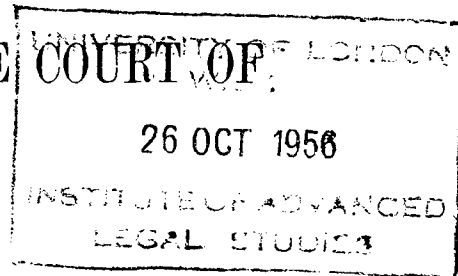


In the Privy Council.

No. 19 of 1942.

ON APPEAL FROM THE SUPREME
CANADA.

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 PRO-
VINCE OF QUEBEC, AND THE ATTORNEY-
GENERAL OF CANADA *Intervenants*.CASE OF THE RESPONDENTS.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 7th October, 1941, whereby an appeal by the Appellant from the judgment dated the 3rd December, 1940, of the Supreme Court of New Brunswick, Appeal Division, was dismissed, and whereby it was declared that the Tobacco Tax Act of the Province of New Brunswick (4 Geo. VI (1940), Chapter 44), hereinafter referred to as "the Act" is within the constitutional powers of the Province of New Brunswick with the exception of the provisions thereof making the agent liable for the tax. (Reported 1941, S.C.R. 670.)

Record.
p. 143, l. 6.

10 2. This action was commenced by Writ of Summons dated the 2nd November, 1940, wherein the Appellant (as Plaintiff) claimed an injunction restraining the Respondents (as Defendants) from entering upon the Appellant's store premises at No. 29, Waterloo Street, in the City of Saint John, from loitering about the said premises or on the streets adjacent thereto, from accosting or questioning or otherwise interfering with customers or prospective customers of the Appellant while on the said premises or on the streets adjacent thereto and questioning them with reference to the purchase

p. 2, l. 21.

Record. of tobacco or the payment of any tobacco tax or demanding their names and addresses for any purpose under the alleged authority of the Act or the Regulations made thereunder, and from instructing or authorising any person to do such acts or any of them or any act of a like character.

p. 3, l. 20,
et seq.

3. In pursuance of the Judicature Act of the Province of New Brunswick and the Rules of the Supreme Court, the parties agreed to state a Special Case to the Supreme Court of New Brunswick, Appeal Division, on the validity of the Act and the Regulations made thereunder upon which the Respondents had proceeded.

4. The Special Case can be summarised as follows :—

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p. 9, l. 15.

The Appellant is a Dominion company having its head office in the City of Saint John, in the Province of New Brunswick.

p. 4, l. 19.

On the 11th May, 1940, the Legislature of the Province of New Brunswick enacted the Act, which came into force on the 1st October, 1940, by proclamation of the Lieutenant-Governor in Council.

p. 4, l. 24.

Certain Regulations were made under the authority of the Act, by the Lieutenant-Governor in Council.

p. 4, l. 27.

On the 15th October, 1940, the Appellant opened a store, in the City of Saint John, and thereafter carried on therein the business of selling tobacco, including cigars and cigarettes, without having obtained any license so to do 20 under the Act, or the Regulations.

p. 4, l. 35.

In its store, the Appellant sells at retail sale, tobacco including cigars and cigarettes, manufactured in Provinces of Canada other than the Province of New Brunswick, to persons defined, by section 2 (a) of the Act as "consumers" or "consumers of tobacco," without collecting the tax imposed by the Act.

p. 4, l. 32.

The Respondent James H. Conlon was, on the coming into force of the Act, appointed to the office of Tobacco Tax Commissioner, being an office created under the Regulations.

p. 5, l. 4.

On the 2nd November, 1940, and from time to time thereafter, the Respondent John McDonough, an inspector appointed under the Act, and others, 30 while acting under the instructions of the other Respondents, entered upon the Appellant's premises and proceeded to question customers of the Appellant as to whether they had paid the Provincial tax on the tobacco purchased by them, to ask them to produce their tobacco tax receipt and to demand their names and addresses. They refused to leave the premises when requested so to do by the Appellant, and claimed that they were entitled to remain therein and to question customers by virtue of the Act and the Regulations made thereunder.

p. 5, l. 18.

