

IN THE MATTER OF A REFERENCE AS TO  
WHETHER THE PARLIAMENT OF CANADA  
HAD LEGISLATIVE JURISDICTION TO EN-  
ACT THE DOMINION TRADE AND INDUS-  
TRY COMMISSION ACT, 1935, BEING 25-26  
GEO. V, C. 59.

1936

\* Jan. 17.

20, 22.

\* June 17.

*Constitutional law—Dominion Trade and Industry Act—Constitutional validity—Agreements between persons in same industry to modify undue competition—National Research Council—"Canada Standard" as trade-mark—Director of Public Prosecutions.*

Section 14 of the Dominion Trade and Industry Act provides *inter alia* that agreements between persons engaged in any specific industry, entered into in order to modify wasteful or demoralizing competition existing in such industry, may be approved by the Governor in Council on the advice of the Commission.

*Held* that said section is *ultra vires* of the Parliament of Canada. Its enactments are not necessarily incidental to the exercise of any powers of the Dominion in relation to criminal law, nor can such section be sustained as legislation in relation to the regulation of trade and commerce.

Sections 16 and 17 of the same Act enacts *inter alia* that, in addition to its powers and duties, under any other statute or law, the National Research Council shall, on the request of the Commission, study, investigate, report and advise upon all matters relating to commodity standards as defined in the Act; and subsection 3 of section 17 provides that such advices and reports shall be privileged.

*Held* that these two sections are *intra vires* of the Parliament of Canada. In view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration.

Sections 18 and 19 of the same Act provide that the words "Canada standard" or initials "C.S." shall be a national trade-mark vested in His Majesty in the right of the Dominion of Canada which may be used only under the conditions prescribed, including the condition that the commodity, to which such trade-mark is applied, shall conform to the requirements of a commodity standard for such commodity or class of commodity established under the provisions of an Act of the Parliament of Canada.

*Held* that both sections are *ultra vires* of the Parliament of Canada. The so-called trade-mark is not a trade-mark in any proper sense of the term and the function of the letters "C.S." as declared by subsection 1 of section 18 is different from the function of an ordinary trade-mark: that subsection is really an attempt to create a civil right of novel character and to vest it in the Crown in right of the Dominion. Subsection 2 of section 18 is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 20 of the same Act provides that the Commission may receive complaints respecting unfair trade practices and may investigate the same and recommend prosecutions if of opinion that the practice com-

\* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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plained of constitutes an offence against any one of the Dominion Laws mentioned in s. 2 (h) of the Act.

*Held* that such section is *intra vires* of the Parliament of Canada in so far as the enactments enumerated in section 2 (h) of the Act may be *intra vires*.

Sections 21 and 22 of the same Act provide for the appointment of an officer to be called the Director of Public Prosecutions to assist in the prosecution of offences against any of these laws mentioned in section 2 (h) of the Act.

*Held* that these sections (as applicable to the criminal offences created by such of the enactments enumerated in section 2 (h) as may be *intra vires*) are not *ultra vires* of the Parliament of Canada. Authority of the Parliament to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (h) as may be competent.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following question: Is the *Dominion Trade and Industry Commission Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to the *Dominion Trade and Industry Commission Act*, 1935, being chapter 59 of the statutes of Canada, 1935, which was passed, as appears from the recitals contained in the preamble of the said Act, for the purpose of giving effect to certain recommendations contained in the report of the Royal Commission on Price Spreads.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing

and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is the *Dominion Trade and Industry Commission Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

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E. J. LEMAIRE,  
*Clerk of the Privy Council.*

Section 2 (h) of the Act, referred to in the judgment, reads as follows:

“Laws prohibiting unfair trade practices” means the provisions of the *Agricultural Pests Control Act*, *The Canada Grain Act*, the *Combines Investigation Act*, the *Dairy Industry Act*, the *Electrical Units Act*, *The Electricity Inspection Act, 1928*, the *Feeding Stuffs Act*, the *Fertilizer Act*, the *Fish Inspection Act*, the *Food and Drugs Act*, *The Fruit, Vegetables and Honey Act*, the *Gas Inspection Act*, the *Inspection and Sale Act*, the *Live Stock and Live Stock Products Act*, *The Maple Sugar Industry Act, 1930*, the *Meat and Canned Foods Act*, *The Natural Products Marketing Act, 1934*, *The Patent Act, 1935*, the *Petroleum and Naphtha Inspection Act*, *The Precious Metals Marking Act, 1928*, the *Proprietary or Patent Medicine Act*, the *Seeds Act*, the *Trade Mark and Design Act*, *The Unfair Competition Act, 1932*, the *Water Meters Inspection Act*, the *Weights and Measures Act*, and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the *Criminal Code*, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest.”

