

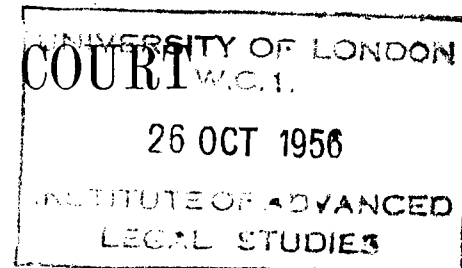
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44,1943

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.*

RECORD OF PROCEEDINGS.

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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.*

RECORD OF PROCEEDINGS.

No. 1.

Writ of Summons.

IN THE SUPREME COURT.
CHANCERY DIVISION.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated company
duly incorporated *Plaintiff*

and

JAMES H. CONLON, JOHN McDONOUGH and THE ATTORNEY-
10 GENERAL OF THE PROVINCE OF NEW BRUNSWICK ... *Defendants.*
(Seal)

GEORGE THE SIXTH, by the Grace of God of Great Britain, Ireland, and
the British Dominions beyond the Seas, King, Defender of the Faith, etc.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 1.
Writ of
Summons,
2nd No-
vember,
1940.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 1.
Writ of
Summons,
2nd No-
vember,
1940—
continued.

To James H. Conlon, of the City of Fredericton in the County of York in the Province of New Brunswick, John McDonough of the City of Saint John and Province aforesaid ; and The Attorney-General of the Province of New Brunswick.

WE COMMAND YOU, That within ten days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Atlantic Smoke Shops, Limited; AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein, and Judgment may be given in your absence.

10

WITNESS the Honourable John B. M. Baxter, Chief Justice, the 2nd day of November in the year of our Lord one thousand nine hundred and forty.

(Sgd.) SMITH.

N.B. This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The Plaintiff's claim is for an Injunction Order, restraining the Defendants and each of them from—

20

- (a) entering upon the store premises of the Plaintiff at No. 29 Waterloo Street, Saint John, being the north-east corner of Waterloo and Peters Streets in the said City of Saint John ;
- (b) loitering about the said premises of the Plaintiff or on the streets adjacent thereto ;
- (c) accosting or questioning or otherwise interfering with customers or prospective customers of the Plaintiff while on the said premises of the Plaintiff, or on the streets adjacent thereto and questioning them or any of them with reference to any purchase of tobacco, or payment of any tobacco tax, or demanding either name or address of any such customer or prospective customer for any purpose under the alleged authority of the Tobacco Tax Act, being the New Brunswick Statute, Chapter 44, 4 George VI, or the regulations styled " Regulations under Tobacco Act " purported to have been enacted by the Lieutenant-Governor-in-Council. 30
- (d) from instructing or authorizing any other person or persons to do such acts or any of them, or any acts of a like character.

ENDORSEMENT ON WRIT OF SUMMONS.

IN THE SUPREME COURT.
CHANCERY DIVISION.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated Company, duly
incorporated

and

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

No. 1.
Writ of
Summons,
2nd No-
vember,
1940—
continued.

10

WRIT OF SUMMONS
Issued Nov. 2nd, 1940

(Copy)

This Writ was issued by Messrs. Porter & Ritchie, whose place of
business and address for service is 94 Prince William St., Saint John, N.B.,
Solicitors for the Plaintiff whose head office and chief place of business is
at the City of Saint John in the Province of New Brunswick.

(Sgd.) PORTER & RITCHIE,
Plaintiff's Solicitors.

No. 2.

No. 2.
Stated Case
agreed
upon, 12th
November,
1940.

20

Stated Case agreed upon.

IN THE SUPREME COURT.
APPEAL DIVISION.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated company
duly incorporated *Plaintiff*

and

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

30

SPECIAL CASE STATED AND AGREED UPON BETWEEN THE PARTIES
FOR THE OPINION AND DECISION OF THE SUPREME COURT, APPEAL
DIVISION.

This action was commenced by Writ of Summons issued on the
2nd day of November, A.D. 1940, wherein the Plaintiff claimed an injunction
order to restrain the Defendants and each of them from :

- (a) Entering upon the store premises of the Plaintiff at No. 29 Waterloo Street, Saint John, being the northeast corner of Waterloo and Peters Streets in the said City of Saint John ;
- (b) Loitering about the said premises of the Plaintiff or on the streets adjacent thereto ;

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2.
Stated Case
agreed
upon, 12th
November,
1940—
continued.

- (c) Accosting or questioning or otherwise interfering with customers or prospective customers of the Plaintiff while on the said premises of the Plaintiff, or on the streets adjacent thereto and questioning them or any of them with reference to any purchase of tobacco, or payment of any tobacco tax, or demanding either name or address of any such customer or prospective customer for any purpose under the alleged authority of the Tobacco Tax Act, being the New Brunswick Statute, Chapter 44, 4 George VI, or the regulations styled "Regulations under Tobacco Act" purported to have been enacted by the Lieutenant-Governor-in-Council; 10
- (d) From instructing or authorizing any other person or persons to do such acts or any of them, or any acts of a like character.

The parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court :

1. That the Plaintiff, Atlantic Smoke Shops Limited 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.
2. That on the eleventh day of May, A.D. 1940, the Legislature 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, A.D. 1940, by proclamation of the Lieutenant-Governor-in-Council. 20
3. That under the authority of the said Act the Lieutenant-Governor-in-Council purported to make regulations styled "Regulations Under Tobacco Tax Act."
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. 30
5. That the said Plaintiff carried on and now carries on 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, manufactured 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. 40
7. That the Defendant, James H. Conlon, was on the coming into force of said Tobacco Tax Act appointed to the office of Tobacco

Tax Commissioner, being the office created under the regulations hereinbefore referred to and has since occupied and now occupies said office.

8. That on the second day of November, A.D. 1940, and from time to time thereafter, the Defendant John 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 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 regulations made thereunder.
9. That by reason of the said actions of the Defendants the said business of the Plaintiff has been and is now being injuriously affected.
10. That submitted herewith and marked "A" is a copy of the said "The Tobacco Tax Act." Submitted herewith and marked "B" is a copy of the said "Regulations" made under the said Act.

The question for the opinion of the Court is whether the Tobacco Tax Act, or any of the provisions thereof, and or the regulations made thereunder or any of them, and in what particular or particulars or to what extent are *ultra vires* of the Legislature of the Province of New Brunswick.

If the Court shall be of opinion that the said Act and Regulations are wholly *intra vires*, this action shall be dismissed.

If the Court shall be of opinion that the said Act and Regulations 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.

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.

Dated the 12th day of November, A.D. 1940.

(Sgd.) PORTER & RITCHIE,
Solicitors for Atlantic Smoke Shops Limited, the above named Plaintiff.

(Sgd.) PETER J. HUGHES,
Solicitor for James H. Conlon, John McDonough and The Attorney-General of the Province of New Brunswick, the above named Defendants.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2.
Stated Case
agreed
upon, 12th
November,
1940—
continued.

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30

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In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(A).

The Tobacco Tax Act of New Brunswick.

SCHEDULE A.

PROVINCE OF NEW BRUNSWICK.

CHAPTER XLIV.

No. 2(A).
The
Tobacco
Tax Act
of New
Brunswick.
Assented to,
11th May,
1940;
proclaimed,
1st October,
1940.

An Act to provide for imposing a tax on the consumption of tobacco.

Section.

1. Short title.
2. Interpretation.
3. Vendors' Licenses.
4. Tax on consumer.
5. Importer of tobacco to report to Minister.
6. Computation of tax.
7. Absorption of tax prohibited.
8. Collection of tax.
9. Allowance to vendors.
10. Consumer liable until tax paid.
11. Vendor to keep records.
12. Returns to Minister.
13. False statement in return.
14. Appointment of Inspectors.

Section.

15. Right to enter premises and inspect. 10
16. Authorization by Minister to Inspector, etc., to enter suspected premises.
17. Violation of any provision of Act to be an offence; penalty.
18. Disposition of fines.
19. Onus of proof.
20. (1) Governor in Council may make regulations: scope. 20
(2) Published in Royal Gazette.
21. Act to come in force on proclamation.
Assented to May 11th, 1940.

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows:

SHORT TITLE.

1. This Act may be cited as the Tobacco Tax Act.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,— 30
 - (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.
 - (b) "Minister" means the Provincial Secretary-Treasurer.
 - (c) "Package" means package, box, tin or other container in which 40 tobacco is contained or sold.

Act 1940

- (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.
- (g) "Tobacco" means tobacco in any form in which tobacco is consumed and includes snuff.
- 10 (h) "Vendor" includes both wholesale vendor and retail vendor.
- (i) "Wholesale Vendor" means any person who, within the Province, sells tobacco for the purpose of resale.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(A).
The
Tobacco
Tax Act
of New
Brunswick.
Assented to,
11th May,
1940;
proclaimed,
1st October,
1940—
continued.

LICENSES OF VENDORS.

- 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.
- (2) No persons 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.
- 20 (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.
- (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 CONSUMER.

- 30 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.
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
- 40 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.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(A).
The
Tobacco
Tax Act
of New
Brunswick.
Assented to,
11th May,
1940;
proclaimed,
1st October,
1940—
continued.

6. The tax shall be computed to the nearest cent and one-half cent shall be considered one cent. The minimum tax payable shall be one cent.

ABSORPTION OF TAX PROHIBITED.

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.

COLLECTION OF TAX.

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

9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax.

CONSUMER LIABLE TO TAX UNTIL PAID.

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

VENDOR'S RETURNS AND RECORDS.

11.—(1) Every wholesale vendor shall keep in a prescribed form a record of all sales of tobacco made by such wholesale vendor in the Province, 20 giving such information as may be required by the Minister.

(2) Every retail vendor shall keep in a prescribed form a record of all purchases of tobacco made by such retail vendor, giving such information as may be required by the Minister.

12. Vendors may be required to make such returns to the Minister, in such forms and at such times and giving such information as the regulations may prescribe.

13. No person shall make a false statement in any record or return required to be kept or required to be made by this Act or the regulations.

INSPECTIONS.

30

14. The Minister may appoint Inspectors for the purpose of enforcing the provisions of this Act.

15. Any person appointed by the Minister, as Inspector under this Act or any member of the Royal Canadian Mounted Police may enter upon the premises occupied by any vendor in order to verify that the tax is being duly collected and paid to the Minister, and may inspect and examine the books, records or documents of the vendor for the purpose of ascertaining the quantities of tobacco on hand or sold by him and the vendor shall answer all questions relating to these matters and shall produce to the Inspector or member of the Royal Canadian Mounted Police such books, records and 40 documents as are required.

16. Every Inspector or member of the Royal Canadian Mounted Police who is authorized in writing for the purpose by the Minister if he has cause

to believe that any person has or had in his possession any tobacco in respect of the consumption of which the tax was payable but has not been paid, may enter upon the premises occupied by such person and make such inquiries and searches as are deemed necessary and may interrogate such person concerning tobacco which he has purchased and such person shall produce for inspection by such officer or member of the Royal Canadian Mounted Police any tobacco in his possession and answer any questions relating thereto.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

OFFENCES AND PENALTIES.

10 17. Every person who contravenes any of the provisions of this Act or of the regulations made thereunder shall be guilty of an offence and shall be liable on summary conviction to a fine of not less than Ten Dollars nor more than Five Hundred Dollars, with costs of conviction, and in default of payment thereof, to imprisonment for a period not exceeding three months.

No. 2(A).
The
Tobacco
Tax Act
of New
Brunswick.
Assented to,
11th May,
1940;
proclaimed,
1st October,
1940—
continued.

18. All fines or penalties and all costs imposed and collected under the provisions of this Act or of the regulations made thereunder shall be paid forthwith to the Provincial Secretary-Treasurer.

20 19. In any prosecution for failure to pay the tax or to collect or forward the tax, the onus of proving that the tax was paid, collected or forwarded, as the case may be, to the Minister, shall be upon the accused.

REGULATIONS.

20. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent or of supplying any deficiency therein the Lieutenant-Governor-in-Council may make such regulations, not inconsistent with the spirit of this Act, as are considered necessary or advisable, and without limiting the generality of the foregoing the Lieutenant-Governor-in-Council may make regulations:

- 30 (a) Providing for the affixing of stamps on tobacco or on the packages in which it is sold before or at the time of delivery to a consumer as evidence of the tax having been paid;
- (b) Providing for the issue of such stamps and the designs and denominations thereof;
- (c) Prohibiting the delivery of tobacco to a consumer and/or the taking of delivery by a consumer upon which stamps are not affixed in accordance with the regulations;
- (d) Providing for stamping or otherwise marking tobacco or the packages in which it is sold before or at the time of delivery to a consumer as evidence of the tax having been paid;
- 40 (e) Prohibiting the delivery to a consumer and/or the taking of delivery by a consumer of tobacco which is not stamped or otherwise marked in accordance with the regulations;
- (f) Prescribing the forms to be used for the purposes of this Act and of the regulations;
- (g) Prescribing the records and sales of tobacco and other records to be kept by vendors;

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(A).
The
Tobacco
Tax Act
of New
Brunswick.
Assented to,
11th May,
1940;
proclaimed,
1st October,
1940—
continued.

- (h) Prescribing the returns to be made by vendors ;
 - (i) Prescribing the methods of collection of the tax and other conditions or requirements affecting such collection ;
 - (j) Prohibiting the doing of any act which may be in contravention of the spirit of this Act ;
 - (k) Prescribing the doing of any act which may be deemed necessary or expedient for the collection of the tax or to prevent evasion thereof ;
 - (l) Defining any expression used in this Act and not herein defined ;
 - (m) Generally for the better carrying out of the provisions of this Act. 10
- (2) Such regulations may from time to time be repealed, amended or varied and, if repealed, may be re-enacted, and such regulations shall have the same force and effect as if enacted by this Act and shall be published in the Royal Gazette.
21. This Act shall come into force on a day to be fixed by Proclamation.

No. 2(B).
Regulations
under The
Tobacco
Tax Act
of New
Brunswick.

No. 2(B).

Regulations under the Tobacco Tax Act of New Brunswick.

SCHEDULE B.

PROVINCE OF NEW BRUNSWICK.

REGULATIONS UNDER THE TOBACCO ACT

20

INTERPRETATION.

1. (1) In these Regulations the words " the Act " means The Tobacco Tax Act.
- (2) In these Regulations, unless the context otherwise requires :
 - (a) The words and expressions defined in Section 2 of the Act, as used herein, shall have the same meaning as in the Act ;
 - (b) " Commissioner " means the Tobacco Tax Commissioner appointed under the provisions of Regulation 2 of these Regulations ;
 - (c) " Inspector " means an inspector appointed under the authority of Section 14 of the Act ;
 - (d) " Place of business " means any shop, store, warehouse or other premises occupied by the vendor in which tobacco is sold or kept for sale ;
 - (e) " Named place of business " means a place of business at which the vendor is licensed to sell tobacco ;
 - (f) " Person " includes an individual, a firm, a company, a corporation, an association of persons, an estate, a sequestrator, a trustee in bankruptcy, a liquidator, a fiduciary trustee, an administrator or an agent ; it shall also include the owner or operator of a vending machine for the automatic sale of tobacco ;

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40

- (g) " Receipt " means an official receipt issued by the minister under the provisions of these Regulations ;
- (h) " Tax " means the tax imposed under the provisions of the Act.

In the Supreme Court of New Brunswick (Appeal Division).

ADMINISTRATION.

2. For the purpose of collecting the tax and generally administering the Act the Lieutenant-Governor-in-Council shall appoint an officer to be designated as the Tobacco Tax Commissioner.

3. The Minister may appoint such officers and clerks as he may deem necessary for the proper carrying out of the provisions of the Act and these
10 Regulations.

No. 2(B). Regulations under The Tobacco Tax Act of New Brunswick
—continued.

LICENSING.

4. No license shall be issued until the applicant therefor shall have filed with the Commissioner an application in writing and paid to the Commissioner the prescribed fees.

5. Every application for a wholesale vendor's license shall be in Form 1 of the Schedule to these Regulations, as near as may be.

6. Every application for a vendor's license, other than a wholesale vendor's license, shall contain an undertaking by the applicant to collect and remit the tax in accordance with the provisions of the Act and these
20 Regulations and shall be in Form 2 of the Schedule to these Regulations, as near as may be. The applicant shall state in his application for a license an estimated amount of his normal monthly Tobacco Sales.

7. Where the applicant for a license is a partnership or association the application shall be signed by one of the partners or a member of the association : Where the applicant is a corporation or a joint stock company the application shall be signed by an officer of the corporation or joint stock company duly authorized to sign the same.

8. Every license, other than an itinerant salesman's license, issued under the provision of Regulation 11 shall designate the place or places
30 at which the business of the vendor is to be carried on and shall entitle the licensee to carry on the business of a vendor only at the place or places so designated in such license.

9. No person, other than the holder of an itinerant salesman's license issued under the provisions of Regulation 11, shall either as principal or agent, sell tobacco at retail at any place other than a place of business designated in a valid, subsisting license issued to such person ; Provided that nothing in this or the next preceding Regulation shall be construed to prohibit or restrict the solicitation of orders for or the sale of tobacco by a licensed wholesale vendor to a licensed retail vendor at any place.

40 10. A copy of the license shall be issued for every place of business designated in such license and one of such copies shall at all times be prominently displayed in each place of business designated in such license.

11. A license may be issued to any person to carry on the business of a retail vendor outside of a named place of business. Such license shall be known as an itinerant salesman's license.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

12. No person shall sell tobacco at retail elsewhere than a named place of business, either as principal or as agent, without having obtained an itinerant salesman's license. No person shall sell tobacco at retail elsewhere than a named place of business through an agent or salesman unless such agent or salesman is the holder of a valid subsisting itinerant salesman's license.

No. 2(B).
Regulations
under The
Tobacco
Tax Act
of New
Brunswick
—continued

13. Any person selling tobacco under the authority of an itinerant salesman's license shall at all times when so engaged have such license in his possession and shall produce such license for the inspection of any inspector or purchaser requesting him to do so. 10

14. No wholesale vendor shall sell any tobacco to any retail vendor in the province unless the retail vendor is the holder of a retail vendor's license issued to him under the authority of the Act and such license is in force at the time of the sale.

15. No wholesale vendor, who is not also a licensed retail vendor, shall sell tobacco to any person other than a licensed vendor.

16. A special retail vendor's license may be issued for any period not exceeding thirty days.

17. Licenses shall be in Form 3 of the Schedule to these Regulations, as near as may be. 20

18. The fees payable for licenses shall be as follows :

- (a) Wholesale vendor's license, \$5.00 for each place of business.
- (b) Retail vendor's license, .50 cents for each place of business.
- (c) Itinerant salesman's license, .50 cents.
- (d) Special retail vendor's license, .50 cents for each place of business.

COLLECTION OF TAX.

19. Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer at the time of purchase of tobacco by the consumer.

20. The Minister may issue receipts of such design or designs as may be approved by him. Such receipts may be for the following amounts : 30
one cent, two cents, three cents and five cents.

21. The tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased and calculated to the nearest cent, one-half cent shall be considered one cent. The minimum tax payable by the purchaser shall be one cent.

22. The retail vendor or his agent shall deliver to every purchaser, at the time of the sale, a receipt for the tax collected and no sale shall be made unless such receipt is given.

23. (1) The retail vendor shall account for and remit the amount of tax collected to the Tobacco Tax Commissioner within ten days immediately following the calendar month during which any sale has taken place and shall with his remittance forward to the Tobacco Tax Commissioner a 40

statement containing the information required by Form 4 in the Schedule of these regulations.

(2) A separate statement must be made for each place of business, unless the filing of a consolidated statement is approved by the Commissioner.

24. When a vendor disposes of, or discontinues his business he must within ten days thereafter remit any tax collected and unaccounted for and file a statement for the period unreported and return to the Commissioner all unused receipts which he may have on hand.

10 25. The Commissioner may call for a statement to be filed by a vendor at any time and for any period or periods. Such statement shall be verified by statutory declaration.

26. The Commissioner shall allow the vendor a commission of three per centum of the tax collected as remuneration and expense for collecting and remitting same.

27. Every vendor shall, when required to do so by the Commissioner,

(a) File a return of all tobacco sales made by him during such period as the Commissioner shall determine;

(b) File an inventory of tobacco on hand at such time as the Commissioner shall determine;

20 (c) File a return of all tobacco purchases made by him during such period as the Commissioner shall determine; Such returns shall be in such form and give such information as the Commissioner may require.

28. No vendor shall consume or give to his employee or any other person tobacco unless the tax has been paid on the retail value of same in accordance with the provisions of the Act and these Regulations.

29. No person shall give to any other person tobacco as a premium, prize or otherwise unless the tax has been paid on the retail value of such tobacco in accordance with the provisions of the Act and these Regulations.

30 30. No person shall purchase tobacco at retail without paying the tax or accept delivery of same without receiving from the retail vendor a receipt for such tax in accordance with the provisions of the Act and these Regulations.

31. Every person who contravenes any of the provisions of the Act or these Regulations shall be guilty of an offence and shall be liable on summary conviction to a fine of not less than Ten Dollars or more than Five Hundred Dollars, with costs of conviction, and in default of payment, to imprisonment for a period not exceeding three months.

40 In addition to any other penalty, the Minister may also cancel or suspend any license for failure to comply with any of the provisions of the Act or these Regulations.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(B).
Regulations
under The
Tobacco
Tax Act
of New
Brunswick
—continued.

In the
Supreme
Court of
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Brunswick
(Appeal
Division).

No. 2(B).
regulations
under The
Tobacco
Tax Act
of New
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--continued.

FORM No. 1.

PROVINCE OF NEW BRUNSWICK.
OFFICE OF THE PROVINCIAL SECRETARY-TREASURER.
TOBACCO TAX BRANCH.

APPLICATION FOR LICENSE TO WHOLESALE TOBACCO.

License will not be issued unless all questions are fully answered.

1. Name under which business is conducted, or to be conducted.

.....
(Please print in block letters)

2. Owner
(Name of owner if different from name on Line No. 1)

10

3. Location of place of business.....
(Street and number)

.....
(City or Town)

.....
(County)

4. Nature of business.....
(Tobacco, general, wholesale or otherwise as the case may be)

5. Type of organization.....
(Individual proprietor, partnership or corporation)

6. Do you operate more than one establishment selling tobacco ?

7. If " yes " to No. 6—how many ?.....
State Addresses.

20

I/We hereby make application for a license, as indicated above, under the provisions of the Tobacco Tax Act 1940.

Dated at.....
this.....day of.....19.....

.....
(Signature of applicant)

Title.....
(Owner, President, Partner, etc.)

Address

NOTE : An accepted cheque or money order for \$5.00 must accompany this application. Application must be forwarded to The Tobacco Tax Commissioner, Ryan Building, Fredericton, N.B.

30

FORM No. 2.

PROVINCE OF NEW BRUNSWICK.
OFFICE OF THE PROVINCIAL SECRETARY-TREASURER
TOBACCO TAX BRANCH.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

APPLICATION FOR LICENSE TO RETAIL TOBACCO

License will not be issued unless all questions are answered and applicant completes the form of undertaking appended.

No. 2(B).
Regulations
under The
Tobacco
Tax Act
of New
Brunswick
—continued.

1. Name under which business is conducted, or to be conducted.

.....
(Please print in block letters)

10 2. Owner
(Name of owner if different from name on line No. 1)

3. Location of place of business.....
(Street and Number)

.....
(City or Town)

.....
(County)

4. Nature of business.....
(Hardware, grocery, department store, hotel, restaurant, club newstand
or otherwise as case may be)

5. Type of License required.....
(Retail, Special or Itinerant Salesman)

20 6. If Special License—for what dates ?.....

7. Type of organization.....
(State whether individual proprietor, partnership or corporation)

8. Do you operate more than one establishment selling tobacco ?.....

9. If " Yes " how many ?.....
State addresses.

10. Do you buy tobacco direct from manufacturers or their agents ?.....
From Local Jobbers ?.....Or from both ?.....

11. State normal amount of monthly tobacco sales.....

12. What was the amount of your last Tobacco Inventory ?.....

I/We hereby make application for a License, as indicated above, under
30 the provisions of the Tobacco Tax Act 1940.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 2(B).
Regulations
under The
Tobacco
Tax Act
of New
Brunswick
—continued.

I/We, upon acceptance of License to Retail Tobacco, agree and undertake to act as the Agent of the Minister for the collection of the Tax imposed by said Act and to account to the Province of New Brunswick for all monies so collected as provided by the Act and regulations.

Dated at.....
this.....day of..... 19.....

.....
(Signature of Applicant)

Title.....
(Owner, President, Partner, etc.)

Address 10

NOTE: A cheque or money order for 50 cents must accompany this application. Application must be forwarded to The Tobacco Tax Commissioner, Ryan Building, Fredericton, N.B.

FORM No. 3.

License to Sell Tobacco.

PROVINCE OF NEW BRUNSWICK.

License.

TOBACCO VENDOR.

Issued under the provisions
of the Tobacco Tax Act. 20

(Kind of License.)

Expires
May 31, 1941.

(Name) No.

(Address)

is hereby licensed to engage in business as a.....vendor
of Tobacco in the Province of New Brunswick.

.....
Countersigned

J. J. HAYES DOONE,
Provincial Secretary-Treasurer.

Penalty as prescribed by the Act : Failure on the part of a vendor to collect 30 and remit the Tax renders him liable to a fine of not less than ten dollars or more than five hundred dollars and costs and in default of payment to imprisonment for a term not exceeding three months.

This License is not transferable, and may be cancelled for cause.

FORM No. 4.

(CREST)

PROVINCE OF NEW BRUNSWICK.

TOBACCO TAX RETURN.

Month of.....

Name of Vendor..... License No.....

Address

(Street and number or name of Post Office)

(City, Town or Parish)

(County)

10 Number of Receipt Books Required Amount of Tobacco Sales during month \$.....

.....1c. Book Amount of Tax collected..... \$.....

.....2c. Books Less 3% Commission..... \$.....

.....3c. Books TOTAL NET REMITTANCE..... \$.....

.....5c. Books

Enclosed find the sum of \$.....which is the amount of Tobacco Tax collected by me during the month ofafter deductions have been made as described above.

WHEN REMITTING BY MAIL SEND CHEQUE OR MONEY ORDER—NO CASH.

20 I.....of.....in the Province of New Brunswick, DO DECLARE THAT

1. I am the above named licensee, or, the attorney or agent of the above named Licensee; a partner in the above mentioned business; (words not applicable to be struck out).

2. The above is a true return of all taxable sales made during the last preceding month.

3. The amount declared herein truly represents all tax imposed by law accruing upon such sales or such transactions as are taxable under the Tobacco Tax Act.

30

.....
Signature.

.....
Title

A. This return must be filed not later than Ten Days following the calendar month in which the tax accrued.

B. This return is to be made in duplicate. One copy to be forwarded to The Tobacco Tax Commissioner, Ryan Building, Fredericton, N.B., and one copy to be retained by Licensee.

BE SURE YOU HAVE ALWAYS AVAILABLE ENOUGH RECEIPTS TO COMPLY WITH THE LAW.

In the Supreme Court of New Brunswick (Appeal Division).

No. 2(B). Regulations under The Tobacco Tax Act of New Brunswick —continued.

No. 3.

Reasons for Judgment.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

IN THE SUPREME COURT
APPEAL DIVISION.

No. 3.
Reasons for
Judgment,
(a)
Baxter, C.J.
(concurrent
in by
Richards,
J.).

ATLANTIC SMOKE SHOPS LIMITED *Plaintiff* } Judgment—(a) BAXTER, C.J.
v. } (concurrent in by Richards, J.)
A. G. FOR N.B., *et al*, *Defendants.* }

In an action originating in the Chancery Division the parties have agreed upon a special case for submission to this Court to determine the constitutionality of the Act of Assembly 4 Geo. VI (1940), cap. 44, "An Act to provide for imposing a tax upon the consumption of tobacco." 10

Argument was heard on the 20th and 21st Nov., instant, Mr. J. F. H. Teed, K.C., Mr. A. N. Carter and Mr. L. McC. Ritchie appearing for the plaintiff, and Mr. Peter J. Hughes, K.C., for the defendants.

The material sections of the Act are :

" 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." 20

" Consumer " or " Consumer of Tobacco " is defined by Sec. 2 (a). It " 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 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."

" 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." 40

The Act aims to control the tobacco trade in the Province by licensing wholesale and retail vendors. A wholesale vendor is one, who, within the Province, sells tobacco for the purpose of resale. A retail vendor is one, who, within the Province, sells tobacco to a consumer and not for resale. Sec. 2 (i) and (f). Sec. 20 gives wide powers for making regulations by the Lieutenant-Governor-in-Council. Reg. 17 provides that no wholesale vendor, who is not also a licensed retail vendor, shall sell tobacco to any person other than a licensed vendor. The charges for vendor's licenses are nominal being under Reg. 18,—\$5.00 for each place of business of a
10 wholesale vendor, fifty cents for each place of business of a retail vendor and fifty cents each for an itinerant salesman's and a special retail vendor's license. Reg. 19 constitutes every licensed retail vendor an agent of the Minister (The Provincial Secretary-Treasurer by Sec. 2 (b)) for the collection of the tax and is required to collect the tax from the consumer at the time of the purchase of tobacco by the consumer. The tax (Reg. 21) is to be computed at the rate of ten per centum of the retail price of the tobacco purchased. Provision is made for the giving of receipts by the retail vendor or his agent and sale is forbidden unless such receipt is given. (Reg. 22). These receipts are of such design as the Minister may approve.
20 (Reg. 20) and, at present, are in the form of stamps, which are not, however, required to be affixed to anything. They simply profess to be receipts. Provision is also made by the regulations for the remitting to a person called The Tobacco Tax Commissioner, of the moneys received under the Act. The regulations further provide that no person shall give tobacco to another as a premium, prize or otherwise, unless the tax has been paid on the retail value and a vendor may not consume or give tobacco to his employees or other persons without the tax has been paid on the retail value thereof. No person may purchase tobacco at retail without paying the tax or accept delivery of the same without receiving from the retail
30 vendor a receipt for the tax. For contravention of these regulations penalties are provided.

The following are the material parts of Section 3 of the Act, relating to vendors' licenses.

- “ 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.
- “ (2). No person shall sell any tobacco in the Province at a retail
40 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.”

By Section 7 a retail vendor is forbidden to
“ 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

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—
No. 3.
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(a)
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“ 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.”

and by Section 10 a consumer shall be and remain liable for the tax imposed by the Act until the same has been collected.

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(a)

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(concurrent
in by
Richards,
J.)—
continued.

The regulations have not been attacked except upon the ground that the Act being *ultra vires*, they fall with it.

The grounds of objection to the validity of the Act were (1) that the taxation was not within the Province (2) that it was an attempt to impose a tax upon interprovincial or international transactions (3) that dealers in tobacco could not without their consent be constituted agents of the Crown for the collection of a tax as it would constitute them public officers (4) that the distinction between direct and indirect taxation was, practically, that the former was upon things in the taxpayers' possession such as municipal taxation on personal estate or taxation upon real estate or succession duties but that the latter fell upon transactions in commodities especially (5) that this was not an act for the imposition of a tax upon the consumption of tobacco but was in its essence a sales tax which, of necessity, must be an indirect tax ; also that taxation of an agent was vital to the scheme of the Act and that taxation so imposed upon an agent gave him a right to be indemnified by his principal, thus indirectly imposing the tax upon the principal. 10 20

As to points 1 and 2 Mr. Teed relied on the provisions of sec. 5, but we fail to see that the legislature has attempted to impose a customs duty upon the importation of tobacco into the Province. The section only applied to “ consumers ” and these are required to furnish the Minister with certain information. The legislation does not purport to affect any person who is outside of nor the commodity when it is not within the Province—in fact, it does not affect the commodity at all. Mr. Teed put forward the argument that a person having purchased tobacco within the Province might consume it elsewhere. Once he has paid a consumer's tax he is free to consume it wherever he pleases. It is enough to read the cases of *Royal Bank of Canada v. The King*, 82 L. J. P. C., 33, where the legislation expressly affected property not within the Province ; *Atty Gen. of B. C. v. McDonald Murphy*, 99 L. J. P. C., 113, where the imposition of an export tax by a provincial legislature was attempted ; the *Prov. Treas. of Alberta v. Kerr*, 102 L. J. P. C., 137, and *Cotton's case* (1914) A. C. 176 (both dealing with succession duties) to see that there is no possible analogy to the facts of the present case. 30

Mr. Teed's proposition (point 3) that dealers in tobacco could not be constituted agents of the Crown for the collection of a tax, without their consent, also, in our opinion, fails. He contended that it constituted them holders of public offices and as such that they would be disqualified from being elected as representatives to the provincial legislature. It seems very 40

doubtful whether sec. 14 B as enacted by the Act of 1938 c. 17 would apply in this sense but it is not even necessary to resolve the doubt. A vendor can give up his business if he wishes to be certain that he is eligible as a candidate. That may be a hardship on the individual but it must be competent for the legislature to provide collectors of the revenue if that revenue comes from the imposition of a direct tax.

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Points 4 and 5 may be taken together. They raise the only real point in the case, viz. : whether the statute imposes direct or indirect taxation. An attempt was made to treat the act as imposing a stamp tax and thus
10 bring it within *A. G. Quebec v. Queen Ins. Co.*, 3 A. C. (1878) 1090, and *A. G. Quebec v. Reed*, 10 A. C. (1884) 141. These cases decided that a stamp tax was indirect taxation. But what was called a "stamp" in argument is not a stamp at all. It is not required or intended to be affixed to anything. It is a simple receipt for payment. See Reg. 20. The objection to a stamp tax is that it is not or may not be borne ultimately by the person who pays it.

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Judgment,
(a)
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Counsel for the dealers postulated that a sales tax was an indirect tax. Generally speaking that is correct but we do not think that there can not be a sales tax which is a direct tax. *Lambe's case*, 12 A. C. (1887) 375 where
20 the question first arose was not a case of a sales tax. Lord Hobhouse there adopted for practical purposes the definition of a direct tax as "one which
" is demanded from the very person who it is intended or desired should
" pay it" and concluded that the tax there imposed was "not a tax on
" any commodity which the bank deals in or can sell at an enhanced price
" to its customers." *Brewers and Maltsters v. A. G. Ontario* (1897), A. C. 231,
went on the ground that the license fee there imposed was not a transmissible
tax. We think that transmissibility is the proper test for the present case.
On this ground we were referred to *A. G. for Manitoba v. A. G. for Canada*
(1925), A. C. 561. That was a tax on persons selling grain for future
30 delivery. In concluding the Judgment of the Privy Council Lord Haldane
said—

" Turning to the only remaining question, whether the tax is in
" substance indirect, and bearing in mind that by s. 5 the liability is
" expressed as if it were to be a personal one, it is impossible to doubt
" that the tax was imposed in the form which contemplated that
" some one else than the person on whom it was imposed should pay it.
" The amount will, in the end, become a charge against the amount
" of the price which is to come to the seller in the world market, and be
" paid by some one else than the persons primarily taxed. The class of
40 " those taxed obviously includes an indefinite number who would
" naturally indemnify themselves out of the property of the owners
" for whom they were acting."

Much similar was the case of *A. G. for B. C. v. C. P. R.* (1927), A.C. 934, where the first vendor in the province, on the sale to the first purchaser was to levy and collect a tax and pay it over to the government. It was

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urged in argument that there was no escape from the language, again of Lord Haldane who said—

“ It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one.” 10

Rex v. Caledonia Collieries (1928), 97 L. J. P. C., 94, was a percentage tax imposed by mine owners in respect of the gross revenue of coal mines. Lord Warrington said at p. 96—

“ The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains. 20

“ It is said on behalf of the appellant that at the time a sale is made the tax has not become payable and therefore cannot be passed on. Their Lordships cannot accept this contention ; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.”

Lower Mainland Dairy v. Crystal Dairy (1933), A. C. 176 was in the same category. The Privy Council said— 30

“ There can be little doubt that such taxes have a tendency to enter into and affect the price which the taxpayer will seek to obtain for his commodities, as in the case with excise and customs.”

“ I think,” said Duff, J., as he then was, in *Lawson v. Interior Tree Fruit Co.* (1931), S. C. R., at p. 164—

“ the contention of the appellant is well founded, that such levies so imposed, have a tendency to enter into and to affect the price of the product. I think, however, that levies of that character, assuming for the moment they come under the head of taxation, are of the nature of those taxes on commodities, on trade in commodities, which have always been regarded as indirect taxes.” 40

1934 22
 We have as the final word in this series of cases the Judgment of Lord Thankerton in *A.G. of B.C. v. Kingcome Navigation Co.*, 103 L.J.P.C. (1934) 1, where referring to previous Judgments of the Board he says :

“ These decisions, in their Lordships’ opinion, made clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax.”

And later at p. 6—

10 “ As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties in the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon that one of the parties to the trading in the particular commodity who is selected as the taxpayer.”

20

Again he says—

“ Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.”

And on p. 8.

30 “ Turning then to the provisions of the Fuel-oil Tax Act here in question it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. *The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else.* Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangements under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot affect the nature of the tax.”