By reason of these actions of the Respondents, the business of the Appellant had been and is now injuriously affected.

p. 5, l. 24.

The question for the opinion of the Court was whether the Act, or any of the provisions thereof, and the regulations made thereunder, or any of them were *ultra vires* the Legislature of New Brunswick; and, if so, in what particular or particulars.

p. 5, l. 28.

It was agreed that, if the Court should be of the opinion that the Act and the Regulations are wholly *intra vires*, the Appellant's action should be

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dismissed. If the Court should be of the opinion that the Act and the Regulations are wholly *ultra vires*, judgment should be entered in favour of the Appellant and against the Respondents for injunctions in the terms of the writ of summons herein. If the Court should be of opinion that the Act or Regulations, or any of them, are *intra vires* in part and *ultra vires* in part, the Court should make such Order by way of declaration or of substantive relief to the Appellant, as should be deemed right and proper.

Record.

5. The Special Case was submitted to the Supreme Court of New Brunswick, Appeal Division (Baxter C.J., Grimmer and Richards JJ.). By its judgment dated the 3rd December, 1940, the Court unanimously held that the Act and the Regulations made thereunder were within the constitutional powers of the Province, and dismissed the action.

p. 18, l. 8,
et seq.

pp. 18-26.

6. The Appellant appealed to the Supreme Court of Canada which was divided in its opinion. Sir Lyman Duff C.J. and Mr. Justice Davis were of opinion that the entire Act was *ultra vires*. Mr. Justice Rinfret and Mr. Justice Crocket were of opinion that the entire Act was *intra vires*. Mr. Justice Kerwin was of opinion that the Act was *intra vires* except as to those portions of the Act which provide for the taxation of tobacco brought into the Province and those portions of the Act which bring within the definition of "consumer" an agent purchasing tobacco for his principal, and that these objectionable portions were severable. Mr. Justice Hudson and Mr. Justice Tachereau were of opinion that the Act was *intra vires* except such portions of it as bring in an agent as above mentioned, and that those portions were severable.

p. 107, l. 36.
p. 114, l. 1.
p. 127, l. 20.
p. 134, l. 20.p. 135, l. 17.
p. 135, l. 23.

7. The Respondents submit that the judgments of the Supreme Court of New Brunswick (Appeal Division) and those of Rinfret and Crocket JJ. in the Supreme Court of Canada were right and that on the true construction of the relevant provisions of the British North America Act, 1867, and of the said Provincial Act and the Regulations made thereunder, the Provincial Act and the Regulations are *intra vires* in their entirety, and within the domain of the Provincial Legislature.

8. In the Supreme Court of Canada the Attorney-General of the Province of Quebec applied and was allowed to intervene in the appeal inasmuch as the New Brunswick Statute and Regulations are 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. On the 15th November, 1941, the Attorney-General of Canada obtained leave from the Supreme Court of Canada to intervene in the appeal.

p. 61, l. 25.

p. 143, l. 33.

9. The Act and the Regulations, made thereunder are set out in full at pp. 6-17 of the Record.

pp. 6-17.

10. Argument was heard by the Supreme Court of Canada on the 18th, 19th and 20th February, 1941. The Appellant challenged the validity of

Record. the Act and the Regulations made thereunder, and the Respondents and the Attorney-General of Quebec supported the validity of the Act and the Regulations in their entirety.

p. 107, l. 35. 11. The Chief Justice of Canada (in whose judgment Davis J. concurred)
 p. 100, l. 30. after considering the provisions of the Act and the Regulations said that in the
 practical sense as far as the purchaser was concerned the tax was part of the
 price he paid for his tobacco. As regards the vendor it was the sum for which
 he was accountable to the Government and in fact it came out of the "price
 p. 109, l. 35. to the consumer"—the price to the purchaser. In other words the payment
 of the tax was not only a condition of legal purchase; it was an integral 10
 element in the transaction of sale and purchase, passing from the purchaser
 p. 110, l. 2. to the vendor as part of the price to the purchaser. The character of the
 tax could best be determined by considering the ordinary case, and, in the
 ordinary case, the sale of tobacco by the licensed vendor would be carried out
 in the manner contemplated by the Act and the tax would be simply a pre-
 determined fraction of the price to the purchaser which was paid to the
 vendor and by him remitted to the Government, and it seemed to the Chief
 p. 110, l. 8. Justice "proper to describe such a tax as a tax on tobacco in respect of
 "the commercial dealing between the retail vendor and the purchaser."

