

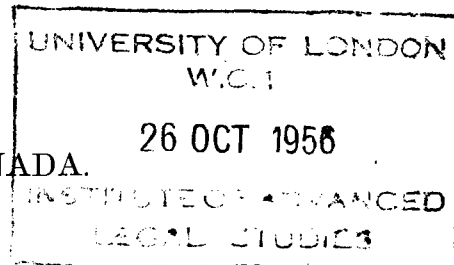
77, 1943

No. 19 of 1942.

In the Privy Council.

**ON APPEAL**  
FROM THE SUPREME COURT OF CANADA.

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BETWEEN—

ATLANTIC SMOKE SHOPS LIMITED

(Plaintiff) *Appellant*

— AND —

JAMES H. CONLON, JOHN McDONOUGH  
and THE ATTORNEY-GENERAL OF THE  
PROVINCE OF NEW BRUNSWICK

(Defendants) *Respondents*

— AND —

THE ATTORNEY-GENERAL OF THE  
PROVINCE OF QUEBEC and THE  
ATTORNEY-GENERAL OF CANADA

*Intervenants.*


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## Case for the Appellant.

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RECORD.

- 20 1. This is an appeal from a judgment of the Supreme Court of Canada dated the 5th January 1942, dismissing by a majority an appeal by the Appellant from a judgment of the Supreme Court of New Brunswick, Appeal Division, dated the 3rd December 1940, and holding that substantially the whole of the Tobacco Tax Act of New Brunswick, being chapter 44 of 4 Geo. VI. (hereinafter called "the Tobacco Tax Act") and all the regulations (hereinafter called "the Regulations") made thereunder are within the legislative powers of the Province of New Brunswick.

pp. 142-3

pp. 26-7

pp. 6-10

pp. 10-17

pp. 6-10

2. The Appeal raises questions as to the validity of the Tobacco Tax Act, the main purport of which is to provide for the levying, on the occasion of every retail sale of tobacco or cigarettes within the Province, and of ad valorem tax on the sale price, payable by the purchaser. The most important of these questions, but not the only one, is whether this tax falls within the definition of "direct taxation within the Province" in head 2 of section 92 of the British North America Act, 1867.

3. The material provisions of the Tobacco Tax Act are as follow:—

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## INTERPRETATION.

s.2. In this Act, unless the context otherwise requires:—

(a) "Consumer" or "Consumer of Tobacco" means any person who within the Province purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal . . . . . 20

(d) "Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(e) "Retail sale" means a sale to a consumer for purposes of consumption and not for resale.

(f) "Retail Vendor" means any person who, within the Province, sells tobacco to a consumer . . . . .

## LICENSES OF VENDORS.

s.3. (1) No person shall sell any tobacco in the Province for resale unless he holds a wholesale vendor's license issued to him under authority of this Act and such license is in force at the time of sale. 30

(2) No person shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under authority of this Act and such license is in force at the time of sale.

(3) No wholesale vendor shall sell any tobacco in the Province for resale in the Province to a person who is not a vendor duly licensed under this Act. 40

p. 6, l. 30 to  
p. 7, l. 12

p. 7, ll. 14-28

(4) Vendors' licenses and such other licenses as may be prescribed by the regulations shall be issued annually by the Minister upon payment of such fee or fees as may be required by the regulations. All licenses shall expire on the thirtieth day of June following the issue thereof.

(5) The Minister may cancel or suspend any license for failure to comply with any of the provisions of this Act.

#### TAX ON CONSUMERS.

10 s.4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased. p. 7, ll. 30-34

20 s.5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price . . . . p. 7, ll. 34-45

#### ABSORPTION OF TAX PROHIBITED.

30 s.7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded. p. 8, ll. 4-8

#### COLLECTION OF TAX.

s.8. The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe. p. 8, ll. 10-12

40 s.9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax. p. 9, ll. 13-14

## CONSUMER LIABLE TO TAX UNTIL PAID.

p. 9, ll. 16-17 s.10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

pp. 10-17 4. It is unnecessary to set out any of the Regulations as it is common ground that the question of their validity stands or falls with that of the validity of the Tobacco Tax Act.