40 The differences between the Act there considered and the Act under review here are two—firstly, the B. C. Act imposes the tax upon the person who has consumed fuel-oil thereby avoiding the decision in *A.G. for B.C.*

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v. *C.P.R.* (1927), A.C. 934, that "Fuel-oil is a marketable commodity and "those who purchase it, even for their own use, acquire the right to take it "into the market." Our Act imposes the duty *before consumption of the commodity*. By actual consumption under the B.C. Act the purchaser becomes the ultimate consumer. We think the same result is attained by the *express provisions of sec. 3 (2)* which takes away the right of resale from the purchaser from a retail dealer. He must obtain a vendor's license to do so or else he violates the law and is subject to a penalty if he does so. *The statute makes him the ultimate consumer*. Such ultimate purchaser, if he seeks to sell again, must acquire a legal capacity to do so. He has 10
purchased tobacco, at retail, and presumably at the ordinary market price of that commodity. He has paid a tax which by the theory of the political economist he is to pass on. To this he must add the cost of the permission of the authorities to become a vendor. It seems impossible to conceive that he can have a market unless he is prepared to sell the commodity at a definite loss.

Secondly, as was powerfully argued by Mr. Carter, there is no, and obviously there could be no definition of "consumer" under the B.C. Act. Sec. 2 (a) of our Act contains a definition which is quoted in full at the beginning of this judgment. By it the consumer may purchase from a 20
vendor by *means of an agent*. The principal must be one who desires to acquire the tobacco for consumption by himself or other persons at his expense. Mr. Carter contended that the tax, necessarily paid by the agent, would be "passed on" to the principal which would bring the transaction within the trading cases to which reference has already been made. But we think the answer to this argument is that *there is not and cannot be a sale by the agent to his principal*. Mr. Carter says that the agent is entitled to be indemnified by his principal. This cannot be controverted, but indemnity is not sale. No person has been introduced into the series with whom a transaction of sale has taken place. *Qui facit per alium facit* 30
per se applies. This is only part of the machinery of the Act. *Forbes v. A.G. of Manitoba* (1937) 106 L.J.P.C. 17, at p. 20.

The tax is not imposed upon the vendor; it is not imposed upon the goods; it is imposed upon the consumer and measured by the extent and value of his purchase. The consumer pays the tax at the time of the sale to him. The vendor pays no tax and the tax cannot by any possibility enter as a factor into the price charged by him. That there is a perception of the tax at the moment that the commodity passes from the seller to the buyer does not make it a sales tax. It seems to fall within the class of excise taxes which may be levied by a provincial legislature. But it is 40
immaterial how it is described. The incidence of the tax falls upon and is borne by the ultimate consumer and cannot be passed on. For these reasons we hold that the Act is within the constitutional powers of the Province.

1037 11-2-68

SUPREME COURT.
ON APPEAL.

ATLANTIC SMOKE SHOPS LIMITED

vs.

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

Judgment—(b) GRIMMER, J.

In the
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Judgment,
(b)
Grimmer, J.

10 Having had the opportunity of reading the profound judgment of my
brother the learned Chief Justice in this case, I have no hesitation whatever
in concurring therein and in adopting it in its entirety and only wish to add
that having carefully considered the various cases that were cited to us on
the able arguments of counsel who attacked the Act, I am satisfied as was
expressed and found in the case of *The Attorney General of British Columbia*
vs. *Kingcome Navigation Co.* (1934) L.J.P.C. 1; that the Act under con-
sideration does not relate to any commercial transaction in the commodity
taxed, between the taxpayer and someone else. That the tax is not
transmissible and it is demanded from the very person who it is intended
should pay it, and is therefore direct. Also that the duty is imposed before
20 consumption of the commodity. That the tax is imposed upon the
consumer and is paid by him at the time of the sale to him, and is not
imposed upon the goods, nor on the vendor, and, therefore, by its nature
it is such that normally it is finally borne by the first payer and is not
susceptible of being passed on.

For these as well as other reasons so ably expressed by the learned Chief
Justice, I am convinced that the Act is within the competency of the
Legislative Assembly of this Province to pass and is therefore valid.

Richards, J., concurred in the judgment of Baxter, C.J.

In the
Supreme
Court of
New
Brunswick
(Appeal
Division).

No. 4.
Formal Judgment.

IN THE SUPREME COURT } November Session, 4 George VI.
(APPEAL DIVISION). } Tuesday, December 3rd, 1940.

SPECIAL CASE IN AN ACTION ORIGINATING IN THE CHANCERY DIVISION.

No. 4.
Formal
Judgment,
3rd Decem-
ber, 1940.

Between

ATLANTIC SMOKE SHOPS, LIMITED, an incorporated Company,
duly incorporated Plaintiff

and

JAMES H. CONLON, JOHN McDONOUGH and THE ATTORNEY
GENERAL OF THE PROVINCE OF NEW BRUNSWICK ... Defendants. 10

Upon hearing, on an earlier day in this session, Mr. A. N. Carter and Mr. J. F. H. Teed, one of His Majesty's Counsel, of counsel for the Plaintiff, and Mr. P. J. Hughes, one of His Majesty's Counsel, of counsel for the Defendants, upon a special case submitted to the Court to determine the constitutionality of the Act of Assembly 4 George VI (1940), Chapter 44, entitled "An Act to provide for imposing a Tax upon the Consumption of Tobacco," the Court, having taken time to consider, DO TH NOW FIND that the said Act is within the constitutional powers of the Province, and the action is therefore dismissed. 20

By the Court,
(Sgd.) H. LESTER SMITH,
Registrar.

No. 5.

No. 5.

Order Granting Special Leave to Appeal, 3rd December, 1940.
(Not printed.)

No. 6.
Notice of
Appeal,
4th Decem-
ber, 1940.

No. 6.
Notice of Appeal.

IN THE SUPREME COURT
(APPEAL DIVISION).

Between

ATLANTIC SMOKE SHOPS, LIMITED, an Incorporated Company,
duly incorporated Plaintiff

and

JAMES H. CONLON, JOHN McDONOUGH and THE ATTORNEY-
GENERAL OF THE PROVINCE OF NEW BRUNSWICK ... Defendants. 30

TAKE NOTICE that Atlantic Smoke Shops, Limited, the above-named Plaintiff intends to appeal and does hereby appeal to the Supreme Court of

Canada, from the Judgment decision and order of the Supreme Court of New Brunswick, Appeal Division, delivered, pronounced and made in this cause on the 3rd day of December A.D., 1940, whereby the said Supreme Court of New Brunswick, Appeal Division, declared that "The Tobacco Tax Act of the Province of New Brunswick" was constitutional and *intra vires* and this action was dismissed.

In the Supreme Court of New Brunswick (Appeal Division).

Dated the 4th day of December A.D., 1940.

(Sgd.) PORTER & RITCHIE,
Solicitors for ATLANTIC SMOKE SHOPS, LIMITED.
Plaintiff (Appellant).

No. 6.
Notice of Appeal—
4th December, 1940—
continued.

10

To : Peter J. Hughes, Esq., K.C., Solicitor
for, James H. Conlon, John McDonough,
and The Attorney-General of The
Province of New Brunswick,
Defendants (Respondents)

No. 7.

No. 7.

Bond on Appeal, 20th December, 1940.

(Not printed.)

No. 8.

No. 8.

20

Order, Approving Bond, 20th December, 1940.

(Not printed.)

No. 9.

No. 9.

**Certificate of Registrar of the Supreme Court of New Brunswick certifying
Case on Appeal, 8th January, 1941.**

(Not printed.)

No. 10.

No. 10.

Certificate of Appellant's Solicitor, 8th January, 1941.

(Not printed.)

In the
Supreme
Court of
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No. 11.

Factum for Appellant.

No. 11. Factum for Appellant.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Between

ATLANTIC SMOKE SHOPS, LIMITED, an incorporated Company,
duly incorporated (Plaintiff) Appellant
and

JAMES H. CONLON, JOHN McDONOUGH and THE ATTORNEY-
GENERAL OF THE PROVINCE OF NEW BRUNSWICK 10
(Defendants) Respondents.

FACTUM FOR PLAINTIFF-APPELLANT.

PART I.

STATEMENT OF FACTS.

This is an appeal from the Judgment of the Supreme Court of New Brunswick, Appeal Division, declaring that the Tobacco Tax Act of New Brunswick is within the constitutional powers of the Province of New Brunswick, and dismissing the Plaintiff's action.

The facts leading up to this appeal may be shortly stated.

1. On the 11th day of May, A.D. 1940, the legislature of the Province 20
of New Brunswick purported to enact a Statute being Chapter 44, 4 George VI, cited as "The Tobacco Tax Act." This Act was brought into force on October 1, 1940, by Proclamation.

2. The Lieutenant-Governor-in-Council, purporting to be acting under the provisions of said Tobacco Tax Act, purported to enact certain regulations, styled, "Regulations under Tobacco Act." Both Act and Regulations are printed in the case on Appeal.

3. The Atlantic Smoke Shops Limited 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 30
of New Brunswick and carried on business at the City of Saint John in a certain store in the said City.

4. Since the 15th day of October, 1940, the Plaintiff has sold tobacco (including cigars and cigarettes) manufactured in Provinces in Canada (other than the Province of New Brunswick) at retail sale 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 said Act.

5. The Defendant, James H. Conlon, was on the coming into force of the said Tobacco Tax Act appointed to the office of Tobacco Tax

Commissioner, being the office created under the Regulations hereinbefore referred to and has since occupied and now occupies said office.

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6. On the 2nd day of November, 1940, the Defendant John McDonough, an Inspector appointed under the said Act, and others, acting under the instructions of the other Defendants, entered upon the Plaintiff's said store premises and proceeded to question the Plaintiff's customers, as to whether they had paid the tax purported to be imposed by the said Tobacco Tax Act, upon or with respect to the tobacco purchased by them from the Plaintiff, and to ask them to produce their tobacco tax receipt and to demand their names and addresses. When requested to leave, the said Defendant McDonough and others refused to do so and claimed that they were entitled to remain on the premises of the Plaintiff and to question its customers, by virtue of certain provisions of the said Tobacco Tax Act and the Regulations made thereunder.

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continued.

7. The parties are agreed that by reason of such actions of the Defendants, the business of the Plaintiff was and is being injuriously affected.

8. On November 2nd, 1940, the Plaintiff commenced an action against the Defendants in the Supreme Court of New Brunswick, the writ in such action being endorsed with a claim for relief in the terms set out on page 2 of the Case.

9. The parties agreed to state a special case and to submit to the Court the question as to whether the Tobacco Tax Act, or any of the provisions thereof, or the Regulations made thereunder or any of them and in what particular or particulars or to what extent were *ultra vires* of the legislature of the Province of New Brunswick. This special case is in the Record on appeal, pages 3-5. The Tobacco Tax Act and Regulations constitute Schedule A thereto (Record, pp. 6-17).

10. It was in and by said special case agreed :

That if the said Act and Regulations made thereunder were found to be wholly *intra vires*, that the action should be dismissed.

That if the Act and the Regulations thereunder were found to be wholly *ultra vires*, Judgment should be entered in favour of the Plaintiff against the Defendants for an Injunction Order in the terms of the claim endorsed on the Writ of Summons.

That if the Act and Regulations thereunder were found to be in part *intra vires* and in part *ultra vires*, the Court should make such order by way of declaration and/or by way of substantive relief as it should deem right and proper.

11. The case was argued before the Supreme Court of New Brunswick, Appeal Division ; the Judges sitting were Baxter, C.J., Grimmer, J., and Richards, J. The Court on the 3rd day of December, 1940, delivered Judgment, holding that the Act and Regulations thereunder were wholly *intra vires* and constitutional.

The principal Judgment was delivered by Baxter C.J. (Record pp. 18-24),

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Grimmer, J., delivered a short Judgment, concurring substantially with the reasoning of Baxter, C.J. (Record p. 25). Richards, J., concurred with Baxter, C.J.

Special leave to appeal from said Judgment to the Supreme Court of Canada was granted by the Supreme Court, Appeal Division.

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Factum for
Appellant—
continued.

PART II.

GROUND OF APPEAL.

The Appellant submits that the Judgment appealed from is erroneous, and the Tobacco Tax Act and the Regulations made thereunder are *ultra vires* for the following reasons : 10

1. The Act is not legislation upon the matters assigned to the legislative jurisdiction of the Province by Sec. 92 of the British North America Act, but is in fact legislation upon matters within the exclusive legislative jurisdiction of the Dominion of Canada by virtue of Sec. 91 of the British North America Act.

2. The Act purports to impose a tax for the raising of a revenue for Provincial purposes, but such tax is neither,

(a) a direct tax, nor

(b) a tax within the Province

as authorized by subsection 2 of Sec. 92 of the British North America Act. 20

3. The tax is not confined in its effect to the Province of New Brunswick nor to the persons upon whom it is levied.

4. The Act infringes upon the exclusive legislative jurisdiction of the Dominion of Canada to impose customs and excise duties ;

5. The Act purports, in violation of the provisions of Sec. 121 of the British North America Act, to impose a tax upon articles grown, produced or manufactured in another Province of Canada when introduced into New Brunswick for purposes of consumption.

6. The licenses provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under Sec. 92 subsection 9 of the British North America Act. 30

7. The Regulations are invalid because the Statute which authorizes them is wholly *ultra vires*.

PART III.

ARGUMENT.

GROUND 1, 2 and 3 may be conveniently argued together.

They involve an examination into two questions.

1st. What is the legislative jurisdiction of a province with respect to taxation ? 40

2nd. Does the Tobacco Tax Act impose taxation of a kind not within provincial legislative jurisdiction ?

The powers of a provincial legislature to impose or authorize the imposition of taxation are found in the B.N.A. Act, Sec. 92, which authorizes :

- (2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes
- (9) Shop, Saloon, Tavern, Auctioneer and other Licenses in order to the raising of a Revenue for Provincial Local or Municipal Purposes.

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(9) only authorized licensing and will be dealt with under Appeal 10 heading No. 6.

(2) authorizes only *direct* taxation *within* the Province.

The meaning of the expression "direct taxation" as the expression was understood in 1867 is established by high judicial authority at least as early as 1884 and is now settled beyond controversy.

See,

Atty. Gen. for Quebec v. Reed, L.R. 10 A.C. 141 at 143 & 4, Cameron, Vol. I, p. 360, at 362 & 3.

Bank of Toronto v. Lambe, L.R. 12 A.C., 575 at 582-3, Cameron, Vol. I, p. 378 at 385.

20 *Cotton v. The King*, L.R. (1914) A.C. 176 at p. 192-3, Cameron, Vol. I, 788 at p. 802-3.

The definition of John Stuart Mill cited in those cases states,

"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 intention that he shall indemnify himself at the expense of another ; such are the excise or customs."

The Tobacco Tax Act imposes a tax which is not direct but on the contrary is indirect in at least two respects.

30 I. It imposes a tax upon the taxpayer with respect to and by reason of his entering into commercial transactions or trades in commodities such tax being imposed with respect to each such individual transaction into which he has entered.

II. It taxes all agents,

- (i) who purchase tobacco on behalf of their principals ; and
- (ii) who bring tobacco into the Province of New Brunswick on behalf of their principals.

40 (I) THE TAX IS INDIRECT BECAUSE IT IS IMPOSED UPON A TAXPAYER WITH RESPECT TO AND BY REASON OF HIS ENTERING INTO A COMMERCIAL TRANSACTION WITH RESPECT TO TOBACCO.

The Appellant submits,

- (a) That the question of the nature of the tax (i.e. as to whether the same is direct or indirect) is one of substance and does not turn

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only on the language used by the local legislature which imposes it, but on the provisions of the *Imperial Statute of 1867*.

Quoting Viscount Haldane in *Grain Futures* case (1925) A.C. 566, Cameron 385.

(b) That in testing the validity of a Statute, the first requisite is to ascertain the real nature of the tax imposed,

Quoting Lord Warrington in

The King v. Caledonian Collieries Ltd. (1928), A.C. 358, Cameron, Vol. 2 494, at L.R., p. 362, Cameron 497,

and Lord MacMillan in

A.G. for British Columbia v. MacDonald & Murphy Lumber Co. (1930), A.C. 357, Plaxton, 43, at L.R. 363, Plaxton 48.

(c) That in applying Sec. 92 (2) of the B.N.A. Act, certain *types* or *kinds* of taxes must always be accepted as belonging to the class of direct or indirect taxes, as the case may be, without inquiry as to the ultimate incidence thereof. In particular a tax on income and a tax on real property are always direct, while excise taxes and customs taxes (and certain other taxes) are always indirect, see *City of Halifax v. Fairbanks*, L.R. (1928), A.C. 117, Cameron, Vol. II, p. 477,

per Viscount Cave, L.R. 124 & 5, Cameron, p. 482-3.

From an examination of the relevant authorities, it appears that two propositions with respect to the validity of the Provincial taxation legislation are clearly established,

(i) A tax upon a person with respect to his *consumption* within the Province of some commodity based upon the quantum of his actual consumption over a period is always direct taxation and *intra vires*, even although in some instances and circuitously he is enabled to pass the burden on to someone else.

(ii) A tax upon a person with respect to a commercial transaction, or with respect to a transaction in a commodity such as a sale or purchase thereof, based upon and with respect to the transaction or the price of the commodity is always indirect taxation and *ultra vires*, even although in some instances the party taxed may not pass the burden to anyone else.

It is the Appellant's submission that the tax imposed under s. 4 of the Tobacco Tax Act is really a tax imposed upon every purchaser of tobacco at a retail sale and is in its essence and in pith and substance a tax upon him in respect of the transaction in which he is engaged, or in respect of the goods which he acquires thereby. Such a tax may be properly designated as a sales tax. It falls within the class of taxes covered by the second proposition above stated as being indirect and therefore *ultra vires*.

The learned Chief Justice in his reasons for Judgment delivered in this case, substantially accepts the appellant's submission that a sales tax

is an indirect tax, but he suggests that it is not always so. He says (Record, p. 21, l. 17),

“ Counsel for the dealers postulated that a sales tax was an indirect tax. Generally speaking, that is correct, but we do not think that there cannot be a sales tax which is a direct tax.”

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The second proposition above set forth and upon which the Appellant relies, is fully supported by authority. No case was cited by the learned Chief Justice in which it has been judicially determined that there was any exception to the general proposition that a tax on sales is an indirect tax and therefore *ultra vires*.

In those cases in the Privy Council where the subject is judicially discussed,—either as part of a decision that some tax is indirect, or, by way of contrast, in a decision that some other tax is direct,—the proposition appears to be stated or discussed without any such qualification as the learned Chief Justice suggests.

The Appellant calls attention to the following observations, chronologically :

1877—*Bank of Toronto v. Lambe*, L.R. 12 A.C. 576, Cameron, Vol. I, 378.

20 Speaking by way of contrasting the tax there imposed upon Banks with respect to the paid-up capital and each place of business in the Province, Lord Hobhouse says, L.R., p. 583, Cameron 384,

30 “ It is not like a customs’ duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer ; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. *It is not a tax on its profits, nor on its several transactions.* It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business.”

40 1925—*A.G. for Manitoba v. A.G. for Canada*, L.R. (1925), A.C. 561, Cameron, Vol. II, 381.

Viscount Haldane, speaking of a tax on the sale of grain for future deliveries, says, L.R., p. 568, Cameron, 386 :

“ Turning to the only remaining question whether the tax is *in substance* indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt

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“ that the tax was imposed in a form which contemplated that someone else than the person on whom it was imposed should pay it. The amount will in the end become a charge against the amount of the price which is to come to the seller in the world market and be paid by some one else than the persons primarily taxed.”

1927—*A.G. for British Columbia v. C.P.R.*, L.R. (1927), A.C. 934, Cameron 441,

Viscount Haldane, delivering the Judgment and speaking of a tax upon the first purchaser of fuel oil, says, L.R. 937, Cameron 444 :

“ the legislation the (B.N.A. 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 these tendencies ’.”

And at L.R. 938, Cameron 444, further says :

“ The respondents purchase oil in British Columbia from the latter company. It is sought to tax them as first purchasers under s. 3 and as holders of the oil for consumption under s 6, which has to be read with reference to s. 3. It may be true that having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel Oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It, therefore, comes within the general principle which determines that the tax is an indirect one.”

1928—*City of Halifax v. Fairbanks*, L.R. (1928), A.C. 477, Cameron, Vol. II, 477,

Viscount Cave, speaking of a tax on the occupier of real estate, quotes with approval the statement of Lord Hobhouse in the *Lambe* case as follows (L.R., p. 124, Cameron 482) :

“ Probably it is true of every indirect tax that some persons are both the first and the final payers of it ; and of every direct tax that it affects persons other than the first payer, and the excellence of an economist’s definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It 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,”

and, speaking of the B.N.A. Act, says :

“ *The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct, and those that cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend.*”

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After discussing the general propositions as to what are direct and indirect taxes, he says,

10 “ Thus, taxes on property or income were everywhere treated as
“ direct taxes ; and John Stuart Mill himself, following Adam Smith,
“ Ricardo and James Mill, said that a tax on rents falls wholly on the
“ landlord and cannot be transferred to anyone else. ‘ It merely takes
“ ‘ so much from the landlord and transfers it to State ’ (Political
“ Economy, Vol. ii, p. 416). On the other hand, duties of *customs*
“ *and excise were regarded by everyone as typical instances of indirect*
“ *taxation.* When therefore the Act of Union allocated the power
“ of direct taxation for Provincial purposes to the Province, it must
“ surely have intended that the taxation, for those purposes, of property
“ and income should belong exclusively to the Provincial legislatures,
20 “ and that without regard to any theory as to the ultimate incidence
“ of such taxation.”

At L.R., p. 125, Cameron 483, he further says,

30 “ *What then is the effect to be given to Mill’s formula above quoted ?*
“ No doubt it is valuable as providing a logical basis for the distinction
“ already established between direct and indirect taxes, and perhaps
“ also as a guide for determining as to any new or unfamiliar tax which
“ may be imposed in which of the two categories it is to be placed ; but
“ *it cannot have the effect of disturbing the established classification of the*
“ *old and well known species of taxation, and making it necessary to apply*
“ *a new test to every particular member of those species.* The imposition
“ of taxes on property and income, of death duties and of municipal and
“ local rates is, according to the common understanding of the term,
“ direct taxation, *just as the exaction of a customs or excise duty on*
“ *commodities or of a percentage duty on services would ordinarily be*
“ *regarded as indirect taxation.*”

1928—*King v. Caledonian Collieries Ltd.*, L.R. (1928), A.C. 358
Cameron, Vol. II, 494.

Lord Warrington, speaking of a percentage tax on the gross revenue of
a mine (L.R. 362, Cameron, 496) also quotes with approval the language of
40 Lord Hobhouse in the *Lambe* case :

“ It is true of every indirect tax that some persons are both the
“ first and the final payers of it ; and of every direct tax that it affects
“ persons other than the first payers ; and the excellence of an
“ economist’s definition will be measured by the accuracy with which
“ it contemplates and embraces every incident of the thing defined.

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“ But that very excellence impairs its value for the purposes of the
“ lawyer. The Legislature cannot possibly have meant to give a power
“ of taxation valid or invalid according to its actual results in
“ particular cases. It 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.”

And continuing says :

“ What then is the general tendency of the tax now in question ?

“ First, it is necessary to ascertain the real nature of the tax. It 10
“ is not disputed that, though the tax is called a tax on ‘ gross revenue ’
“ such gross revenue is in reality the aggregate of sums received from
“ sales of coal, and is indistinguishable from a tax upon every sum
“ received from the sale of coal.”

“ The respondents are producers of coal, a commodity, the subject
“ of commercial transactions. Their Lordships can have no doubt that
“ the general tendency of a tax upon the sums received from the sale
“ of the commodity which they produce and in which they deal is that
“ they would seek to recover it in the price charged to a purchaser.
“ *Under particular circumstances the recovery of the tax may, it is true, 20*
“ *be economically undesirable or practically impossible, but the general*
“ *tendency of the tax remains.*”

1930.—*A.G. for British Columbia v. McDonald, Murphy Lumber Co.*
L.R. (1930), A.C. 357, Plaxton, p. 43. .

Lord MacMillan speaking of a tax upon timber cut within the Province,
says L.R. 365, Plaxton, p. 50.

“ While it is no doubt true that a tax levied on personal property,
“ no less than a tax levied on real property, may be a direct tax where
“ the taxpayer’s personal property is selected as the criterion of his
“ ability to pay, a tax which like the tax here in question, is 30
“ levied on a *commercial commodity* on the occasion of its exportation
“ in pursuance of *trading transactions*, cannot be described as a tax
“ whose incidence is, *by its nature*, such that normally it is finally borne
“ by the first payer and is not susceptible of being passed on.”

1931—*Lawson v. Interior Tree Fruit and Vegetable Committee* (1931),
S.C.R. 357, the present Chief Justice, then Duff, J., says
at p. 362 :

“ Before proceeding to discuss the question arising in relation to
“ s. 91 (2), I shall consider, first of all, the levies imposed upon the
“ appellant by s. 10 (k) and the demands for the payment of such levies. 40
“ I think the contention of the appellant is well founded, that such
“ levies so imposed, have a tendency to enter into and to affect the
“ price of the product. I think moreover that levies of that character,
“ assuming for the moment they come under the head of taxation

“ are of the nature of those taxes on commodities, on trade in commodities,
 “ which have always been regarded as indirect taxes.”

1933.—*Lower Mainland Dairy Products Sales Adjustment Committee*
v. Crystal Dairy Ltd., L.R. (1933), A.C. 168, Plaxton 181.

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Lord Thankerton, speaking of a tax on the vendor of milk based on
 the quantum sold, says, L.R. 176, Plaxton 189 :

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10 “ The distinction between the present class of tax and that class
 “ of direct tax of which the assessment for the workmen’s compensation
 “ fund were an example (*Workmen’s Compensation (177) Board v.*
 “ *Canadian Pacific Ry. Co.*) is pointed out in the Judgment of the
 “ Board in that case. Lord Haldane in delivering the Judgment says :

20 “ Nor can it be successfully contended that the Province
 “ had not a general power to impose direct taxation in this form
 “ on the respondents if for Provincial purposes. In *Bank of*
 “ *Toronto v. Lambe* it was decided by the Judicial Committee
 “ that a Province could impose direct taxes in aid of its general
 “ revenue on a number of banks and insurance companies carrying
 “ on business within the Province, and none the less that some of
 “ them were, like the respondents, incorporated by Dominion
 “ statute. *The tax in that case was not a general one, and it was*
 “ *imposed not on profits nor on particular transactions, but on*
 “ *paid-up capital and places of business.*”

“ The tax in that case was assessed according to the amount of
 “ the employers’ pay-rolls. *The tax here is imposed on the proceeds of*
 “ *particular transactions.* Their Lordships are of the opinion that both
 “ the levies here are *indirect taxes.*”

1934—*A.G. for British Columbia v. Kingcome Navigation Co.*,
 L.R. (1934), A.C. 45, Plaxton 223.

30 Here the tax was imposed on the consumer of fuel oil according to the
 quantity which he consumed *within the Province.* After discussing the
Fairbanks case, Lord Thankerton, says L.R. 57, Plaxton, 232 :

40 “ As has already been pointed out the ultimate incidence of the
 “ tax, in the sense of the political economist, is to be disregarded, but
 “ *where the tax is imposed in respect to a transaction,* the taxing
 “ authority is indifferent as to which of the parties to the transaction
 “ ultimately bears the burden, and, as Mill expresses it, it is not
 “ intended as a peculiar contribution upon the particular party selected
 “ to pay the tax. *Similarly where the tax is imposed in respect of some*
 “ *dealing with commodities, such as their import or sale, or production*
 “ *for sale, the tax is not a peculiar contribution upon the one of the*
 “ *parties to the trading in the particular commodity who is selected*
 “ *as the taxpayer.* This is brought out in the second paragraph of
 “ Mill’s definition, and is true of the typical custom and excise duties
 “ referred to by Lord Cave.”

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Continuing he says L.R. 59, Plaxton 234 :

“ In their Lordships’ opinion the customs or excise duty on
“ commodities ordinarily regarded as indirect taxation, referred to
“ in the Judgment in *Fairbanks’* case and the *McDonald Murphy*
“ *Lumber Co’s* case, are duties which are imposed in respect of commercial
“ dealings in commodities and they would necessarily fall within Mill’s
“ definition of indirect taxes. They do not extend for instance, to a dog
“ tax, which is clearly direct taxation though the machinery of the
“ excise law might be applied to its collection, or to a license duty,
“ such as was considered in *Lambe’s* case. Customs and Excise duties
“ are in their essence, trading taxes and may be said to be more concerned 10
“ with the commodity in respect of which the taxation is imposed
“ than with the particular person from whom the tax is exacted.”

And further says, L.R. 59, Plaxton, p. 235 :

“ Turning then to the provisions of the Fuel-oil Act here in
“ question, it is clear that the Act purports to exact the tax from
“ a person who has consumed fuel-oil the amount of the tax being
“ computed broadly according to the amount consumed. The Act
“ does not relate to any commercial transaction in the commodity between
“ the taxpayer and some one else. Their Lordships are unable to find 20
“ on examination of the Act, any justification for the suggestion that
“ the tax is truly imposed in respect of the transaction by which the
“ taxpayer acquires the property in the fuel oil nor in respect of any
“ contract or arrangement under which the oil is consumed, though,
“ it is, of course, possible that individual taxpayers may recoup them-
“ selves by such a contract or arrangement ; but this cannot affect
“ the nature of the tax.”

In three different passages of this Judgment, the fact is stressed that the tax was not imposed in respect of or in relation to a transaction or dealing in the commodity.

It is fair to suggest that this point was so stressed because it had 30 previously been held

- (i) That a tax imposed upon or with respect to any commercial transaction or transactions in a commodity, and whether
- (ii) upon the vendor (See *Grain Futures* case, 1925 ; the *Caledonian Collieries* case, 1928 and *Lower Mainland* case, 1933) or
- (iii) the purchaser (see *C.P.R.* case, 1927)

was indirect and *ultra vires*.

Therefore, in the *Kingcome* case, the point was stressed that the tax there imposed was a tax imposed upon and with respect to the actual consumption of a commodity measured in terms of quantity of the com- 40modity, in fact consumed, over a period, and not upon or with respect to the commercial transaction or transactions therein nor measured in terms of the quantum or the value of the commodity involved in any such transaction.

In his work so repeatedly quoted by the Courts, Mill suggests that a producer or importer is called upon to pay a tax not with the intent to levy a peculiar contribution upon him, but to tax through him the *consumers* of a commodity.

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The Provincial Legislature has endeavoured to artificially prevent the operation of the natural tendencies of a sales tax, and thereby to take a tax imposed upon or with respect to sale of a commodity out of the category of indirect taxation, where it normally and properly belongs, and to place it in the category of direct taxation in which category a true consumption tax belongs.

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The learned Chief Justice of New Brunswick was of the opinion that the legislature had succeeded in so doing. In his Judgment (Record, p. 24, l. 4) he says :

“ By actual consumption under the B.C. Act the purchaser becomes the ultimate consumer. We think the same result is attained by the express provisions of sec. 3 (2) which takes away the right of resale from the purchaser from a retail dealer. He must obtain a vendor’s license to do so or else he violates the law and is subject to a penalty if he does so. The statute makes him the ultimate consumer. Such ultimate purchaser, if he seeks to sell again, must acquire a legal capacity to do so. He has purchased tobacco at retail, and presumably at the ordinary market price of that commodity. He has paid a tax which by the theory of the political economist he is to pass on. To this he must add the cost of the permission of the authorities to become a vendor. It seems impossible to conceive that he can have a market unless he is prepared to sell the commodity at a definite loss.”

To this, the Appellant makes two submissions.

1st. That a provincial legislature cannot do indirectly that which it cannot do directly (see *Madden v. Nelson*, L.R. 1899, A.C. p. 626 at 628, Cameron, Vol. I, p. 571 at 572) that, inasmuch as a tax upon a vendor or purchaser upon or with respect to a transaction of sale of goods is indirect, it cannot change such indirect tax into a direct one by a definition clause declaring that the purchaser shall be the consumer of the goods or by purporting to prohibit any subsequent transaction in such goods. Any Act which purports so to do is *ultra vires*.

2nd. That the legislation in question does not in fact prevent a purchaser from reselling tobacco purchased in New Brunswick for the purpose of consumption, and therefore, does not in fact get rid of the natural tendencies of a tax on sales to be passed on which tendency is inherent in its character.

1st Proposition.

The Province has not the Legislative jurisdiction to make a tax on a sale (an indirect tax), a tax on the consumer (a direct tax).

In testing the validity of taxation and other legislation, the Court must determine what is its “ pith and substance.”

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In arriving at such determination, the designation or title, and any definition, machinery, or other provisions introduced into the Statute for the purpose of concealing or camouflaging such "pith and substance" will be ignored. No such title, definition, statutory machinery, etc., will enable either a province or the Dominion to legislate with respect to a subject which is beyond its competence as established by the Imperial Statute of 1867.

That this is the law is established by very numerous cases. Those decided by the Privy Council prior to 1924 are referred to and discussed in, *A.G. for Ontario v. Reciprocal Insurers et al*, L.R. (1924), A.C., 328 10
Cameron, Vol. I, 334.

In delivering the judgment of the Privy Council in the above case His Lordship the present Chief Justice of Canada, speaking of the Dominion Statute which was in *form* an amendment to the Criminal Code, says, L.R. 336, Cameron, 341 :

"The question now to be decided is whether, in the frame of
"which this legislation of 1917 is cast, that part of it which is so
"enacted can receive effect as a lawful exercise of the legislative
"authority of the Parliament of Canada in relation to the criminal
"law. It has been formally laid down in judgments of this Board 20
"that in such an inquiry the Courts must ascertain the 'true nature
"and character' of the enactment: *Citizens' Insurance v. Parsons* :
"its 'pith and substance' : *Union Colliery Co. v. Bryden* : and it
"is the result of this investigation not the form alone, which the
"statute may have assumed under the hand of the draftsman, that
"will determine within which of the categories of subject matters
"mentioned in ss. 91 and 92 the legislation falls ; and for this purpose
"the legislation must be 'scrutinised in its entirety'."

The following cases are also illustrative of this principle and of the rejection by the Courts of the various attempts of some legislative bodies to 30
enact legislation of a character not assigned to it by the B.N.A. Act, under the guise or pretence, of enacting legislation of a character actually assigned to it by that Act.

A.G. Manitoba v. A.G. for Canada, L.R. (1925), A.C. 561, Cameron,
Vol. II, p. 581.

Here a tax upon sales of grain for future delivery was by the Statute designated as a "direct" tax ; this designation did not save the Statute from being declared an attempt to impose indirect taxation and as being invalid, see

L.R., p. 566, Cameron, 385.

Caledonian Collieries, Ltd., v. The King (1927), S.C.R. 257. 40

Here a tax was levied upon the gross proceeds of the sale of coal. It was attempted to be supported as being a tax upon income and therefore a direct tax (income tax being within the classification of direct taxes). This

contention was rejected, see Judgment delivered by Duff, J., p. 258, confirmed in Privy Council as noted on page 9 supra.

A.G. for British Columbia v. C.P.R., L.R. (1927), A.C. 934, Cameron. Vol. II, 441.

at L.R., p. 927, Cameron 443, the Privy Council called attention to the fact that in the *Grain Futures* case the tax was declared invalid, notwithstanding that the Act declared in terms that the tax was a *direct* one.

City of Charlottetown v. Foundation Maritime Ltd. (1932), S.C.R. 589.

10 The tax upon a contracting company based upon the amount of contract entered into by it in P. E. I. was declared to be *direct* tax. This declaration did not validate the legislation which was declared to be *ultra vires*, see Per Rinfret, J., delivering the Judgment of the Court at p. 593.

A.G. of Canada v. A.G. of Ontario (re Employment and Social Insurance Act), L.R. (1937), A.C. 355, Plaxton 305.

This Statute purported to deal with unemployment insurance. Was held bad. See

Judgment of Lord Atkin, L.R. p. 367, Plaxton 316.

A.G. for Alberta v. A.G. for Canada (re Alberta Bank Tax Act), L.R. 1939), A.C. 117, Plaxton 394.

20 Here a Statute purporting to be and defended as a Statute imposing a direct tax on Banks was held to be *ultra vires*, because it was not in its true nature taxation for the raising of revenue for provincial purposes, see

Judgment of Lord Maugham, L.R. 136, Plaxton, p. 401.

When the New Brunswick legislation was prepared, it had been judicially determined

(i) that a tax upon the purchaser of a commodity imposed at the time of the purchase, and with respect to the commodity purchased, was an indirect tax and *ultra vires* (*C.P.R.* case, 1927); and

30 (ii) that a tax imposed upon the consumer of a commodity after and with respect to its actual consumption within the province was direct taxation and *intra vires* (*Kingcome* case, 1934).

The draftsman who prepared the Tobacco Tax Act has endeavoured to avoid the effect of the decision in the *C.P.R.* case and to bring this legislation within the principle of the *Kingcome* case, by the introduction of section 2 (a) (which defines "consumer" as the purchaser) and of sec. 3 (2) (which prohibits retail sale in the Province unless the vendor holds a retail vendor's license).