Referring to Section 4 and after quoting from the judgment of the 20
 Judicial Committee in the case of *The Attorney-General for British Columbia v.
 Kingcome Navigation Company, Ltd.* [1934] A.C. 45, at p. 57, and observing
 that it was said on behalf of the Respondents that this tobacco tax was a tax
 in respect of consumption and stood in the same category as the oil fuel tax
 in question in the *Kingcome case*, the Chief Justice pointed out that the oil
 fuel tax imposed the obligation on every person consuming oil fuel to keep
 books and records and to furnish returns, and that the amount of the tax
 in that case was recoverable by action, and that in every such action the
 burden of proving the quantity consumed was upon the defendant; and
 after pointing out that there was no such provision in the Statute before him, 30
 p. 111, l. 32. continued: "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 con-
 "templates 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."

p. 111, l. 40. The Chief Justice then dealt with the Respondents' argument that the
 tax was a direct tax on the consumer, because after purchase from the retail
 vendor the tobacco could not lawfully be sold by the purchaser unless he 40
 took out a vendor's license, a provision which insured that he could never
 sell except at a loss. The Chief Justice said that there was no limit to the
 quantity which might be purchased from a retail vendor, and that any
 purchaser was entitled to obtain a license as a retail vendor, although the
 Chief Justice recognised that as a general rule, tobacco sold at retail in
 the ordinary sense would be purchased with the intention that it would
 be consumed by the purchaser or his friends or associates, and that the
 vast majority of purchasers of tobacco would be purchasers for immediate

consumption. But the Chief Justice continued: "It does not at all follow
 "from this that the tax is a tax in respect of consumption, especially when
 "it is so obviously a tax in respect of the sale and purchase. There is
 "nothing in the Statute, truly, which can fairly be said to give to the tax
 "the character of a tax in respect of consumption, except the declaration
 "of the legislature to that effect and some collateral provisions which are
 "relied upon as supporting the contention that such is its character. Record.
 p. 112, l. 3.

"I do not think too much importance can be attached to the declarations
 "of the legislature that the tax is payable in respect of consumption. The
 10 "British North America Act 'must have contemplated some tangible dividing
 "line referable to and ascertainable by the general tendencies of the tax
 "and the common understanding of men as to those tendencies.' (*Bank
 "of Toronto v. Lambe* 12 A.C., p. 581; *City of Halifax v. Fairbanks Estate*
 "[1928] A.C. p. 124). Nor was it probably contemplated that the 'tangible
 "dividing line' between direct and indirect taxation could be shifted at will
 "by the declarations of the legislature as to its expectations, or intentions, in
 "respect of the ultimate incidence of a tax. 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
 20 "a form calculated to give a colour of legality to the legislative effort."

12. Dealing with Section 5 of the Act the Chief Justice said that the
 importation which brought Section 5 into operation seemed clearly to be a
 dealing in tobacco within the meaning of its judgment in the *Kingcome*
Navigation Company, Ltd. case above referred to and that the tax imposed
 by Section 4 was an Excise Duty within the contemplation of that judgment. p. 112, l. 24.
 p. 112, l. 38.

The Chief Justice also was of opinion that Section 5 came within the ban
 of Section 121 of the British North America Act, 1867, and, moreover, was
 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
 30 Section 91 of that Act.

The Chief Justice added that the provision in Section 4 with regard to
 the purchase by an agent, was invalid, on the principle of the decisions in
A.-G. for Manitoba v. A.-G. for Canada [1925] A.C. 561. p. 113, l. 28.
 p. 113, l. 37.