pp. 1-3 5. As a convenient method of testing the validity of the Act, the Appellant issued a writ on the 2nd November 1940 in the Chancery Division of the Supreme Court of New Brunswick, claiming an injunction restraining the Respondents (who were 10 officers of the Provincial Government) and each of them from entering upon the store premises of the Appellant in the City of St. John, or from accosting, questioning, or otherwise interfering with customers of the Appellant while on those premises, or on the streets adjacent thereto, with reference to any purchase of tobacco or the payment of any tobacco tax under the authority of the Tobacco Tax Act or the Regulations.

pp. 3-5 6. The parties concurred in stating, in the form of a Special Case for the opinion of the Court, the questions of law arising, as follow:— 20

p. 4, ll. 15-18 "1. That the Plaintiff, Atlantic Smoke Shops Limited" (the now Appellant) "is a corporation duly incorporated by "letters patent issued under the Companies Act of the Dominion "of Canada and having its head office at the City of Saint John "in the Province of New Brunswick.

p. 4, ll. 19-23 "2. That on the eleventh day of May, A.D. 1940, the legis-  
pp. 6-10 "lature of the Province of New Brunswick purported to enact a "statute, being Chapter 44, 4 George VI, cited as 'The Tobacco "Tax Act'. The said Act came into force on the 1st day of "October 1940 by proclamation of the Lieutenant-Governor in 30  
"Council.

p. 4, ll. 24-26 "3. That under the authority of the said Act the  
pp. 10-17 "Lieutenant-Governor in Council purported to make regulations "styled 'Regulations Under Tobacco Tax Act'.

p. 4, ll. 27-31 "4. That on the fifteenth day of October, A.D. 1940, the  
"said Atlantic Smoke Shops Limited opened a store on the  
"north-east corner of Waterloo and Peters Streets in the said  
"City of Saint John, and thereafter carried on and now carries  
"on therein the business of selling tobacco, including cigars and  
"cigarettes. 40

p. 4, ll. 32-34 "5. That the said Plaintiff carried on and now carries on  
pp. 6-10, 10-17 "its said business without having obtained any license so to do  
"under the Tobacco Tax Act or the said regulations.

- “6. That in its said store the said Plaintiff has since the  
 “fifteenth day of October, A.D. 1940, sold and is now selling at  
 “retail sale tobacco, including cigars and cigarettes, manufac-  
 “tured in provinces of Canada other than the Province of New  
 “Brunswick, to persons defined by section 2 (a) of the said  
 “Tobacco Tax Act as ‘Consumers’ or ‘Consumers of Tobacco’,  
 “without collecting the tax imposed by the said Act. p. 4, ll. 35-41  
 p. 6, ll. 30-38
- “7. That the Defendant, James H. Conlon” (the respon- p. 4, l. 42 to  
 p. 5, l. 3  
 10 “Tax Act appointed to the office of Tobacco Tax Commissioner, pp. 6-10  
 “being the office created under the regulations hereinbefore pp. 10-17  
 “referred to, and has since occupied and now occupies said  
 “office.
- “8. That on the second day of November, A.D. 1940 and p. 5, ll. 4-17  
 “from time to time thereafter, the defendant John McDonough”  
 (the respondent McDonough) “an inspector appointed under the  
 “said Act, and others, all acting under the instructions of the  
 “other defendants, entered upon the plaintiff’s said premises  
 “and proceeded to question customers of the plaintiff as to  
 20 “whether they had paid the provincial tax on the tobacco  
 “purchased by them from the plaintiff, to ask them to produce  
 “their tobacco tax receipts and to demand their names and  
 “addresses. The said defendant John McDonough and other  
 “persons so entering the said premises as aforesaid refused to  
 “leave the same when requested so to do by the plaintiff, and  
 “claimed that they were entitled to remain therein and to  
 “question the said customers of the plaintiff by virtue of  
 “certain provisions of the said Tobacco Tax Act and the regu- pp. 6-10, 10-17  
 “lations made thereunder.
- “9. That by reason of the said actions of the defendants p. 5, ll. 18-20  
 30 “the said business of the plaintiff has been and is now being  
 “injuriously affected . . . .
- “The question for the opinion of the Court is whether the p. 5, ll. 24-37  
 pp. 6-10  
 “Tobacco Tax Act, or any of the provisions thereof, and or the  
 “Regulations made thereunder or any of them, and in what parti-  
 “cular or particulars or to what extent, are *ultra vires* of the Legis- pp. 10-17  
 “lature of the Province of New Brunswick.
- “If the Court shall be of opinion that the said Act and Regula- pp. 6-10, 10-17  
 40 “tions are wholly *intra vires*, this action shall be dismissed.
- “If the Court shall be of opinion that the said Act and Regula- pp. 6-10, 10-17  
 “tions are wholly *ultra vires*, judgment shall be entered in favour  
 “of the plaintiff and against the defendants for an Injunction Order  
 “in the terms of the claim endorsed on the Writ of Summons herein.