The appellant once again submits that under the authorities last cited, a Province has not the jurisdiction validly to enact any such legislation.

40 In considering the effect of the provisions of the B.N.A. Act, the meaning to be placed upon the words used in any challenged legislation is and must be the meaning of the words as accepted by the common understanding of mankind in 1867 (*C.P.R.* case, 1927, A.C. 937, Cameron 444) and not the meaning which the legislative body whose Act is challenged

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has declared to be its meaning. On that basis, "consumer" means the person who has in fact consumed; "consumption" means consumption which has in fact taken place; "purchaser" means one of the persons who has entered into a transaction of sale, etc.

So long as the goods are in existence, from their inherent nature they may be the subject of further commercial transactions.

It is submitted that the alleged "consumption" tax purported to be imposed by the Tobacco Tax Act with respect to the "consumption" of tobacco prior to its *actual* consumption is not in its true nature and character or in pith and substance (*Reciprocal Insurance* case, 1924, A.C. 336, 10 Cameron 341), a "consumption tax" at all but must be and is a tax upon a purchaser with respect to a commercial transaction by him in tobacco, therefore an indirect tax and *ultra vires*.

To illustrate this point:

If under the B.N.A. Act a legislature had been authorized to impose a tax upon and with respect to every dog, it could not acquire jurisdiction to impose a tax upon and with respect to any other kind of animal by defining "dog" as meaning "every animal with four legs and a tail, etc."

Sec. 2 (a) is therefore legally ineffective to change the legal immunity from taxation of a purchaser (*C.P.R.* case) into liability to taxation of an 20 actual consumer (*Kingcome* case).

2nd Proposition.

The Act does not prevent a purchaser of tobacco from reselling the same.

The learned Chief Justice was of the opinion and stated (Record, p. 24, ll. 4-16) that sec. 3 (2) prevented a resale of tobacco and therefore forced the purchaser to be consumer in fact.

That subsection reads,

"No persons shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under authority 30 of this Act and such license is in force at the time of sale."

To this the Appellant makes two submissions:

1st. That the retail sale prohibited by the above subsection is a retail sale *within* the Province. The Statute does not purport to, and of course could not prevent a legal retail sale of tobacco outside the Province. There is nothing in the Statute to prevent a party who buys for the purpose of consumption, from changing his mind and reselling his tobacco outside the Province without taking out any license. He is perfectly free to do so, and if he does, he certainly is not the consumer although he has been forced to pay the consumption tax imposed by this Act. 40

2nd. That any person who so desires, has an absolute right to acquire a retail vendor's license, sec. 3 (4) reads,

"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."

This license is obtainable for the nominal fee of 50c. and cannot be refused to any applicant—(see *A.G. for Canada v. A.G. for B.C.*) (*Regulation of Fish Canneries* case), L.R. 1930, A.C., at p. 123, Plaxton, p. 1 at p. 13.

A person who has purchased a carton of cigarettes for his own consumption and who wishes to resell the same may acquire the right lawfully to resell within the Province by payment of that nominal fee.

The learned Chief Justice suggested that the cost of obtaining a license would render it “impossible to conceive” that the purchaser could find a market for resale. But speaking of an *indirect* tax Lord Warrington in the *Collieries* case (1928), A.C., at 262, Cameron, Vol. II, at p. 497, said that “in *particular circumstances*, the recovery of the tax may it is true, be “economically undesirable or *practically impossible*, but the general tendency “of the tax remains.”

The Appellant’s submission is, that a provincial legislature cannot defeat the “general tendency” of a tax which is indirect in such general tendency within the meaning attributed to “indirect” taxation and make it “direct” as the expression “direct” is used in the B.N.A. Act, by creating legal obstacles to commercial transactions. These would be only *particular circumstances* which might render it difficult or “*practically impossible*” to pass on the tax, but they could not prevent the existence of the “general tendency” of the tax to be passed on.

If it may so legislate with respect to sales, there appears to be no logical reason why a provincial legislature should not so legislate with respect to every kind of,—what has heretofore been universally recognized as,—indirect taxation.

(II) THE TAX IS INDIRECT BECAUSE THE ACT TAXES THE AGENT WITH RESPECT TO HIS TRANSACTIONS ON BEHALF OF HIS PRINCIPAL. (Record, p. 31, l. 34).

This type of taxation has repeatedly been held to be indirect taxation and *ultra vires* of a provincial legislature.

So far as the Appellant can ascertain in every case where the provincial legislature has sought to impose a tax of this character, the same, when challenged in the Courts, has been held bad as being indirect taxation,—see

Cotton v. The King, L.R. (1914), A.C. 176, at p. 193-4-5, Cameron, Vol. I, p. 788, at p. 80 2-3-4.

In *Attorney Gen. for Manitoba v. Attorney Gen. for Canada* (1925), A.C. 561, Cameron, Vol. II, p. 381,

the Act there in question purported to enact,

“That upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the Province, a tax computed upon the gross quantities of grain sold, or agreed to be sold.”

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Sec. 5 provided,

“ The tax imposed by this Act shall be a *direct tax* upon the *person actually entering into* the contract of sale, whether such person is the principal in the contract or is *acting only in the capacity of a broker* or agent for some other person and is imposed solely in order to supplement the revenues of this Province.”

Sec. 6 provided,

“ The tax hereby imposed shall be payable in cash by the seller his *broker or agent* in each case,” etc.

In discussing this Act, in delivering the Judgment of the Judicial 10 Committee, Viscount Haldane says, L.R. 566, Cameron, p. 384,

“ The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect.

“ As to the test to be applied in answering this question there is no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of sec. 92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. 20
“ An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes, excise and customs are given as examples.

“ *It does not exclude* the operation of the principle, if as here, by s. 5, the Taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. *For the question of the nature of the tax* is one of substance, and *does not turn only on the language used by the local legislature which imposes it but on the 30 provisions of the Imperial Statute of 1867.*”

Continuing, he says, L.R. 567, Cameron 383,

“ *The tax is not a license tax* ; it is one to be levied upon the contracts for the sale of the grain for future delivery. There is exemption when the seller under the contract is the grower of the grain and when either party to the contract is the owner or tenant of the land on which the grain is to be grown ; *but in nearly every other case the person entering into a contract of sale for future delivery has to pay a tax proportionate to the quantity sold.* It is obvious that this liability will extend not only to the brokers and mere agents, 40
“ but to factors, such as elevator companies.”

And continuing, he held that the Act was *ultra vires* because it purported to impose a tax which was an indirect tax within the meaning of the B.N.A. Act.

This same principle, namely, that a tax sought to be imposed upon an agent with respect to a transaction on behalf of property of his principal is indirect, was shortly afterwards (the next year, 1926) clearly recognized by Judges of this Court, see

Fairbanks v. City of Halifax (1926), S.C.R. 349, per Duff, J., at 368.

McLeod v. City of Windsor (1926), S.C.R. 450, per Anglin, J., 450, at 455-6-7.

Any possible doubt which may have existed as to the effect of the *Cotton* case was removed by the decision of the Privy Council in

10 *Provincial Treasurer of Alberta v. Kerr*, L.R. (1933), A.C. 710, Plaxton, p. 207.

In the *Kerr* case, two Alberta Statutes were held *ultra vires*, one upon the ground that the tax was not direct, and the other upon the ground that the tax was neither direct nor within the Province.

In this part of its Factum, the Appellant will refer only to those portions of the Judgment dealing with the matter of the tax being a direct one.

20 Under the Alberta Statute, the tax was made payable by the executor, —dealing with the question as to whether or not the tax was a direct one, Lord Thankerton in delivering the judgment of the Judicial Committee, says (L.R. 723, Plaxton, 218):

30 “ In their Lordships’ opinion, the determination of this issue depends on the answer to a simple test, which was applied in the case of *Cotton* and *Alleyn* already referred to—namely *whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor with the obvious intention that he should indemnify himself out of the beneficiaries’ estate, and the taxation is indirect. If the executor is not personally liable for the duties then the tax is truly imposed on the beneficiaries and the taxation is direct.*”

Continuing, he discusses the *Cotton* case and other cases and at L.R. 725, Plaxton, 221, says:

40 “ The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and in their Lordships’ opinion *it is clear* under ss. 11 and 12 of the Act, *that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer and must either pay them or give security for their payment by a bond in the statutory form, and further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.*”

Taking up the Tobacco Tax Act, it is clear that it purports to tax not only the principal but also the agent who, on behalf of his principal, purchases tobacco, or who imports or brings tobacco into the Province.

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By Sec. 2 (a) "consumer" is defined as meaning :

"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."

Applying the definition of "consumer"—as applicable to agent,—to the taxing section (4) we find it means that "every person 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,*" etc., is required to pay a tax in respect to the consumption of such tobacco. 10

The Act, therefore, purports to impose a tax upon every agent who purchases tobacco in New Brunswick at retail sale on behalf of his principal.

Sec. 10 enacts that :

"A 'consumer' (which expression includes the agent who purchases for his principal) 'shall be and remain liable for the tax imposed by this Act until the same has been collected'."

Sec. 17 enacts that :

"Every person who contravenes any of the provisions of the Act or regulations ('person' will include any 'agent' who is taxed, and who does not pay the tax) is guilty of an offence and made liable to fine or imprisonment." 20

Sec. 5 purports to impose a tax upon any principal and also upon any agent who brings tobacco into the Province from anywhere beyond its limits. Selecting those portions of the section which are applicable to an agent, it reads :

"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—*on behalf of or as agent* for a principal who desires to acquire such tobacco for consumption by such principal or other person at his expense shall, immediately report the matter to the Minister and forward or produce to him the invoices, 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 to the consumption of such tobacco as would have been payable if the tobacco had been purchased at retail sale in the Province at the same price." 30

By this Section the Legislature has attempted to impose a personal liability to pay the tax upon any agent who brings tobacco into the Province for his principal. 40

The learned Chief Justice of New Brunswick in his Judgment (Record, p. 20, l. 19), stated the submission *re* agency made by the Plaintiff, but when he came to deal with the matter of agency in his conclusion (Record,

p. 24, l. 22), he misapprehended it and did not deal with it at all ; but merely states that the transaction between principal and agent is not a *resale* ; that there is not and cannot be a sale by the agent to his principal. The Plaintiff never contended or even suggested that there was. Its submission was and is, that the Act purports to tax an agent ; that the agent is entitled to be indemnified by his principal and that the tax so imposed on him is an indirect tax, because in the normal course of business the agent would pass it on to his principal and be indemnified by him against the same.

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10 Applying the principle so clearly affirmed and applied in the *Cotton* case, the *Grain Futures* case and the *Kerr* case and recognized by Judges of this Court in the *Fairbanks* case and the *McLeod* case, the Act in so far as Secs. 4 and 5 purport to impose a tax upon Agents, is purporting to impose an indirect tax and is *ultra vires*.

But if this Act is *ultra vires* in so far as it purports to tax agents, it is *ultra vires* in toto. In the *Cotton* case, *Grain Futures* case, and *Kerr* case, the Act purported to tax *both* principals and agents and in each case was held altogether *ultra vires*.

In delivering the Judgment in

20 *A.G. for Manitoba v. A.G. for Canada* (1925), A.C. 561, at 568, Cameron, Vol. II, 381, at 386, Viscount Haldane said :

30 “ If, therefore, the statute seeks to impose on *the brokers and agents* and the miscellaneous group of factors and elevator companies, who may fall within its provisions, a tax which is really indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff, J., in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.”

3rd Ground of Appeal.

THE TAX IS NOT CONFINED IN ITS EFFECT TO THE PROVINCE OF NEW BRUNSWICK, NOR TO THE PERSONS UPON WHOM IT IS LEVIED.

If a tax is really a consumption Tax, it is not limited to consumption *within* the Province of New Brunswick and is for that reason *ultra vires*.

40 The Appellant submits that the Respondents, in seeking to uphold the validity of the legislation in question, are in this dilemma, either the tax imposed is,

(i) a tax imposed upon the purchaser *as such*, with respect to a purchase and therefore for the reasons already stated, indirect and *ultra vires*, or

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(ii) a tax imposed upon and with respect to consumption as such and is invalid because it is not limited to consumption *within the Province* of New Brunswick.

By Sec. 92 (2) the legislative jurisdiction of the Province is limited to direct taxation "*within the Province.*"

By other enumerated clauses such jurisdiction is limited to certain matters "*in the Province.*"

If there is any difference between the effect of the words "*within*" as used in No. 2 and "*in*" as used in defining other classes of objects under sec. 92, it is submitted that *within* is the more limiting expression. 10

It has been repeatedly held that the legislative jurisdiction of a Province under No. 2 is limited to taxation with respect to matters within the provincial boundaries and that legislation under other classifications, e.g. No. 13 is likewise limited to matters within the provincial boundaries and cannot have extra territorial effect.

This principle has been held in numerous cases,

Woodruff v. A.G. for Ontario, L.R. (1903), A.C. 508, Cameron, Vol. I, p. 662.

In that case it was claimed that the Province was entitled to recover succession duties with respect to the transfer in New York of certain 20 property there situate made by an Ontario decedent.

It was held that it was not entitled so to do.

In delivering the Judgment of the Privy Council, Lord Collins, says, L.R. 513, Cameron, 666 :

"The pith of the matters seems to be that, the powers of the provincial legislature, being strictly limited to 'direct taxation within the Province' (British North America Act, 30 & 31 Vict. c. 3, s. 92, sub-s. 2) any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub- 30 sections of s. 4 of the Succession Duty Act on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the Legislature has forbidden to the Province—taxation of property not within the Province."

Royal Bank of Canada v. The King (1913), A.C. 283, Cameron, Vol. I, p. 756.

In that case the Province of Alberta had passed legislation purporting to appropriate to the Province, balances standing in certain accounts in Banks which had branch offices in Alberta. 40

The monies had been deposited in branches of the Banks outside of Alberta, but by certain bookkeeping entries had been placed to the credit of accounts in their Alberta branches.

It was held that the legislation purporting to appropriate those monies to the Province was *ultra vires* because the right of the lenders of the monies

to demand repayment thereof was a civil *right* existing *outside* of the Province and that said Province could not legislate in derogation of that right.

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Viscount Haldane says, L.R. 298, Cameron, 768 :

“ The statute was on this ground beyond the powers of the
“ Legislature of Alberta inasmuch as what was sought to be enacted
“ was *neither confined* to property and civil rights *within* the Province
“ nor directed solely to matters of merely local or private nature
“ *within it.*”

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10 The same principle was applied as one of the bases of the decision in *Cotton v. The King*, L.R. (1914), A.C. 176, Cameron, Vol. I, 788. In that case Quebec purported to impose taxation with respect to property situate in New York.

It was held it could not do so.

The same principle is a basis for the decisions in *Burland v. The King* and *Alleyn v. Barthe*, L.R. (1922), A.C. 215, Cameron, Vol. II, 262.

In the *Burland* case, legislation imposing tax upon and with respect to property outside Quebec was held *ultra vires*.

In the *Alleyn* case a tax imposed upon the *transmission within the Province* of property outside was held valid.

20 This principle was recognized and emphasized by this Court in

Lawson v. Interior Tree, Fruit, etc., Committee (1931), S.C.R., 357.

In that case the present Chief Justice, in delivering a Judgment concurred in by Rinfret and Lamont, J.J., speaking of the Act there in question says at p. 361 :

“ Then it is said that the statute directly and substantively
“ regulates the conduct of people *outside* the Province and thereby
“ purports to operate within a sphere beyond the control of the
“ provincial legislature.”

At pp. 362-3, speaking of the levies under that Act he says :

30 “ If they are taxes, they cannot be justified as Direct Taxation
“ within the province. That they are taxes I have no doubt.”

At p. 363 he further says :

“ Indeed when one considers the number of people affected by
“ the orders of this Committee and the extent of the territory over
“ which it executes its orders and directions, it becomes evident,
“ that in point of their potential effect upon the population of the
“ territory and of the interest of the population in the Committee’s
“ activities, the operations of the Committee, as contemplated by the
“ Statute, greatly surpass in public importance many municipal
40 “ schemes, the levies for the support of which nobody could dispute,
“ would come under the head of taxation.”

Concluding his observations on this point he says at p. 364,

“ This part of the statute would appear to be *ultra vires*. The
“ levy authorized is not within s. 92 (2), and the license is not within
“ s. 92 (9).”

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continued.

Cannon, J., in delivering Judgment says at p. 372 :

“ My brother, Duff, has in his opinion gone into all the details
“ of the Act and regulations and, to avoid repetition, I will shortly
“ state my views,—The Act, if restricted to the local provincial market
“ would, according to the evidence, have affected less than ten per
“ cent. of the fruit and vegetables grown in British Columbia ; its
“ intent and purpose was to regulate the trade outside the province.
“ *Its actual operation affects the shipment to points in Canada outside*
“ *of British Columbia* of about 90 per cent. of the products.

“ The Act is intended to operate interprovincially, and its clauses 10
“ and the regulations adopted to carry it out constitute barriers to
“ *free trade between the provinces* and clash with section 121 of the
“ British North America Act, 1867, which in enacting that—

“ all articles of the growth, produce or manufacture of any one
“ of the provinces shall, from and after the Union, be admitted
“ free into each of the other provinces.

“ prevents, in my humble opinion, any hindrance, such as that now
“ before us, by legislation of the untrammelled commerce between the
“ provinces in all ‘ articles of the growth, produce or manufacture ’ of
“ any one of them.”

20

In *Provincial Treasurer of Alberta v. Kerr* (1932), A.C. 710, Plaxton,
p. 207, Lord Thankerton says, L.R., p. 718, Plaxton, p. 214 :

“ In considering the limits placed on provincial taxation, the Courts
“ have invariably had regard to the basis or subject-matter in respect
“ of which the taxation is imposed, and their Lordships agree with
“ the statement of Anglin, C.J., in *Rex v. Cotton*, where he said,

“ *in order that a provincial tax should be valid under the British*
“ *North America Act, in my opinion the subject of taxation must*
“ *be within the Province.*”

“ The province maintained in the first place that under the Alberta 30
“ Succession Duties Act the subject-matter of taxation was the
“ transmission of the property and not the property itself, and fell
“ within the principle of the decision of this Board in *Alleyn v. Barthe*.
“ In their Lordships’ opinion, the principle to be derived from the
“ decisions of this Board is that the Province, on the death of a person
“ domiciled within the Province, is *not* entitled to *impose taxation* in
“ respect of personal property *locally situate outside the Province*, but
“ that it is entitled to impose taxation on persons domiciled or resident
“ *within the Province* in respect of the *transmission to them* under the
“ Provincial law of personal property locally situate outside the 40
“ Province.”

In these cases in which a provincial taxing statute has been held *intra vires*, the legislation imposed a tax upon or with respect to a class of subject matter wholly within the Province, such as *property within the Province* or

a transmission of property taking place within the Province or the actual consumption of property within the Province.

In those cases in which a provincial taxing Statute has been held *ultra vires* the legislation imposed a tax upon or with respect to a class of subject matters outside of the Province, such as property *outside* the Province or a *transfer* of property taking place *outside* the province.

In the Judgment appealed from, the learned Chief Justice says (Record, p. 20, l. 27):

10 “The legislation does not purport to affect any person who is
“outside of nor the commodity when it is not within the Province—
“in fact, it does not affect the commodity at all. Mr. Teed put
“forward the argument that a person having purchased tobacco within
“the Province might consume it elsewhere. Once he has paid a
“consumer’s tax, he is free to consume it wherever he pleases.”

With all respect to His Lordship, he appears to have overlooked the point of the Appellant’s submission.

20 Tobacco is a commodity which, to the common knowledge of mankind, is in all probability more frequently than any other commodity, transported by a purchaser to, and consumed in some locality, other than that where it is purchased. It would probably be safe to say that more than 50% male persons of 16 years of age and upwards, and a large proportion of female persons of like age, habitually carry with them quantities of tobacco in some form.

A large amount of tobacco purchased in New Brunswick for consumption, will be consumed either in whole or in part within some other jurisdiction.

30 If the true subject matter of taxation is the *consumption* of the tobacco, it is the Appellant’s submission that to be taxable by a province, the consumption must take place therein, i.e., the *subject matter* of taxation must be *within* the Province.

That is the proposition expressly recognized in the *Kerr* case (1932), A.C. at p. 718, Plaxton, p. 214, already quoted.

It was recognized de facto by the Province of British Columbia in the Fuel Oil Tax Act which was held valid in the *Kingcome* case (1934).

Sec. 2 of that Statute (Chap. 71 of Act of 1930) reads:

“For the raising of a revenue for Provincial purposes *every person*
“*who consumes any fuel oil in the Province* shall pay to the Minister of
“Finance a tax in respect of that fuel-oil at the rate of one-half cent
“a gallon.”

40 But the tax imposed by Sec. 4 of the Tobacco Tax Act is not limited to consumption of tobacco in New Brunswick. At the time he makes his purchase, the buyer is required to pay a tax irrespective of where consumption takes place and also irrespective of where he intends such consumption to take place—to illustrate:

A resident of Amherst, Nova Scotia, who purchases a package of cigarettes in Sackville, New Brunswick, intending to consume the same

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after he has returned home in Amherst, and who does in fact consume them in Nova Scotia, is required to pay the tax.

If the tax is upon or with respect to consumption, the legislature is attempting to tax a non-resident of the Province with respect to his consumption of tobacco outside the Province.

That clearly is not taxation with respect to a subject matter *within* the Province. The *purchase* is made within the Province but in the *C.P.R.* case (1927) it was held that legislation imposing a tax at the time of the transaction upon the purchaser with respect to his purchase or the goods purchased, is indirect and invalid.

Therefore if the tax is a consumption tax, the legislation is *ultra vires* to a large and practically undeterminable extent.

Applying the language of Viscount Haldane in,

A.G. for Manitoba v. A.G. for Canada, L.R. (1925), A.C. at 557, Cameron, Vol. 2, at p. 386:

“ The task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of Law to make the exhaustive partition required. In other words if the Statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether.”

It is likewise impracticable for any taxing body to make any such partition.

The Statute is, therefore, wholly *ultra vires*.

4th and 5th Grounds of Appeal.

Ground 4—

“ The Act infringes upon the exclusive legislative jurisdiction of the Dominion of Canada to impose customs and excise duties.”

Ground 5—

“ The Act purports in violation of the provisions of Sec. 121 of the British North America Act to impose a tax upon articles grown, produced, or manufactured in another province of Canada when introduced into New Brunswick for purpose of consumption.”

That Section of the Act, the validity of which is primarily challenged upon these grounds is Section 5, which reads:

“ 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.”

Shortly stated, Section 5 purports to impose a tax upon each person who brings tobacco into the Province of New Brunswick for, or who receives it therein for, consumption by himself or his principal, etc.

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The Appellant submits this Section imposes indirect taxation and is *ultra vires* in at least four respects :

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- 10 (i) It imposes a liability upon every agent who imports or receives such tobacco on behalf of a principal.
- (ii) While it purports to impose such tax with respect to the consumption of such tobacco, the tax is not imposed *after* consumption but immediate payment is required so soon as the tobacco is brought into the Province or received therein.
- (iii) Because the tobacco is manufactured in other provinces of Canada and the tax imposed is in contravention of Section 121 of the B.N.A. Act.
- (iv) That if otherwise valid, as being a tax on consumption the Section is bad because it is not limited to consumption within the Province.
- (i) This point has already been discussed in this Factum (page 43, l. 26, page 47, l. 35).

- 20 (ii) The Appellant submits that the statement that the tax is payable in respect of consumption of tobacco does not alter its real character, and is but camouflage designed to conceal the real nature of the tax.

Upon the grounds already advanced and discussed in this Factum (p. 39, l. 29, p. 42 l. 21) the Appellant submits that the tax is really one payable on importation into or receipt of goods in the Province.

Such a tax is, in its pith and substance, a customs tax which is the classic example cited by Mill of an indirect tax. Such a tax is always an indirect one even although the importer personally consumes the goods he imports.

- 30 In delivering the Judgment in the *Fairbanks* case, Viscount Cave says, L.R. (1927), A.C., at p. 126, Cameron, Vol. II, at p. 483 :

“ Probably no one would say that the income tax levied in this country under sch. A of the Income Tax Act, although levied upon the occupier of property who is authorized to recover it from the owner is not a direct tax. So, although a customs duty paid by a person importing commodities for his own use is not passed on to any one else, it would hardly be contended that such a duty is a direct tax within the meaning of the British America Act.”

Yet that is precisely what the Respondents do now contend.

- 40 The Chief Justice of the Court appealed from, dealing with this point says (Record, p. 20, l. 8) :

“ The grounds of objection to the validity of the Act were (1) that the taxation was not within the Province (2) that it was an attempt to impose a tax upon interprovincial or international transactions.”

And continuing he says (Record, p. 20, l. 23) :

“ As to points 1 and 2 Mr. Teed relied on the provisions of Sec. 5,

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continued.

“ but we fail to see that the legislature has attempted to impose
“ a customs duty upon the importation of tobacco into the Province.
“ The section only applied to ‘ consumers ’ and these are required to
“ furnish the Minister with certain information. The legislation does
“ not purport to affect any person who is outside of nor the commodity
“ when it is not within the Province,—in fact it does not affect the
“ commodity at all.”

His Lordship apparently overlooked the fact that Sect. 5 imposes a tax.
Sec. 5 is substantially undistinguishable in its essential phraseology from
the Section 3 in the Customs Act of Canada. See Chapter 44, Revised 10
Statutes of Canada (1927) Sec. 3.

It was suggested by the Chief Justice in the course of the argument that
the tax was not imposed upon or with respect to the introduction of the
article into the Province but with respect to its consumption after it was in
the Province.

The answer to that suggestion is, that Sec. 5 is designed and inserted
for the express purpose of imposing a tax upon tobacco *immediately* it is
brought into the Province for consumption. The Section does not impose
a tax *after* consumption.

It is submitted that it is not essentially characteristic of a Customs Tax 20
that the tax should be imposed before the goods are in the country. In
ordinary practice the customs dues are not assessed or paid before the goods
are in the country. In practically all instances the goods are somewhere in
the taxing country before the duties are either assessed or paid. Such
goods are usually in a ship's hold in some harbour, or on some wharf, or
in a railway car in some yard, or in some customs office in some city or
town, or in some warehouse—in the country imposing the customs duty
at the time the customs duties are assessed and paid.

(iii) The tax imposed is in contravention of Sec. 121 of the B.N.A.
Act, which reads: 30

“ All articles of the growth, produce or manufacture of any one
“ of the provinces, shall from and after the Union be admitted free
“ into each of the other provinces.”

Sec. 5 imposes a tax upon such articles (not upon their actual con-
sumption) and is therefore bad.

See *Lawson* case, 1931, S.C.R., p. 357, per Cannon, J., at p. 372.

The Respondents really suggest that Article 121 should be interpreted
as if it read:

“ All articles of the growth, produce or manufacture of any one
“ of the provinces shall, from and after the Union, be admitted free 40
“ into each of the other provinces ” (except when admitted into a
“ province for purposes of consumption by or at the expense of the
“ person bringing in or receiving there such articles).

(iv) That if otherwise valid, as being a tax on consumption the
Section is bad because it is not limited to consumption within the Province.

The Appellant submits that Section 5 is upon this ground invalid and relies upon the reasoning and authorities cited in this Factum (p. 47, l. 35 *et seq.*). As a further illustration of the effect of Sec. 5 it submits that if "A" a resident of New Brunswick, purchased 10 boxes of cigars in Montreal on the occasion of a trip there, and brings them with him to New Brunswick for the purpose of sending them by way of gift to 10 of his friends in Nova Scotia and does so send them, he is liable under Sec. 5 to payment of a tax on those cigars and to fine and imprisonment if he fails to make payment of such tax immediately he brings the cigars into New Brunswick. The fact that the cigars are neither retained nor consumed here does not relieve him, although the cigars are neither purchased nor consumed in the Province which imposed the tax.

GROUND 6.

LICENSING PROVISIONS ARE NOT AUTHORIZED BY THE B.N.A. ACT.

This objection applies to Sec. 3 of the Act and Regulations Nos. 4 to 18 inclusive.

The Appellant submits that these are not authorized by any of the provisions of the B.N.A. Act.

The licensing provisions of the statute are obviously not for the purpose of raising a revenue under Sec. 92 (9) of the British North America Act. No license fee is named and as the fees under the regulations are nominal, it is clear that the government does not regard the license fee to be for the purpose of raising a revenue (Regulation 18). The licensing provision merely affords the machinery by which the tax is enabled to be collected.

The licensing provisions are not justifiable under Sec. 92 (13) or (16) of the British North America Act as they fulfil no independent function and do not set up any system of local regulation of a particular trade.

The Act contains no provisions regulating the tobacco trade, there are no provisions of that nature, such as the hours in which the store may sell, sanitary conditions, conditions of employment, quality of goods sold, etc.

GROUND 7.

REGULATIONS ARE INVALID.

If the Act is wholly *ultra vires*, all the regulations of course will fall with it.

If the Act is *ultra vires* in part, then the regulations or some of them, dependent on the extent of the invalidity of the Statute, are also *ultra vires*.

The Appellant submits that its appeal should be allowed and judgment entered for it for an injunction order in the terms of the claim endorsed on the writ of summons herein; failing that, that the Court should make such declaration as to the invalidity of portions of the Tobacco Tax Act and regulations, and give such substantive relief by way of injunction or otherwise as it shall deem right and proper.

J. F. H. TEED,
Of Counsel for (Plaintiff) Appellant.

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Respondents' Factum.

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IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,
APPEAL DIVISION.

Between

ATLANTIC SMOKE SHOPS, LIMITED, an incorporated
Company (Plaintiff) Appellant
and

JAMES H. CONLON, JOHN McDONOUGH, and THE
ATTORNEY-GENERAL OF THE PROVINCE OF
NEW BRUNSWICK (Defendants) Respondents. 10

RESPONDENTS' FACTUM.

PART 1.

STATEMENT OF FACTS.

The Appellant alleges in this case that the Tobacco Tax Act of the Province of New Brunswick (4 George VI (1940) Chapter 44) and the regulations made thereunder are *ultra vires* of the Province. The Act was to come into force on a day to be fixed by proclamation (Record p. 10, l. 15). The Act came into force on the first day of October 1940. 20

Regulations were made by the Lieutenant-Governor-in-Council under Section 20 of the said Act and are set out as Schedule B annexed to the Stated Case (p. 10).

The Appellant commenced business and undertook to sell tobacco without taking out a license as provided by the said Tobacco Tax Act (p. 4, ll. 27-34), and without collecting from the purchaser the tax as provided by the said Act (p. 4, ll. 35-41).

The Respondent James H. Conlon is the Tobacco Tax Commissioner appointed under the said Act and Regulations (p. 11, l. 5), and the Respondent John McDonough is an Inspector appointed under the said 30 Act.

The said John McDonough entered upon the Plaintiff's premises where the said sales were being made and questioned customers as to whether they had paid the tobacco tax as required by the said Act and asked to see the receipts for the said tax. This suit was commenced as a result.

The parties hereto have agreed on a stated case for the opinion of the Court as to the validity of the said Act.

The case was argued before the Court of Appeal and that Court unanimously held the Act and Regulations *intra vires* and dismissed the action. 40

The Appellant now appeals to this Court against that decision.

PART II.
 GROUNDS.

The Respondents submit that the said Act and Regulations made thereunder are *intra vires* in their entirety.

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PART III.
 ARGUMENT.

The Act imposes a tax on the consumer of tobacco in the Province of New Brunswick. It is submitted that the tax is a direct tax.

By Section 4 of the Act it is provided that

10 “ 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 tobacco purchased.”

A “ Consumer ” by Section 2 (a) of the Act is defined as follows :

20 “ ‘ 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.”

The Appellant suggested below that the tax is not a direct tax or a tax imposed within the Province in order to the raising of a revenue for provincial purposes under Sub-section 2 of Section 92 of the B.N.A. Act.

30 It is submitted the tax is a direct tax. No person is interested in the payment except the consumer. He is the person intended by the Legislature to pay the tax and he does pay it. The Appellant pays nothing.

Section 10 of the Act is as follows :

“ 10. A consumer shall be and remain liable for the tax imposed
 “ by this Act until the same has been collected.”

Section 5 provides that a consumer ordinarily resident in the Province shall pay the tax with respect to tobacco brought into the Province in the same way as on tobacco purchased in the Province.

40 By Section 17 every person who contravenes any of the provisions of this Act or of the regulations made thereunder shall be guilty of an offence and shall be liable to a fine of from Ten to Five Hundred Dollars with costs of conviction.

By Section 20 (1) the Lieutenant-Governor-in-Council is authorized :

“ For the purpose of carrying into effect the provisions of this
 “ Act according to their true intent or of supplying any deficiency
 “ therein ”

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to make such regulations as are considered necessary or advisable. The regulations set out in Schedule B were accordingly made.

By Regulation 2 the Lieutenant-Governor-in-Council is authorized to appoint a Tobacco Tax Commissioner.

By Regulation 19,—

“ Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer at the time of purchase of tobacco by the consumer.”

No person shall purchase tobacco at retail without paying the tax. 10
(Reg. 30.)

The Act provides that no person shall sell any tobacco unless he is licensed to do so. Section 3 (2) and (3).

The vendor who is so licensed is required by the regulations to collect the tax from the consumer. (Regulation 19.)

In the ordinary course this tax cannot be passed on to any other person. The tobacco cannot be sold again unless the purchaser has a license to sell. The tax cannot be absorbed by the vendor. (Section 7.)

There is no doubt that the tax is imposed for the purpose of raising a revenue for the Province. 20

In *The Attorney-General of British Columbia v. Kingcome Navigation Co., Ltd.* (1934) A.C. 45, 103 L.J.; P.C. 1, it was held that :

“ The Fuel Oil Tax Act 1930 of B.C. which imposes a tax upon every consumer of fuel oil according to the quantity which he has consumed is valid under Section 92 Head 2 of the B.N.A. Act 1867 ; the tax is direct taxation because it is demanded from the very persons who it is intended or desired should pay it.”

At page 53 the Court said :—

“ These decisions in their Lordships' opinion make clear that if the tax is demanded from the very persons who it is intended or 30
“ desired should pay it the taxation is direct, and that it is none the less direct even if it might be described as an excise tax, for instance, or is collected as an excise tax.”

See also *Bank of Toronto v. Lambe* (1887) 12 A.C. 574, 56 L.J.P.C. 87. in this case the Court said :

“ Any person found within the Province may legally be taxed there if taxed directly.”

The tax is imposed only on persons in the Province.

In *Shannon v. Lower Mainland Products Board* (1938) 107 L.J.P.C. 115, there was objection that the Natural Products Marketing (B.C.) Act was 40
invalid. The Privy Council held :

“ (1) That the provincial statute was confined to regulating transactions that took place wholly within the Province and was therefore within the sovereign powers granted to the provinces in that respect by Section 92 of the B.N.A. Act 1867. The statute of 1936 was clearly confined to dealings with such products as were situate within the Province and the word 'transportation' was

“ confined to the passage of goods whose transport began within the Province to a destination also within the Province. The pith and substance of the statute being to regulate particular businesses entirely within the Province it was therefore *intra vires* of the Province.”

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“ (2) Regulation of trade within the Province being valid the ordinary method of regulating trade that is by a system of licenses must also be admissible and there could be no objection that fees were charged.”

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dents’
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continued.

10 In *Brewers & Maltsters Association of Ontario v. Attorney General of Ontario*, 66 L.J.P.C. 34 (1897) A.C. 231. It was held that—

“ A license fee of a fixed and uniform amount imposed by a provincial Act ‘ in order to the raising of a revenue for provincial purposes ’ open for brewer and distiller in the Province is ‘ direct taxation ’ within the meaning of Section 92, Subsection 2 of the B.N.A. Act, 1867, and is therefore within the powers conferred by that Act upon Provincial Legislatures.”

The Court in this case said p. 35 :

20 “ In the present case as in *Lambe’s* case their Lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it. They did not think there was either an expectation or intention that he should indemnify himself at the expense of some other person It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders but this may happen in the case of every direct tax.”

Lord Thankerton in *Provincial Treasurer of Alberta v. Kerr* (1933) 102 L.J.P.C. 137 at page 142 stated clearly the meaning of “ direct taxation ” thus :

30 “ There remains the question of direct taxation. The principle to be applied in such case is now well settled. Is the duty imposed on the very person whom the legislature intended or desired should pay it without any expectation or intention that he should indemnify himself at the expense of some other person ? ”

The Appellant contends that the tax is not a direct tax because if some person sends a messenger to buy the tobacco for him the messenger is required to pay the tax and he would be entitled to be reimbursed by the purchaser and that therefore that shows that the tax is indirect.

40 It is submitted that such a case falls within the definition of “ consumer ” in Section 2 (a) and that it does not make the tax indirect. Particular cases do not change the principle. If by paying any provincial tax through the agency of a messenger you could change that tax to an indirect tax the Province would be denied most of its taxation rights. It is the general tendency of the Act which prevails.

The City of Halifax v. Fairbanks Estate, 97 L.J.P.C. 11 (1928) A.C. 117. See judgment of Lord Chancellor Cave at pages 14 and 15.