13. Rinfret J. in considering whether the tax was not a direct tax and so
 contrary to the powers of Provincial legislatures under Section 92 (2) of the
 British North America Act said: "In fact the statute is framed in such a
 "way that the legislature has indicated its intention that the person on whom
 "the tax is imposed will bear it himself; and it has taken every precaution
 "to prevent the consumer from indemnifying himself at the expense of
 40 "another. This must be inferred both from the form in which the tax is
 "imposed and from the results which, in the ordinary course of business
 "transactions must be held to have been contemplated. Indeed, it may not
 "only be inferred from the statute itself, but it is there expressly so stated.

"The consumer who is taxed is a person who, within the Province
 "purchases tobacco at a retail sale, in the Province, for consumption of himself,
 "or of other persons at his expense," After considering the definition section

Record. of the Act and pointing out that the right of the consumer to resell was taken
 away by the Act and referring to the cases of *Attorney-General for British
 Columbia v. C. P. R.* [1927] A.C. 934, at p. 938, and *Rex v. Nat Bell Liquors,
 Limited* [1922] 2 A.C. 128, at p. 135, Rinfret J. continued: "It is the general
 " tendency of the legislation that must be considered, and exceptional cases
 " must be ignored. The suggestion made by the Appellant that the purchaser
 " may go outside the Province and resell there can hardly be entertained.
 " Section 4, read with Sections 2 (a) and 2 (e) imposes the tax on one who
 " purchases in the Province for consumption. The purchaser may exception-
 " ally go outside and consume the tobacco sold in the Province; but this 10
 " would be an exceptional case resulting from the free act of the purchaser
 " once he has become the absolute owner of the tobacco; and this isolated
 " case cannot make of the statute one imposing a tax outside the Province.
 " The effect of the tax is intended to be confined to the Province of New
 " Brunswick. It is imposed upon the consumers of tobacco in New Brunswick;
 " and it does not pretend to have any effect at all outside the Province."

14. On the question as to whether the tax was indirect because it taxed
 the agent with respect to his transaction on behalf of his principal, Rinfret J.,
 after examining the definition of "consumer" and pointing out that the
 circumstance no doubt contemplated by the Act would be where the 20
 purchaser sent a messenger to a tobacco store with the object of buying for
 him tobacco which he intended to consume, and saying that in almost every
 case the messenger would have received his principal's money to pay both
 for the tobacco and the tax, continued: "I would be very loath to declare
 " a Provincial statute unconstitutional on such a slim objection."

"Moreover it is very doubtful whether the occurrence in such a case
 " could really be described as 'passing on.' This, to my mind, is not the
 " kind of 'passing on' deemed to be, in the decided cases, the characteristic
 " of an indirect tax. The 'agent' in this instance, would not be paying for
 " himself, but for and on behalf of the principal. There would be, as a con- 30
 " sequence, no enhancement of the actual cost as between the agent and his
 " principal."

Further, the Judge was of opinion that if this feature of the Act were
 unconstitutional it was severable.

Dealing particularly with Section 5 of the Act, he was also of opinion
 that the Act did not infringe upon the exclusive legislative jurisdiction of
 the Parliament of Canada to impose customs and excise duties. He did not
 think that it was a customs duty as those words were generally understood.
 He said: "Under Section 5, the tax is not collected at the border of New
 " Brunswick, or before the tobacco is allowed to enter the territory of the 40
 " Province. That section covers the case of a resident of New Brunswick or
 " of a person carrying on business therein, who brings into the Province
 " tobacco 'for his consumption, or for the consumption of other persons at
 " his own expense.' The consumer of tobacco is not called upon to pay the
 " tax before the tobacco comes into the Province, or before he receives
 " possession of the tobacco. He pays after delivery, or after he has come into
 " possession. Surely there must be a moment when property entering a

“Province becomes property in the Province subject to be taxed by the Province.” He concluded by saying that the Act could not be regarded as imposing a customs duty. Record.
p. 126, l. 6.