pp. 6-10, 10-17

"If the Court shall be of the opinion that the said Act and Regulations or any of them are *intra vires* in part and *ultra vires* in part, the Court shall make such Order, by way of declaration and or by way of substantive relief to the plaintiff, as it shall deem right and proper."

pp. 18-25, 26

pp. 6-10, 10-17

7. The Case was argued before the Supreme Court of New Brunswick, Appeal Division (Baxter C.J., Grimmer and Richards, JJ.) which gave a unanimous judgment on the 3rd December 1940, holding that the Tobacco Tax Act and the Regulations were *intra vires* as being within the constitutional powers of the Province of New Brunswick. 10

pp. 26-7

8. The Appellant appealed from this judgment to the Supreme Court of Canada.

pp. 61, ll. 25-6

pp. 6-10, 10-17

pp. 70-75

pp. 75-101

9. In the Supreme Court of Canada the Attorney-General of the Province of Quebec applied and by Order dated the 1st February 1941 was allowed to intervene on the Appeal inasmuch as the Tobacco Tax Act and Regulations were closely similar to a Quebec Statute, being Chapter 15 of the Statutes of 1940, 4 Geo. VI, entitled "The Tobacco Tax Act", the validity of which was then being attacked before the Courts of the Province of Quebec by petition for a Writ of Prohibition. 20

pp. 142-3

p. 143, ll. 10-11

pp. 6-17

10. The Supreme Court of Canada (Sir Lyman Duff, C.J., and Rinfret, Crocket, Davis, Kerwin, Hudson, and Taschereau, JJ.), gave judgment on the 7th October 1941, holding by a majority that the whole of the Tobacco Tax Act "with the exception of the provisions thereof making the agent liable for the tax", and the Regulations were within the legislative powers of the Province.

pp. 142-3

p. 143

11. The said judgment was not formally settled until the 5th January 1942, and meanwhile by Order dated the 15th November 1941 the Attorney-General of Canada was allowed to intervene in the Appeal. 30

pp. 107-113

pp. 6-10

pp. 114-127, 127,134.

pp. 6-10

pp. 134-5, pp. 6-10

p. 7, ll. 35-45

p. 6, ll. 31-38

p. 135 pp. 135-142.

pp. 6-10

p. 7, ll. 31-38

12. The seven learned judges of the Supreme Court differed considerably in opinion. Sir Lyman Duff, C.J. and Mr. Justice Davis were of opinion that the entire Tobacco Tax Act was *ultra vires* of the Province. Mr. Justice Rinfret and Mr. Justice Crocket held that the entire Tobacco Tax Act was *intra vires* of the Province. Mr. Justice Kerwin held that the Tobacco Tax Act was *intra vires* except as to those portions thereof which provide for the taxation of tobacco brought into the Province from outside and those portions which bring within the definition of "consumer" an agent purchasing tobacco for his principal. Mr. Justice Hudson and Mr. Justice Taschereau held that the Tobacco Tax Act was *intra vires* except as to the portions designed to include the agent as above mentioned. 40

13. The Chief Justice, Sir Lyman Duff, with whose reasons for judgment Mr. Justice Davis concurred, held that the appeal should be allowed. pp. 107-113

In his view the payment of the tax under section 4 of the Statute was not only a condition of legal purchase but also an integral element in the transaction of sale and purchase passing from the purchaser to the vendor as part of the price to the purchaser. p. 7, ll. 30-34  
p. 109, l. 34  
p. 110, l. 10

As regards section 5, the tax, he thought, was a tax on tobacco in respect of the import of it for consumption, and although not collected in a manner in which customs duties were collected by the Dominion Government was in the nature of a duty of customs. p. 7, ll. 35-45  
p. 110, ll. 11-26

