

5, 1932

# In the Privy Council.

No. 58 of 1931.

CANADIAN  
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APPELLANTS' CASE.

## ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

BETWEEN

JOHN FARQUHAR LYMBURN (Attorney-  
General for the Province of Alberta) and  
JAMES JOSEPH FRAWLEY ... .. (Defendants) Appellants,

AND

ALBERT HENRY MAYLAND and MERCURY  
OILS LIMITED ... .. (Plaintiffs) Respondents,

AND

THE ATTORNEY-GENERAL FOR CANADA,  
THE ATTORNEY-GENERAL FOR THE  
PROVINCE OF QUEBEC and THE  
ATTORNEY-GENERAL FOR THE PRO-  
VINCE OF ONTARIO ... .. Interveners.

### APPELLANTS' CASE.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta delivered on the 23rd April, 1931, declaring that section 9 of "The Security Frauds Prevention Act 1930" (Statutes of Alberta 20 George V. chapter 8) had no application to Companies incorporated under legislation of the Dominion of Canada and that the Appellants had no authority to conduct a certain investigation pursuant to the said Act. Record.  
pp. 43-44.

2. The Act, the full title of which is "An Act for the Prevention of Fraud in connection with the sale of securities," is printed in the Record. pp. 60-75.

10 Part I of the Act requires all brokers including officials of partnerships and companies and their salesmen to be registered; permits but does not require partnerships and companies to apply for registration in lieu of their officials; prohibits, subject to a number of exceptions, the trading in p. 62, l. 28.

## Record.

- p. 65, l. 9. securities by any person not so registered and requires security to be given.
- p. 67, l. 16. Part 2 of the Act provides for investigation and action by the Attorney-General of the Province. The Attorney-General or his representative is authorised to hold examinations in order to ascertain whether any fraudulent act or any offence against the Act or the regulations made thereunder has been, is being, or is about to be, committed and to enforce the attendance of witnesses. Provision is also made for the temporary suspension by the Attorney-General of the registration of any Broker, Company or Salesman and for the enjoining by order of the Court of any Broker, company or salesman committing fraudulent acts from trading in any security or securities. The Attorney-General may also in certain circumstances direct that funds or securities of the person examined, or about to be examined, or against whom proceedings have been, or are about to be taken, should be held and not transferred. Part 3 of the Act provides for the compulsory auditing of Brokers' books by auditors selected by the Executive Committee of a stock exchange annually or, if so ordered by the Executive Committee, at any time. Part 4 enables the Broker's customer in certain circumstances to avoid marginal transactions and requires Brokers to give to the customers a written confirmation of each transaction. Part 5 contains general provisions including penalties for the violation of any provision of the Act. 20
- p. 68, l. 16.
- p. 68, l. 33.
- p. 69, l. 26.
- p. 70, l. 35.
- p. 72, l. 38.
- p. 73, l. 17.
- p. 74, l. 27.

3. In all but one of the Canadian Provinces statutes similar in character to the Security Frauds Prevention Act of Alberta have recently been passed. These Acts are : in Ontario 20 Geo. V. chapter 39 ; in Quebec 20 Geo. V. chapter 88 ; in Nova Scotia 20 Geo. V. chapter 3 ; in Manitoba 19 Geo. V. (1929) chapter 48 and 20 Geo. V. chapter 36 ; in Saskatchewan 20 Geo. V. Chapter 74 ; in Prince Edward Island 19 Geo. V. (1929) chapter 8 ; and in British Columbia 20 Geo. V. chapter 64.

4. Section 9 of the Act, the validity of which in relation to Companies incorporated under legislation of the Dominion of Canada is in question, is in part as follows :— 30

- p. 67, l. 17. “ 9. (1) The Attorney-General, or any person or persons to whom as his representative or representatives he may in writing delegate such authority, may examine any person, company, property or thing whatsoever at any time in order to ascertain whether any fraudulent act, or any offence against this Act or of the Regulations has been, is being, or is about to be committed, and for such purpose shall have the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath and to produce documents, records and things as is vested in the Supreme Court or a Judge thereof for the trial of civil cases, save that the provisions of rules of Court or of law relating to the service of subpoenas upon and to the payment of conduct money or witness fees to witnesses shall not apply and save further that no person shall be entitled to claim any privilege in respect of any document, record or thing asked for, given or produced, on the ground that he might be incriminated or exposed to a penalty or to civil litigation 40

thereby, and no evidence given shall be privileged except under The Alberta Evidence Act and The Canada Evidence Act, and save further that no provisions of The Alberta Evidence Act shall exempt any bank or any officer or employee thereof from the operation of this section. Record.

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“(4) Disclosure by any person other than the Attorney-General, his representative or the Registrar, without the consent of any one of them, of any information or evidence obtained or the name of any witness examined or sought to be examined under subsection (1) shall constitute an offence.” p. 68, l. 11.