Forbes v. Attorney General of Manitoba (1937) 106 L.J.P.C. 17. In this case Lord McMillan at page 20 says :

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“ In their (Lordships') view Section 3 is what it professes to be a
“ section charging the tax on the employee. The following sections
“ which provide for the deduction of the amount of the tax by the
“ employer before he pays over his employee's wages are mere
“ machinery and machinery of a very familiar type in income tax
“ legislation. The expedient of requiring deduction of tax at the
“ source, as it is called, is one which has long been in effective use in
“ the United Kingdom.”

In the same way the Tobacco Tax Act makes plain that the tax is
imposed on the consumer and that the vendor is merely an agent of the 10
Minister for the purpose of receiving the money and forwarding it to the
Minister.

The fact that the Appellant is a company incorporated under Dominion
legislation does not affect the matter. The Province must have authority
to deal with the collection of the tax in any way which seems satisfactory
to it. *Lymburn v. Mayland* (1932) 101 L.J.P.C. 89.

The tax under the Tobacco Tax Act is collected in the same way as
the theatre tax is collected.

The effect of the tax is confined to the Province of New Brunswick.
It is imposed upon consumers of tobacco in New Brunswick and it has 20
no effect at all outside the Province.

The licensing provisions of the Act are fully authorized. The B.N.A.
Act expressly authorizes the Province to issue licenses. The present charge
for a license is small but it may be changed from time to time. It cannot
be reasonably suggested that the licensing would be valid if fees charged
were large and invalid if small.

The Province has plenary powers over its citizens within the limits
provided for under the B.N.A. Act. The Province can impose a duty and
compel the citizens to perform it. If it were not so it might be impossible
to have certain public offices filled and their duties performed. In the same 30
way the operator of a theatre or the operator of a gasoline station is compelled
to collect tax for the Government. In this case the regulations require
the person who is licensed to sell tobacco by retail in the Province to collect
the tax from the consumer. If the vendor does not want to collect the tax
he does not have to be a vendor.

The Appellant has suggested that the Tobacco Tax Act contravenes
Section 121 of the B.N.A. Act. It is submitted there is no provision in the
said Act which contravenes said section of the B.N.A. Act. Tobacco may
be brought in from any province without any charge but when obtained
by the consumer the consumer must pay the tax in accordance with the 40
value of it. The provisions of the Act apply no matter where the tobacco
comes from.

There is no ground for the suggestion that this tax is a customs tax
or an excise duty. It is the same as any other direct tax.

PETER J. HUGHES,
Solicitor for the Respondents.

Fredericton, N.B.
January 11, 1941.

No. 13.

Factum of the Intervenant, The Attorney-General of the Province of Quebec.

In the Supreme Court of Canada.

No. 13. Factum of the Intervenant, The Attorney-General of the Province of Quebec.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated Company ... (Plaintiff) Appellant

10

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

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC ... Intervenant.

FACTUM OF THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC.

20 Counsel Aimé Geoffrion, K.C.

ROSARIO GENEST, Attorney for Intervenant.

Ottawa Agent Auguste Lemieux, K.C.

PART I.

The Attorney-General of the Province of Quebec was allowed to intervene on this appeal by Order of this Court of February 1st, 1941.

The Legislature of the Province of Quebec has passed a statute, copy of which is printed as an annex to this case, being Chapter 15 of the Statutes of 1940, 4 George VI, entitled "Tobacco Tax Act."

30 The validity of that statute was attacked before the Courts of the Province of Quebec by petition for a Writ of Prohibition, directed against proceedings for the recovery of penalties for violation of the Act.

The trial Judge and the Court of Appeals unanimously dismissed the petition declaring that the Act was *intra vires*.

There is no appeal to the Supreme Court of Canada from the Judgment of the Court of Appeals in that case.

The New Brunswick statute under consideration on this appeal and the regulations adopted under it are almost similar to the Quebec statute above mentioned.

40 A decision of this Court declaring the New Brunswick statute void would be equivalent to an overruling of the Judgment given in respect of the Quebec statute by the Quebec Courts in the above-mentioned proceedings.

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General
of the
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continued.

Hence, the interest of the Attorney-General of Quebec in the present case.

PART II.

Intervenant submits that the New Brunswick statute in issue on the present appeal is constitutional.

PART III.

The chief objection to the validity of that statute is that it imposes an indirect tax, and therefore is beyond the powers of the Provincial Legislature.

The Privy Council Judgment in re: *Attorney-General of British Columbia v. Kingcome Navigation Company Limited*, 1934 A.C., page 45, is the most recent Judgment where this question is fully discussed. 10

The most important of the previous decisions on the question are reviewed in that Judgment.

The statute under consideration there appears at page 49.

The statute imposes a tax on fuel-oil; the argument was there, as in this case, that the tax was indirect, and the Court of British Columbia had so found. The Judgment was reversed.

Lord Thankerton giving the Judgment says at page 51 referring to the contention that the tax was indirect: "In their Lordships' opinion, 20
"this contention is inconsistent with the decisions of this Board which
"go back to the year 1878, and have settled that the test to be applied in
"determining what is direct taxation within the meaning of Section 92,
"Head 2, of the Act of 1867 is to be found in Mill's definition of direct and
"indirect taxes."

Lord Thankerton, then, refers to various previous decisions, and quotes the definition of Stuart Mill at page 53:

"A direct tax is one which is demanded from the very person
"who it is intended or desired should pay it. Indirect taxes are those
"which are demanded from one person in the expectation and intention 30
"that he shall indemnify himself at the expense of another; such are
"the Excise or Customs."

Referring at page 54 to the Judgment in re *Bank of Toronto v. Lambe* where this definition was first referred to, Lord Thankerton says:

"On the terms of that Judgment, it might have been open to the
"present Respondent to maintain that Mill's definition was not the
"only alternative as a test, but such a contention is excluded by
"later decisions of the Board to which their Lordships will next refer."

At page 59, he again says, after considering later decisions:

"It follows that the tax here in question must be tested by Mill's 40
"definition, as adopted by the decisions of the Board."

The rule is therefore clearly laid down and the only question is: Is the present tax one which is demanded from the very person who it is intended or desired shall pay it, or is it demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another?

The previous decisions need not be referred to here; they are quoted in Respondents' factum and in that judgment of the Privy Council.

It is suggested that there is only one qualification to this definition and, in fact, it is involved in the definition of Stuart Mill; it is that the general tendency of the Legislation must be considered and exceptional cases must be ignored.

Attorney General for British Columbia v. Canadian Pacific Railway Company, A.C. 1927, page 934, at page 938; *Rex v. Caledonian Collieries Limited*, A.C. 1928, page 358, at pages 361-362.

10 It is submitted that section 4 and section 2, paragraphs (a) and (e) clearly make of the tax a direct tax.

The case of a purchase by a consumer for consumption by others remains within the rule, since he purchases at his own expense. At all events, it would be an exceptional case, such as the case of the person who imports for himself.

It is also contended that the act operates outside of the Province.

Section 4 is obviously not open to that objection; read with section 2; paragraphs (a) and (e), it imposes a tax on one who purchases in the Province for consumption. Once he has paid his purchase price and tax, he may 20 exceptionally consume the tobacco outside of the Province. It is submitted that this exceptional case resulting from the free act of the purchaser once absolute owner of the tobacco cannot make of the statute one imposing a tax outside of the Province.

Section 5 of the Act is attacked on the ground that it imposes custom duties and violates section 121 of the British North America Act. It is submitted that this is not a customs duty such as to make it an indirect tax.

The usual customs duty is a duty imposed on all importations of a certain kind nearly all of which will be for resale and of which only a few 30 will exceptionally be for consumption by the importer.

A tax imposed on a person residing or doing business in the Province who brings into the Province for his consumption is not a customs duty within that meaning.

It is not an indirect tax within Stuart Mill's definition, because it is to be paid clearly by the person who it is intended or desired should pay it, and there is no expectation and intention that it should indemnify himself at the expense of another.

That is the decisive test. Lord Thankerton in the *Kingcome Navigation Company* Judgment says at page 55 :

40 " These decisions, in their Lordships' opinion, make clear that if
" the tax is demanded from the very person who it is intended or
" desired should pay it, the taxation is direct and that it is none the
" less direct even if it might be described as an *excise* tax for instance,
" or is collected as an excise tax."

It is submitted that a similar answer applies to the argument based on Article 121 of the British North America Act.

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Tobacco enters perfectly freely into the Province, but the consumer is taxed in connection with the consumption, although the Legislature assumes that one who acquires for the purpose of consumption will consume, and the exceptional cases where he would change his mind after purchasing, are legitimately ignored by the Legislature.

It does not need to be said that the invalidity of section 5 could not affect the rest of the statute, *Toronto Corporation v. York Corporation* 1938 A.C., page 415.

The last objection is that the license required from the vendors is not a licence authorized by Head 9 of Section 92 of the British North America Act. 10

The licenses provided for by Head 9 of Section 92 are not the only licenses which provincial legislatures may provide for.

It is submitted that the Provincial Legislatures can provide for licenses not only for the purpose of raising a revenue, but also for the purpose of regulating when regulating is within their powers.

More generally, provinces, it is submitted, have the power of requiring licenses as an incident to any one of their other powers, apart from the power to require licenses merely for the purpose of raising a revenue.

The license can, therefore, be required as a means of collecting a tax 20 which is valid, or as a means of compelling those who are entrusted with the duty of collecting the tax to comply with that duty. This is the case here.

The statute considered in the *Kingcome Navigation Company* case provided for a license.

It is therefore submitted that the appeal should be dismissed.

Montreal, February 1st, 1941.

ROSARIO GENEST,
Attorney for Intervenant.

Counsel.
Aimé Geoffrion, K.C.

APPENDIX.

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4 GEO. VI, CH. 15.

Loi de l'impôt sur le tabac.

(*sanctionnée le 22 juin 1940*).

SECTION I.

1. La présente loi peut être citée sous le titre de *Loi de l'impôt sur le tabac*.

2. Dans la présente loi, à moins que le contexte ne comporte un sens différent :

1. "contrôleur" signifie le contrôleur du revenu de la province de Québec ;

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2. "consommateur" signifie toute personne qui achète du tabac d'un vendeur par une vente en détail, en cette province ;
3. "ministre" signifie le trésorier de la province de Québec ;
4. "paquet" signifie un paquet, une boîte métallique ou autre contenant dans lequel le tabac est contenu ou vendu lors d'une vente en détail ;
5. "personne" désigne et inclut tout individu, société, compagnie, corporation, association de personnes, succession, séquestre, syndic de faillite, liquidateur, fiduciaire, administrateur ou agent, et le propriétaire ou l'opérateur d'une machine automatique pour la vente du tabac ;
6. "province" signifie la province de Québec ;
7. "acheteur" signifie toute personne qui achète du tabac d'un vendeur par une vente en détail en cette province ;
8. "tabac brut en feuilles" signifie le tabac non ouvré, ou les feuilles ou tiges de la plante ;
9. "vente en détail" signifie une vente faite à un consommateur pour fins de consommation et non de revente ;
10. "vendeur en détail" signifie toute personne qui, en cette province, vend du tabac à un autre consommateur ;
- 20 11. "Bureau du revenu" signifie le Bureau du revenu de la province de Québec ;
12. "vente" signifie le contrat ordinaire de vente et comprend l'échange, le transport, le troc et aussi un cadeau fait par un vendeur ;
13. "prix de vente" ou "prix d'achat" signifie le prix en argent, la valeur du service rendu et toute autre considération ou prestation acceptée par le vendeur comme prix ou valeur de l'objet du contrat de vente ;
14. "tabac" signifie le tabac sous quelque forme qu'il soit consommé, y compris le tabac à priser ; mais ne comprend pas le tabac brut en feuilles et les cigares vendus à un prix de vente en détail de cinq cents ou moins
- 30 chacun ;
15. "vendeur" comprend le vendeur en gros de même que le vendeur en détail ;
16. "vendeur en gros" signifie toute personne qui, en cette province, vend pour fins de revente du tabac ouvré par lui-même ou par tout autre ;

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SECTION II.

Licences.

3. Personne ne peut vendre de tabac en cette province à moins que, sur sa demande, une licence ne lui ait été émise sous l'autorité de la présente

40 loi et ne soit en vigueur lors de la vente.

Cette licence demeure en vigueur tant qu'elle n'est pas révoquée pour cause par le ministre.

4. La demande pour l'obtention de cette licence doit être transmise au contrôleur.

5. Sur paiement par le vendeur d'un droit d'un dollar à Sa Majesté

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aux droits de la province, cette licence doit être accordée par le ministre, ou tout officier qu'il désignera; elle doit être gardée à l'endroit où le licencié vend du tabac, ou à sa principale place d'affaires en cette province.

6. Le ministre peut suspendre ou annuler la licence de toute personne trouvée coupable d'une infraction à la présente loi; il peut également refuser d'émettre une licence à une personne trouvée coupable d'une infraction à la présente loi.

7. Les renseignements suivants sont requis quand une licence est demandée :

(a) Par une ou plusieurs personnes faisant affaires sous un nom collectif ou raison sociale, —leurs noms et adresses ;

(b) Par une société, —le nom et l'adresse de chaque associé ;

(c) Par une corporation, un club, une association ou un syndicat, —le nom et l'adresse du président s'il réside en cette province, sinon, le nom et l'adresse de son gérant ou représentant résidant en cette province, de même que l'adresse de sa place d'affaires en cette province.

SECTION III.

8. Afin de pourvoir aux besoins du service public de la province, chaque consommateur doit, lors de l'achat de tabac en cette province, pour fins de consommation par lui-même ou par tout autre, payer à Sa Majesté aux droits de la province un impôt de consommation du tabac au taux de dix pour cent du prix de vente en détail.

9. Toute personne résidant ordinairement en cette province ou y faisant affaires qui, elle-même ou par l'intermédiaire de toute autre, apporte en cette province ou fait en sorte qu'il y soit apporté ou livré du tabac pour consommation par elle-même doit, immédiatement en faire rapport au contrôleur, en lui transmettant ou produisant la facture s'il y en a, avec tout renseignement que celui-ci pourra exiger, et, en outre, doit payer à Sa Majesté aux droits de la province, l'impôt sur la consommation de ce tabac qui eût été payable si ce tabac avait été acheté au même prix à une vente en détail en cette province.

10. L'impôt établi par la présente loi doit être calculé séparément sur chaque paquet et toute fraction d'une cent doit être comptée comme une cent entier. Cependant, dans le cas de ventes en détail de cigares, l'impôt sera calculé sur le prix de détail de chaque cigare.

11. L'impôt exigible de l'acheteur au moment de son achat, doit être perçu par le vendeur qui en tient compte et le remet au bureau du revenu de la manière indiquée par le lieutenant-gouverneur en conseil.

Le vendeur doit agir en ce cas comme mandataire du ministre, tenir et rendre compte des montants ainsi perçus et les lui transmettre au bureau du revenu, dans les quinze jours suivant immédiatement le mois de calendrier durant lequel toute vente s'est effectuée.

12. Le ministre peut allouer aux vendeurs, pour la perception de la taxe et sa remise à la province, toute indemnité que pourra déterminer le lieutenant-gouverneur en conseil.

13. Nonobstant toute loi ou règlement au contraire, nulle taxe de vente sur l'achat en détail de tabac par un consommateur ne peut être prélevée par aucune corporation municipale et toute telle taxe de vente actuellement imposée par aucune corporation municipale sur l'achat en détail de tabac est par les présentes abolie, à compter du jour de l'entrée en vigueur de la présente loi.

Cet article s'applique également à tout cigare vendu à un prix de détail de cinq cents ou moins chacun, et au tabac brut en feuilles.

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SECTION IV.

14. 1. Le vendeur, comme mandataire du ministre, doit tenir compte de l'impôt perçu et en rendre compte, le tout en la forme et manière prescrites par le ministre.

2. L'exactitude du compte rendu doit être attestée par un affidavit ou une déclaration solennelle du vendeur.

3. Le ministre peut obliger tout vendeur de tabac en gros ou en détail, à tenir en la forme prescrite, un état convenable de tous ses achats, ventes et livraisons le tabac, et à lui remettre de la manière et au temps qu'il juge à propos, copie ou extrait de cet état.

20 4. Tout officier du revenu dûment autorisé peut entrer à toute heure convenable dans l'établissement d'un vendeur en gros ou en détail, en examiner les livres et documents, déterminer les quantités de tabac vendu ou livré, contrôler l'exactitude des rapports soumis, et au cas d'absence de rapport ou au cas de rapport inexact, déterminer les quantités de tabac vendu ou livré.

15. Tout vendeur doit faire au bureau du revenu, un rapport contenant les renseignements que le ministre peut exiger. Ce rapport doit être fait en la manière et au temps que ce dernier détermine.

30 16. Aucune personne employée au service de Sa Majesté ne doit communiquer ou permettre que soit communiquée à toute personne non légalement autorisée une information obtenue en vertu des dispositions de la présente loi, ou permettre à une telle personne d'examiner ou prendre connaissance de tout rapport ou état fourni en vertu des dispositions de la présente loi.

SECTION V.

Infractions et peines.

17. Toute personne qui,

40 (a) sans licence valide, vend ou livre du tabac en la province, ou contrevient autrement aux dispositions de la section II de la présente loi, ou des règlements faits sous son autorité ou

(b) étant mandataire du ministre, refuse ou néglige de percevoir l'impôt, d'en tenir compte ou d'en faire remise, en la manière prévue par la présente loi ou des règlements faits sous son autorité, ou

(c) refuse ou néglige de permettre à un officier du revenu de faire l'examen et le contrôle mentionnés à l'article 14 ci-dessus.

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commet une infraction à la présente loi et est passible, sur poursuite sommaire, en sus des frais et de l'obligation de faire remise de l'impôt, d'une amende d'au moins dix dollars, mais n'excédant pas mille dollars pour chaque vente, dans les cas prévus au paragraphe " b " du présent article, et pour chaque jour de telle infraction dans les cas prévus aux paragraphes " a " ou " c " du présent article et dans tous les cas, à défaut de paiement de l'amende et des frais et de remise de l'impôt ci-dessus mentionné, d'un emprisonnement de trois mois.

18. Tout consommateur qui achète du tabac dans la province, sans payer l'impôt exigible suivant la présente loi, est coupable d'une infraction 10 en vertu de cette loi et est passible, sur poursuite sommaire, en sus du paiement de l'impôt et des frais, d'une amende de pas moins de dix dollars et de pas plus de deux cents dollars, et à défaut de paiement de l'amende, de l'impôt et des frais, d'un mois d'emprisonnement.

19. Toute personne contravenant à l'article 15 de la présente loi ou aux règlements faits sous son autorité, est passible, sur poursuite sommaire : pour la première infraction, d'une amende de pas moins de dix dollars et pas plus de mille dollars, et les frais, et à défaut de payer une telle amende et les frais, d'un emprisonnement de pas moins d'un mois et pas plus de trois mois ; et pour chaque infraction subséquente, en sus des frais, d'un 20 emprisonnement de trois mois.

20. Toute personne qui contrevient à quelque'une des dispositions de l'article 16 est passible, sur poursuite sommaire, d'une amende d'au moins vingt-cinq dollars et d'au plus deux cent dollars en sus des frais, et à défaut de paiement de l'amende et des frais, d'un emprisonnement d'excédant pas trois mois.

SECTION VI

Poursuites.

21. 1. Les poursuites intentées en vertu de cette loi sont prises au nom du procureur général de la province de Québec, représentant Sa 30 Majesté aux droits de la province, devant un juge de paix, un juge des sessions de la paix, un magistrat de police ou un magistrat de district, et sont régies par la Première partie de la Loi des convictions sommaires de Québec (Statuts refondus, 1925, chapitre 165) sauf que, chaque fois que seul le paiement de l'impôt est réclamé, telle poursuite devra être portée devant la Cour supérieure ou devant toute autre cour de juridiction compétente en matière civile.

2. Il n'est pas nécessaire de produire l'original d'un livre, document, ordre ou registre en la possession du bureau du revenu, mais une copie ou un extrait certifié par le contrôleur ou par le directeur du service, sera, *prima* 40 *facie*, une preuve suffisante du contenu de l'original.

3. Il n'est pas nécessaire pour le contrôleur de signer ou d'assermenter la plainte, de comparaître ou de faire preuve de sa nomination et de son maintien en fonctions ; à toutes fins, il sera représenté par l'avocat comparaisant au nom du procureur général.

22. En plus des recours spécialement prévus par cette loi pour toute

violation de ses dispositions, Sa Majesté aux droits de la Province, peut demander à un juge de la Court Supérieure d'émettre un bref d'injonction contre toute personne qui vend du tabac sans une licence émise sous l'autorité de cette loi, et encore valide, lui ordonnant de cesser de vendre du tabac tant qu'une licence ne lui aura été émise ou réémise, et que tous les frais n'aient été payés.

Le procureur général représentant Sa Majesté aux droits de la Province est dispensé de l'obligation de fournir caution.

10 A tous autres égards, les dispositions du Code de procédure civile concernant les brefs d'injonction s'appliquent à tous brefs d'injonction mentionnés dans cet article.

23. Lorsqu'un jugement a été rendu en vertu de cette loi contre une société, corporation, club, association ou syndicat, tel jugement peut, à défaut de paiement de l'amende et des frais, être exécuté :

(a) dans de cas d'une société, contre chacun des membres de cette société ;

(b) dans le cas d'une corporation, d'un club, d'une association ou d'un syndicat, contre son président si domicilié dans la province, et dans le cas contraire, contre son gérant ou son représentant dans la province.

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SECTION VII.

Dispositions générales.

24. Dans le but de faciliter la perception et la remise de l'impôt établi par la présente loi, ou de prévenir le double paiement de cet impôt sur le même tabac, le ministre peut faire avec un vendeur telles conventions qu'il jugera à propos, et telles conventions seront sujettes à la présente loi.

25. L'impôt et les droits perçus suivant la présente loi et toutes les amendes recouvrées sous son autorité font partie du fonds consolidé du revenu de la province.

30 26. Tout impôt exigible en vertu de la présente loi portera intérêt au taux de cinq pour cent par année, à compter de la date où il aurait dû être remis au bureau du revenu.

27. Toute somme due à la couronne en vertu de la présente loi constitue une dette privilégiée prenant rang immédiatement après les frais de justice.

28. 1. Pour mettre à exécution les dispositions de la présente loi selon leur sens véritable ou en vue de suppléer à toute omission, le lieutenant gouverneur en conseil peut faire tout règlement non incompatible avec la présente loi et jugé nécessaire.

40 2. Le lieutenant-gouverneur en conseil peut aussi ordonner que la perception de l'impôt établi par cette loi se fasse au moyen de timbres adhésifs apposés par le vendeur sur le tabac vendu pour consommation ou sur le paquet. Ces timbres sont émis en conformité des lois de la province et plus particulièrement de la Loi des timbres, (Statuts refondus, 1925, chapitre 24) et de tous arrêtés ministériels s'y rapportant.

3. Ces règlements ont la même force et le même effet que s'ils étaient

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formulés par la présente loi et devront être publiés dans la *Gazette officielle de Québec*.

29. Les dépenses occasionnées par l'application de la présente loi, durant l'année financière 1940-41, sont payées à même le fonds consolidé du revenu.

30. Le trésorier de la province est chargé de l'application de la présente loi.

31. La présente loi entrera en vigueur le premier jour de juillet 1940.

4 GEO. VI, CH. 15.

AN ACT TO IMPOSE A TAX UPON CONSUMERS OF TOBACCO. 10

(Assented to June 22nd 1940.)

DIVISION I.

Interpretation.

1. This Act may be cited as "Tobacco Tax Act."
2. In this Act, unless the context indicates a different meaning :
 1. "Comptroller" means the Comptroller of Provincial Revenue ;
 2. "Consumer" means any person who purchases from a vendor tobacco at a retail sale in the Province ;
 3. "Minister" means the Provincial Treasurer ;
 4. "Package" means package, box, tin or other container in which 20 tobacco is contained or sold at a retail sale ;
 5. "Person" includes an individual, a firm, a company, a corporation an association of persons, an estate, a sequestrator, a trustee in bankruptcy, a liquidator, a fiduciary trustee, an administrator or an agent ; it shall also include the owner or operator of a vending machine for the automatic sale of tobacco ;
 6. "Province" means the Province of Quebec ;
 7. "Purchaser" means any person who purchases from a vendor tobacco at a retail sale in the Province ;
 8. "Raw leaf tobacco" means the unmanufactured tobacco, or the 30 leaves and stems of the plant ;
 9. "Retail sale" means a sale to a consumer for purposes of consumption, and not for resale ;
 10. "Retail vendor" means any person who, within the Province, sells tobacco to a consumer ;
 11. "Revenue Branch" means the Revenue Branch of the Province of Quebec ;
 12. "Sale" means the ordinary contract of sale and includes exchanges, transfers and barter ; it shall also include gifts by vendors ;
 13. "Sale price" or "purchase price" means a price in money, also 40 the value of services rendered or other consideration or prestations accepted by the seller as price or value of the thing given ;

14. "Tobacco" means tobacco in any form in which tobacco is consumed and includes snuff, but does not include cigars sold at a retail price of five cents or less each and raw leaf tobacco ;

15. "Vendor" includes both wholesale vendor and retail vendor ;

16. "Wholesale vendor" means any person who, within the Province, sells tobacco for the purpose of resale, whether manufactured by himself or any other person.

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DIVISION II.

Licenses.

10 3. No person may sell tobacco in the Province unless a license therefor has been, upon his application, issued to him under authority of this Act, and unless such license be in force at the time of sale.

Such license shall remain in force until revoked for cause by the Minister.

4. The application for the license shall be filed with the Comptroller.

5. Such license shall be granted by the Minister or by such officer as he may appoint, upon payment by the vendor of a fee of one dollar to His Majesty in the rights of the Province, and shall be kept in the place where the licensee sells tobacco, or at his chief place of business in the Province.

20 6. The Minister may cancel or suspend the license of any person who has been found guilty of an infringement of this Act ; he may also refuse to issue a license to any person who has been found guilty of an infringement of this Act.

7. The following information must be given when a license is requested :

a. by one or more persons doing business under a firm name,—the name and address of such person or persons ;

b. by a partnership,—the names and addresses of each partner ;

30 c. by a corporation, club, association or syndicate,—the name and address of the president, if he resides in the Province ; if not, the name and address of its resident manager or representative, and the address of its place of business in the Province.

DIVISION III.

Taxation.

8. In order to provide for the exigencies of the public service of the Province, every consumer shall pay to His Majesty in the rights of the Province, at the time of making a purchase of tobacco in this Province, for consumption by himself or by any other person, a tax in respect of the consumption of such tobacco at the rate of ten per centum of the retail price.

40 9. Every person ordinarily residing or carrying on business in the Province, who, himself or through the intermediary of any other person, brings or causes to be brought into the Province any tobacco, or receives delivery of any such tobacco in the Province, for consumption by himself, shall immediately report the matter to the Comptroller and forward or

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produce to him the invoice, if any, and any other information he may require, and shall then pay to His Majesty in the rights of the Province the same tax in respect of the consumption of such tobacco as would have been payable if same had been purchased at a retail sale in the Province at the same price.

10. The tax imposed by this Act shall be calculated separately on every package, and any fraction of a cent shall be computed as one cent. However, in the case of a retail sale of cigars, the tax shall be computed on the retail price of each cigar.

11. The tax payable by the purchaser at the time of his purchase shall be collected and accounted for by the vendor, and be remitted by him to the Minister through the Revenue Branch, in such manner as the Lieutenant-Governor in Council may prescribe. 10

The vendor shall act, in such a case, as the agent for the Minister and shall account for and remit to him the amounts so collected, within fifteen days immediately following the calendar month during which any sale has taken place.

12. The Minister may make an allowance to the vendors for their services in collecting and forwarding the tax to the Revenue Branch, which allowance shall be determined by the Lieutenant-Governor in Council. 20

13. Notwithstanding any act or by-law to the contrary, no sales tax on the purchase at retail of tobacco by a consumer may be levied by any municipal corporation, and any such sales tax presently imposed by any such municipal corporation on the purchase at retail of tobacco is hereby abolished from the date of the coming into force of this Act.

This section shall also apply to cigars sold at a retail price of five cents or less each and to raw leaf tobacco.

DIVISION IV.

Accounts, reports and inspection.

14. 1. The vendor, as agent for the Minister, shall keep and render accounts of the tax collected, in the form and manner established by the Minister. 30

2. The account rendered shall be verified by the affidavit or the statutory declaration of the vendor.

3. The Minister may require wholesale or retail vendors to keep in a prescribed form record of all purchases, sales and deliveries of tobacco made by them, and to forward to him copies of such records or extracts therefrom, at such time and in such manner as he deems fit.

4. Any revenue officer authorised to that effect may enter the premises of a wholesale and retail vendor during reasonable hours, examine his books and documents, verify the quantities of tobacco sold or delivered, establish the correctness of the reports made, and, in the event of a report not being correct or not having been made, establish the quantity of tobacco sold or delivered. 40

15. Every vendor must make such returns to the Revenue Branch, in such form, at such times and with such information as the Minister may prescribe.

16. No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any statement or return furnished under the provisions of this Act.

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DIVISION V.

Offences and penalties.

10

17. 1. Every person who :

a. sells or delivers tobacco in the Province, without a license in force, or otherwise contravenes the provisions of Division II of this Act or of the regulations made in virtue of this Act, or,

b. being an agent of the Minister, refuses or neglects to collect, account for or remit the amount of the tax in accordance with the provisions of this Act or of the regulations made thereunder, or,

20 *c.* refuses or neglects to permit a revenue officer to make the examination and verification set forth in Section 14 of this Act, commits an offence under this Act, and shall be liable, upon summary proceeding, in addition to the payment of the costs and to the remittance of the tax, to a fine of not less than ten dollars and not more than one thousand dollars, in the cases provided for in the paragraph *b* of this section for each sale so made, and in the cases provided for in paragraph *a* or *c* of this section, for each day of such offence, and, in all cases, in default of the payment of the fine and costs and of the remittance of the aforesaid taxes, to imprisonment for three months.

30 18. Every consumer who buys tobacco in the Province without paying the tax imposed under Division III of this Act shall be guilty of an offence under this Act and shall be liable, upon summary proceeding, in addition to the payment of the tax and costs, to a fine of not less than ten dollars and not more than two hundred dollars, and in default of payment of the fine, tax and costs, to imprisonment for a period not exceeding one month.

40 19. Any person contravening Section 15 of this Act or any of the regulations made in virtue of this Act, shall be liable, upon summary proceeding : for a first offence, to a fine of not less than ten dollars and not more than one thousand dollars, and costs, and, on failure to pay such fine and costs, to an imprisonment of not less than one month and not more than three months ; and for each subsequent offence, in addition to the costs, to an imprisonment of three months.

20. Any person violating any of the provisions of Section 16 shall be liable upon summary proceeding, to a fine of not less than twenty-five dollars and of not more than two hundred dollars, and costs, and, in default of payment of the fine and costs, to an imprisonment not exceeding three months.

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Prosecutions.

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21. 1. Suits brought under this Act shall be taken in the name of the Attorney-General of the Province of Quebec representing His Majesty in the rights of the Province, before a justice of the peace, a judge of the sessions, a police magistrate or a district magistrate, and shall be governed by Part I of the Quebec Summary Convictions Act (Revised Statutes, 1925, chapter 165) save that, whenever the payment only of the tax is claimed, such suit shall be brought before the Superior Court or any other Court of competent jurisdiction in civil matters. 10

2. It shall not be necessary to produce the original of a book, document, order or register in the possession of the Revenue Branch, but a copy or extract certified by the Comptroller, or by the Director of the Service, shall be *prima facie* sufficient proof of the contents of the original.

3. It shall not be necessary for the Comptroller to sign or swear to the complaint, to appear or to make proof of his appointment and of his exercising his office ; for all purposes he shall be represented by the attorney appearing on behalf of the Attorney-General.

22. In addition to the recourses specially provided under this Act for the violation of its provisions, His Majesty in the rights of the Province may apply to a judge of the Superior Court for the granting of an injunction against any person who sells tobacco without having a license issued under the authority of this Act and still in force ordering him to cease selling tobacco until a license be issued or reissued, and all costs be paid. 20

The Attorney-General representing His Majesty in the rights of the Province shall be dispensed from the obligation of giving security.

In all other respects, the provisions of the Code of Civil Procedure, respecting injunctions shall apply to the injunction proceedings mentioned in this section.

23. Whenever a judgment has been rendered under this Act against a partnership, corporation, club, association or syndicate, such judgment may, in default of payment of the fine and costs, be executed : 30

a. in the case of a partnership, against each member of partnership ;

b. In the case of a corporation, club, association or syndicate, against its president, if the latter be in the Province, and, if not, against its manager or representative in the Province.

DIVISION VII.

General provisions.

24. In order to facilitate the collection and remittance of the tax imposed by this Act or to prevent the double payment of such taxes on the same tobacco, the Minister may effect such arrangements as he may deem expedient to make with a vendor and such arrangements shall be subject to this Act. 40

25. The fees and taxes imposed by and collected under this Act, and

all fines recovered thereunder, shall form part of the consolidated revenue fund of the Province.

26. Any tax due under this Act shall bear interest at the rate of five per centum per annum, from the date such tax should have been remitted to the Revenue Branch.

27. Every sum due to the Crown under this Act shall constitute a privileged debt ranking immediately after law costs.

10 28. 1. For the purpose of carrying into effect the provisions of this Act according to their true intent or of supplying any deficiency therein, the Lieutenant-Governor in Council may make such regulations, not inconsistent with this Act, as are considered necessary.

2. The Lieutenant-Governor in Council may also direct that the payment of the tax imposed by this Act shall be evidenced by the affixing by the vendor of stamps upon the tobacco sold for consumption or upon the package. The stamps shall be issued according to the laws of the Province and particularly in accordance with the provisions of the Stamp Act (Revised Statutes, 1925, Chapter 24), and with any Order-in-Council respecting the same.

20 3. Such regulations or Orders-in-Council shall have the same force and effect as if enacted by this Act and shall be published in the Quebec Official Gazette.

29. The expenses occasioned by the carrying out of this Act, during the fiscal year of the Province 1940-41, shall be paid out of the consolidated revenue fund.

30. The Provincial Treasurer shall have charge of the carrying out of this Act.

31. This Act shall come into force on the first day of July 1940.

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CANADA.

30 PROVINCE DE QUEBEC.
DISTRICT DE MONTREAL,
No. 193307.

JUDGMENT OF THE SUPERIOR COURT.

Le 29 ième jour d'août, 1940.

Présent : L'Honorable Juge Trahan.

ALLEN ALEXANDER MCGINN, de la cité et du district de Montréal,
demeurant au No. 1422 Jeanne Mance *Petitioner*

— et —

40 THE COURT OF SESSIONS OF THE PEACE sitting in and for the District of Montreal, and all JUDGES OF SESSIONS OF THE PEACE of the District of Montreal, sitting as the Court of Sessions of the Peace and for the district of Montreal, in virtue of any authority to sit as such vested in them by law or by the Quebec Summary

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Convictions Act ; THE COURT OF JUSTICES OF THE PEACE sitting in and for the District of Montreal, and all JUSTICES OF THE PEACE of the District of Montreal sitting as The Court of the Justices of the Peace in and for the district of Montreal in virtue of any authority to sit as such vested in them by LAW or by the Quebec Summary Convictions Act ; THE COURT OF SUMMARY CONVICTIONS sitting in and for the District of Montreal and all Judges of Sessions of the Peace of the District of Montreal, and ALL JUSTICES OF THE PEACE of the District of Montreal sitting as the Court of SUMMARY CONVICTIONS in and under any authority to sit as such vested in them by law or by the Quebec Summary Convictions Act ; and HIS MAJESTY THE KING and the Attorney General of the Province of Quebec Respondents.