Dealing with the Judgment of the Privy Council in *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* (1934) A.C. 45, he drew attention to the distinction between typical direct taxes and those taxes which are indirect because p. 110, l. 35-  
p. 111, l. 21

“the taxing authorities are indifferent as to who ultimately bears the burden, such as taxes in respect of transactions and taxes in respect of some dealing in commodities, such as their import or sale”

20 and said:—

“I have said sufficient to show why, in my opinion, the tax imposed by section 4 is a tax in respect of a dealing with tobacco, the sale and purchase of it, and this dealing falls. I think, within the class of dealings with commodities envisaged by such passages in their Lordships’ judgment” p. 7, ll. 30-34

Dealing with the contention that it was a tax in respect of consumption, he said:— p. 111, l. 22 to  
p. 112, l. 9

30 “The tax is not payable by the consumer as such. It is payable by the purchaser, or the agent of the purchaser, and the Statute itself contemplates that neither of them may be the consumer. No liability attaches to the consumer as such. To repeat, in the practical administration of the Act there can be no manner of doubt that the payment of the tax and the delivery of the receipt take place as acts in the transaction of sale and purchase. The matter of consumption never comes into question”.

As to the contention that the Act particularly declared that the tax was payable in respect of consumption, he said:— p. 112, ll. 10-23

40 “It is especially important, I think, in the application of Mill’s test not to be led away by legislative declarations, or collateral legislative provisions, imparting to the legislation a form calculated to give a colour of legality to the legislative effort”.

(NOTE: The definition of John Stuart Mill referred to by his Lordship runs as follows:—

“Taxes are either direct or indirect. A direct tax is one “which is demanded from the very persons who it is intended “or desired should pay it. Indirect taxes are those which are “demanded from one person in the expectation and intent that “he shall indemnify himself at the expense of another; such “are the excise or customs”).

p. 112, l. 24 to  
p. 113, l. 43

Turning again to section 5, the learned Chief Justice found that it imposed a tax within section 122 of the British North America Act (which deals with “customs and excise laws”) and an excise duty within the meaning of the judgment in the *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* (*supra*). He also found that section 5 came within the ban of section 121 of the British North America Act (which provides that all articles of the growth produce or manufacture of any province shall be admitted free to any other province), and was moreover an enactment in regulation of trade and commerce within the ambit of the exclusive authority in relation to that subject vested in the Dominion by head 2 of section 91. Finally, he held that the provision making the tax under section 4 payable by the agent where the purchase was made by an agent was invalid. 10

p. 7, ll. 35-45

p. 7, ll. 30-34

pp. 114-127  
pp. 6-10

14. Mr. Justice Rinfret found that under the Tobacco Tax Act the only person who it was intended should be taxed was the consumer, and that it did not matter that the tax was imposed before consumption. He found that the Act was framed in such a way that the legislature has indicated its intention that the person on whom the tax was imposed would bear it himself, and that the effect of the tax was intended to be confined to the Province of New Brunswick. 20

p. 122, l. 41-

p. 124, l. 13

p. 124, ll. 14-47

Dealing with the contention that the tax was indirect because the agent was taxed in respect of his transaction on behalf of his principal, he held this feature to be almost negligible, and said:—

“The amount of tax at all events would be but a trifle; and “the instances where it may happen that the messenger would “advance the money would be extremely scarce. I would be “very loath to declare a provincial statute unconstitutional on “such a slim objection”.

p. 125, ll. 1-15

Moreover he doubted whether the occurrence in such a case could really be described as “passing on”. In any event he thought this feature of the Act was severable. 40

p. 125, l. 18 to  
p. 126, l. 7

He could not agree that the Act imposed a customs or excise duty, considering it an important element that the consumer paid the tax only after delivery, or after he had come into possession of the tobacco.