10 5. Pursuant to the Act the Appellant Lymburn, as Attorney-General of Alberta, proceeded to conduct an examination respecting the Respondent the Mercury Oils Limited and another Company known as Mill City Petroleum Limited. Both of these Companies are incorporated under the Companies Act of the Dominion of Canada. For the purpose of the examination the Attorney-General appointed as his representative the Appellant Frawley. p. 4, l. 12.  
p. 6, l. 30.  
p. 8, l. 12.  
p. 5, l. 14.  
p. 6, l. 10.

6. In accordance with notices for examination Counsel for the Respondents and for Mill City Petroleum Limited attended before the Appellant Frawley on the 27th February, 1931, and took objection to the 20 competency of the investigation and the constitutionality of the Security Frauds Prevention Act and the investigation was adjourned. p. 23.

7. On the 10th March, 1931, the Respondents brought an action in the Trial Division of the Supreme Court of Alberta and by statement of claim delivered on the 10th March, 1931, claimed a declaratory judgment, an injunction restraining the Appellants from proceeding with the investigations and from examining the Respondent Mayland or examining into the affairs of the Respondent Company, in the alternative an injunction restraining the Appellants from proceeding with the investigations and examinations save in respect of such matters and within such limits as the 30 Court was of opinion were proper and lawful, an interim injunction and other relief. pp. 3-13.

8. The Respondents moved for an interim injunction to prevent the Appellants from proceeding with the investigation or examination and the Court (Ives J.) on the 20th March, 1931, ordered that the application be referred to the Appellate Division of the Supreme Court of Alberta. p. 14.

9. By the judgment of the Appellate Division delivered on the 23rd April, 1931, it was declared that section 9 of the Security Frauds Prevention Act had no application to the Companies in question and that the Appellants had no authority to proceed with the examinations and investigations and 40 that there should be final judgment to that effect. p. 44, l. 18.

Record.  
pp. 38-43. **10.** The Reasons for the judgment of the Appellate Division (Harvey C.J.A., Walsh and Clarke JJ.A.) were delivered by Chief Justice Harvey.

The learned Chief Justice observed :—

p. 40, l. 21. “ It is a matter of such common knowledge that the Court may notice it judicially that in recent years there has been much speculation in stocks and shares and that in this and other Provinces there have been prosecutions of brokers for frauds in connection with the sales of securities and that convictions and imprisonments have resulted. That, however, has all been under the Dominion criminal law though it may be that assistance has been given by the aid of such statutes 10 as the one under consideration, which Mr Frawley states is a uniform Act existing in different Provinces. . . .”

p. 40, l. 15. While the provisions of section 9 of the Act were very drastic the learned Chief Justice considered that they came within the power to make laws respecting “ Property and Civil rights ” conferred upon the Provinces by the British North America Act. Dealing with certain provisions of the Act and particularly section 20 imposing penalties for fraudulent acts not punishable under the provisions of the Criminal Code the Chief Justice came to the conclusion that such imposition of penalties was *ultra vires* but he considered that these provisions were severable from those under con- 20  
p. 41, l. 14. sideration. Although section 9 of the Act was within the authority of the provincial legislature it did not follow, in the opinion of the Court, that it might not be *ultra vires* in its application to Dominion Companies. The limitation of the right of a Province to legislate with respect to Dominion Companies had recently been considered by the Court in the Case *In re Royalite Oil Co. Ltd.* (1931) 1, W.W.R. 484 where it had been pointed out that a Dominion Company could not be prevented by provincial legislation from exercising the powers conferred upon it by its Dominion charter, but could be compelled to submit to competent general provincial legislation and could be required to furnish information relating to its affairs of which it was 30  
p. 41, l. 28. reasonable that the public dealing with it should have knowledge. But it had been held that a clause which authorised the Registrar of Companies to demand information without qualification could not apply to a Dominion Company because the legislature could not delegate an unfettered authority which it did not itself possess. This seemed to apply with equal force to the provisions of section 9 of the Security Frauds Prevention Act. A legis-  
p. 42, l. 1. lature having a limited right to obtain information from Dominion Companies certainly could not authorise the Attorney-General to obtain informa-  
p. 42, l. 40. tion without limitation. In this view it was unnecessary to decide whether the legislation in question was inapplicable to Dominion Companies on the 40 ground that the field was not open to the Province either as being Company legislation or by reason of the Dominion having occupied the field.

**11.** The judgment in the case of *In re Royalite Oil Co. Ltd.* is reported in (1931) 1 W.W.R. at page 484. The Royalite Oil Company had been incorporated under the Companies Act of the Dominion of Canada and by agreement between the Attorney-General and the Company a case had been

stated for the purpose of obtaining a declaration of the Court as to the validity or the applicability to the Company of certain sections of the Alberta Companies Act (chapter 14 of 1929) as amended by the Companies Act Amendment Act (chapter 12 of 1930).