10

LA COUR, ayant entendu le requérant et le Procureur-Général de la Province de Québec sur la requête du requérant tendant à faire décerner un bref de prohibition contre certains tribunaux inférieurs et les juges d'iceux ci-dessus énumérés, examiné le dossier, et délibéré :

ATTENDU que le requérant : prays that a writ of prohibition issue under the authority of this Court addressed to the Court of inferior jurisdiction, the Respondents in the present case, and to His Majesty the King and to the Attorney General of the Province of Quebec, ordering them to appear before this Honourable Court to answer to the demand contained in the present petition and particularly that the said Tobacco Tax Act, 4 Geo. VI., Ch. 15 is illegal and *ultra vires* of the Province of Quebec and unconstitutional, null and void ; and that the said Respondents herein be consequently ordered to discontinue all proceedings in the matter with reference to the complaint and charge contained in the summons referred to in the present Case ;

20

ATTENDU que, au soutien de sa requête, il allègue ce qui suit :

1. That he is a resident of the City of Montreal ;
2. That on or about the 18th day of July, 1940, a complaint upon oath was lodged by and on behalf of the Respondents, His Majesty, and in His Majesty's name against your Petitioner before the Honourable Chief Justice Charles E. Guerin in his quality of judge of the Sessions of the Peace for the District of Montreal and your Petitioner was summoned to appear before the said Chief Justice or said Judges of Sessions of the Peace or justices of the Peace for the said District in answer to a charge based upon the said Complaint ;
3. That the charge against your Petitioner in this Complaint was that, in Montreal, said district, on the 20th day of July, 1940, he, being a consumer under the provision of the Tobacco Tax Act, Geo. VI., Ch. 15, did buy Tobacco in a store bearing civic number 381 St. Catherine Street West, in the City of Montreal, in the Province of Quebec, without paying the tax imposed under Division III of the said Act and that in violation of the said Tobacco Tax Act, 4 Geo. VI., Ch. 15 ;

30

40

4. That your Petitioner appeared before a judge of the Sessions of the Peace in answer to the said summons and charge and pleaded "not guilty" thereto, at the same time declining, through the undersigned Attorneys, the jurisdiction of the said Court and of the Judge of the Sessions of the Peace presiding at the Arraignment;

5. That the said Complaint and charge are now fixed for Trial and Hearing for the 2nd day of August, 1940, before the Courts, the Respondents herein;

10 6. That the Respondents, His Majesty, has indicated his intention of proceeding with the Trial of the said Complaint and charge on the said day before the Court, described as the Respondents in the present case, notwithstanding your Petitioner's objection thereto;

7. That the charge as laid against your Petitioner is not and does not constitute any offence in law, the whole for the following reasons:

(A) That the Statute 4 Geo. VI. Ch. 15 described as the Tobacco Tax Act is illegal, null and void, inasmuch as it does not legislate upon the matters provided for by Section 92 of the British North America Act, but in fact legislates upon matters within the legislative authority of the Dominion of Canada in virtue of Section 91 of the British North America Act;

20

(B) That, particularly, the Act in question does not constitute Direct Taxation within the Province in order to the raising of revenue for Provincial purposes under subsection 2 of Section 92 of the British North America Act;

(C) That the licenses provided for in the Statute in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for Provincial, local or municipal purposes;

30

(D) That the Statute is illegal and *ultra vires* in providing that the vendor is to collect and remit the tax;

(E) That the Tax is illegal and *ultra vires* of the Province of Quebec, inasmuch as it is not a direct tax upon the consumer, but is a sales tax and a tax relating to a marketable commodity and upon a commercial transaction between the tax-payer and the other party to the transaction;

(F) That the tax is illegal and *ultra vires* of the Province of Quebec as constituting the regulation of trade and commerce under sub-section 2 of Section 91 of the British North America Act;

40

(G) That the subject matter of the Act is not a matter of merely local or private nature in the Province of Quebec;

(H) That, in providing for a tax upon any tobacco brought into the Province or caused to be brought into the Province of Quebec, the tax is illegal and *ultra vires* of the Province of Quebec and particularly, violates Section 121 and 122 of the British North America Act providing that "all the articles of the growth, produce or manufacture of any one of the Provinces shall, from

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“ and after the Union, be admitted free into each of the other
“ Provinces ; ”

8. That, in consequence of the foregoing, it appears that the Complaint and Charge against your Petitioner and the Trial of the said charge, constitutes an excess of jurisdiction on the part of the Court of inferior jurisdiction, the Respondents in the present case ;

9. That the matter involved in the said charge is one of great importance to the public in general and your Petitioner in particular, as it represents a serious and unjust interference with his liberties and rights and with those of others in the Province similarly situated ; 10

10. That your Petitioner is entitled to address himself to this Superior Court for the purpose of restraining by a writ of prohibition the excess of jurisdiction complained of hereinabove ;

ATTENDU que le Procureur Général de la Province de Québec, dûment assigné, a comparu lors de la présentation de cette requête, l'a contestée à l'audience comme mal fondée et s'est alors opposé à l'émission du bref de prohibition demandé ;

VU les articles 114, 114a, 992, 993, 1003, 1006, 1292 et 1293 du Code de procédure civile ;

CONSIDERANT que l'article 1003 précité, sur lequel se fonde le requérant 20 est la reproduction textuelle et intégrale du même article édicté par le Code de procédure entré en vigueur le 1er septembre 1897 ; après avoir été modifié en 1929, (10 Geo. VI, Ch. 15), il a été, en 1936, rétabli dans son texte primitif, (I Edouard VIII, 2^e Session, Ch. 41) ; ses dispositions sont substantiellement les mêmes que celles de l'article 1031 de l'ancien Code de procédure en force avant celui de 1897 ;

CONSIDERANT que les modifications apportées en 1929 audit article par le législateur n'ont pas altéré essentiellement la nature du bref de prohibition ni les conditions de son émission, mais ont eu pour objet de sanctionner et de confirmer la jurisprudence de nos Cours en la matière ; 30

CONSIDERANT que le second paragraphe de 1003, assimilant le bref de prohibition au mandamus, est, selon le rapport des codificateurs, emprunté de la pratique anglaise ; au surplus, le bref de prohibition lui-même nous vient d'Angleterre ; c'est la raison pour laquelle nos tribunaux se sont inspirés avec raison de la doctrine et de la jurisprudence anglaises pour décider les divers litiges poursuivis devant eux en matière de prohibition ;

CONSIDERANT que M. le Juge Gwynne, Re : *Molson v. Lambe* (15 Supreme Court Reports), s'exprime comme suit à la page 270 : In the above case of the *Mayor of London v. Cox, Willis J.* referring to the writ being issuable at the suit of a stranger, says : 40

“ In this respect, prohibition strongly resembles mandamus, where
“ the Court of Queen's Bench exercises a *discretion* as to whether the writ
“ shall go, but the writ once granted must be met by a return showing
“ a legal answer . . . ”

CONSIDERANT que notre Cour d'Appel, Re-*Maillet v. Bureau des Gouverneurs des Dentistes et Fortin*, 27 B.R. page 370, a décidé “ que le

“ bref de prohibition, quoique ayant le même *objet en vue que le bref d'injonction*, en diffère cependant en ce que le bref d'injonction doit être adressé aux parties litigantes, tandis que le bref de prohibition est adressé à la Cour elle-même ; ”

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M. le Juge Carroll cite à la page 367 à l'appui de cette décision, l'autorité suivante :

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10 “ It (prohibition) must not be confounded with the remedy by
“ injunction. *Both have the same object, but the difference between*
“ them is that an injunction is directed against the parties litigant,
“ while the prohibition is directed to the Court itself ” (*Short v. Mellow*,
Crown practice, 2nd Ed., 253) ;

CONSIDERANT, en effet, que le bref d'injonction et le bref de prohibition sont tous deux décernés dans le but d'empêcher la commission ou la continuation d'une action ou opération, soit temporairement, soit permanentement, ou encore d'empêcher la continuation d'une procédure devant un tribunal inférieur qui, illégalement et sans autorité, usurpe une juridiction qu'il ne possède pas ou excède la juridiction qui lui est conférée ;

20 CONSIDERANT que l'ordonnance d'injonction de même que le bref de
prohibition ne peuvent être émis sans l'autorisation d'un juge de la Cour
Supérieure accordée, s'il y a lieu, sur présentation d'une requête libellée,
dûment signifiée à la partie adverse et appuyée d'un affidavit ; l'article 993
C.P. oblige le requérant en mandamus à observer les mêmes formalités ;

CONSIDERANT que, selon la loi, la doctrine et la jurisprudence tant anglaises que canadiennes, les principes généraux régissant le bref de prohibition peuvent se résumer ainsi :

- (a) Le bref de prohibition est une mesure spéciale et exceptionnelle et, partant, strictement restreinte aux cas prévus par l'article 1003 C.P. ;
- (b) L'émission de ce bref est laissé à l'entière discrétion de la Cour ou du juge saisi d'une requête introductive d'instance en prohibition ;
- 30 (c) Dans l'exercice du pouvoir discrétionnaire qu'ils possèdent
d'accorder ou de refuser le bref de prohibition, la Cour ou le Juge
doivent considérer les droits apparents des parties, *les circonstances de*
chaque espèce et les inconvénients ou dommages qui pourraient résulter
à l'une ou l'autre de ces parties par suite de l'émission de ce bref ;
- (d) La Cour ou le Juge ne doivent accorder ce remède extraordinaire qu'avec une très grande circonspection et dans des cas extrêmement rares ; Ils ne peuvent intervenir que s'il y a absence complète ou excès de juridiction de la part du tribunal que l'on veut dessaisir du litige ;
- 40 (e) Ce défaut absolu ou cet excès de juridiction du tribunal
inférieur doivent apparaître clairement et positivement à la face même
de la requête en prohibition ;

(f) Il n'y a pas ouverture à la procédure par voie de prohibition lorsqu'il existe un autre remède également approprié, efficace et avantageux, permettant à la partie qui se prétend lésée de faire valoir ses droits et d'obtenir le redressement des griefs qu'elle allègue ;

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CONSIDERANT qu'il importe de citer quelques précédents relatifs aux principes ci-dessus énoncés ; (1887) 15 Supreme Court Reports. *Molson v. Lambe.* Page 253 :

Page 253 :

HELD, Per Ritchie, C.J. and Strong, Fournier and Henry, J.J., that the Quebec License Act and its amendments were *intra vires*, and that the Court of Special Sessions of the Peace at Montreal having jurisdiction to try the alleged offense and being the proper tribunal to decide the question of facts and of law involved, a writ of prohibition did not lie. 10

M. le Juge Henry, page 267—cite *Blackstone et High*, puis ajoute :
Blackstone says :

“ A prohibition is a writ issuing properly out of the Court of King’s Bench, being the King’s prerogative writ, but for the furtherance of justice it may be now also had in some cases out of the Court of Chancery, Common Pleas or Exchequer, directed to the judge and parties of a suit in any inferior court commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court ; 20

High on Extraordinary Remedies (p. 606) says :

“ The Court does not lie for grievances which may be redressed in the ordinary course of judicial proceedings. Nor is it a writ of right granted *ex debito justitiæ*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. Nor should it be granted except in a clear case of want of jurisdiction on the Court whose action it is sought to prohibit.”

On an application for the writ, the want of jurisdiction about to be exercised should be clearly shown, and regardless of the law and facts to be considered by the Court sought to be prohibited, the sole question is as to its jurisdiction to deal with them. If that is not clearly shown, the issue of the writ would be unjustifiable (M. le Juge Henry, page 267). 30

B—*Corporation de Ste-Geneviève v. Boileau* (1890) M.L.R., 6 B.R. p. 461 ;

Le jugement de la Cour d’Appel contient le considérant suivant :

Considérant qu’il est laissé à la Cour Supérieure, ou à un juge d’icelle, dans l’exercice d’une saine discrétion, de permettre ou de refuser l’émanation d’un bref de prohibition, suivant qu’il juge que les raisons alléguées par le requérant sont suffisantes ou insuffisantes, 40 pour justifier l’adoption de cette procédure extraordinaire, et qu’une Cour d’Appel ne doit intervenir, dans l’exercice de cette discrétion que lorsqu’il est évident que le tribunal inférieur n’avait pas de juridiction ; (p. 463) ;

1905 Re *Gaynor et al.*, requérants, 7 R.P. 115.

M. le Juge Davidson s'exprime comme suit à la page 126 :

“ According to article 1003 and 992, of the Code of Procedure the writ of prohibition lies whenever a Court of Inferior jurisdiction exceeds its jurisdiction, *if there is no other remedy equally convenient, beneficial and effectual*. It may also be used to restrain anybody or persons or officers assuming to exercise judicial or quasi-judicial powers although not strictly or technically a court.”

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10 High, Extraordinary Remedies, No. 764a ; Clark's Mag. Man. 36 ; Short on Information (Blackstone Ed.) No. 431 ; *Kearney v. Desnoyers* (1889) 10 R.J. Q.B. 436 ; *O'Farrell v. Brossard* (1875), 4 Q.L.R. 62 ;

It should not be granted except in a substantially clear case of want of jurisdiction. There must be imminent danger of failure of justice. *Tessier v. Desnoyers*, 12, R.J. S.C. 35 ;

Confirmé par la Cour d'Appel, 7 R.P. page 240 ; 1905—*Re Bastien v. Amyot*, 15 B.R. page 22.

M. le Juge Trenholme parlant au nom de la majorité s'exprime comme suit :

Page 24 :

20 “ Our Courts have adopted and acted on the principle stated by High and the other authorities, that prohibition will not be granted if another adequate remedy exists. Thus in *Audet et Doyon* (10 Q.L.R., 21) McCord, J., delivering the judgment of the majority of the Court, said :

“ ‘ Prohibition is an extraordinary remedy and should not be employed where the party has a complete remedy in some other and more ordinary form. He adds :

30 “ ‘ High, on Extraordinary Remedies, says : It is a principle of universal application, one which lies at the foundation of the law of prohibition that the jurisdiction is *strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another complete remedy at law.*’ ”

To the same effect is Spelling, Nos. 1727 *et seq.*

40 “ The above case and the principle enunciated have been repeatedly cited and approved of by both our Superior Court and this Court, in the case of *Laliberté and Fortin* (2 Q.B. 573). Wurtele, J., delivering the judgment of the Court, cites with approval *Audet & Doyon*, and also *Wood, Short and High*, to the effect ” that in all cases where an inferior court has jurisdiction upon the matter in controversy, the Superior Court will refuse to interfere by prohibition, but will leave the party aggrieved to pursue the ordinary remedies for the correction of error, such as a writ of *certiorari*.

“ One of the considerants of the judgment of this Court in the case of *Laliberté & Fortin* was : ‘ Considering that the writ of prohibition only lies and can issue when the inferior Court has no jurisdiction over the matter in controversy.’ ”

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*dicare, against its president, if the latter be in the Province, and,

M. le Juge en Chef Lacoste, dissident, disait ce qui suit dans la même cause :

En empruntant à l'Angleterre le bref de prohibition, nous l'avons consigné dans notre Code de procédure, comme moyen donné aux juges de contrôler les tribunaux inférieurs, au cas d'excès de juridiction. Ce n'est plus ici un bref de prérogative royale, un remède extraordinaire mais une simple procédure qui nous est donnée pour la bonne administration de la justice et spécialement pour permettre à la Cour Supérieure d'exercer sa surveillance sur les tribunaux inférieurs. *Le Juge peut* 10
l'accorder ou la refuser sans violer la loi (p. 42).

1922—*Bourbonnais v. Perrault*, 29 *Revue légale*, 247.
(Bruneau, Juge)

Considérant que le bref ou le writ de prohibition n'est pas de droit, *ex debito justitiae*, mais son émission en est abandonnée à l'entière discrétion du tribunal ; qu'il ne doit être accordé que dans le cas où la Cour inférieure excède clairement sa juridiction, ou n'en possède aucune, ou commet une injustice grave et évidente ; High, p. 709 ; *Champagne v. Simard et al.*, (1895), 7 C.S. 40 ; *Corp. de Ste Geneviève v. Cour de circuit*, (1890) M.L.R. 6-Q.B., 461) ; 20

Sir François Lemieux avait exprimé la même opinion dans les causes de *Sing v. Cour du Recorder*, (1921) 60 C.S. page 72 ; *Eliosoff v. Choquette*, (1922) 60 C.S. page 486,

1925—*Hearn v. Choquette*, 64, C.S. 169.

Sir François Lemieux, Juge en Chef, à la page 177 ;

Page 177 :

Un bref de prohibition est un bref de prérogative émanant d'une haute Cour de Justice pour ramener le tribunal inférieur dans les limites de sa juridiction, lors qu'il n'y a pas d'autre remède, mais à la condition, suivant la doctrine anglaise qui prévaut en pareille matière : 30

“ *That this writ cannot be claimed as of right unless the effect of jurisdiction is clear, or unless the error invokes the doing of something which, in the word of Littledale, J., is contrary to the general laws of the land, or to use the words of Lush, J., is so vicious as to violate some fundamental principle of justice.* (I. Halsbury, p. 383).”

1925—*Giroux v. Marchildon*, 40 B.R. 362.

M. le Juge Howard parlant au nom de la Cour dit ce qui suit aux pages 365-366 et 367 ;

Our own law, which is one of *exception and therefore restrictive*, is stated very simply in article 1003 of our Code. 40

“ The writ of prohibition lies whenever a Court of inferior jurisdiction exceeds its jurisdiction.”

It is adopted from the law of England, and so decisions of the English Court and of other Common Law jurisdictions have special weight with us.

Perhaps the leading English case on the subject is the *Mayor of*

* *sic qq.*

London v. Cox (L.R. Appeals before the House of Lords), Vol. 2, 239.

A l'appui de son opinion il cite les autorités suivantes :

Being a prerogative writ, it is to be used, like all other prerogative writs, with great caution and forbearance, for the furtherance of justice and to secure order and regularity in judicial proceedings, *when none of the ordinary remedies provided by law are applicable* :

Nor should it be granted except *in a clear case* of want of jurisdiction in the Court whose action it is sought to prohibit.

10 And to warrant the relief the petition must clearly show that an inferior Court is about to proceed in a matter over which it has no jurisdiction, and unless this is distinctly and affirmatively shown, the relief will not be granted. (High, Extraordinary Legal Rem. 3e Edition, par. 765).

Like other extraordinary remedies, prohibition is granted only in case where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists. *Ibid.* par. 770.

20 Another fundamental principle and one which is to be constantly borne in mind, in determining whether an appropriate case is presented for the exercise of this extraordinary jurisdiction, is that the writ is never allowed to usurp the functions of a writ of error or *certiorari*, and it is never employed as a process for the correction of errors of inferior tribunals. (*Ibid.* par. 772.)

1928—*Peterson v. Recorder de Montréal*, 31 R.P. 433 (1928).

M. le Juge Surveyer approuve la décision de M. le Juge Davidson
Re : *Gaynor v. Green*, 7-R.P. 115, et cite, entr'autres autorités, la suivante :

30 " It would seem that the only discretion which the Superior Court has to refuse a prohibition is, if it is no doubt in fact, or law, whether the inferior Court is exceeding its jurisdiction or is acting without "jurisdiction." (Halsbury's Laws of England, Vol. 10 pp. 143-144.)
Il y aurait également avantage à consulter les précédents suivants :

C.R. 1883—*Audet v. Doyon*, 10 Q.L.R. page 20 ;

1883—*Hogan v. Recorder de Montréal*, 6 L.N. 317 ;

1889—*Breton-Landry*, 13 C.S. 31 ;

1884—*Poulin v. Corporation de Québec*, 9 Cour Suprême, pages 186-196 ;

1938—*Levesque v. Choquette*, 68 C.S. p. 147, Lemieux, J. ;

1938—*Rex-Smith*, 71 C. Cr. Cases, pa. 136 ;

40 1938—*De Lamirande v. Recorder de Westmount*, 66 B.R. 235 ;

CONSIDERANT que, pour justifier sa requête en prohibition, le requérant attaque la constitutionnalité de la loi, (4, Geo. VI, Ch. 15), sous l'autorité de laquelle il a été pour suivi devant la Cour des Sessions de la Paix pour le District de Montréal :

CONSIDERANT que le seul fait de mettre en question dans une requête pour l'émission d'un bref de prohibition la constitutionnalité d'une loi ou

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d'un Statut en vertu duquel poursuivi devant le tribunal inférieur n'enlève pas à ce dernier sa juridiction et ne donne pas ouverture au bref de prohibition. (*Ferland Corset Co. v. Cité de Montréal*, 73 C.S. 334) ;

CONSIDERANT que, selon M. le Juge Davidson, il est pour le moins douteux que le bref de prohibition soit le remède approprié pour invoquer devant cette Cour la question de la constitutionnalité d'une loi ou d'un Statut en vertu de laquelle une Cour inférieure ou un officier public prétend agir. (7 R.P. 115) ;

CONSIDERANT que la dite Cour des Sessions ayant incontestablement juridiction pour entendre et juger la plainte mentionnée dans la requête 10 du requérant et faite en vertu de ladite loi 4 Geo. VI. Ch. 15, cette dernière doit être observée tant qu'elle existe, puisque, selon M. le Juge Letourneau :

“ Sous l'acte constitutionnel qui régit le pays, la loi reste la loi, “ fût-elle *ultra vires* des pouvoirs de la Province qui l'a édictée, tant et “ aussi longtemps qu'elle n'a pas été désavouée, ou bien mise de “ côté par le tribunal compétent. Et c'est ici tout ce qu'on lui reproche, “ en somme, d'être *ultra vires*, des pouvoirs de la Province.” (*Lessard v. Regem*, 67 B.R. page 452) ;

CONSIDERANT que les articles 114 et 114a du Code de procédure prescrivent la procédure à suivre pour plaider devant les tribunaux 20 l'inconstitutionnalité d'une loi de la Province et du Canada ;

CONSIDERANT que, si le Statut 4, Geo. VI, Ch. 15 est *ultra vires*, son inconstitutionnalité peut être plaidée en défense devant la Cour des Sessions de la paix, et que la décision de cette dernière peut être révisée par voie d'un certiorari (Vide : Galibert et al, Cour du Recorder, 53 C.S. pa. 82, jugement de M. le Juge McLennan, confirmé à l'unanimité par Messieurs les Juges Fortin, Greenshields et Lamothe ; *Paquin v. Cour de Circuit*, 34 R.P. à la page 126, remarques de M. le Juge Duclos ; *Poulin v. Corporation de Québec*, 9 Suprême Court Reports, remarques de M. le Juge Strong, pages 124 à 196) ; 30

CONSIDERANT que, sur ce point, la Cour fait siennes les remarques de M. le Juge Cannon, l'un des deux juges qui ont parlé au nom du tribunal, *Re Cité de Montréal v. Ségal*, 46 B.R. On les trouve à la page 395 dudit rapport.

Les appelants prétendent que 1292 C.P. fournissait à l'intimé le seul moyen d'évoquer sa cause avant jugement ou de faire réviser le jugement rendu par la Cour du Recorder, vu qu'il n'y avait pas d'appel. En effet 1293, donne le recours par certiorari ; 1.—Lorsqu'il y a défaut ou excès de juridiction ; 2.—lorsque les règlements sur lesquels la plainte est portée ou le jugement rendu, sont nuls ou sans effet ; 40

Il est assez difficile de trancher cette question de procédure, mais même en admettant que l'intimé n'était pas restreint au recours unique par certiorari à l'exclusion du bref de prohibition *il me paraît difficile d'admettre ce recours*, et ce, à l'exemple du juge en Chef, Strong, dont j'adopte le langage re : *Pigeon v. Cour du Recorder et Cité de Montréal*, 17 R.C. Supreme, 506 ;

10 “ It seems to be extremely doubtful, to say the least that the writ
 “ of prohibition was the appropriate remedy in the present case. The
 “ writ is only applicable to restrain an excess of jurisdiction by inferior
 “ Court. The Recorder’s Court would not, however, have exceeded
 “ its jurisdiction even though the by-law might have been bad, or the
 “ Statute *ultra vires*, if it had proceeded to hear and determine the
 “ action instituted by the City. If any Court had jurisdiction the
 “ Recorder’s Court had it; the appellant’s defences therefore, that the
 “ by-law and Statute were invalid, did not, strictly speaking, constitute
 “ objections to the jurisdiction, but were objections on the merits to
 “ the foundation of the action in point of law :”

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Il convient de noter ici que, pour étayer son opinion, M. le juge Rivard, (46 B.R. 384) cite celles des deux juges dissidents, Sir Alex. Lacoste et M. le Juge Cimon, Re : *Bastien-Amyot*, 15 B.R. 22 ;

CONSIDERANT qu’il ressort du jugement de M. le Juge Guérin, 49 C.S. p. 34 que, si l’avis prévu par l’article 114 du Code de procédure avait été donné au Procureur-général, la Cour du Recorder eût été compétente pour connaître et décider si la loi arguée d’inconstitutionnalité était valide ou non ;

20 CONSIDERANT que, si le seul fait de mettre en question la constitutionnalité d’une loi devant un tribunal inférieur enlevait à ce dernier sa juridiction et donnait ouverture au bref de prohibition, tous les violateurs de la loi tenteraient cette défense facile et, dans bien des cas, l’administration de la justice en matière pénale deviendrait illusoire. (*Revillon Bros. v. Pagé* 33 C.S. p. 263) ;

30 CONSIDERANT qu’un jugement accueillant favorablement une requête introductive d’instance en prohibition, bien que préparatoire ou interlocutoire, a pour conséquence nécessaire de suspendre pour un temps indéfini et indéterminé l’administration de la justice en matière pénale et, par voie de conséquence en l’espèce, de saboter la saine administration financière de notre Province ;

40 CONSIDERANT que accorder la requête du requérant, serait dans l’espèce, méconnaître le but de la loi ainsi que la mission du bref de prohibition, et entraver sérieusement les poursuites pénales instituées pour protéger les contribuables qui observent la loi et punir ceux qui l’enfreignent ; que ce serait, en outre, transférer à la Cour Supérieure *in limine litis* toutes les causes pénales où la constitutionnalité d’une loi créant une infraction et édictant une pénalité serait mise en doute par le requérant dans le but de gagner du temps et de renverser l’ordre établi par la loi pour la marche des procès. (Cpr. 60 C.S. p. 75 et 35 R.P. p. 96) ;

CONSIDERANT que, si la Cour faisait droit à la présente requête, toute personne poursuivie devant un tribunal inférieur en vertu d’une loi quelconque pour pénalité encourue en raison de sa violation, pourrait en faire suspendre l’opération pour un temps indéfini ; même, plusieurs contribuables, financièrement intéressés ou animés d’idées pernicieuses et subversives, et en ayant le désir et les moyens, pourraient se coaliser et se

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concerter pour attaquer la validité de toutes et chacune des lois fiscales ou autres, tant du Canada que de la Province, et organiser, au moyen d'un abus singulier et répréhensible, des procédés judiciaires entravant et compliquant la marche régulière d'une poursuite pénale, une espèce de résistance passive à la loi, causant par là des dommages incalculables et irréparables à l'Etat ;

CONSIDERANT que si la thèse du requérant devait prévaloir, nos tribunaux au lieu de rendre la justice et de faire observer et respecter la loi, encourageraient le mépris de la loi et de la désobéissance à l'autorité légitime ; cela entraînerait des conséquences graves, même désastreuses, pour la 10 sécurité de l'Etat et de la société ;

CONSIDERANT que la Cour ou le Juge saisi d'une requête en prohibition qui, si elle était accordée, aurait pour effet d'enjoindre au tribunal inférieur de ne pas procéder sur une plainte portée sous l'empire de la loi régissant la matière, et ce, à raison de la prétendue inconstitutionnalité de cette loi, et de suspendre en conséquence, pour un temps indéfini, l'application de ladite loi, dans l'espèce, la loi incriminée est d'une importance capitale et vitale pour la Province,—a le devoir impérieux de considérer si la suspension temporaire de la procédure devant le tribunal inférieur, ainsi que de l'opération de cette loi, causerait à l'Etat ou au public des inconvénients 20 plus graves et plus considérables que ceux que pourrait subir le requérant, si sa requête en prohibition était rejetée ; il a, en outre, le devoir d'examiner à fond la valeur juridique et légale des moyens invoqués par le requérant au soutien de sa demande pour l'émission d'un bref de prohibition (1905 *Re Gaynor*, 7 R.P. 115, confirmé en appel 7 R.P. 240 ; *Peterson v. Recorder de la cité de Montréal*, 31 R.P. 433) ;

CONSIDERANT que la Cour, mettant en balance le fait que, d'une part, le requérant poursuivi en correctionnelle pour avoir refusé de payer une taxe bien minime sera exposé en conséquence à payer une légère amende (4 Geo. VI, Ch. 15, art. 18), et, que d'autre part, l'administration fiscale de 30 toute une province sera sabotée, compromise et mise en péril par l'exercice du recours auquel prétend avoir droit le requérant, décide que la demande du requérant se présente dans des circonstances défavorables, et que l'octroi de son pourvoi en prohibition est injustifiable et constituerait une ingérence grave et non autorisée de cette Cour dans l'administration de la justice pénale ;

CONSIDERANT que l'intérêt public domine toujours l'intérêt privé et que le devoir des tribunaux est de veiller à ce que le bien commun et l'intérêt général soient sauvegardés ;

CONSIDERANT que cette question de la mise en balance des inconvénients 40 pouvant résulter à l'une ou à l'autre des parties du rejet ou de l'octroi de la présente requête n'a pas été discutée dans les causes de *Asch Limited v. La Cour du Recorder de Lachine* 52 B.R. 363, et le *Procureur Général de la Province v. Lazarovitch*, décision de la Cour d'Appel non rapportée citées par le requérant au soutien de sa demande. C'est ce qui distingue ces précédents du présent litige et les rend inapplicables dans l'espèce ;

CONSIDERANT d'ailleurs, que le requérant a d'autres remèdes également appropriés, avantageux et efficaces de se pourvoir contre la décision qui pourrait être rendue par le tribunal inférieur ;

CONSIDERANT qu'il reste à examiner la validité de la loi, 4 Geo. VI, Ch. 15, arguée d'inconstitutionnalité par le requérant, ainsi que la question de savoir s'il y a lieu de faire émettre le bref de prohibition avant de considérer le fond du litige ;

CONSIDERANT que la requête du requérant ne comporte aucune allégation de faits, qui, fussent-ils prouvés, constitueraient ou établiraient
10 défaut ou excès de juridiction ;

CONSIDERANT que ladite requête allègue exclusivement une pure question de droit, savoir l'inconstitutionnalité de la loi, 4 Geo. VI, Ch. 15, dont la Cour Supérieure ou un juge de cette Cour peuvent disposer aussi bien *avant* qu'après l'émission du bref de prohibition ;

CONSIDERANT que, selon M. le Juge en Chef, Sir François Lemieux, " c'est là la règle invariablement suivie par nos Cours canadiennes (*Eliosoph v. Choquette*, 60 C.S. page 87) ;

CONSIDERANT que les arrêts de notre Cour d'Appel. " *Re* " *Gaynor* (7-R.P. 240) et " *Re* " *de Lamirande v. Recorder de Westmount* (66 B.R. 235)
20 semblent confirmer ce point de vue ;

CONSIDERANT que le bref de prohibition est une mesure spéciale et un remède extraordinaire édicté pour assurer la bonne administration de la justice ;

CONSIDERANT que l'administration de la justice, pour être bonne et efficace, doit être impartiale, expéditive et peu coûteuse ;

CONSIDERANT que, si la Cour adoptait l'opinion de ceux qui soutiennent que ce n'est pas sur la requête introductive d'instance en prohibition que le fond même du débat, en l'espèce, la validité ou l'invalidité de la loi arguée d'inconstitutionnalité, peut être jugé (Cpr. 52-B.R. p. 373), elle renverserait
30 l'ordre établi par la loi pour la marche des procès, retarderait indûment et injustement l'administration de la justice et occasionnerait aux parties des frais considérables et inutiles ; l'énumération des procédures nombreuses et compliquées faites dans la cause de *Sun Lung v. La Cour du Recorder de Québec* et relatées par M. le Juge Gibson, à 60 C.S. page 171, en est une illustration frappante ;

CONSIDERANT que les parties ont tout avantage et intérêt à ce que le fond même du litige soit décidé par le tribunal dans le plus bref délai et avec le moins de frais possible ;

CONSIDERANT qu'il y a appel du jugement et que, par suite, toute la
40 question pourra être vidée rapidement et économiquement par nos tribunaux de dernier ressort en la matière (Art. 1006 C.P.)

CONSIDERANT, dès lors, que le requérant ne peut souffrir aucun préjudice du fait que la Cour statue sur le fond du litige en même temps qu'il décide s'il a droit ou non à l'émission du bref demandé dans sa requête introductive d'instance en prohibition ;

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VU LA LOI 4 Geo. VI, Ch. 15 ;

CONSIDERANT que ladite loi paraît être *intra vires* des pouvoirs de la Législature de Québec ;

CONSIDERANT que le nom donné à une loi est indifférent et importe peu ; c'est la réalité des choses qu'il faut considérer objectivement pour décider le présent litige ;

CONSIDERANT que ladite loi édicte, entr'autres choses, ce qui suit :

Article 2-par. 2 : " consommateur " signifie toute personne qui achète du tabac d'un vendeur par une vente en détail, en cette Province ; "

10

Par. 9 : " *Vente en détail* " signifie une vente faite à un consommateur pour fins de consommation et *non de revente* ;

Art. 8 : Afin de pourvoir aux besoins du service public de la province, chaque *consommateur* doit, lors de l'achat de tabac en cette province, pour fins de consommation par lui même ou pour tout autre, payer à Sa Majesté aux droits de la Province un *impôt de consommation* du tabac au taux de dix pour cent du prix de *vente en détail*.

CONSIDERANT qu'il résulte de la combinaison de ces articles que la loi incriminée établit, à proprement parler, un impôt directement par le consommateur, tel que défini au sous paragraphe 2 de l'article 2, et équivalent à 10% du prix de vente en détail, telle que définie au sous-paragraphe 9 du dit article 2 ;

20

CONSIDERANT que tel consommateur payant ainsi la taxe ne peut en aucune façon s'indemniser ou se dédommager aux dépens d'une autre personne du paiement qu'il fait de cette taxe, car, selon les dispositions de la loi en litige, il achète du tabac d'un vendeur par une vente en détail, c'est-à-dire pour fins de consommation et non de revente. Il ne saurait y avoir dans cette opération aucune idée de profit, de spéculation ou de commerce quelconque :

30

CONSIDERANT que l'intention du législateur est manifeste : c'est celui qui achète pour consommer et non pour revendre qui est taxé et qui seul doit payer la taxe ; comme la consommation n'a pas lieu sur place, et que l'acheteur peut acheter pour sa famille, ou pour faire un cadeau, la taxe est payable lors de l'achat, au vendeur dûment constitué par la loi percepteur de la taxe pour le compte du trésorier de la Province ; (Art II) ce n'est que pour fixer la date du paiement que l'art. 8 réfère à l'achat ; c'est toujours le consommateur qui paie ;

CONSIDERANT que ce n'est pas du vendeur que le législateur entend recouvrer la taxe, mais bien du consommateur tel que ci-dessus défini, qui la paiera audit vendeur, ainsi obligé par la loi de la percevoir pour le compte du Trésorier de la Province, de tenir compte des sommes perçues et d'en faire remise à son mandant ;

40

CONSIDERANT que le fait pour le législateur d'imposer au vendeur cette obligation, ou mieux, ce devoir social, n'a pas pour conséquence de rendre la

taxe indirecte, mais constitue plutôt l'adoption d'un système approuvé par le Conseil Privé, et existant depuis longtemps dans tout le pays pour la perception de diverses taxes analogues à celle dont il est question en cette cause (*A.G. v. Kingcome Navigation, Plaxton, 223*);

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CONSIDERANT que le requérant, étant poursuivi comme consommateur en vertu des articles 8 et 18 de la loi, est sans intérêt pour se plaindre de l'article 9 de ladite loi qui ne le concerne en aucune façon;

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10 CONSIDERANT que le requérant est également mal fondé à invoquer la prétendue invalidité de l'article 28, par. 2, car il n'a allégué nulle part dans sa requête que le Lieutenant-Gouverneur en Conseil ait ordonné que la perception de l'impôt établi par la loi incriminée soit faite au moyen de timbres;

CONSIDERANT que, supposé même le cas où ces dits articles 9 et 28 par. 2, seraient inconstitutionnels, cela n'entraînerait pas la nullité de toute la loi; le Conseil Privé et la Cour Suprême ont rendu des décisions dans lesquelles, après avoir émondé certains statuts ou Actes du Parlement et de la législature de leurs clauses inconstitutionnelles, ils ont décrété que, pour le surplus, lesdits Statuts ou Actes doivent demeurer en vigueur, avoir pleine force et effet et sont absolument valides et constitutionnels;

20 CONSIDERANT que la proposition du requérant que cette loi serait inconstitutionnelle, parce qu'elle aurait pour but de réglementer le commerce, ne nous paraît pas sérieuse; en effet, le paragraphe 2 de l'article 91 de l'acte de l'Amérique Britannique de Nord, s'applique à la réglementation du commerce international et interprovincial, ou, si on l'aime mieux, du commerce général du Canada. Mais il est constant qu'elle n'empêche pas la réglementation d'un commerce particulier dans une Province (*Clement's Canadian Constitution, pages 684, 685, 690, et s.*);

CONSIDERANT que, dans l'espèce, la loi attaquée réglemente un commerce particulier dans notre province;

30 CONSIDERANT que l'obligation imposée par ladite loi d'obtenir une licence pour vendre du tabac n'en affecte pas la validité;

CONSIDERANT que l'octroi à l'exécutif du pouvoir de faire des règlements sous l'autorité de la loi et pour sa mise à exécution n'est pas illégal;

CONSIDERANT que la nature même de l'impôt a été déterminée par la loi et le législateur, et que la violation de cette loi par les vendeurs, ainsi que les conventions particulières entre vendeurs et consommateurs qui y dérogent, ne sauraient en changer l'essence (*Ferland Corset Co. v. Cité de Montréal, 73-C.S. 339*);

40 CONSIDERANT que le défaut de juridiction allégué par le requérant n'est, ni évident, ni matériel;

CONSIDERANT, au contraire, que la juridiction de la Cour des Sessions de la Paix et des autres tribunaux inférieurs mentionnés comme Intimés, paraît indiscutable en présence: 1o.—de la loi 4 Geo. VI, Ch. 15 et décrétant l'imposition d'une taxe directe, payable exclusivement par le consommateur

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et sans possibilité pour ce dernier de s'indemniser ou de se rémunérer et 20.—de l'Acte de l'Amérique Britannique du Nord qui, conformément à la jurisprudence du Conseil Privé confère aux provinces le droit : a) d'imposer et de prélever des taxes directes, b) d'exiger des permis pour contrôler et faciliter la perception des taxes ou à titre de réglementation, c) de réglementer un commerce particulier dans la province, et d) d'adopter des règlements sous l'autorité de la loi et pour sa mise à exécution ;

CONSIDERANT que le requérant n'est pas dans les conditions voulues pour obtenir les conclusions de sa requête, qui est, au surplus, mal fondée ;

PAR CES MOTIFS :

REJETTE ladite requête, avec dépens.

