their Lordships agree with this; and find it unnecessary to add anything. There was a further attempt to support the Act upon the general powers to legislate for the peace, order and good government of Canada. Their Lordships

have already dealt with this matter in their previous judgments in this series and need not repeat what is there said. The judgment of the Chief Justice in this case is conclusive against the claim for validity on this ground. In the result therefore there is no answer to the contention that the Act in substance invades the provincial field and is invalid. It was however urged before us that portions of the Act notably section 9 in the first part and the whole of part II are within the competence of Parliament. Section 9 because it only purports to deal with inter-provincial or export trade; and part II because it goes no further than the similar provisions in the Combines Investigation Act and is a genuine exercise of the Dominion legislative authority over criminal law. Reference was made to section 26 of the Act which is in these terms:—

> "If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of the powers to every enactment and provision in this Act contained."

It is said that this a plain indication of the intention of the legislature to pass any portion of the Act which might be valid in itself, in however truncated form the whole Act is left after rejecting the other portions. Moreover counsel for British Columbia urged the Board to make a declaration that it was only so far as authority was conferred on the Board to deal with local matters not necessarily ancillary to the main power that the Act was *ultra vires* and that the validity of each scheme must be determined as matters arise under it. No such declaration was asked for from the Supreme Court. British Columbia did not even appear at the hearing in Canada: and there is no claim for such a declaration in the case filed before this Board. It is of special importance in constitutional questions that this Board should if possible have the assistance of the opinion of the members of the Supreme Court: and as a general rule the Board will not be prepared in such cases to entertain claims for relief which have never been formulated in the Dominion Court. In no event therefore would they have acceded to the request for such a declaration as mentioned above. It does appear that the question of severability was raised in the factums of the Dominion and Ontario and their Lordships were told and of course accept the statement that this point was mentioned to the Supreme Court. It cannot, they think, have been emphasised, for the very careful judgment of the Court makes no mention of it. There appear to be two answers. In the first place it appears to their Lordships that the whole texture of the Act is inextricably interwoven and that neither section 12 nor part II can be contemplated as existing independently of the provisions as to the creation of a Board and the

regulation of products. There are no separate and independent enactments to which section 26 could give a real existence. In the second place both the Dominion and British Columbia in their cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this is true: and that as the main legislation is invalid as being in pith and substance an encroachment upon the provincial rights the sections referred to must fall with it as being in part merely ancillary to it. This relieves them from the task of deciding whether they would have been justified when dealing with constitutional issues of this importance in giving effect to arguments inconsistent with the reasons formally put before the Board in the filed cases of the respective parties.

The Board were given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation: and their attention was called to the existence of provincial legislation setting up provincial schemes for various provincial products. It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other. In the present case their Lordships are unable to support the Dominion legislation as it stands. They will therefore humbly advise His Majesty that this appeal should be dismissed.

(40354—3A) Wt. 8136—2 175 2/37 P. St. G. 33

In the Privy Council

THE ATTORNEY-GENERAL OF
BRITISH COLUMBIA

v.

THE ATTORNEY-GENERAL OF
CANADA AND OTHERS

DELIVERED BY LORD ATKIN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1937