Dealing with section 121 of the British North America Act, he did not find that the taxing Statute prevented free entry into the Province. p. 126 ll. 8-29

Dealing with the contention that the license required from the vendors was not one authorized by head 9 of section 92 of the British North America Act, he found that a license could be required by a province as a means of collecting a valid tax, or as a means of compelling those entrusted with the duty of collecting a tax to comply with that duty. p. 126, l. 33 to p. 127, l. 12

10 He found the tax valid as a whole.

15. Mr. Justice Crocket concurred with Mr. Justice Rinfret. pp. 127-134

In considering whether the tax could be passed on, he referred to the terms of section 7 of the Act, which prohibit the absorption of the tax in the price. p. 130, ll. 21-6 p. 8, ll. 4-8

16. Mr. Justice Kerwin held the tax to be a direct tax, but held that in two respects the Act was partially *ultra vires*, the first being in respect of the imposition of the tax on an agent by the words in section 2 (a) which provide that "consumer" means "any person who purchases on behalf of  
20 "or as agent for a principal who desires to acquire such tobacco for "consumption by such principal or other persons at the expense of "such principal", and the second being the important provisions of section 5 which, he found, infringed section 121 of the British North America Act. He found these two sections to be severable, and apart from them he held the Act to be *intra vires*. pp. 134-5 p. 134, l. 34 to p. 135, l. 10 p. 6, ll. 31-38 p. 7, ll. 35-45

17. Mr. Justice Hudson agreed with Mr. Justice Rinfret, except as to the personal liability imposed by the Act on an agent. This, he thought, overstepped the limits of provincial legislative power. p. 135, ll. 16-20 p. 6, ll. 31-38

18. Mr. Justice Taschereau found that the tax was direct as  
30 incapable of being passed on. pp. 135-142

On the point that the tax was not "direct taxation within the Province", he said: p. 138, ll. 35-38

"The purchaser pays the tax at the time and place he purchases the commodity. Although this tax has been called "a consumption tax, it is more a purchasing tax which is paid "by the last purchaser, who is deemed to be the consumer".

Section 121 of the British North America Act he found inapplicable, as the tax was imposed only after the importation was made, and the importation did not depend upon the payment of the tax. p. 139, l. 1 to p. 140, l. 7  
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p. 140, ll. 8-16  
p. 7, ll. 14-28

As for the licensing provisions (i.e. sect. 3 of the Act), he held that the Provinces may provide for licenses not only for the purpose of raising revenue, but as an incident to any one of their other powers.

p. 140, ll. 32-35;

Dealing, however, with the tax on the agent, he said:

p. 141, ll. 38-9

“It is clear . . . that the agent who purchases tobacco for his principal is personally liable for the payment of the tax. To my mind, this disposition has the effect, when such a transaction is made, to make the tax an indirect tax . . . It is imposed upon him (the agent) but it was obviously the intention of the legislature that he should indemnify himself at the expense of his principal”.

His conclusion, therefore, was that the Statute was within the powers of the province except the sections making the agent who buys tobacco for his principal personally liable for the tax.

pp. 142-3  
pp. 6-10

19. The Appellant humbly submits that this Appeal should be allowed and that the judgment of the Supreme Court of Canada should be reversed and the Tobacco Tax Act of New Brunswick (Chapter 44 of 4 Geo. VI) declared to be wholly invalid for the following amongst other

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### REASONS.

1. Because the tax sought to be imposed by the said Act is not “direct taxation”; in its pith and substance it is a tax levied on a purchaser in respect of the transaction of sale and purchase in which he engages or in respect of the tobacco which he acquires thereby; it is not in truth a tax on consumption, and is levied irrespective of whether the tobacco is consumed or not.
2. Because the said tax is not “taxation within the province”: the tobacco in respect of the sale whereof the tax is levied may be consumed within or without the province, and the tax is payable irrespective of the place of consumption.
3. Because the provincial legislature cannot do indirectly what it cannot do directly.
4. Because the Act trespassed upon the exclusive legislative power of the Dominion of Canada to impose duties of custom and excise.
5. Because the Act conflicts with sect. 121 of the British North America Act, which provides that all articles

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of the growth produce or manufacture of any of the provinces shall be admitted free into each of the other provinces.

6. Because the provision of the licenses mentioned in the Act is not within the legislative power of the Province.
7. Because the provisions as to levying the tax on agents for purchase are not reasonably severable from the rest of the Tobacco Tax Act.
8. Because section 5 of the Act is a provision for the "regulation of trade and commerce".
9. Because the judgments of the Chief Justice and of Mr. Justice Davis and the reasons given therefor are correct.

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D. N. PRITT.

E. HOLROYD PEARCE.

In the Privy Council.

**ON APPEAL**

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*Intervenants.*

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**Case for the Appellant.**

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