10

ARTHUR TRAHAN, J.C.S.

NOTES OF THE JUDGES OF THE COURT OF KING'S BENCH
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Honourable Mr. Justice LETOURNEAU.

Depuis que cet appel, nous a été soumis, Me. Chipman, l'avocat de l'Appelant, nous a très loyalement fait tenir copie de ce qu'ont récemment dit deux des juges de la Cour Suprême du Nouveau-Brunswick—division des appels—au sujet d'un cas analogue.

Vu cette opinion et les raisons que donnent respectivement dans leurs 20 notes mes collègues, les Juges Hall et Francoeur, je confirmerais le jugement *a quo*, sans toutefois en retenir tous les Considérants, encore que l'élément "inconvenients" devrait avoir sa valeur pour que fût décidée sur le champ, soit aussi bien avant qu'après l'émission du Bref de prohibition, la question de droit, celle d'une inconstitutionnalité de la loi invoquée, qui servait de base à la plainte.

J'ajouterais—bien que ceci soit étranger à cette plainte dont l'Appelant est l'objet—que pas plus que les autres, l'article 9 de la loi ne me paraît *ultra vires*, car en le lisant attentivement, on se rend compte que la disposition ne vise pas le cas de *douane* ou *accise* qui généralement implique 30 une importation, mais tout au plus d'atteindre là aussi le "consommateur" en l'assujettissant à un contrôle équivalent à celui du "vendeur en détail" qui, pour ce cas, ferait défaut.

Je rejetterais l'appel.

Honourable Mr. Justice ST. JACQUES.

La Cour supérieure aurait pu, sur la requête qui lui était présentée, ordonner l'émission du bref de prohibition. En refusant de le faire, a-t-elle violé un principe de droit ? Je ne le crois pas.

Elle a jugé qu'il valait mieux disposer immédiatement des motifs invoqués par la requérante, étant donné les conséquences graves que 40

pourrait entraîner l'émission du bref. La Cour s'est donc prononcée sur la véritable question de droit que soulève le litige, à savoir : la constitutionnalité de la loi de l'impôt sur le tabac, édictée par la législature de la province de Québec. Arrivant à la conclusion que les dispositions de cette loi sont du ressort de la province, elle a rejeté la demande de bref de prohibition.

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La Cour d'Appel n'a donc maintenant qu, à résoudre cette seule question de la validité de la loi, et, quant à moi, la solution n'est pas dépourvue de difficultés.

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10 S'il fallait s'en rapporter au sens naturel et ordinaire des mots, que devrait on entendre par "une taxe directe" ? Ne serait-ce pas celle qui atteint directement les biens qui sont déjà dans le patrimoine de celui qui est appelé à la payer, comme, par exemple, les taxes municipales et scolaires, l'impôt sur le revenu, les taxes sur les successions et autres du même genre ?

20 Or, la taxe imposée par la loi attaquée pèse sur le consommateur ; pour consommer une chose, il faut la produire soi-même, ou se la procurer par voie d'achat, c'est à-dire par une opération commerciale. La loi ne vise pas le producteur de tabac, mais uniquement le consommateur qui s'en procure pour des fins de consommation. La taxe est payable lors de l'achat, c'est-à-dire, au moment même où le tabac entre dans le domaine de propriété du consommateur. Il me paraît que ce circuit d'opérations rende assez douteux le caractère de la taxe et qu'elle ne soit pas clairement "une taxe directe."

30 Toutefois, si l'on s'en rapporte aux directives données par le Conseil privé—et il faut le faire—ce n'est pas dans le sens commun des mots qu'il faut rechercher la nature et le caractère de la taxe. Suivant la définition qu'en a donné Mills, et qui aurait inspiré le parlement anglais lorsque l'Acte de l'Amérique Britannique du Nord a été adopté, une taxe est *Directe* lorsque celui qui en supporte le poids ne peut le faire passer sur les épaules d'une autre personne. La loi de l'impôt sur le tabac a été rédigée de façon telle, que l'acheteur ne peut raisonnablement pas trouver le moyen de se faire rembourser par un autre la taxe qu'il a payée à l'occasion de cet achat.

La poursuite instituée contre l'appelant est fondée sur les dispositions de l'article 8 de la loi, et appliquant la règle posée par le Conseil privé, il y avait lieu pour la Cour Supérieure de déclarer que le bref de prohibition demandé par l'appelant n'avait pas sa raison d'être.

Je rejetterais donc l'appel avec dépens.

Honorable Mr. Justice FRANCOEUR.

40 La "Loi de l'impôt sur le tabac" adoptée par la Législature de la province de Québec fut sanctionnée le 22 juin 1940, et est devenue en vigueur le premier juillet suivant. (4 Geo. VI, chap. 15.)

L'appelant aurait violé cette loi. Une plainte a été portée contre lui par le procureur général de la province de Québec, l'accusant, étant un consommateur, d'avoir le 18 juillet 1940 acheté du tabac dans un magasin situé au No. 381 rue Ste-Catherine Ouest, Montréal, sans payer la taxe due.

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L'appelant a comparu devant un juge de la Cour des Sessions de la Paix et a plaidé " non coupable " à l'accusation portée contre lui. Il a immédiatement, par ses procureurs, décliné la juridiction de cette Cour et du juge, en alléguant que le statut en vertu duquel la plainte est faite est *ultra vires* des pouvoirs de la Législature de Québec, pour les raisons formulées comme suit dans son mémoire :

- (a) It did not constitute direct taxation in the Province ;
- (b) It set up a licensing system which was not " in order to the " raising of revenue " by the licenses ;
- (c) It provided that the Vendor should collect the tax ; 10
- (d) It was not a direct tax but was a sales tax and one relating to a marketable commodity and upon a commercial transaction between the taxpayer and the other party to the transaction ;
- (e) It constituted a regulation of trade and commerce under Section 91, subsection 2, of the British North America Act ;
- (f) Its subject matter was not of a merely local and private nature in the Province ;
- (g) By taxing imports, it violated Sections 121 and 122 of the British North America Act ; "

Malgré ces objections, le procureur général insista pour procéder au 20 mérite et la cause fut fixée pour enquête et audition le 2ième jour d'août 1940. L'appelant présenta alors une requête à un juge de la Cour Supérieure, demandant l'émanation d'un bref de prohibition. Les allégations de cette requête développent et précisent les objections faites lors de la comparution de l'appelant :

" 7.—That the charge as laid against your Petitioner is not and does not constitute any offence in law, the whole for the following reasons :

(a) That the Statute 4 Geo. VI, Ch. 15 described as the Tobacco Tax Act is illegal, null and void inasmuch as it does not legislate upon 30 matters provided for by Section 92 of the British North America Act, but, in fact, legislates upon matters within the legislative authority of the Dominion of Canada in virtue of Section 91 of the British North America Act.

(b) That, particularly, the Act in question does not constitute direct taxation within the Province in order to the raising of revenue for Provincial purposes under subsection 2 of Section 92 of the British North America Act.

(c) That the licenses provided for in the Statutes in question are not within the category of shop, saloon, tavern, auctioneer or other 40 licenses in order to the raising of revenue for Provincial, local or municipal purposes.

(d) That the Statute is illegal and *ultra vires* in providing that the vendor is to collect and remit the tax.

(e) That the tax is illegal and *ultra vires* of the Province of Quebec, inasmuch as it is not a direct tax upon the consumer, but is a sales tax and a tax relating to a marketable commodity and upon

a commercial transaction between the tax payer and the other party to the transaction.

(f) That the tax is illegal and *ultra vires* of the Province of Quebec as constituting the regulation of trade and commerce under sub-section 2 of Section 91 of the British North America Act.

(g) That the subject matter of the Act is not a matter of merely local or private nature in the Province of Quebec.

10 (h) That in providing for a tax upon any tobacco brought into the Province or caused to be brought into the Province of Quebec, the tax is illegal and *ultra vires* of the Province of Quebec and particularly violates Section 121 of the British North America Act providing that "all articles of the growth, produce or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

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8.—That, in consequence of the foregoing it appears that the Complaint and Charge against your Petitioner and the trial of the said Charge constitutes an excess of jurisdiction on the part of the Courts of Inferior Jurisdiction, the Respondents in the present case.

20 9.—That the matter involved in the said Charge is one of great importance to the public in general and your Petitioner in particular as it represents a serious and unjust interference with his liberties and rights and with those of others in the Province similarly situated."

Après avoir entendu le requérant et le procureur général intimé, le juge de la Cour Supérieure a, le 29 août 1940, refusé d'émaner le bref, et, statuant en même temps sur le fond, décrète que l'acte attaqué est légal, constitutionnel, *intra vires* des pouvoirs de la Législature.

Les allégations de la requête justifient-elles l'émanation du bref de prohibition ? Les moyens invoqués au sujet de l'excès de juridiction sont-ils *prima facie* suffisamment sérieux pour accueillir cette procédure ?

30 Le litige présente une question de droit très importante : L'illégalité et l'inconstitutionnalité d'une loi qui oblige les contribuables de toute la province à payer une certaine taxe.

Le juge de la Cour Supérieure considère que la Cour des Sessions de la Paix a juridiction. Les parties devaient donc être renvoyées devant ce Tribunal qui aurait exercé sa compétence. Il est admis que le bref de prohibition est un remède extraordinaire auquel on ne doit recourir qu'avec grande circonspection.

40 Avec beaucoup de déférence pour la Cour Supérieure, je ne veux pas accepter comme juridiques tous les motifs, formulés contre l'émanation de ce bref. Appelé à décider si la loi est constitutionnelle ou non, le tribunal, en se conformant à la procédure, n'a pas à se préoccuper des ennuis ou inconvénients dont le fisc pourrait souffrir. Tout en s'opposant aux raisons invoquées en faveur de l'émanation du bref, celui-ci est implicitement accordé puisqu'on a disposé aussitôt du mérite de la cause. Cependant, il ne me paraît pas justifiable, sauf dans des cas très exceptionnels, de déroger à la jurisprudence établie par les décisions suivantes de cette cour :

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Sung Lung et la cité de Québec, 31 B.R., p. 212. *Asch Limited v. La Cour du Recorder et la Cité de Lachine & al et la cité de Lachine*, 52 B.R., p. 363. *Procureur Général de Québec et Dame Lazarovitch et Comité paritaire des réparateurs de chaussures du district de Montréal et Cour des Sessions de la Paix & al*, 69 B.R., p. 214.

Le requérant a obtenu, toutefois, la conclusion principale de sa requête obligeant les intimés “ to appear before this Honourable Court to answer “ to the demand contained in the present Petition *and particularly that the “ said Tobacco Tax Act 4 Geo. VI, ch. 15 is illegal and ultra vires of the “ Province of Quebec and unconstitutional, null and void.”* 10

La Cour s'est prononcée sur ce point.

L'unique question qui se pose est celle-ci : La taxe prélevée en vertu de cet acte (4 Geo. VI, ch. 15) est-elle indirecte ou directe ? L'appellant soutient que c'est une taxe indirecte ; Le Procureur Général intimé maintient que c'est une taxe directe. La Cour a donné raison à celui-ci. Elle donne une interprétation juste de texte, d'exiger l'impôt du consommateur au moment de l'achat. cette loi, en tenant compte de la règle générale sur laquelle le législateur s'est appuyé.

Cette règle, c'est de faire payer la taxe par le consommateur, c'est-à-dire par celui qui achète pour consommer et non pas pour revendre dans le but 20 de se rembourser. Voilà la tendance générale de la loi, l'intention qui apparaît nettement au texte d'exiger l'impôt du consommateur au moment de l'achat. (l'article 8). C'est lui qu'on a voulu atteindre. Ce n'est donc pas une taxe sur la vente, mais sur l'achat.

C'est normalement la taxe directe perçue du consommateur qui achète mais ne revend pas. Il ne peut pas transférer cette taxe à un autre. Il faut écarter les cas spéciaux ou exceptionnels, les arrangements particuliers en vue d'une revente éventuelle.

Nos tribunaux ont souvent été appelés à se prononcer sur l'étendue des pouvoirs des législatures provinciales en matière de taxation. Plusieurs 30 causes importantes ont été jugées par le Conseil Privé. Il me paraît inutile de répéter les propositions qui ont été longuement discutées.

Les parties, au soutien de leurs prétentions respectives, ont cité de nombreux arrêts, tant de nos cours que du Conseil Privé. Après les avoir examinés, il faut, je crois, en arriver à la conclusion que celui qui s'applique au présent litige est : *Attorney General for British Columbia v. Kingcome Co. Ltd.* (Plaxton p. 223—A.C. 1934, p. 45). Dans cette cause, le Conseil Privé a interprété une loi presque identique à celle soumise à notre considération. Lord Thankerton analyse plusieurs jugements dans lesquels on retrouve la définition de la taxe directe et de la taxe indirecte. 40

Le débat portait principalement, comme dans la cause actuelle, sur la question de savoir si la taxe fixée est directe et relève exclusivement de la juridiction de la Législature provinciale, en vertu de la section 92 de l'Acte de l'Amérique Britannique du Nord, ou est indirecte, du ressort du Parlement fédéral, section 91 du même acte.

Notons que l'intimé Kingcome Navigation Co., Ltd., soulevait, en substance, pour faire déclarer la loi de la Colombie Britannique incon-

stitutionnelle, les moyens invoqués par l'appelant Parsons. Référant à la cause *Bank of Toronto v. Lambe*, Lord Thankerton cite une partie des remarques faites par Lord Hobhouse, Celui-ci cite la définition de la taxe directe et indirecte donnée par John Stuart Mill.

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C'est la suivante :

10 " 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 intention that he shall indemnify himself at the expense of another ; such are the excise or customs."

Lord Hobhouse ajoute :

20 " Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act."

Après avoir étudié d'autres arrêts rendus par le même tribunal, Lord Thankerton conclut :

" It follows that the tax here in question must be tested by Mill's definition, as adopted by the decisions of the Board.

30 " Turning then to the provisions of the Fuel Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement ; but this cannot affect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act.

40 " The last contention of the responder was that the Fuel-Oil Act invaded the province of the Dominion Parliament, in that it regulated trade and commerce. Except that the Act taxes persons in respect of a commercial commodity, which is not procured in its raw state within the Province, there is nothing in the Act to suggest that its purpose was the regulation of trade and commerce, and the respondent has to rely on extrinsic circumstances such as the competition of coal

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in the fuel market. But if the taxation falls within the terms of s. 92, head 2, that is, it is direct taxation within the Province in order to raise a revenue for Provincial purposes, and it does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the Province.”

Comme on le voit, le Conseil Privé adopte comme finale la définition de la taxe directe et indirecte donnée par Mill. Elle a toujours été admise depuis. Elle est devenue le critérium d'appréciation. Il faut donc accepter cette décision. Elle résume et clot le débat. Elle donne réponse péremptoire à toutes les objections soulevées par l'appelant. Les motifs très élaborés du jugement a quo basé sur la décision susmentionnée en disposent. 10

Ce jugement est donc bien fondé.

Je rejetterais l'appel avec dépens.

Honourable Mr. Justice WALSH.

The Appellant's petition for a writ of prohibition was dismissed by the Superior Court. The Petitioner alleged that he had been brought before the Court of Sessions for violation of the Act that imposed a tax on tobacco consumers (4 Geo. VI, ch. 15). The validity of this Act is the issue on this appeal.

It was submitted that the law is invalid, because it constitutes indirect taxation, and such cannot be imposed by the Province. 20

“In order to provide for the exigencies of the public service of the Province, every consumer shall pay to His Majesty in the rights of the Province, at the time of making a purchase of tobacco in this Province, for consumption *by himself or by any other person*, a tax in respect of the consumption of such tobacco at the rate of ten per centum of the retail price. (Art. 8 of the Act.)

The Privy Council declared (*Atty. General of B.C. v. Kingcome Nav. Co.*, 1934 A.C. p. 45):

“... the test to be applied in determining what is direct taxation within the meaning of Section 92, Head 2, of the Act of 1867, is to be found in Mill's definition of direct and indirect taxes. 30

“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 intention that he shall indemnify himself at the expense of another; such are the Excise or Customs.”

(Plaxton p. 223 & seq.)

In this instance, the tax is made to fall on the person, who, it is intended, should pay it. Such is the general tendency of the law, though there may be exceptional cases. 40

“The Act does not relate to any commercial transaction in the commodity between the tax payer and some one else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the

transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement ; but this cannot affect the nature of the tax." (Ibidem.)

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" For consumption by himself or by any other person."

This does not mean that the tax will be passed to the principal by an agent ; this cannot be considered a sale.

10 In regard to the writ of prohibition, which was denied, it may be indicated that the appellant was afforded what he sought : study by the Court of the Act that imposed this tax, as Mr. Justice Francoeur remarks.

I concur with him and Mr. Justice Hall.

The Act in question is within the competence of the Province.

Since the hearing and study of this case by this Court, the same issue was decided by the Court of Appeal of New Brunswick ; the tax was there upheld. The *New Brunswick* case is presently before the Supreme Court, I understand.

I would dismiss the appeal, with costs.

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Honourable Mr. Justice HALL.

20 By the " Tobacco Tax Act " (4 Geo. VI, chap. 15) the Province of Quebec imposed a tax upon consumers of tobacco in the following words :

" 6. In order to provide for the exigencies of the public service of the Province, every consumer shall pay to His Majesty in the rights of the Province, at the time of making a purchase of tobacco in this Province, for consumption by himself or by any other person, a tax in respect of the consumption of such tobacco at the rate of ten per centum of the retail price."

30 The appellant, having refused to pay the tax in question, was charged before the Court of Sessions of the Peace, and when the complaint was due to be heard, he presented to the Superior Court a petition for the issue of a writ of prohibition, ordering the Judges of Sessions of the Peace to appear before the Superior Court to answer the demand that the said Tobacco Tax Act be declared illegal and *ultra vires* of the Province of Quebec, and to discontinue all proceedings in the matter with reference to the complaint and charge.

40 The material allegations of the petition are that the Act is *ultra vires* of the Provincial Legislature, because it does not constitute direct taxation ; because the licenses provided for in the Statute in question are not within the category of licenses issued for the purpose of raising revenue for provincial, local or municipal purposes ; because, upon the vendor is imposed the duty of collecting and remitting the tax ; because the said tax is a sales' tax, and a tax relating to a marketable commodity, and upon a commercial transaction ; and further because the subject-matter of the Act is not a matter of merely local or private nature in the Province of Quebec because, by section 9, it imposes restrictions upon interprovincial

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transactions, and thereby violates section 121 of the British North America Act.

By a carefully reasoned and comprehensive judgment, the learned Trial Judge declared that, since the questions at issue were fully disclosed in the pleadings, and in the Act itself, no useful or essential requirement would be served by issuing a writ of prohibition, and he, therefore, concluded that the Act in question was within the competence of the Provincial Legislature; that the tax imposed was a direct tax, which could not be passed on to any other person, and that the other criticisms were equally unfounded in law. He, accordingly, refused to grant the writ of prohibition 10 and dismissed the appellant's petition. From that judgment the appellant now appeals.

The fundamental contention of the appellant is that the Tobacco Tax Act, under which he is charged, is *ultra vires* of the Province, because its provisions do not constitute direct taxation, because the licensing system set up is not one "in order to the raising of revenue"; because it provides that the vendor should collect the tax; because the tax is not a direct tax but a sales' tax, and one relating to a marketable commodity and upon a commercial transaction between the tax-payer and the vendor.

The test upon which rests the classification of a tax is found in Mill's 20 definition, which has been uniformly followed by the judgments of the Privy Council since the ruling in *Bank of Toronto v. Lambe* (1887, 12 A.C. p. 575). This definition reads as follows:

"A direct tax is one which is demanded from the persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs."

Discussing this definition, Lord Haldane said:

(*Attorney General for B.C. v. C.P.R.*—1927 A.C. p. 938.) 30

"The definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the act in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious *indicia* of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867."

In that case, it is true, the tax in question was held to be an indirect tax because "from the terms of the Act there appears an expectation and intention that the person required to pay the tax will indemnify himself upon a resale of the commodity taxed." 40

In the more recent case—*Attorney General for B.C. v. Kingcome Navigation Co., Ltd.* (1934 A.C. p. 45), it was, however, held that:

"The Fuel Oil Tax, 1930, of British Columbia, which imposes a tax upon every consumer of fuel oil according to the quantity which he has consumed, is valid under s. 92, head 2, of the British North America Act, 1867; the tax is direct taxation, because it is demanded

from the very person who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity, it does not fall within the category of customs and excise duties, which are within the legislative powers of the Dominions, both because they are by nature indirect taxes and having regard to s. 122 of the Act. The Act being within the legislative power given by s. 92, head 2, and not purporting to regulate trade and commerce, is not invalid as infringing the Dominion authority under s. 91, head 2, to legislate for that purpose."

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10 Lord Thankerton, discussing this question, says at p. 52 :

"The question whether it is a direct or indirect tax cannot depend upon those special events which may vary at the time of payment ; and if at the time, the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question. (B.N.A. Act.) It is clear that the ultimate incidence is not there used in the sense of the political economists, but refers to the ultimate incidence among the parties to the transaction in respect of which the tax is imposed."

20 Applying these rules of interpretation to the provisions of the Tobacco Tax Act, it appears to me to be obvious that the tax is a direct tax imposed upon the consumer, who can have neither the expectation nor the intention to indemnify himself at the expense of another.

It is to be noted that the tax is to be paid by the consumer at the time of making a purchase on a retail sale, and such a purchaser is precluded from making a subsequent sale, both by the terms of the Act, section 3 of which declares that no person may sell tobacco in the Province unless he has received a license therefor, and also by the virtual impossibility of making a remunerative sale after he himself has paid a special tax of 10% on the original retail price.

30 Counsel for the appellant have emphasized the contention that, since the Act applies to one who purchases for the consumption "by any other person," it implies that such other person would indemnify the purchaser for the tax.

I am unable to discover any valid basis for this argument, for the insertion of the words "by any other person," in my opinion, clearly points to a gratuitous transfer of the consumption by the purchaser to another. If, on the other hand, the purchaser, in making the purchase, was acting for another, he would, in effect be the agent of the other, and the real
40 purchaser would be the principal, to whom would apply the maxim "*qui facit per alium per se facere videtur.*"

I have no hesitation, therefore, in expressing the opinion that the tax is a direct tax and, therefore, *inter vires* of the Provincial Legislature.

Insofar as the question of a license is concerned, I conclude that the pith and substance of this Act is to regulate the tobacco business within

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the Province, and the purpose of the license is to provide the necessary machinery for that regulation.

In *Shannon et al, v. Lower Mainland Dairy Products* (1938 A.C. p. 708), it was held :

“ Further, the regulation of trade within the Province being valid, the method of regulation by a system of licenses is also admissible and it is no objection that license fees should be charged either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes, and the Act is accordingly *inter vires* of the Provincial Legislature under s. 92 (9) of the British North America Act, 1867. The license fees can also be supported as validly imposed, on the ground that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13) and (16) of the Act of 1867.” 10

Counsel for the appellant based a further argument upon section 9 of the Act, which refers to the importation into the Province of tobacco, in which event the importer must produce to the Comptroller of Customs his invoice, and pay the same tax in respect of the consumption, as is provided for by section 6.

I am of the opinion that the provisions of section 9, are entirely irrelevant to the issues in the present appeal, which concern only a retail purchase within the Province. 20

The respective provisions have to do with transactions of an entirely different character, and are, therefore, severable, so that, even if it should be held that sec. 9 was *ultra vires*, the validity of the tax imposed by sec. 8, would not be affected.

On the question of severability, the recent judgment of the Privy Council, in *Toronto Corporation v. Attorney General for Ontario* 1938 A.C. p. 415), is instructive :

“ Held :..... 30

“ Assuming that the Ontario Municipal Board Act, 1932, which set up the Board, does by some of its sections purport to constitute the Board a Court of Justice analogous to a Superior, District or County Court, it is to that extent invalid. There is, however, nothing to suggest that the Board would not have been granted its administration powers without the addition of the alleged judicial powers, and although, therefore, such parts of the Act of 1932, as purport to vest in the Board the functions of a Court have no effect, *they are severable, and the Board is validly constituted for the performance of its administrative functions.*” 40

As to the procedure, it is contended by the appellant that the Trial Judge should have granted the Writ of Prohibition, and reserved his consideration of the constitutional question, until the parties appeared before him upon the merits.

Our jurisprudence seems to have adopted the rule that "a Writ of Prohibition should not be refused if the Petitioner presents what appears to be *prima facie* a serious ground of complaint, or attacks the jurisdiction in question for reasons which 'deserve a serious and attentive study.'" In the Supreme Court of Canada.

Ash, Limited, v. Recorder's Court, Lachine; (52 K.B. p. 363).

The question in that case was whether the by-law of the City of Lachine was *ultra vires* because it discriminated between one part and another part of the City's territory, and interfered, without compensation, with vested rights and it seems to me to be obvious that the examination of that plea called for a much more serious and attentive study than the present claim that the Act in question is *ultra vires* because it imposed a tax which is indirect rather than direct. No. 13. Factum of the Intervenant, The Attorney-General of the Province of Quebec—*continued.*

It is evident from the terms of the judgment and the contents of the record, that the constitutional question was fully argued before the Trial Judge, and he reached the conclusion that the Privy Council had clearly laid down the rules which govern the application of Mill's definition of a direct tax, and that the application of that jurisprudence to the issues in the present case offered no peculiar difficulty. In other words, that the appellant had failed to make out even a *prima facie* case in support of his contention. 20

I am unable to discover that the appellant's rights were in any way prejudiced by the refusal of the Trial Judge to issue a Writ of Prohibition since, if that had been done, the constitutional question would have been presented to him in the same manner, and without any further evidence at the hearing on the merits.

This Court, similarly, is fully conversant with the issues raised, and no useful purpose could possibly be served by sending the record back to the Superior Court for the issue of a Writ of Prohibition and a new argument on the merits. All essential elements of the controversy have 30 been effectively presented both to the Superior Court and to this Court.

I conclude, therefore, that the appeal should be dismissed, with costs.

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Province of Quebec.**

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DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA

OTTAWA.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK
APPEAL DIVISION.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated company... (Plaintiff) Appellant 10

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 ... Intervenant

FACTUM of the (Plaintiff) Appellant in answer to the Factum of the Attorney-General for the Province of Quebec. 20

PART I.

The Appellant concedes the substantial similarity between the statute under consideration in this appeal and the Quebec Tax Act.

PART II.

The Appellant submits that the New Brunswick statute is unconstitutional for the reasons already set forth in its main factum and particularly for the following reasons set forth in answer to the submissions of the Attorney-General for the Province of Quebec.

PART III.

The Appellant submits : 30

1. The Tobacco Tax Act is *ultra vires* of the Province of New Brunswick as enacting a sales tax or a tax "on commodities, or trade in commodities" and "relating to or in respect of a commercial transaction in the commodity between the taxpayer and someone else." Compare:

Attorney-General for Quebec v. Reed, (1884) 10 A.C. 141; *Cameron*, Vol. 1, 360.

- Bank of Toronto v. Lambe*, (1887) 12 A.C. 576; Cameron, Vol. I, 378.
- Attorney-General for Manitoba v. Attorney-General for Canada*, (1925) A.C. 561; Cameron, Vol. II, 381.
- Attorney-General for British Columbia v. C.P.R.*, (1927) A.C. 934; Cameron, Vol. II, 441.
- City of Halifax v. Fairbanks*, (1928) A.C. 117; Cameron, Vol. II, 477.
- 10 *King v. Caledonian Collieries, Ltd.*, (1928) A.C. 358; Cameron, Vol. II, 494.
- Attorney-General for British Columbia v. McDonald Murphy Lumber Co., Ltd.* (1930) A.C. 357; Plaxton, 43.
- Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. 357.
- Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, (1933) A.C. 168; Plaxton 181.
- Attorney-General for British Columbia v. Kingcome Navigation* (1934) A.C. 45; Plaxton 223.
- 20 *Forbes v. Attorney-General of Manitoba* (1937) A.C. 260; Plaxton 259.

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2. Such a tax is indirect under the above authorities :

(a) Because while the broad distinction drawn by Mill and other authorities between taxes that are passed on and taxes that are not passed on may be useful in doubtful cases, there are outstanding kinds of taxation which must be automatically accepted as belonging to one or the other class without further enquiry; so that income taxes or real estate or property taxes are always direct irrespective of their ultimate incidence, while excise and customs taxes and taxes on commercial commodities or transactions in commodities are always indirect whatever their ultimate incidence ;

30 (b) Because where the tax is imposed in respect of some dealing in commodities such as their import or sale, the tax is not intended as a peculiar contribution upon the particular party selected to pay the tax but is more concerned with the commodity in respect of which the tax is imposed than with the particular person from whom the tax is exacted ;

(c) Because in such cases and under the Act now in question the tax is susceptible of being passed on, and would have a tendency to enter into and affect the price of the product ;

40 (d) Because it is particular to and inseparable from the specific transaction and trading rather than proportional to the fortune, the capital, or the revenues of the taxpayer, or his actual consumption computed broadly according to the amount consumed ; and has to do with the particular transactions between the taxpayer and someone else rather than with the status, property, or past and unalterable acts of the taxpayer.

Compare also *Choquette v. Lavergne* 5 S.C. 108 at 113 ;
Lamonde v. Lavergne 3 K.B. 303 at 306.

3. The judgment of the Privy Council in *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* (1934) A.C. 45 ;

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Plaxton 223, does not lay down the absolute rule that Mill's definition is to be taken as disposing of all cases by the test of whether the tax is or is not demanded from the very person who it is intended or desired shall pay it. On the contrary the judgment excepts from the application of the rule cases where the tax is imposed in respect to a transaction or some dealing with commodities such as their import or sale, or constitutes a trading tax—see Plaxton 232, 234 and 235. Thus then customs and excise duties were held by the Privy Council to be in their essence trading taxes and necessarily indirect.

4. Under the Act now in question it may also be noted that the agent 10 is taxed when acting for a principal and that accordingly he would necessarily pass on to the principal the tax as well as the price ; see Sections 2 (a) and 5. Compare

Cotton v. The King (1914) A.C. 176 ; Cameron, Vol. I, p. 788 ;
Attorney-General for Manitoba v. Attorney-General for Canada
(1925) A.C. 561, Cameron, Vol. II, p. 381 ;
Fairbanks v. City of Halifax (1926) S.C.R. 349 ;
McLeod v. City of Windsor (1926) S.C.R. 450 ;
Provincial Treasurer of Alberta v. Kerr, L.R. (1933) A.C. 710 ;
Plaxton p. 207. 20

5. The provisions of the Act as to consumption are unreal and in the contention of the Appellant designed merely to disguise the true nature of the tax as a sales tax. The reference to consumption has no relation to the facts. The so-called consumer is merely the purchaser at a retail sale either as principal or as agent. The main duties with regard to collecting and accounting for the tax are laid upon the vendor, who is in reality the taxpayer.

6. Section 5 of the Act contravenes both Sections 121 and 122 of the British North America Act reading as follows :

“ 121. All articles of the growth, produce, or manufacture of any 30 one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

“ 122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.”

7. The tax is exigible in advance of and independently of any consumption, and affects goods whether from other Provinces of Canada or elsewhere outside the Province of New Brunswick and merely because there has been a retail sale. Any consumption if relevant need not be within the Province. Section 5 is an essential part of the economy of the Act and is 40 not severable.

8. The licenses provided for by the Act are admittedly not for the raising of a revenue under Section 92 (9) of the British North America Act, reading as follows :

“ 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

(9) Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal classes." Nor are they part of any system of local regulation. They constitute merely the means of compelling the vendor to collect and remit the tax. The whole respectfully submitted.

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W. F. CHIPMAN.
J. F. H. TEED.
Of Counsel for Appellant.

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No. 15.

10 **Supplementary Factum of the Appellant in reply to the Factum of the Attorney-General for the Province of Quebec.**

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IN THE SUPREME COURT OF CANADA

OTTAWA.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK
APPEAL DIVISION.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated
company (Plaintiff) *Appellant*

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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... .. *Intervenant*

SUPPLEMENTARY FACTUM of the (Plaintiff) Appellant in reply to the Factum of the Attorney-General for the Province of Quebec.

30 *only* In its factum, p. 62, the Attorney-General of Quebec submits that the question is whether or not the tax is demanded of the very person intended to pay it (p. 62, ll. 40-46) and on four occasions stresses its submission that exceptional case should be ignored (p. 63, ll. 5, 14, 21, p. 64, l. 4).

The Appellant submits that there has been a failure to appreciate the distinction between :

1. (a) a "direct tax" and
- (b) a tax "directly imposed."

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(c) a tax which in its general tendency is direct, but the burden of which might under exceptional circumstances, be passed on by the taxpayer; and

(d) a tax imposed upon with respect to *all* objects or subject matters of a certain class, a portion of which class is normally beyond the taxing jurisdiction of the taxing province.

To illustrate :

“ DIRECT TAXATION ” and “ TAXATION DIRECTLY IMPOSED.”

In the provincial legislation imposing a tax upon an agent, etc., which has been held *ultra vires*, such tax, although imposed upon an agent, etc., with respect to his transactions on behalf of his principal, was imposed *directly upon him*. 10

In the *Cotton* case, *Grain Futures* case, *McLeod* case and *Kerr* case (Appellant's factum, pp. 43 and 49) the legislature imposed the tax *directly* upon the agent, executor, notary, etc., and declared that the tax should be paid by the person designated.

It is clear that in each of these cases tax was *directly* imposed upon the very persons whom the legislature had selected as the persons to be taxed and to pay the tax; many such persons were principals *quo ad them*, the tax was a direct tax. Nevertheless, the taxation so imposed, was, with respect to *such persons*, who were *not* principals, an “ *indirect tax* ” and by reason of that fact, the taxing statute was declared wholly *ultra vires*. 20

EXCEPTIONAL CASES AND CIRCUMSTANCES.

Applying the observations of Viscount Haldane in the *Royal Bank* case (1913 A.C. at 29, Cameron, Vol. I, at 768):

The tax sought to be imposed must be *confined by the Statute* to matters within the Province.

But applying the language of Lord Moulton in the *Cotton* case (1913), 30 A.C. at 193, Cameron, Vol. I, at 803), the respondents contend that the Act imposes a consumption duty or tax upon all tobacco *purchased* in the province, irrespective of where it may be consumed.

If the tax imposed is a tax on consumption, such tax is not by the Statute confined to the consumption of such of the tobacco as is *de facto* consumed within the province, (note that in the *Kingcome* case the tax imposed was limited by the Statute to the consumption of oil within the province), but is a tax on the consumption of tobacco purchased in New Brunswick irrespective of where such consumption *de facto* takes place.

Normally, a substantial quantity of the tobacco purchased in New Brunswick is consumed beyond its borders. If “A” purchases tobacco in New Brunswick and intends to and then states he intends to consume it in Nova Scotia and does in fact consume it in Nova Scotia, he is under the Statute required to pay a tax. 40

It is surely axiomatic that New Brunswick has no power to impose a tax with respect to the consumption of a commodity beyond its geographical limits, (e.g., in Nova Scotia or in the U.S.A.). Those jurisdictions alone have power to impose such a tax. New Brunswick cannot

acquire jurisdiction to impose a tax on such consumption by imposing the tax and requiring payment thereof, because or when the commodity to be consumed happened to be within or to be the subject of a commercial transaction within, its geographical limits.

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Extra provincial consumption of tobacco purchased at retail sale in New Brunswick is a normal thing, although the quantum so consumed may be small as compared with the quantum of such tobacco consumed within its limits.

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Such quantum of normal extra provincial consumption is not the exceptional or abnormal case contemplated and referred to in the decisions. Such exceptional case is one which comes into existence through contract or arrangement (see Plaxton, pp. 232 and 235, 1934, A.C. 56 and 59).

The correct principle appears to be that if there be a number of persons who under the normal operation of the taxing Statute may be required to pay a tax and with respect to whom the tax is either "indirect" in its nature (under the B.N.A. Act), or is imposed with respect to a subject matter normally not wholly "within the Province," such legislation is *ultra vires*, notwithstanding the fact that such tax will in the majority of instances of its application be imposed upon a person with respect to whom such tax would be *intra vires*.

Cotton case, 1914, A.C. at 195. Cameron, Vol. 1, at 804.

Grain Futures case, 1925, A.C. 561, at 586. Cameron, Vol. 1, 381 at 386.

Respectfully submitted.