15. On the question as to whether the Act was a violation of Section 121 of the British North America Act, Rinfret J. held it was not. He said that under the provisions of the Act tobacco enters perfectly free into the Province but the consumer was taxed in connection with the consumption of a commodity which was in the consumer’s possession within the Province. p. 126, l. 13.

16. Finally, with regard to the license required by vendors of tobacco, after referring to the cases of *Brewers and Maltsters Association v. Attorney-General for Ontario* [1897] A.C. 231 ; *Attorney-General for Manitoba v. License Holders Association* [1902] A.C. 73 ; *Shannon v. Lower Mainland Dairy Products Board* [1938] A.C., p. 708, Rinfret J. said : “ A license can, therefore, be required by a Province as a means of collecting a tax which is valid, or as a means of compelling those who are entrusted with the duty of collecting a tax to comply with that duty. Such is the case here. It may be said, as a matter of fact, that the license required under the Tobacco Tax Act is a means of enabling the Province to possess a list of the names of the agents who are entrusted with the collection of the tax.” p. 127, l. 4.

20 Accordingly, Rinfret J. was of opinion that the Act was competently enacted by the legislature of the Province.

17. Crocket J. agreed with Rinfret J. and for substantially the same reasons. p. 127, l. 20.

18. Kerwin J. was of opinion that speaking generally the tax in question was a direct tax for the raising of a revenue for provincial purposes within the meaning of Section 92 (2), British North America Act. He said : “ The mere insertion, by the legislature, of the phrase in Section 4 of the Act, ‘a tax in respect of the consumption of such tobacco,’ is not conclusive, but upon consideration it appears to me that the tax is imposed upon the very person it is intended should bear it, and who, in the ordinary course, will not be able to pass it on. The ‘consumer’ of tobacco purchasing it at a retail sale in the Province is ordered to pay the tax at the time of purchase, and the vendor is made the collecting agency for the Province. In my view the tax is not imposed on one of the parties to a sale of tobacco in respect of that transaction, and the fact that it is imposed before consumption (instead of after consumption as in the *Kingcome case*) is not of importance if my conclusion as to the true nature and tendency of the tax is correct.” p. 134, l. 20.
p. 134, l. 23.

30 But Kerwin J. held that in two respects the statute was partially *ultra vires*. “ The attempt by that part of the definition of ‘consumer’ or ‘consumer of tobacco’ to impose the tax on an agent,” failed as being indirect taxation. But this was severable. Section 5, which the Judge also thought severable, was *ultra vires* because it infringed Section 121 of the British North America Act. p. 134, l. 34.

40 *vires*. “ The attempt by that part of the definition of ‘consumer’ or ‘consumer of tobacco’ to impose the tax on an agent,” failed as being indirect taxation. But this was severable. Section 5, which the Judge also thought severable, was *ultra vires* because it infringed Section 121 of the British North America Act.

Record.
p. 135, l. 17.

19. Hudson J. agreed with the conclusions of Rinfret J., except on the point of the personal liability imposed on an agent. This he thought overstepped the limits of provincial legislative jurisdiction.

p. 142, l. 1.
p. 141, l. 41.

20. Taschereau J. came to a similar conclusion, holding that the Act was within the legislative powers of the Province, except in so far as it imposed the liability upon an agent; but he thought that this objectionable provision was severable.

21. The Respondents submit that the judgments of the Supreme Court of New Brunswick (Appeal Division) and those of Rinfret J. and Crocket J. are correct, and that this appeal should be dismissed with costs, and that the Act should be declared *intra vires* the legislature of New Brunswick in its entirety, for the following amongst other

REASONS.