Record.

By the Alberta Companies Act all foreign Companies (*i.e.*, all Companies not incorporated under provincial legislation) are required to be registered within thirty days after commencing to carry on business in Alberta and such Companies are by Section 135 required to file with the Registrar of Joint Stock Companies a statement containing certain specified  
 10 particulars including the name of the Company, the place and date of incorporation, the paid up capital, the address of the head office and the principal office within the Province, the address of the Company's Attorney in the Province, etc., and lastly "*(l)* such other information as the Registrar may require." The Act provides that upon receipt of the statement and other documents, etc., prescribed "the Registrar shall register the Company and issue . . . a certificate of registration." The Amending Act, Chapter 12, of 1930, Section 24 provides: "Nothing in this Act shall apply to any  
 "Dominion Company so as to affect its right to do business in the Province." p. 52.

The judgment of the Court (Harvey C.J.A., Clarke, Mitchell and  
 20 Lunney J.J.A.) was delivered on the 20th February, 1931, by Chief Justice Harvey. After reviewing the authorities and examining the sections of the Act, the Court expressed the opinion that in framing the Act care had been exercised to avoid the errors of the legislation previously held invalid; that it was as clear as words could make it that the purpose of the Act was not to make the performance of any of the prescribed requirements a condition of the Company's right to carry on its business in the Province; but that if the legislature had imposed conditions with which a Dominion Company could not comply, or perhaps could not reasonably be expected to comply, this might belie the words used.

30 The Court considered that all the information required by Section 135 of the Act seemed reasonably required and capable of being furnished without difficulty except the last head "*(l)* such other information as the Registrar may require." Under this head something might possibly be demanded which the Company was unable or ought not to be asked to furnish. The failure to register while not preventing the Company from carrying on business, might subject it to penalties and prevent it having power to acquire land. To place this unlimited power in the hands of an official could not be justified since it enabled the official to impose a condition which if imposed directly by the Act would be held unwarranted. It was accordingly held that the  
 40 clause, so far as it directed that the statement should include "such other information as the Registrar may require," was not applicable to Dominion Companies. Other sections of the Act were considered.

12. With regard to the case of *In re Royalite Oil Co. Ltd.* it is submitted that the giving of information required by the Registrar could not affect

the Company's status, capacity or its right to carry on business and alternatively, that the clause in question might fairly have been construed as applying only to such information as the Registrar might lawfully require.

13. In the present case it is submitted that an inquiry under Section 9 of the Security Frauds Prevention Act is definitely limited to ascertaining whether a fraudulent act or an offence against the Act has been, is being or is about to be committed and that the inquiry could not trench upon the status and capacity of the Company or interfere with its right, subject to compliance with the general law, to carry on its business or issue its shares in the Province, and that there is no valid reason why a Dominion Company 10 should be exempt from the provisions of the Act. If in the course of any such inquiry touching the affairs of a Dominion Company the giving of any information were alleged to be likely to interfere with the status or capacity of the Company or with its right, subject to compliance with the general provincial law, to carry on its business or issue its shares in the Province, it would be open to the officers of the Company to withhold such information pending a decision by the Court. With reference to the observations of the Chief Justice in regard to Section 20 of the Security Frauds Prevention Act it is submitted that the fraudulent acts referred to are fraudulent acts as defined by the Act and Regulations and that it 20 is competent for the Province to impose penalties in such cases.

14. The Appellants submit that the judgment of the Appellate Division of the Supreme Court of Alberta, dated the 23rd April, 1931, is wrong and ought to be reversed and that Section 9 of the Security Frauds Prevention Act should be declared applicable to Dominion Companies for the following, among other,

### REASONS.

1. Because the Appellate Division was right in holding that Section 9 of the Security Frauds Prevention Act was valid provincial legislation but wrong in declaring that 30 Dominion Companies were exempt from its provisions.
2. Because the purpose of the Act is to prevent citizens of the Province being defrauded by brokers and others in connection with contracts for the sale and purchase of shares in the Province.
3. Because Dominion Companies are bound to conduct their business subject to the general law of the Province.
4. Because the Province has power to conduct inquiries in regard to any breach or supposed or anticipated breach of provincial law by any person or company within the 40 Province.

5. Because the inquiry under Section 9 of the Act is definitely limited to ascertaining whether a fraudulent act as defined by the Act or an offence against its provisions has been, is being or is about to be committed.
6. Because the subject matter of the Act is within the classes of subjects assigned to the Provincial Legislatures by Section 92 of the British North America Act 1867.
7. Because the investigation authorised by Section 9 of the Act is not an interference with the status or capacity of the Company investigated or its power to carry on its lawful business.
8. Because it has not been shown that the investigation directed in the present case would affect the status or capacity or power to do business of the Respondent Company.

W. N. TILLEY.

W. S. GRAY.



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APPELLANTS' CASE.

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