W. F. CHIPMAN,
J. F. H. TEED,
Of Counsel for Appellant.

No. 16.

Reasons for Judgment.

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ATLANTIC SMOKE SHOPS, LTD.

v.

CONLON AND ATTORNEY-GENERAL FOR NEW BRUNSWICK.

Before: THE CHIEF JUSTICE and RINFRET, CROCKET, DAVIS, KERWIN, HUDSON and TASCHEREAU, JJ.

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(a) THE CHIEF JUSTICE (concurrent in by DAVIS, J.) :—

It is necessary first to ascertain the characteristics of the tax, the validity of which is in question. The charging sections are Sections 4 and 5 which must be read in light of the meanings attached to the phrases therein employed by the interpretation sections. Sections 4 and 5 are as follows :—

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" 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

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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.

“ 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 person as 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.” 10

The material provisions of the interpretation Section are 2 (a), (d) and (e) which are in the following words :—

“ 2 (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.” 30

Section 8 provides that 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. The statute provides for the licensing of vendors and *inter alia* by Section 3, subsection (2) that no person shall sell tobacco at a retail sale unless he holds a retail vendor’s licence.

The regulations, which have the force of statute (Section 20, subsection (2)) provide (Regulations 5 and 6, Form II) that every application for a retail vendor’s license shall contain an undertaking by the applicant to collect and remit the tax. The undertaking, in the Form, is that the applicant undertakes to act as agent for the Minister for the collection of the tax and to account to the Province for all monies so collected. On the license is printed a notice that failure on the part of a vendor to collect and remit the tax renders him liable to a fine and to imprisonment in default of payment. There are two forms of licenses, an itinerant salesman’s license and a license to carry on the business of a retail vendor at a named place 30

of business. The effect of Regulations 9 and 12 is that no person shall, either as principal or agent, sell tobacco at retail, other than a person having a license in one or other of these forms.

The regulations contain important provisions touching the payment of the tax. By Regulation 19 the licensed retail vendor is "hereby constituted an agent of the Minister for the collection of the tax," and the Regulation also provides that the retail vendor "shall collect the tax from the consumer at the time of purchase of tobacco by the consumer." By Regulation 22 the retail vendor, or his agent, shall deliver to every purchaser at the time of the sale a receipt for the tax collected, and it also provides that no sale shall be made unless such receipt is given. By Regulation 30 it is enacted that "no person shall purchase tobacco at retail without paying the tax," and it is further provided that no person shall "accept delivery" of tobacco "without receiving from the retail vendor a receipt for such tax."

The condition of the obligation to pay under Section 4 is that the tobacco in respect of which the liability arises has been purchased at a retail sale. It is true the section describes the purchaser as "consumer," but consumer means, as we have seen, a person purchasing tobacco at a retail sale for his own consumption, or for the consumption of other persons at his expense. It is a condition of a legal purchase at a retail sale that the tax be paid and of a lawful delivery of the tobacco to a purchaser that a receipt of the tax be also delivered to him by the seller. There can be no legal purchase without the payment of the tax; there can be no legal sale without the delivery of a receipt for the tax. In the ordinary case, sales will be cash sales. The price demanded will be the "price to the consumer," to use the words of Section 7; that is to say, the price to the purchaser, which includes the amount of the tax, a sum which is earmarked as such, of course, by the delivery of the receipt. In a practical sense, as far as the purchaser is concerned, it is part of the price he pays for his tobacco. As regards the vendor, it is the sum for which he is accountable to the government and, in fact, it comes out of the "price to the consumer"—the price to the purchaser.

In other words, the payment of the tax is not only a condition of legal purchase; it is 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.

Moreover, the real security to the Government for the payment of the tax is the vendor's responsibility. True enough, the statute declares that the consumer continues to be liable until the tax is collected, but the real sanction for the obligation of the purchaser lies in the fact that he cannot lawfully, or in practice, get his tobacco without paying the tax. There is no provision for keeping account of consumption. On the other hand, the vendor is obliged, as licensee, to keep account of his purchases, of his sales, of the tobacco he has on hand from time to time. Not only is his default in performing his duty to collect the tax a punishable offence, he must account for his stamps and as agent, under a contractual duty to

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collect the tax, he is directly responsible if he has made a sale of tobacco without performing that duty. The character of the tax, I think, can best be determined by considering the ordinary case and in the ordinary case, that is to say, in all but exceedingly few cases. the sale of tobacco by a licensed retail vendor will be carried out in the manner contemplated by the Act, and the tax will be simply a predetermined fraction of the price to the purchaser which is paid to the vendor and by him remitted to the Government. It seems to me to be proper to describe such a tax as a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser.

As regards Section 5, the tax is imposed upon the importer of tobacco who imports it for his own consumption, or the consumption of others at his expense, and that, I think, is a tax on tobacco in respect of the import of it for consumption.

To turn now to the legal questions involved. Section 5 imposes an import duty applying to imports from other parts of Canada, as well as from places outside of Canada. Although not collected in a manner in which customs duties are collected by the Dominion government in this country, it is of the nature of a duty of customs.

In the *Attorney-General for British Columbia v. McDonald Murphy Lumber Co.* (1930) A.C., at p. 364. Lord Macmillan, speaking for the Lords of the Judicial Committee, said :

“ In Wharton’s Law Lexicon ‘ Customs ’ are defined as ‘ duties charged upon commodities on their importation into or exportation out of a country,’ and a similar definition is given in Murray’s New English Dictionary.”

I shall revert to Section 5 after discussing the tax imposed by Section 4.

The enactment in Section 4 and the ancillary enactments in the statute and regulations are justified on the ground that they constitute legislation in relation to direct taxation within the province within the meaning of Section 92 (2). The question whether the tax is an excise duty of the class falling within the exclusive authority of the Parliament of Canada to impose can be considered more conveniently with Section 5.

If I may say so without presumption, the subject of direct and indirect taxation as it affects the application of Section 92 (2) has been put in a very clear light in the judgment delivered by Lord Thankerton on behalf of the Lords of the Judicial Committee in the *Attorney-General for British Columbia v. Kingcome Navigation Co., Ltd.* (1934), A.C., at p. 45. At p. 55 it is said, after a review of some of the previous decisions of the Judicial Committee, these decisions, in their Lordships’ opinion, make clear that if the tax is demanded from the “ very person who it is intended or desired should pay it, the taxation is direct.” His Lordship proceeds to point out that in the case of typical direct taxes, the taxation on property and income, for example, mentioned by Lord Cave in the *City of Halifax v. Fairbanks’ Estate* (1928), A.C., p. 117, such taxes “ are imposed in respect of the particular taxpayer’s interest in property or the taxpayer’s own income,

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and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists." Such taxes are contrasted with those as regards which 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. The words of the judgment are these :

10 " . . . where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer."

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
20 of it, and this dealing falls, I think, within the class of dealings with commodities envisaged by such passages in their Lordships' judgment.

On behalf of the Respondent it is said that this is a tax in respect of consumption and that it stands in the same category as that in question in the *Attorney-General v. Kingcome*. The tax in question there was payable by every person who consumed fuel oil in the Province in respect of the fuel oil consumed and at the rate of one-half cent a gallon. Every person consuming fuel oil was obliged to keep such books and records and furnish such returns as might be prescribed by the regulations, the failure to do so being a punishable offence. The amount of the tax was recoverable
30 by action, and in every such action the burden of proving the quantity consumed by the Defendant was upon him. There are no such provisions in the statute before us. 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.

40 On behalf of the Respondent it is argued that the purchase from the retail vendor is a purchase for consumption because the tobacco cannot lawfully be sold by the purchaser unless he takes out a vendor's license which insures that he can never sell except at a loss. There is no limit, however, as to the quantity which may be purchased from a retail vendor and any purchaser is entitled to obtain a license as a retail vendor and the license fee is only fifty cents. However, as a rule, tobacco sold at retail, in the ordinary sense, is purchased with the intention that it will be consumed

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by the purchaser, or his friends or associates, and the vast majority of the purchases of tobacco at retail will be purchased for immediate consumption.

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.

I do not think too much importance can be attached to the declarations 10
of the legislature that the tax is payable in respect of consumption. The
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 20
legislative declarations, or collateral legislative provisions, imparting to
the legislation a form calculated to give a colour of legality to the legislative
effort.

I return now to Section 5. As I have said it imposes a duty in respect
of import. Such a duty is one of those mentioned in the passage quoted
above from Lord Thankerton's judgment as being not imposed as a peculiar
contribution upon one of the parties and as being, consequently, an indirect
tax. It seems clear, moreover, to be a tax within Section 122. There
were customs duties levied on manufactured tobacco by the provinces 30
at the time of Confederation. The Dominion has always imposed customs
duties in respect of imports of tobacco and it would seem an extraordinary
thing if each one of the provinces could impose such duties upon persons
who import for their own consumption and who should be obliged to pay
this duty after paying the duty imposed by the Dominion; and equally
extraordinary in the case of raw tobacco imported by an importer in
Montreal, who has paid the customs duty upon it and manufactured it
there, that it should, on shipment into New Brunswick to a consumer, be
subjected to a further import duty in that Province. The importation which
brings Section 5 into operation seems clearly to be a dealing in tobacco
within the meaning of the judgment quoted above. So also, I think, the 40
tax imposed by Section 4 is an excise duty within the contemplation of
that judgment. At pp. 58, 59, Lord Thankerton says:—

"In their Lordships' opinion the customs or excise duties on
commodities ordinarily regarded as indirect taxation, referred to in the
judgments in *Fairbanks'* case and the *McDonald Murphy Lumber Co.'s*
case, are duties which are imposed in respect of commercial dealings
in commodities, and they would necessarily fall within Mill's definition

of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a license duty, such as was considered in *Lambe's* case. Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted."

The tax imposed by Section 4 fulfils the conditions of this "definition of customs and excise duties," as the judgment describes this passage.

10 The distinction between the New Brunswick statute and the provisions of the British Columbia Fuel Oil Act, with which the judgment is concerned, is brought out very clearly in the part of the judgment I now quote at p. 59 :—

20 "Turning then to the provisions of the Fuel Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement ; but this cannot affect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act."

I should add that Section 5, in my opinion, comes within the ban of Section 121. I do not think either the decision in the *Gold Seal* case, or the

30 observations in the judgments, are in any way in conflict with this.

The duty imposed by Section 5, as I have already observed, being a duty imposed by a provincial legislature, is, of course, not collected through the machinery of the customs, but levied in New Brunswick prior to Confederation it would have been levied as a customs duty ; and considered even from the point of view of its application to goods imported from other provinces, it is of the nature of a customs duty, if the expression is properly applicable in such circumstances. Section 5 is moreover, in my opinion, 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

40 Section 91.

I should add that the tax under Section 4 is payable by the purchaser's agent where the purchase is made by an agent. On the principle of the *Manitoba Grain* case, this provision appears to be invalid.

For these reasons, I think the appeal should be allowed.

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(b)
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(b) RINFRET, J.—

The question in this case is about the constitutionality of "An Act to provide for imposing a tax on the consumption of tobacco" (c. 44 of the Acts of New Brunswick, 1940), hereinafter referred to as "The Tobacco Tax Act."

The Appellant caused a writ to issue in the Chancery Division of the Supreme Court of New Brunswick claiming an injunction restraining the Defendants, 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 Act above mentioned, or the regulations under it. 10

The parties concurred in stating the questions of law arising for the opinion of the Court as follows:—

The Appellant is a Dominion Company having its head-office in the City of St. John, in the province of New Brunswick.

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

Certain regulations were made under the authority of the Act. 20

On October 15, 1940, the Appellant opened a store in the City of St. John, and thereafter carried on, and now carries on, therein the business of selling tobacco, including cigars and cigarettes, without having obtained any license so to do under The Tobacco Tax Act, or the regulations.

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 said Tobacco Tax Act, as "consumers" or "consumers of tobacco," without collecting the tax imposed by the said Act.

The Respondent James H. Conlon was, on the coming into force of the said Tobacco Tax Act, appointed to the office of Tobacco Tax Commissioner, it being an office created under the regulations. 30

On November 2, 1940, and from time to time thereafter, the Respondent John McDonough, an inspector appointed under the Act, and others, while acting under the instruction 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 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 said Tobacco Tax Act and the regulations made thereunder. 40

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

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

It was agreed that, if the Court should be of the opinion that the Act and the regulations were wholly *intra vires*, the Appellant's action should be dismissed. If the Court should be of 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 an injunction order 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 shall make such Order by way of declaration or of substantive relief to the Appellant, as shall be deemed right and proper.

The special case was submitted to the Appeal Division of the Supreme Court ; and, after argument heard, the judgment of that Court was delivered by the Chief Justice of the Province of New Brunswick, in which Grimmer and Richards, JJ., concurred.

The Court unanimously held that the Act was within the constitutional powers of the Province.

After having quoted the material sections of the Act, the learned Chief Justice stated that the regulations had not been attacked, except upon the ground that, the Act being *ultra vires*, they fell with it.

He proceeded to enumerate the grounds of objection to the validity of the Act :

- (1) That the transaction was not within the Province ;
- (2) That it was an attempt to impose a tax upon inter-provincial or international transactions ;
- (3) That dealers in tobacco could not without their consent be constituted agents for the Crown for the collection of a tax, as it would constitute them public officers ;
- (4) That the tax was indirect as falling upon transactions in commodities especially ;
- (5) That it was an indirect tax as being in essence a sales tax ;
- (6) That the taxation of an agent was vital to the scheme of the Act and that taxation so imposed upon an agent gave him a right to be indemnified by his principal, thus indirectly imposing the tax upon the principal.

Dealing first with grounds of objection 1 and 2, the judgment failed to see that the legislature had attempted to impose a customs duty upon the importation of tobacco into the Province, contrary to the contention of counsel for the Appellant. In the opinion of the Appeal Division, the legislation did not purport to affect any person who was outside of the Province, nor the commodity when it was not within the Province. In fact, it did not affect the commodity at all.

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As to objection No. 3, the Court thought that it also failed and that it must be competent for the legislature to provide for collectors of revenue, if that revenue derives from a direct tax.

Objections 4 and 5 were taken together. In the Court's opinion, they raised the only real point in the case, viz., whether the statute imposes direct or indirect taxation.

The attempt made to treat the Act as imposing a stamp tax and thus bringing it within *Attorney-General of Quebec v. Queen Insurance Company*, 3 App. Cas. 1090, and *Attorney-General of Quebec v. Reed*, 10 A.C. 141, was disregarded. It was said by the Court that what was called a "stamp" 10 in argument is not a stamp at all. It was not regarded as such nor intended to be affixed to anything. It was simply a receipt for payment; and Regulation 20 was referred to.

As to the attempt of counsel for the Appellant to assimilate the tax to a sales tax, and therefore to an indirect tax, the Court thought that transmissibility is the proper test for the present case. On this ground, reference was made to *Attorney-General for Manitoba v. Attorney-General for Canada*, 1925, A.C. 561, where the tax was on persons selling grain for future delivery; and to *Attorney-General for British Columbia v. C.P.R.*, 1927, A.C. 934, where the Privy Council stated that fuel oil, being a 20 marketable commodity, those who purchased it, even for their own use, acquired a right to take it into the market; and that, therefore, a tax levied on the first purchasers of fuel oil came within the general principle which determines that the tax is an indirect one.

Reference was also made by the learned Chief Justice to *Rex v. Caledonian Collieries* (1928), A.C., 358, which dealt with a percentage tax imposed on mine owners on the gross revenue of coal mines, and where it was held that the general tendency of tax upon the sums received from the sale of the commodity which the mine owners produced was that they would seek to recover it in the price charged to the purchaser; and that, 30 although, under the particular circumstances, the recovery of the tax be economically undesirable or practically impossible, nevertheless the general tendency of the tax remained. The effect of the Privy Council decision in *Lower Mainland Dairy v. Crystal Dairy* (1933), A.C. 176, and of the decision of this Court in *Lawson v. Interior Tree Fruit Co.* (1931), S.C.R., at p. 164, was also examined; and the Court found that these cases were not in the same category as the present case.

The Court then discussed the judgment of Lord Thankerton in *Attorney-General for British Columbia v. Kingcome Navigation Company* 40 (1934), A.C. 45, where the noble Lord reviewed previous judgments of the Board and said that: "These decisions made clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax.

* * * *

“ The ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties in the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon that one of the parties to the trading in the particular commodity who is selected as the taxpayer.”

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10 Of the Fuel Oil Tax Act of British Columbia, Lord Thankerton said that it was clear that the Act purported to exact the tax from a person who had consumed fuel oil, the amount of the tax being computed broadly according to the amount consumed, and the Act did not relate to any commercial transaction in the commodity between the taxpayer and someone else. Although it was, of course, possible that individual taxpayers may recoup themselves by the contract or arrangements under which the oil was acquired, this could not, in their Lordships' opinion, affect the nature of the tax.

20 The Appeal Division, in the present case, then pointed out that the differences between the Act considered by the Privy Council in the *Kingcome* case and the case at present under review were two :

30 Firstly, the British Columbia tax was imposed upon the person “ who has consumed fuel oil ” ; the New Brunswick Act imposed the duty “ before consumption of the commodity.” It was shown that by actual consumption, under the British Columbia Act, the purchaser became the ultimate consumer. The Appeal Division thought that the same result was attained by the express provisions of Sec. 3(2) of the New Brunswick Act, which took away the right of resale from the purchaser from a retail dealer. The statute thereby made him the ultimate consumer. As a result of that section, it seemed impossible to conceive that the purchaser attempting to resell could have a market, unless he was prepared to sell the commodity at a definite loss.

40 Secondly, there was no definition of the word “ consumer ” in the British Columbia Act, and obviously there could be none, while Section 2 (a) of the New Brunswick Act contained a definition and by it the consumer could purchase from a vendor by “ means of an agent.” The principal must be one who desires to acquire the tobacco for consumption by himself, or by other persons at his expense. The Appellant contended that the tax necessarily paid by the agent would be “ passed on ” to the principal, which would bring the transaction within the trading cases to which reference has already been made. To this argument, the Court thought the answer was : “ That there is not, and cannot be, a sale by the agent to his principal.” True, the agent, if he had not the required money in advance, would be entitled to be indemnified by his principal ; but indemnity is not sale. “ *Qui facit per alium facit per se*,” applies. This is only part of the machinery of the Act. *Forbes v. Attorney-General of Manitoba*, 1937, A.C., 260.

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Summing up, the learned Chief Justice came to the conclusion that the tax was not imposed upon the vendor, it was not imposed upon the goods ; it was imposed upon the consumer, and measured and valued by the extent of his purchases. The consumer paid the tax at the time of the sale to him. The vendor paid no tax ; and the tax could not by any possibility enter as a factor into the price charged by him. That there was a perception of the tax at the moment that the commodity passed from the vendor to the buyer did not make it a sales tax. It seemed to fall within the class of excise taxes which may be levied by a provincial legislature. But it was immaterial how it was described ; the incidence of the tax fell upon and 10 was borne by the ultimate consumer and could not be passed on.

For these reasons, the Court held that the Act was within the constitutional power of the Province.

From that judgment, Atlantic Smoke Shops now appeals to this Court by special leave granted therefor by the Appeal Division of the Supreme Court of New Brunswick ; and the Attorney-General of the Province of Quebec intervenes to support the constitutionality of the New Brunswick Act, in view of the fact that the legislature of Quebec has adopted a similar statute.

The Tobacco Tax Act now in question enacts, in Section 3, that 20

“ (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 the 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 to a person who is not a vendor duly licensed under this Act.”

By Section 4, it is enacted that

“ 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 30 computed at the rate of ten per centum of the retail price of the tobacco purchased.”

By Section 5 :

“ 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 40 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.”

In the Act, “ 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." (Section 2 a.)

" Purchaser " means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province. (Section 2 d.)

10 " Retail sale " means a sale to a consumer for purposes of consumption and not for resale. (Section 2 e.)

" Retail vendor " means any person who, within the Province sells tobacco to a consumer. (Section 2 f.)

By Section 7 :

" 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."

20 By Section 9 :

" 9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax."

And, finally, by Section 10 :

" 10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected."

30 For the purpose of carrying into effect the provisions of the Act, the Lieutenant-Governor in Council was authorised to make such regulations, not inconsistent with the spirit of the Act, as were considered necessary, or advisable (Section 20) ; and, amongst other things, for " (a) providing for the affixing of stamps on tobacco or on the packages in which it was sold, before or at the time it is sold to the consumer, as evidence of the tax having been paid " ; and it is enacted that such regulations shall have the same force and effect as if enacted by the Act and that they shall be published in the Royal Gazette (Section 20-2).

Of the regulations so made, only the following shall be quoted :

" 19. Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer, etc.

40 " 23. The retail vendor shall account for and remit the amount of tax collected to the Tobacco Tax Commissioner within ten days immediately following the calendar month during which any sale has taken place, and shall with his remittance forward to the Tobacco Tax Commissioner a statement containing the information required by Form 4 in the Schedule of these regulations."

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Retail vendors are required to make an application for the licence to sell at retail. That application is signed by them and the form so signed contains the following undertaking :

“ I/We hereby make application for a licence as indicated above under the provisions of the Tobacco Tax Act, 1940.

“ I/We, upon acceptance of licence to retail tobacco, agree and undertake to act as the agent of the Minister for the collection of the tax imposed by the said Act and to account to the Province of New Brunswick for all moneys so collected, as provided by the Act and Regulations.”

10

The form of licence itself contains the following prescriptions :

“ Penalty as prescribed by the Act.

“ Failure on the part of a vendor to collect the tax renders him liable to a fine of not less than ten or more than five hundred dollars and costs ; and, in default of payment, to imprisonment to a term not exceeding three months.”

The form of Tobacco Tax return provides for the deduction of a commission of 3%, being the allowance to the vendor for his services in collecting the tax ; and it contains the following :

“ Enclosed find the sum of \$..... which is the amount of 20 Tobacco Tax collected by me during the month of _____ after deductions being made as described above.”

And attached to the return is a declaration which has to be signed by the vendor to the effect that the remittance is a true return of all taxable sales made during the last preceding months, and that the return herein truly represents all tax imposable by law accruing upon such sales or transactions as was chargeable under the Tobacco Tax Act.

The attack made upon that Act by the appellant and the grounds of appeal from the Appeal Division of the Supreme Court of New Brunswick, which upheld the Act, are :

30

(1) The Act is not legislation upon the matters assigned to the legislative jurisdiction of the Provinces by Sec. 92 of the British North America Act ;

(2) The Act purports to impose a tax for the raising of a revenue for provincial purposes, but it is neither

(a) a direct tax, or

(b) a tax within the Province,

as authorised by subsection 2 of Section 92 ;

(3) The tax is not confined in its effect to the Province of New Brunswick, nor to the persons upon whom it is levied ;

40

(4) The Act infringed upon the exclusive legislative jurisdiction of the Dominion Parliament to impose customs or excise duties ;

(5) The Act purports, in violation of the provisions in Section 121 of the British North America Act, to impose a tax upon articles grown, produced or manufactured in other provinces of Canada when introduced into New Brunswick for purposes of consumption ;

(6) The licenses provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under Section 92, subsection 9 of the British North America Act;

(7) The Regulations are invalid because the statute which authorizes them is wholly *ultra vires*.

It is to be observed, as already pointed out in the reasons for judgment of the Appeal Division, that the regulations are not brought into question
 10 except in so far as they are authorized by the statute and that they will have to be found *ultra vires* only if the statute itself is held unconstitutional. They may, therefore, be disregarded for the purpose of the present discussion; and that disposes of ground of appeal No. 7.

Ground No. 1 is only a general statement of the objections of the Appellant, the details of which are enumerated in grounds 2, 3, 4, 5, and 6. Those, therefore, are the grounds which have to be examined in order to decide the present appeal.

It is alleged in ground of appeal No. 2 that the tax imposed is not
 20 a direct tax, contrary to the powers of a Provincial legislature under head 2 of Sec. 92.

“Direct taxation” alone may be imposed by a Province, and it must be “taxation within the Province.”

It was said by this Court, in *City of Charlottetown v. Foundation Maritime Limited*, 1932, S.C.R. 589, at p. 594:

30 “It is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy, ed. 1886, Vol. II, p. 415), has been judicially adopted as affording a guide to the application of Section 92, head 2 (*Fairbanks* case, 1928, A.C. 117, at p. 125). Mill’s definition was held to embody ‘the most obvious indicia of direct and indirect taxation’ and was accepted as providing a logical basis for the distinction to be made between the two. (*Bank of Toronto v. Lambe*, 12 A.C., 575, at 582.) The expression ‘indirect taxation’ connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill’s canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases
 40 to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on (*The King v. Caledonian Collieries*, 1928, A.C. 358). It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated.”

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The definition of John Stuart Mill, above referred to, states :

“ Taxes are 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 intention that he shall indemnify himself at the expense of another ; such as the excise or customs.”

Now the Appellant contends that the tax we are now examining comes under the definition of an indirect tax because it is imposed upon the taxpayer with respect to, and by reason of, his entering into a commercial transaction or trade in commodities ; also because it taxes all agents who purchase tobacco on behalf of their principals or who bring tobacco into the Province of New Brunswick on behalf of their principals. 10

Of course, the question of the nature of the tax is one of substance. It does not turn only on the language used by the legislature which imposed it ; and in testing the validity of the statute, the first requisite is to ascertain the real nature of the tax imposed.

It may be admitted as a principle, which generally proves to be true, that a tax upon a person with respect to his consumption of some commodity within the Province is direct taxation and *intra vires*, even although, in some instances and circuituously, he is enabled to pass the burden on to someone else. 20

It may be assumed that, generally speaking, a tax upon a person with respect to a commercial transaction, such as a sale or purchase, based upon and with respect to the price of the commodity, is indirect taxation and *ultra vires* of a Province, even although, in some instances, the party taxed may not pass the burden to anyone else.

In the *Kingcome* case, the tax was imposed on the consumer of fuel oil according to the quantity which he consumed within the Province. It was held that this was direct taxation and *intra vires*. The British Columbia Act, in their Lordships' view, did not relate to any transaction in the commodity between the taxpayer and someone else. 30

Here, the Appellant argues that the tax is upon the purchaser of commodities, imposed at the time of the purchase, and with respect to the commodity purchased ; and that it is accordingly an indirect tax and *ultra vires*. He relies on a long line of decisions of the Privy Council upholding this principle.

If we turn to the New Brunswick statute, we find that the charging section (sec. 4) imposes the tax only on the consumer of tobacco, in respect of the consumption of such tobacco, and computed at the rate of ten per centum of the retail price of the tobacco purchased. 40

The statute makes it clear that the only person who it is intended or desired should be taxed is the consumer. It is just as much a consumption tax as was the British Columbia Tax in the *Kingcome* case.

For the purpose of deciding whether such a tax is a direct or an indirect tax, it does not matter that the tax is imposed before or after consumption of the commodity. The point is that the tax is imposed in respect of the actual consumption, that the legislature intends that it should be a tax

Consumer

with respect to consumption and that the language of the statute is so guarded that, except in extremely exceptional and almost inconceivable cases, it makes it impossible for the consumer to pass it on to someone else, or, in the words of Mill, to "indemnify himself at the expense of another."

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 another. This must be inferred
 10 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. By definition "purchaser" means a person within the Province purchasing from a retail vendor at a retail sale in the Province. A "retail vendor" means a person, within
 20 the Province, selling tobacco to a consumer, and that is to say: a person who holds a retail vendor's license, issued to him under the authority of the Act, and whose license is in force at the time of the sale. And, also by definition, a "retail sale" means a sale to a consumer for purposes of consumption and not for resale.

The right of the consumer to resell is taken away by the provisions of the Act, thus meeting the possibility suggested by Viscount Haldane, in *Attorney-General for British Columbia v. C.P.R.*, 1927, A.C. 934. It was stated, in that case, that "it may be true that, having regard to the practice of the Respondents, the oil they purchase is used by themselves alone and is not at present resold. But the Respondents might develop their business
 30 so as to resell the oil they have bought. The principle of construction as established is satisfied if this is practicable and does not for its application depend on the special circumstances of individual cases."

In the present case, this possibility has been provided against; and no legal resale by the consumer may take place within the Province. Not only that; but the fact that the tax is imposed upon a consumer purchasing at a retail sale, in view of the definition of the words "retail sale" in the Act, means that the tax is imposed only in respect of a "sale to a consumer for purposes of consumption and not for resale"; and it follows that if
 40 some alleged consumer intended to purchase tobacco with the concealed intention of reselling it, he might, as a consequence, become open to a penalty for violating the Act; but he would not, within the precise terms of the Act, come under the provisions of the charging section (Section 4) and conceivably he might not render himself liable to the tax.

Here, on account of the prescriptions of the Act, the possibility of a resale cannot be said to be according to the common understanding of men; and the legislature, by its statute, has taken every means to provide against that possibility. (*Rex vs. Nat. Bell*, 1922, 2 A.C. 128, at pp. 135 and 136.)

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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 exceptionally go outside and consume the tobacco sold in the Province; but this 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. 10

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.

But it is argued that the tax is indirect because the Act taxes the agent with respect to his transaction on behalf of his principal; and the Privy Council's decisions, in *Cotton v. The King*, 1914, A.C. 176, and in *Attorney-General for Manitoba v. Attorney-General for Canada*, 1925, A.C. 561, and in *Provincial Treasurer of Alberta v. Kerr*, 1933, A.C., 710, are relied on.

The Act taxes the "consumer"; and, by definition, "Consumer" 20 includes a 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 . . . 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." And the Act further says that a consumer, and therefore an agent, in the circumstances within the definition "shall be and remain liable for the tax imposed by this Act until the same has been collected." From a practical point of view, it may be said that this feature of the Act, so far as it is made a point against it constitutionally, is 30 almost negligible.

Under the Act, the "tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased" (Section 4). The circumstance no doubt contemplated by the Act, when a person would purchase tobacco "on behalf of or as agent for a principal," would be where the purchaser sends a messenger to a tobacco store, with the object of buying for him the tobacco which he intends to consume. The purchasers meant to be so covered are purchasers of tobacco "at a retail sale," and "for consumption" by the principal. In ninety-nine cases out of a hundred, the tax, in such cases, would amount to something between ten to fifty 40 cents, the latter being an extreme suggestion. It is to be assumed that, in almost every case, the messenger would have received his principal's money to pay both for the tobacco and for the tax. The amount of the 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.

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 consequence, no enhancement of the actual cost as between the agent and his principal.

Moreover, should this feature of the Act be found unconstitutional—which, in my view, it should not—it is severable, and it may not be allowed to defeat either the whole Act or its principle. The objection would be met by deleting the provision concerning agents in the definition of "consumer." As the tax must be paid immediately "at the time of making the purchase," no valid retail sale may be made without the tax being paid at once, and there is no perceivable object in enacting that the agent will remain responsible for it.

I have now discussed the grounds of appeal Nos. 1, 2 and 3. The others do not require elaborate consideration.

As to Ground No. 4, I cannot agree that the Act infringes upon the exclusive legislative jurisdiction of the Parliament of Canada to impose customs and excise duties. Section 5 of the Act is relied on for the Appellant's argument on this point. It provides that a "person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who received delivery in the Province of tobacco for his own consumption or 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 in respect of such tobacco," etc., "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."

In regard to this, it should be observed that it affects only persons residing, or ordinarily resident, or carrying on business in New Brunswick. But it is argued that, since it covers such a person "who brings into the Province, or who receives delivery in the Province" of, tobacco from outside, the tax is an attempt to impose customs duties, which are of the exclusive competency of the Dominion Parliament.

I do not think that it is a customs duty within the meaning of those words as they are generally understood.

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 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.

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Surely there must be a moment when property entering a Province becomes property in the Province subject to be taxed by the Province.

To my mind, Section 5 has no other purpose than to equalise between purchasers in the Province and purchasers residing in New Brunswick who happened to have purchased tobacco outside of it. It may be styled legislation incidental to the scheme of The Tobacco Tax Act; it cannot be regarded as imposing a customs duty.

Then, as ground of appeal No. 5, the Appellant urges that the Act purports, in violation of the provisions of Section 121 of the British North America Act, to impose a tax upon articles grown, produced or manu- 10
factured in any one of the Provinces, when introduced into the Province of New Brunswick for purposes of consumption.

To my mind, under the provisions of the Act, tobacco enters perfectly free into the Province; but the consumer is taxed in connection with the consumption of a commodity which is in the consumer's possession in the Province. The Legislature has assumed that one who acquires for the purpose of consumption will consume. The exceptional cases where he might change his mind after introducing into the Province the tobacco he has purchased for consumption are legitimately ignored by the Legis- 20
lature.

It would seem further that Section 121 of the British North America Act only aims at the prohibition of customs duties when the articles of the growth, produce or manufacture of any one of the Provinces are carried into any other Province (*Gold Seal Ltd. v. Dominion Express Company & The Attorney-General of the Province of Alberta*, 62, S.C.R. 424). On the occasion of their importation from other provinces, the admission into the Province must be free and that is to say that no tax or duty can be imposed as a condition of such admission (*The King v. Nat Bell Liquors Ltd.*, 1922, 2, App. Cas., p. 128).

Incidentally, it need hardly be said that the invalidity of Section 5 30
could not affect the rest of the statute (*Toronto Corporation v. York Corporation*, 1938, A.C., p. 415).

The last ground of appeal is that the license required from the vendors is not one authorized by Head 9 of Section 92 of the British North America Act.

It has been repeatedly held that the licenses specifically enumerated in Head 9 of Section 92 are not the only licenses which Provincial legislatures may provide for. It has been held also that the words "other licenses" in sub-head 9 are not limited to licenses *ejusdem generis* (*Brewers & Maltsters Association v. Attorney-General for Ontario*, 1897, A.C. 231; 40
Attorney-General for Manitoba v. License Holders Association, 1902, A.C. 73; *Shannon v. Lower Mainland Dairy Products Board* (1938) A.C., p. 708. Provincial legislatures can provide for licenses not only for the purpose of revenue, but also for the purpose of regulating matters within their powers.

For example, they have the power of requiring licenses as an incident of any of their other powers, apart from the power to require licenses merely for the purpose of raising a revenue.

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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.

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In the *Kingcome Navigation* case, the statute there considered also provided for a license.

Under all the circumstances, I think that the judgment appealed from was right and that The Tobacco Tax Act was competently enacted by the legislature of the Province of New Brunswick.

The appeal should, therefore, be dismissed with costs, except that there will be no costs to the Intervenant, the Attorney-General of the Province of Quebec.

(c) CROCKET, J. —

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I agree with my brother Rinfret and the judgment of the Appeal Division of the Supreme Court of New Brunswick that the Tobacco Tax Act, as enacted by the Legislature of that Province, is wholly *intra vires*.

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My brother Rinfret has so methodically and exhaustively dealt with the various points involved in the appeal as argued before us that, agreeing with him, as I do, in all his conclusions thereon, I find it difficult to state my own reasons for arriving at the same conclusion without reiterating much of what he has so pointedly said. However, in the circumstances, I feel, even at that risk, I should do so.

30

Apart from the objection that the vendors' licences provided for by the statute are not licences within the meaning of Section 92(9) of the B.N.A. Act, all the grounds upon which its constitutional validity was challenged here, as in the Court below, centre around the question as to whether the tax thereby imposed is a direct tax within the meaning of Section 92(2) of that Act.

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As to the nature or form of the tax imposed, the Appellant, of course, contends that it is an "indirect," rather than a "direct" tax, for the reason that it arises out of a commercial or trading transaction, to which the intended taxpayer is a party, and that it therefore falls within the meaning of the so-called trading cases, which were so strongly relied upon to support the appeal, as well as for the reason that upon the true construction of Section 2 (a) the tax is imposed, not only upon the purchasing

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prospective consumer, but alternatively upon his agent in making the purchase for him. As to the cases thus relied upon, it will be found on examination that they all proceed upon the ground that, although a tax purports to be imposed upon one party to a commercial or trading transaction, its real nature is determinable by the practicability of its being passed on to other persons by means of a resale and thus absorbed in the purchase price obtained on its resale. The pronouncement of Viscount Haldane in *Attorney-General for British Columbia v. C.P.R.*, was especially relied upon in this regard, as stated by my brother Rinfret.

In the present case, as Baxter, C.J., in the Court below distinctly held, 10 and as clearly appears from the very careful analysis my learned brother here has made of the relevant provisions of the New Brunswick Act, this possibility has been definitely eliminated by the Statute itself.

Not only does Section 3 (2) expressly enact that “no person shall sell any tobacco in the Province at a retail sale unless he holds a vendor’s licence issued to him under authority of this Act and such licence is in force at the time of sale,” but Clause (e) of Section 2 declares that “retail sale” means a sale to a consumer for the purposes of consumption and not for resale. Furthermore, Section 4 in the most explicit terms imposes the tax on the consumer in respect of the consumption of the tobacco purchased, and 20 makes it payable at the time the purchaser makes his purchase. It is true that the word “consumer,” as defined in Section 2 (a), includes, not only a person who purchases tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense, but one who purchases the tobacco “on behalf of or as the 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 that Section 10 provides “that a consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.”