\* The judgment of the Court was delivered by

DUFF C.J.—The sections which require consideration are sections 14, 16, 17, 18, 20, 21 and 22.

As to section 14, we cannot perceive any ground for holding that the enactments of this section are necessarily incidental to the exercise of any powers of the Dominion in relation to the criminal law. Nor can the section, we think, be sustained as legislation in relation to the regulation of trade and commerce consistently with the passage

\* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

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quoted from the judgment of the Judicial Committee in *Snider's* case (1), in the reasons given in the judgment upon the Reference concerning the *Natural Products Marketing Act*. It is to be observed that this section contemplates action by the Commission and by the Governor in Council in respect of individual agreements which may relate to trade that is entirely local.

If confined to external trade and interprovincial trade, the section might well be competent under head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent; but as it stands, we think this section is invalid.

As regards sections 16 and 17, it would appear that in view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may (as seems to be suggested by the judgments of the Judicial Committee in the *Board of Commerce* case (2) and in *Proprietary Articles Trade Association v. Attorney-General for Canada* (3), exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration; for that reason we think these two sections, 16 and 17, are *intra vires*. Subsection 3 of section 17 would seem to be reasonably ancillary to the principal provisions of the two sections.

As to sections 18 and 19, it is not necessary to pass upon the question whether or not the exclusive legislative jurisdiction of the Dominion extends to the subject of trade marks in virtue of subdivision 2 of section 91, "The regulation of trade and commerce." The so-called trade mark is not a trade mark in any proper sense of the term. The function of a trade mark is to indicate the origin of goods placed on the market and the protection given to a trade mark is intended to be a protection to the producer or seller of his reputation in his trade. The function of the letters "C.S.," as declared by section 18 (1), is something altogether different. That subsection is really an attempt to create a civil right of novel character and to vest it in

(1) [1925] A.C. 396.

(2) [1922] 1 A.C. 191, at 201.

(3) [1931] A.C. 310.

the Crown in right of the Dominion. Generally speaking, except when legislating in respect of matters falling within the enumerated subjects of section 91, Parliament possesses no competence to create a civil right of a new kind which, if validly created, would be a civil right within the scope and meaning of head no. 13 of section 92. The second subsection is also objectionable as attempting to control the exercise of a civil right in the provinces.

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Section 19 is merely subsidiary to section 18 and necessarily falls with it.

The first part of section 20 would appear to be unobjectionable as respects enactments mentioned in section 2 (*h*) which may be *intra vires* of Parliament. As regards the validity of these enactments we have only heard argument in respect of two of them; the *Natural Products Marketing Act* and section 498A of the Criminal Code. We have elsewhere given our reasons for considering the first of these *ultra vires*. As to the second of them (section 498A of the Criminal Code) a majority of the Court hold that section to be *intra vires* in its entirety (Cannon and Crocket JJ. dissenting as to subsection (*a*) of that section).

As to sections 21 and 22, it would appear that authority to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (*h*) as may be competent. We do not think it can be said that the authority to provide for the prosecution of criminal offences falls "strictly" within the subject "Criminal law and criminal procedure,"—head 27 of the enumerated heads of section 91; but our view is that the authority to make such provision, and the authority to enact conditions in respect of the institution and the conduct of criminal proceedings is necessarily incidental to the powers given to the Parliament of Canada under head no. 27 (*Proprietary Articles Trade Association v. Attorney-General for Canada*) (1).

This reasoning would appear to apply to the question of the validity of subsection 1 of section 15 and the second part of section 20, which, accordingly, seem to be valid.