1. Because the taxation imposed by the Act is direct taxation within the Province of New Brunswick, within the meaning of Section 92 (2) British North America Act.
2. Because the tax paid by the consumer at the time of his purchase, although paid to the vendor, is not in the hands of the vendor money belonging to the vendor, but money belonging to and held by the vendor on behalf of His Majesty in the right of the Province, and the imposition and payment of the tax is not therefore a part of the actual transaction of sale and purchase as between the vendor and purchaser, but is independent of it.
3. Because the Act indicates with precision the person who is ultimately to bear the tax, and by its provisions ensures that, in all ordinary and normal circumstances, the burden of the tax will not and cannot be borne by or passed on to any other person, and it is this general tendency of the tax which determines whether it is direct or indirect. 30
4. Because the Act does not impose any tax upon a purchase or an importation made for the purposes of resale, or otherwise than for the purchaser's own consumption or for consumption by persons at the purchaser's expense.
5. Because the Act imposes the ultimate liability for the tax upon the person who purchases or imports the tobacco for consumption as aforesaid, and upon no one else.
6. Because, as regards every purchase through an agent, the principal, whether disclosed or undisclosed, is a party to the contract of purchase and sale, and such contract can be enforced by, or against, such principal. 40

7. Because in every such case the principal himself becomes a "consumer" under the first part of the definition of that word in Section 2 (a) of the Act, and thereupon himself becomes personally liable for the tax under Section 10 of the Act.
8. Because, as regards an importation of tobacco into the Province by an agent on behalf of his principal, the act of importation by the agent is the act of the principal, and the principal thereupon himself becomes personally liable for the tax under the first part of Section 5 of the Act.
- 10 9. Because, if necessary, it should be held that on the true construction of Section 5 of the Act the "principal" therein mentioned means only a person residing or ordinarily resident or carrying on business in New Brunswick.
10. Because it follows that in every case where an agent is personally liable for any tax, the principal is also directly liable for the same tax, and payment by either will discharge the liability of both.
- 20 11. Because where an agent pays the tax in such cases, he must be deemed to have paid the money on behalf of and at the implied request of his principal, and his right to be recouped by his principal arises under the general law of agency, and does not arise out of some further and independent transaction between himself and the principal.
12. Because it follows that the taxation has none of the characteristics required to render it indirect taxation.
13. Because in any event the imposition of liability on the agent is merely machinery for preventing evasion of the tax by persons liable to pay it.
- 30 14. Because even if the provisions imposing liability to tax upon agents are invalid, such provisions are severable.
15. Because, customs and excise duties are, in their essence, trading taxes; and where, as here, the tax is imposed only upon a person in connection with an acquisition of goods otherwise than for purposes of trade, so that the tax cannot in any ordinary circumstances be passed on, the tax is not properly described as a customs or excise duty in the ordinary meaning of those terms.
- 40 16. Because even if the tax payable under Section 4 is an excise duty, and the tax payable under Section 5 is a customs duty, both taxes are nevertheless direct taxes within the Province, and are therefore within the competence of the Provincial legislature under Section 92 (2) British North America Act, 1867.

17. Because the power to impose any tax (whether customs, excise or otherwise) which is in fact "direct taxation" within the province, in order to the raising of a revenue "for provincial purposes," does not fall within the area of the exclusive legislative power of the Dominion Parliament, and the tobacco tax is not therefore invalid by reason of Section 91, British North America Act, 1867.
18. Because, as regards the tax charged under Section 5, the payment of the tax is not a condition of admission of the tobacco into the Province, but is charged only after it has been received by a person in the Province, and the tax is not therefore invalid by reason of Section 121, British North America Act, 1867. 10
19. Because even if the tax charged under Section 5 of the Act is invalid, such part of the Act is severable.
20. Because, Section 122, British North America Act, 1867, does not of itself forbid the imposition of any new duty, but at the most only forbids the alteration of those customs and excise duties of each province which were in force in 1867. 20
21. Because the provisions of the Act relating to licenses to be held by vendors are authorised by Section 92 (9) British North America Act, 1867, or alternatively, are within the powers necessarily incidental to the power to impose and collect the tobacco tax.
22. For the reasons contained in the judgments of the Supreme Court of New Brunswick, and those of Rinfret and Crocket, JJ.

J. MILLARD TUCKER.

J. LEONARD STONE.

30

(L. Stone)



In the Privy Council.

No. 19 of 1942.

On Appeal from the Supreme Court of Canada.

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.*

CASE OF THE RESPONDENTS.

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