So far, however, as purchases made in the Province are concerned, it 30 is plain that the tax must be paid at the time of the purchase, and that if the tax is not then paid no purchase can lawfully be made, so that Section 10 cannot very well be intended to apply to the purchase of any tobacco within the Province. It is obviously intended to apply to the provisions of Section 5 in any case where a person residing or ordinarily resident or carrying on business in the Province may be found to have brought into the Province or have received delivery in the Province of tobacco purchased outside the Province for his consumption, when he is required to report the fact to the Minister and then to pay the same tax in respect of the consumption of such tobacco as would have been payable 40 if the tobacco had been purchased at a retail sale in the Province at the same price.

In any event, as I read the relevant provisions, the tax is imposed upon the consumer in respect of his own consumption of it or the consumption of it by other persons at his expense, whether the tobacco be

purchased by him personally or by someone whom he has requested to make the purchase for him, either within or without the Province. It cannot reasonably, in my opinion, be held to be a tax imposed upon any other person than upon the consumer himself in respect of tobacco purchased for his own consumption or consumption by other persons at his expense. It was surely never intended to make a servant or a messenger, who might be sent by his employer to buy a package of tobacco or cigarettes for consumption by his employer or his employer's friends at his employer's expense, liable for the tax so explicitly imposed by the statute in respect of the consumption of the tobacco thus purchased. The fact that the purchase is made for the master and intending consumer by a servant or messenger does not make the purchase any less the purchase of the master, either at law or according to the common understanding of men, than if the master—the intending consumer—went to the retail store to make it personally. No purchase being possible without payment of the tax, there could in the ordinary course of events be but few instances where a master would send a servant or messenger to a retail vendor's shop to buy tobacco for him without giving him the money to pay both the tax and the price of the tobacco. It would only be in a case where the intending consumer at the moment found himself without the necessary money that there would be any likelihood of the messenger himself paying either the tax or the purchase price with any other than the consumer's own money. In such a contingency the master might borrow the necessary money from someone else, or possibly the servant might himself for the time being lend the money to his master, if he had the change in his own pocket. Constructively at least the money paid to the vendor would none the less be the master's. The tax itself would not amount at the most in such a case to more than five or ten cents, for the statute provides for the computation of the tax to the nearest cent (one-half cent being considered as one cent) at the rate of ten per centum of the retail price of the tobacco purchased.

For my part I would, like my brother Rinfret, be very loathe to hold that the mere fact of the purchase being made by a servant or by a special messenger under such exceptional circumstances could have the effect of converting what is otherwise so plainly a direct tax upon a consumer in respect of his own consumption of tobacco, and thus within the constitutional power of a Provincial Legislature, into an indirect tax entirely beyond the legislative power of any of the Provinces.

The statute intends the payment of but one tax in respect of each separate purchase of tobacco in the Province. This, as I have said, it definitely requires to be paid at the time the purchase is made by or on behalf of the prospective consumer. If the servant or messenger in the circumstances I have indicated, either for his own or for his master's convenience, voluntarily makes the payment for his master with his own money or with money borrowed by him for the purpose, it surely cannot well be said that he thereby becomes the "consumer" within the meaning of the charging section of the statute, and that the statute imposes the tax

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upon him and not upon his master as the prospective consumer. The statute certainly does not compel the servant or agent to pay the tax if the master or employer does not provide him with the money for the purpose. It would in such circumstances be purely a voluntary payment upon his part wholly incompatible with the legal conception of a tax. It seems to me that there would be quite as much reason for saying that if the prospective consumer, not having the money in his pocket at the moment, borrowed it from a servant or from anybody else, went to the vendor's shop himself, made the purchase and paid the tax with the borrowed money, the lender, and not the purchaser, would thereby become the consumer and the taxpayer. 10

Even if the alternative provision contained in Section 2(a) concerning the purchase within the province from a retail vendor by an agent for his principal for consumption by the latter or by other persons at his expense must be construed as constituting the servant or agent, and not the principal, for whom the purchase is made, the intended taxpayer in such circumstances as above suggested, the servant or agent would not surely find it any less practicable or possible to pass on the tax to his master by means of a resale to him, than the master would to pass it on by the same means to anybody else—in the face of the express statutory prohibition 20 against any resale in any manner whatsoever. Perhaps I should in this connection mention Section 7 in addition to the other sections I have referred to. This section, so far as all retail vendors are concerned, precludes as effectually as any statutory provisions can the absorption of the tax in the retail price or its recoupment in whole or in part to the purchaser.

Reading all the material sections together, it is impossible, I think, to conceive how the Legislature could more effectually have indicated its intention that this tax should be demanded from the very persons, who it intended or desired should pay it. This is the essential characteristic of 30 "direct," as distinguished from "indirect" taxation, and constitutes the true criterion for determining whether a particular tax falls under the former or the latter category, as expounded by John Stuart Mill in his well known treatise on Political Economy, and adopted by the Judicial Committee of the Privy Council in *Bank of Toronto v. Lambe*, (1887), 12 A.C., 575, and in *Cotton v. Rex*, (1914), A.C., 176, and other cases, and so distinctly reaffirmed by Lord Thankerton in the recent case of *Attorney-General for British Columbia v. Kingcome Navigation Co.* (1934), A.C., 45, as to the meaning of the term "direct taxation" in Section 92(2) of the 40 British North America Act. In the face of the various provisions of the statute itself, how can it logically be said that the tax imposed by the impugned statute is a tax which the Legislature intended should be borne by any other person than the prospective consumer himself, or that it is a tax, the general tendency of which is to enhance or in any way affect the retail price of tobacco either within or without the Province? The definite provisions of the statute itself, in my judgment, make the question

as to the general tendency of the tax quite irrelevant, unless indeed one is disposed to question the good faith of the Legislature and regard the whole scheme of the statute as a mere pretence or colourable arrangement in order to disguise what is claimed to be "indirect taxation," which is not within its legislative powers, as "direct taxation," which is. For my part I am not disposed to do so.

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10 With all respect, the only ground to my mind upon which any argument could possibly be based in support of the contention that the tax imposed by the Act is not a direct tax within the competency of the Provinces under the provisions of Section 92 (2) of the British North America Act is that of the inclusion of the alternative provision regarding purchases by agents in the definition of "consumer" in Section 2 (2) of the impugned statute. The most that can be said as to this is that the language of the alternative clause may be confusing. Seeing that no retail purchase could lawfully be made within the Province without the tax being immediately paid, this clause would appear to have no perceivable object and to be quite unnecessary to the levying of the intended tax. For this reason the draftsman would have been well advised, in my opinion, to omit it. It could be deleted at any time without affecting the vital object
20 of the Act.

As to Section 5, it is directed only against persons ordinarily resident or carrying on business in New Brunswick who might otherwise seek to avail themselves of favourable opportunities to buy their tobacco outside the Province and thereby easily evade the tax, which Section 4 so plainly intends to apply to all consumers alike in the Province. Its only and perfectly obvious purpose is to close such an inviting opening to such persons as might be inclined to dodge the intended tax by such convenient means. The section merely places such persons on the same footing in respect of their consumption of tobacco purchased by or for them outside the Province as all "consumers," who buy their tobacco within the Province.
30 It does not purport in any sense to prohibit anyone from buying tobacco outside the Province, but makes it clear that when one does so and brings it into the Province or receives delivery of it in the Province for his own consumption he does not thereby free himself of liability to pay the same tax in respect of its consumption as if he had bought it at a retail store within the Province at the same price. Surely if the charging section of the statute is itself within the legislative competency of the Province, such a purely subsidiary section—having no other perceivable object than the prevention of the evasion or defeat of the intended tax—cannot well be
40 held to be beyond it.

As to the contention that the intended tax is in reality a customs or excise duty and consequently an "indirect tax," and that its attempted imposition therefore infringes the exclusive legislative jurisdiction of the Dominion Parliament in relation to the creation or alteration of such duties, as expressly conferred by Section 122 of the B.N.A. Act, precisely the same objection was made in the *Kingcome* case regarding the imposition of the

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fuel oil tax by the British Columbia Fuel Oil Tax Act, 1930, c. 71, as amended by the statute of 1932, c. 51, upon every consumer of fuel oil according to the quantity which he has consumed. The Judicial Committee overruled the objection as inconsistent with its own decisions, "which"—to quote the language of Lord Thankerton—"go back to the year 1878, and settled that the test to be applied in determining what is "direct taxation" within the meaning of Section 92, Head 2, of the Act of 1867, is to be found in Mill's definition of direct and indirect taxes." That is surely conclusive as to this ground of appeal.

It is argued as well that Section 5 of the New Brunswick statute 10
contravenes Section 121 of the B.N.A. Act, as interposing an obstacle to the free admission of tobacco as an article "of the growth, produce or manufacture of any one of the Provinces into each of the other Provinces," within the meaning of that enactment.

This section came before this Court for interpretation for the first time in 1921, in the case of *Gold Seal Ltd. v. Attorney-General for Alberta*, 62 S.C.R., 439, on the question of the constitutional validity of an enactment of the Parliament of Canada contained in Chapter 8, 10 Geo. V, 1919, prohibiting the importation of intoxicating liquor into those Provinces, where its sale for beverage purposes is forbidden by provincial law. The case was 20
heard by Sir Louis Davies, C.J., and Idington, Duff, Anglin and Mignault, J.J. Duff, J., dealing with the construction of Section 121, held that "the phraseology adopted, when the context is considered in which the section is found, shows that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any Province of the Union." Anglin, J., expressed the view that the impugned legislation was not obnoxious to Section 121 of the B.N.A. Act. "The purpose," he said, "of that section is to insure that articles of the growth, produce or manufacture of any Province shall not be subjected to any customs duty when carried into any other Province. 30
Prohibition of import in aid of temperance legislation is not within the purview of the section." Mignault, J., thought that "the object of Section 121 was not to decree that all articles of the growth, produce or manufacture of any of the Provinces should be admitted into the others, but merely to secure that they should be admitted 'free,' that is to say, without any tax or duty imposed as a condition of their admission." "The essential word here," he continued, "is 'free,' and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade."

The clear effect of these three several pronouncements as read together, 40
it seems to me, is that the words "admitted free," as used in Section 121, mean admitted free of customs duties, and for that reason, and that reason only, even an express prohibition of the import of intoxicating liquor from one province to another in aid of provincial temperance legislation is not within the purview of the section. That is precisely how the headnote of the case states the decision of the Court on the construction of the section

relied on as invalidating the legislation there in question. Whether or not that decision means that the section only applies to Dominion legislation, it plainly implies, I most respectfully think, that the Parliament of Canada may validly go so far as to expressly prohibit the admission from one Province to another of any article of the growth, produce or manufacture of another Province, so long as the prohibition does not involve the imposition of a customs duty. If that be so in respect of the application of the section to Dominion legislation, how can this Court now consistently hold that a provincial enactment, which neither prohibits nor in any sense
 10 obstructs or restrains, as between vendor and purchaser, the passage of any such article from one Province to another does fall within the purview of the intended ban? No one contends or could well contend that intoxicating liquor is not quite as much an article of the growth, produce or manufacture of one or more of the Provinces of Canada as tobacco. Surely Section 121 of our Constitutional Act was never intended to have one meaning in its application to Dominion legislation and quite another meaning in its application to Provincial legislation. And for my part I cannot see how the fact that in the *Gold Seal* case the Court was considering an enactment of the Parliament of Canada in relation to the
 20 importation of intoxicating liquor from one Province to another can justify us in completely discarding the construction so explicitly placed on Section 121 of the B.N.A. Act in that case, and now construing the words "admitted free," as used therein, in such a sweeping sense as that contended for in support of this appeal.

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If we were being called upon to interpret the section for the first time, and if I may say so with all respect, I should be disposed to regard it in precisely the same light as Mignault, J., so clearly expounded it in the passage I have quoted, and to hold that it was inserted in the Imperial Act "merely to secure that they (articles of the growth, produce or manu-
 30 facture of any of the Provinces) should be admitted 'free' (in each of the other Provinces), that is to say, without any tax or duty imposed as a condition of their admission," and that "what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade." This treats the section as applicable to Dominion and provincial legislation alike, and in no way concerns the distribution of legislative powers as between the Dominion and the Provinces. It recognizes on the one hand the exclusive power of the Dominion to create and impose both customs and excise duties, and on the other the exclusive right of the Provinces to impose direct taxation within the Province for the
 40 purpose of raising revenue for provincial purposes, so long as the imposition of such duties or taxes by either authority does not constitute an obstacle to the admission of articles grown, produced or manufactured in any one or more of the Provinces into any other Province in the sense of imposing any condition to such admission. For the reasons already stated, I cannot see how the New Brunswick Tobacco Tax Act imposes any condition whatever to the importation or admission into that Province

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of tobacco, whether it be the produce of any other Province of Canada or of any foreign country.

The tax or charge contemplated by Section 5 is a tax or charge which, I repeat, is not payable until after the tobacco has been brought into the Province by the prospective consumer or received by him within the Province for consumption by himself or others at his expense. Indeed, the tax is neither leviable nor in any manner recoverable until after the intending consumer has reported to the Provincial Secretary-Treasurer the fact that he has brought the tobacco into the Province or received delivery of it within the Province for that purpose, and the price paid for it to the 10 outside vendor.

The objection that the statute's requirements regarding vendors' licences are *ultra vires* of the Legislature as not falling within the purview of Section 92(9) of the B.N.A. Act, is equally untenable for the reasons so convincingly stated by my brother Rinfret.

I agree with him that the appeal should be dismissed with costs against the Appellant, but with no costs to the Intervenant, the Attorney-General of the Province of Quebec.

(d)
Kerwin, J.

(d) KERWIN, J.

Speaking generally, the tax in question is, in my opinion, a direct 20 tax for the raising of a revenue for provincial purposes within the meaning of Head 2 of Section 92 of the British North America Act. 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 30 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.

In two respects the statute is partially *ultra vires*. The attempt by that part of the definition of "consumer" or "consumer of tobacco" to impose the tax on an agent must, I think, fail as being indirect taxation. However, the principal is liable for the tax and the part relating to the agent is clearly severable.

Section 5, which is also severable, is *ultra vires* because it infringes the provisions of Section 121 of the British North America Act. The 40 statute before this Court in the *Gold Seal* case was a Dominion enactment, and there is nothing in any of the judgments inconsistent with this conclusion. It is true that the person who brings into New Brunswick tobacco for his own consumption reports the matter to the Minister, but the fact that the entry into the Province may, or always will, precede the reporting

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and payment of the tax, makes it none the less an impost upon the production or manufacture of another Province if the tobacco in question falls within that class. If, of course, the tobacco is brought from a foreign country, the tax directed to be paid by Section 5 is a customs duty and beyond the powers of a provincial legislature. The main purpose of the statute is to impose direct taxation within the Province, but it is not ancillary to that purpose to attempt to regulate external trade in a particular commodity or to impose a customs duty thereon. A provincial legislature is not authorized thus to seize a power that was expressly withheld
10 from it.

With the two exceptions mentioned, the statute is *intra vires* and, as the repugnant provisions are severable, the plaintiff Appellant, which carries on the business of selling tobacco in New Brunswick, is unable to succeed in its action which by the judgment *a quo* stands dismissed. The appeal should be dismissed, but there should be no costs.

(e) HUDSON, J.—

I have had an opportunity of reading the judgment prepared by my brother Rinfret, and agree with the conclusions at which he has arrived, except on one point, that is, the personal liability imposed on an agent.
20 This, I think, oversteps the limits of provincial legislative jurisdiction, but, with this qualification, I would dismiss the appeal.

(f) TASCHEREAU, J.—

The Supreme Court of New Brunswick, Appeal Division, held that the Tobacco Tax Act and regulations thereunder are constitutional. The Atlantic Smoke Shops Limited now appeals to this Court, and the Attorney-General for the Province of Quebec (where a law substantially similar has been enacted) having been allowed to intervene, joins with the Attorney-General for New Brunswick, and submits that the Act is *intra vires* of the provincial powers.

30 The Act which was enacted on the 11th of May, 1940, came into force on the first day of October of the same year by Proclamation of the Lieutenant-Governor in Council.

The Appellant has a retail store in the City of St. John and carries on the business of selling tobacco, including cigars and cigarettes, and has refused to obtain the licence required by the Act. It has also neglected to collect the tax imposed upon every purchaser.

40 The Appellant submits that this tax is not a direct tax, nor a tax within the Province; that the Act infringes upon the exclusive legislative jurisdiction of the Dominion to impose customs and excise duties, and that the licence provided for is not within the category of licences for which, under Section 92, Subsection 9 of the British North America Act, the Provinces have legislative powers.

The principal sections of the Act which have to be considered are the following:

In the
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Court of
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No. 16.
Reasons for
Judgment.
(d)
Kerwin, J.
—continued.

(e)
Hudson, J.

(f)
Taschereau,
J.

In the
Supreme
Court of
Canada.

No. 16.
Reasons for
Judgment.
(f)
Taschereau,
J.—
continued.

Section 4, which is the taxing section, reads :

“ 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.”

The word “ consumer ” is defined as follows :

“ 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.” 10

The Act further provides that the purchaser must purchase from a retail vendor who must obtain a licence issued from the proper authorities ; and a retail sale is defined as being a “ sale to a consumer for purposes of consumption and not for resale.” Every licensed retail vendor is constituted 20 an agent of the Minister for the collection of the tax, and he must collect it from the purchaser upon whom the tax is imposed, at the time the purchase is made within the Province.

The Provinces draw their power to impose direct taxation from Section 92, Subsection 2 of the British North America Act, and in order to determine whether this particular tax is direct or indirect, the rule many times adopted by this Court and by the Judicial Committee of the Privy Council has once more to be applied.

In “ *City of Charlottetown v. Foundation Maritime Limited* ” (1932), Supreme Court Reports, p. 593, Mr. Justice Rinfret, delivering the judgment of the Court, analyzed the various pronouncements on this matter and said : 30

“ At the time of the passing of the Act,—and before—the classification of the then existing species of taxes into these two separate and distinct categories was familiar to statesmen. Certain taxes were then universally recognized as falling within one or the other category. The framers of the Act should not be taken to have intended to disturb ‘ the established classification of the old and well known species of taxation.’ (*City of Halifax v. Fairbanks’ Estate*, 1928, A.C. 125.)

Customs or excise duties were the classical type of indirect taxes. Taxes on property or income were commonly regarded as direct taxes. 40

These taxes had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies. (*Bank of Toronto v. Lambe*, 12 A.C. 582).”

As to the taxes outside these classifications "the meaning of the words 'direct taxation' as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed." It is now settled that the tax is direct, if it is demanded from the very person who it is intended or desired shall pay it, and it is indirect, if it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

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continued.

10 It is also the general tendency of the legislation that has to be considered, although in exceptional cases the person made liable by the law to pay the tax may succeed in passing it on, and indemnify himself upon a resale of the commodity. (*Attorney-General for B.C. v. C.P.R.*, App. Cases, 1927, p. 938); (*Rex v. Caledonian Collieries Limited*, App. Cases, 1928, pp. 361-362). When the ultimate incidence of the tax, in its ordinary and normal operation, is uncertain, then the tax is indirect, because the question whether the tax is direct or not cannot depend upon those special events, which may vary at the time of payment. (*Attorney-General for Quebec v. Reed*, 10 A.C., p. 143); (*Attorney-General for B.C. v. Kingcome*, 1934, A.C., p. 52.)

20 In the case submitted to this Court (I will deal later with the clause making the agent personally liable) the tax is clearly imposed upon the purchaser of tobacco, who is the last purchaser. It is a purchasing tax, not imposed on the transaction of the commodity, but upon every purchaser at the time of making his purchase at a retail sale in the Province. This purchaser is the person intended by the Legislature to pay the tax, and he does pay it at the time of the purchase. Under Section 10 of the Act he is made liable for the tax imposed until it has been collected. There is no expectation or intention that this purchaser from whom the tax is demanded shall pass it on and indemnify himself, and that someone else
30 than the person primarily taxed will pay it eventually.

The Appellant has cited the case of the *Attorney-General for B.C. v. Canadian Pacific Railway* (A.C. 1927, p. 934) where it was decided that a tax imposed upon every person purchasing fuel oil within the Province for the first time after its manufacture, was an indirect tax, and therefore *ultra vires*. The Judicial Committee came to the conclusion that fuel oil is a marketable commodity, and that those who purchase it for the first time after its manufacture, even for their own use, acquire the right to take it into the market and indemnify themselves at the expense of others. This, therefore, brought the tax within the principles which made it an
40 indirect tax.

In the present case it is the last purchaser who is taxed, and it is, therefore, quite impossible that the tax can be passed on. In the case already cited of the *Attorney-General for B.C. v. Kingcome*, the Judicial

In the
Supreme
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No. 16.
Reasons for
Judgment.
(f)
Taschereau,
J.—
continued.

Committee upheld the validity of the second fuel oil tax enacted by the Province of British Columbia. The Legislature imposed a tax upon every consumer of fuel oil according to the quantity consumed. It was held that the tax was direct taxation, because it was demanded from the very person who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity, it does not fall within the category of customs and excise duties which are within the legislative powers of the Dominion.

In that case, Lord Thankerton expresses himself as follows :

“ It is clear that the Act (fuel oil) purports to exact the tax from 10
a person who has consumed fuel oil, the amount of the tax being
computed broadly according to the amount consumed. The Act
does not relate to any commercial transaction in the commodity be-
tween the taxpayer and someone else. Their Lordships are unable to
find, on examination of the Act, any justification for the suggestion
that the tax is truly imposed in respect of the transaction by which
the taxpayer acquires the property in the fuel oil nor in respect of
any contract or arrangements under which the oil is consumed, though
it is of course possible that individual taxpayers may recoup them-
selves by such a contract or arrangement ; but this cannot affect the 20
nature of the tax. Accordingly their Lordships are of opinion that the
tax is direct taxation within the meaning of Section 92, Head 2, of
the British North America Act.”

I have no doubt that this tax is a direct one, and, therefore, within the powers of the Legislature of New Brunswick.

The next point raised is that the tax is not a tax within the Province. The argument is that the Legislature is attempting to tax a non-resident of the Province of New Brunswick with respect to his consumption of tobacco outside the Province. The Act provides that the tax is levied only when the purchaser purchases in the Province. It is undoubted that it is 30
within the powers of the Legislature to tax any person found in the Pro-
vince, whether that person is therein domiciled or not, if taxed directly.
(*Bank of Toronto v. Lambe*, 12 A.C., at page 584) ; *Forbes v. Attorney-
General for Manitoba*, 1937, A.C., p. 260).

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. As Section 2(a) of the Act says, “ consumer ” means any person who within the Province, purchases . . . for his own con- 40
sumption. As the purchase is made within the Province, it seems clear
that the taxation is imposed within the Province, even if by exception
the tobacco purchased is consumed in a different Province. It is only in
exceptional cases resulting from the act of the purchaser that the tobacco
may be consumed outside the Province.

The Appellant has also raised the contention that this tax is *ultra vires* because it violates the dispositions of Section 121 of the B.N.A. Act, which says :

“ 121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.”

The argument of the Appellant is that the Act purports to impose a tax upon articles produced or manufactured in another Province of Canada when introduced into New Brunswick. In the submission of the Appellant
10 the objectionable clause of the Act is Section 5, which reads as follows :—

“ 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.”
20

This tax, in my opinion, is not a customs duty nor an excise tax. In *Attorney-General for B.C. v. Kingcome*, Lord Thankerton said :

“ Customs and Excise duties are in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.”

In the case of *Bank of Toronto v. Lambe*, Lord Hobhouse expressed
30 himself in the following manner :—

“ It is not like a customs duty which enters into the price of the taxed commodity.”

These customs duties impose a condition on the admission of the commodity before reaching the consumer, and as Mr. Justice Mignault says in *Gold Seal Limited v. Dominion Express Company* (62, Supreme Court of Canada, at p. 470) :

“ I think that, like the enactment I have just quoted, the object of Section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted ‘ free,’ that is to say, without any tax or duty imposed as a condition of their admission. The essential word here is ‘ free ’ and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade.”
40

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Supreme
Court of
Canada.

No. 16.
Reasons for
Judgment.

(f)
Taschereau,
J.—
continued.

In the
Supreme
Court of
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No. 16.
Reasons for
Judgment.

(f)
Taschereau,
J.—
continued.

The tax contemplated by the Tobacco Act is imposed only once the importation is made, and such importation in the Province of New Brunswick does not depend upon the payment of the tax. If we were to adopt the construction suggested by the Appellant, no purchaser of a commodity coming from a different province could ever be taxed. When the commodity has entered into the Province, I see no valid reason why the purchaser could not be compelled to pay a tax to the provincial authorities.

It has also been submitted that the retail vendors are subject to the payment of a licence and that the licensing provisions found in the Act are not authorized by the British North America Act. I fail to see how the Appellant can succeed on this ground. The licences provided for in Section 92, subsection 9, of the British North America Act are not the only licences in relation to which the various provinces may enact laws. They may provide for licences not only for the purpose of raising a revenue, but they have also the right to require licences as an incident to any one of their other powers. 10

The Appellant has submitted also that the Tobacco Act purports to tax not only the principal but also the agent who, on behalf of his principal, purchases tobacco. The Appellant's argument is that the agent purchasing for his principal is by the law liable for the payment of the tax and that it is, therefore, possible that he may recoup himself in passing on the tax to his principal. 20

It will be remembered that under Section 2, paragraph (a) of the Act, "consumer" means not only any person who, within the Province, purchases tobacco for his own consumption, but also any other person who purchases tobacco in the Province as agent for his principal who desires to acquire such tobacco for consumption by such principal. This consumer, whether he is the principal or the agent, is personally liable for the payment of the tax, under Section 10, which reads as follows:—

"10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected." 30

It is clear, therefore, 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.

In *Cotton v. The King*, A.C. 1914, p. 176, the Judicial Committee, after having construed the provisions of the Quebec Succession Duties Act as entitling the collector of inland revenue to collect the duties on the estate from the person making the declaration (the Notary), came to the conclusion that this tax was indirect. Lord Moulton said: 40

"How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside of the definition of direct taxation accepted by this Court in previous cases."

In *Burland v. The King*, 1 A.C., p. 215, the Judicial Committee discussed the *Cotton* case, thought that it could not be distinguished and

reaffirmed the principle cited *supra*. Later, in 1924, in the reference by the Governor-General in Council, the Supreme Court of Canada (1924, Supreme Court, p. 317) came to the conclusion that the Grain Futures Taxation Act of Manitoba purporting to impose a tax upon every person whether broker, agent or principal, entering into a contract for the sale of grain for future delivery, was *ultra vires* of the legislature. At page 322, Sir Lyman Duff, the present Chief Justice of Canada, said :

10 “ The statute, therefore, in so far as it levies a tax upon principals in the transactions to which it applies would, if the legislation were so limited, be, in my opinion, valid. I am unable, however, to perceive how, consistently with the decisions upon the subject, it is possible to sustain the tax upon brokers and agents as a legitimate exercise of the authority of the Provinces in relation to direct taxation.”

This case was submitted to the Privy Council, 1925 A.C., p. 561 (*Attorney-General for Manitoba and Attorney General for Canada*) and the judgment of the Supreme Court was upheld. The same principles were applied in *The Provincial Treasurer of Alberta v. Kerr*, 1933, A.C. 710. In that case, Lord Thankerton said :

20 “ Under the Alberta Succession Duties Act, the duties in question were imposed on the executors on their application for probate, and letters probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships' opinion, the determination of this issue depends on the answer to a simple test, which was applied

30 in the cases of *Cotton* and *Alleyn*, already referred to, namely, whether the executor is personally liable for duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is *not personally* liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.”

In the present case the agent is made personally liable for the tax. It is imposed upon him, but it was obviously the intention of the Legislature that he should indemnify himself at the expense of his principal.

40 This makes the taxation indirect, and, therefore, *ultra vires*.

However, the invalidity of the section declaring the agent who buys on behalf of his principal personally liable for the tax, does not affect the rest of the statute, which is severable, and which I find within the powers of the Legislature of New Brunswick. (*Toronto Corporation v. York Corporation*, A.C. 1938, p. 415).

In the
Supreme
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Taschereau,
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continued.

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Canada.

My conclusion is that the Tobacco Tax Act enacted by the Province of New Brunswick is within the legislative powers of that Province, and that it is *intra vires*, except the sections making the agent who buys tobacco for his principal personally liable for the tax.

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Reasons for
Judgment.
(f)
Taschereau,
J.—
continued.

The appeal should, therefore, be dismissed without costs to either party here and in the Courts below.

Ottawa, 2nd February, 1942.

I hereby certify that the foregoing is a true copy of the reasons for judgment given by the Honourable Judges of the Supreme Court of Canada in this case.

10

ARMAND GRENIER,
Law Reporter.

No. 17.
Formal
Judgment
of the
Supreme
Court of
Canada,
7th Octo-
ber, 1941.

With

No. 17.

Formal Judgment of the Supreme Court of Canada.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 7th day of October, A.D. 1941.

Present

The Right Honourable the CHIEF JUSTICE OF CANADA.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice CROCKET.
The Honourable Mr. Justice DAVIS.
The Honourable Mr. Justice KERWIN.
The Honourable Mr. Justice HUDSON.
The Honourable Mr. Justice TASCHEREAU.

20

Between

ATLANTIC SMOKE SHOPS LIMITED, an in-
corporated company (Plaintiff) Appellant

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

30

and
THE ATTORNEY-GENERAL OF THE PROVINCE
OF QUEBEC

and
THE ATTORNEY-GENERAL OF CANADA... .. *Intervenants.*

The appeal of the above-named Appellant from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced in the above cause on the 3rd day of December, A.D. 1940, having come on to be heard before this Court on the 18th, 19th and 20th days of February,

A.D. 1941, in the presence of Counsel as well for the Appellant as for the Respondents and the Attorney-General for the Province of Quebec, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

In the Supreme Court of Canada.

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed.

No. 17.
Formal Judgment of the Supreme Court of Canada, 7th October, 1941—
continued.

10 AND THIS COURT DID DECLARE that the Act, being Chapter 44 of the Acts of New Brunswick, A.D. 1940, 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.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that there should be no costs in this Court or in the Court below to either Party hereto.

(Signed) PAUL LEDUC,
Registrar.

No. 18.

Order Granting Leave to the Attorney-General of Canada to intervene.

No. 18.
Order granting leave to the Attorney-General of Canada to intervene, 15th November, 1941.

IN THE SUPREME COURT OF CANADA.

20 ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,
APPEAL DIVISION.

Saturday, the 15th day of November, A.D. 1941.

Present: THE RIGHT HONOURABLE THE CHIEF JUSTICE.

Between

ATLANTIC SMOKE SHOPS LIMITED, an incorporated Company (Plaintiff) Appellant
and

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

30 UPON application made on behalf of the Attorney-General of Canada and upon hearing what was alleged by Counsel for the Attorney-General and Counsel for the Appellant and Respondents;

IT IS ORDERED that leave be granted to the Attorney-General of Canada to intervene in this appeal.

(Signed) L. P. DUFF,
C.J.C.

No. 19.

In the
Privy
Council.

Order in Council Granting Special Leave to Appeal to His Majesty
in Council.

No. 19.
Order in
Council
granting
Special
Leave to
Appeal to
His Majesty
in Council,
22nd May,
1942.

[L.S.]

AT THE COURT AT BUCKINGHAM PALACE.

The 22nd day of May, 1942.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

MR. BRACKEN

EARL OF SELBORNE

MR. EVATT

MR. SECRETARY ATTLEE

10

WHEREAS there was this day read at the Board a Report from the
Judicial Committee of the Privy Council dated the 18th day of May 1942
in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October 1909 there was
referred unto this Committee a humble Petition of Atlantic Smoke
Shops Limited in the matter of an Appeal from the Supreme Court
of Canada between the Petitioner Appellant and James H. Conlon
John McDonough and The Attorney-General of the Province of New
Brunswick Respondents and The Attorney-General of the Province
of Quebec and The Attorney-General of Canada Intervenants setting
forth (amongst other matters) that this is a Petition for special leave
to appeal from a Judgment of the Supreme Court of Canada rendered
on the 7th October 1941 dismissing by a majority an Appeal by the
Petitioner from a Judgment of the Supreme Court of New Brunswick
Appeal Division dated the 3rd December 1940 holding that sub-
stantially the whole of the Tobacco Tax Act of New Brunswick being
Chapter 44 of 4 Geo. VI. (thereinafter called ' the Tobacco Tax Act ')
and all the Regulations made thereunder are within the legislative
powers of the Province of New Brunswick ; that the case turns on a
question of great constitutional importance relating to provincial
powers of taxation : that the legislation at present in force in two
Provinces is directly involved and other Provinces may well be dis-
posed to legislate on similar lines : that by reason of its importance
and of the difference of judicial opinion between the seven Judges
of the Supreme Court the question must inevitably come at some
time before Your Majesty in Council to be finally settled and the
Petitioner submits that it is desirable that this should come about
at as early a date as is possible : that the Tobacco Tax Act in effect
provides for the levying on the occasion of every retail sale of tobacco
or cigarettes within the Province of an *ad valorem* tax on the sale

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price payable by the purchaser who is described in the Act as a 'Consumer' and it makes incidental provisions dealing with the application of the tax to tobacco brought into the Province from outside: that the question of its validity depends mainly but not wholly on the application of sub-head 2 of Section 92 of the British North America Act 1867 viz.: 'Direct taxation within the Province in order to the raising of a revenue for provincial purposes': that there was a remarkable division of opinion in the Supreme Court of Canada: that Sir Lyman Duff C.J. and Mr. Justice Davis were of opinion that the entire Act is *ultra vires* of the Province: that Mr. Justice Rinfret and Mr. Justice Crocket held the entire Act *intra vires*: that Mr. Justice Kerwin thought that those portions of the Act which provide for the taxation of tobacco brought into the Province from outside and also those portions which bring within the definition of 'Consumer' an agent purchasing tobacco for his principal are *ultra vires*: that Mr. Justice Hudson and Mr. Justice Taschereau thought that the Act is *intra vires* except as to the portion designed to include the agent as above mentioned: that the Petitioner is informed by the Attorney-General for Canada that he is desirous of supporting this Petition on the grounds that the case raises a question of great constitutional importance affecting the distribution of legislative powers between the Parliament of Canada and provincial legislatures and in particular the powers of taxation vested in provincial legislatures that it is at the same time of great practical importance as revenue is being raised under the Statute the validity of which is in question and that it is therefore desirable that the question should be finally determined with the least possible delay: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court of Canada of the 7th October 1941 or for such further or other Order as to Your Majesty in Council may appear fit.

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the Supreme Court of Canada dated the 7th day of October 1941 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs.

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents and Intervenants) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

In the
Privy
Council.

No. 19.
Order in
Council
granting
Special
Leave to
Appeal to
His Majesty
in Council,
22nd May,
1942—
continued.

In the
Privy
Council.

No. 19.

Order in
Council
granting
Special
Leave to
Appeal to
His Majesty
in Council,
22nd May,
1942—
continued.

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

RUPERT B. HOWORTH.

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.

RECORD OF PROCEEDINGS

DUNCAN MORRIS OPPENHEIM,
Westminster House,
7 Millbank, S.W.1,
Solicitor for the Appellant.

BLAKE & REDDEN,
17 Victoria Street, S.W.1,
Solicitors for the Respondents.

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street, E.C.2,
*Solicitors for the Intervenants (The Attorney-
General of the Province of Quebec.)*

CHARLES RUSSELL & CO.,
37 Norfolk Street, Strand, W.C.2,
*Solicitors for the Intervenants (The Attorney-
General of Canada.)*

21 May 1943 10th day continued

Minutes;

2.10.

Revs judgments in *Judo factum*

3.45

Burton v The King Revs 121, 122 *Pratt*

11th day May 24th 1943

11 am. D. H. Pratt (reply) agency

2.10 pm

Kirjama case

Reverability

3.30

LC most important case

31 July

Judgment - Viscount Simon

appeals fails. one of S. Ct varied

app to pay - Repts costs.

Pitt 10/5/25

Atka VII
L.C. IIII
Wright III
Mayhew IIII
Russell IIII
Stinky
Cross III

Days Pitt
1st 4 May 1943
2nd 6 "
3rd 10 "
4th 11 "

Gibson
4th 11 May
5th 13 "
6th 14 "
7th 17 "

Tucker
7th 17 May
8th 18 May
9th 20 May
10th 21 May

Mmchtm
10th 21 May

Pitt in reply
11th 24 May

11-1 } 4 hours
2-4 }
10-30-1 } 4 1/2 hours
2-4 }
11-1 } 4 hours
2-4 }
11-12.45 } 1 3/4 "

14 1/4 hours

12.45-1 } 1 1/4
11-1 } 4
2-4 } 2 1/2

10-30-1 } 3 hrs
~~2-4~~
11-1-30 } 9 3/4 hours

2-4 } 2 hours
10-30-1 } 2 1/2 "
11 am - 1.15 } 2 1/4 "

10-30-12.20 } 2 1/2 "
9 hours

12-20-1.30 } 1 hour
2.10 - 3.45 } 1 1/2 hours
2 1/2

11-1-30
2.10 - 3.30
C.A.V.

Allen Kame
Wright
Hans

Grand Totals 1925
Mantola & Co.

