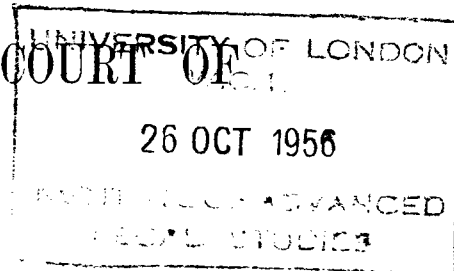


In the Privy Council.

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 PRO-  
VINCE OF QUEBEC and THE ATTORNEY-  
GENERAL OF CANADA .. .. .  
*Intervenants.*

## CASE FOR THE ATTORNEY-GENERAL OF CANADA.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada which by a majority declared that the Tobacco Tax Act of New Brunswick, being chapter 44 of the Statutes of New Brunswick, 1940, is within the constitutional powers of the province with the exception of the provisions thereof making the agent liable for the tax, and which dismissed an appeal from a judgment of the Supreme Court of New Brunswick (Appeal Division) which upon a special case had found the Act in its entirety to be within the constitutional powers of the Province.

Record.

p. 142.

pp. 6-17.

p. 143, l. 8.

p. 143, l. 6.

p. 26.

pp. 3-5.

2. The Act, which is printed in the Record, together with the regulations made pursuant thereto by the Lieutenant-Governor in Council, is entitled "An Act to provide for imposing a tax on the consumption of tobacco" and came into force on the 1st October, 1940. The provisions which are chiefly relevant may be summarised as follows:—

pp. 6-10.

pp. 10-17.

p. 4, l. 21.

(i) By sections 2 (a) and 2 (e) a consumer means a person who within the province purchases tobacco for consumption and not for resale from a

p. 6, l. 31;

p. 7, l. 4.

Record.  
p. 7, l. 17.

retailer vendor (who by section 3 (2) must be licensed under the Act) either for his own consumption or the consumption of others at his expense, or as agent for a principal who desires the tobacco for his own consumption or the consumption of others at his expense.

p. 7, l. 30.

(ii) By section 4 every consumer at the time of purchase must pay a tax of 10 per cent. of the retail price of the tobacco purchased.

p. 7, l. 35.

(iii) By section 5 an importer of tobacco who is resident or carrying on business in New Brunswick and who would be a consumer if instead of importing the tobacco he bought it in New Brunswick is required to report the matter and pay a tax of 10 per cent. on the price. 10

p. 8, l. 4;  
l. 16.

(iv) Section 7 prohibits a retail vendor from representing that the tax will be borne otherwise than by the consumer, and section 10 makes the consumer liable for the tax until it has been collected.

p. 8, l. 10.

(v) Sections 8 and 9 provide for the collection of tax according to regulations and for an allowance to vendors for their services in collecting the tax.

p. 9, l. 23.

(vi) By section 20 the Lieutenant-Governor in Council is empowered to make regulations for carrying out the Act including regulations requiring the affixing of stamps before or at delivery showing the tax has been paid and prohibiting the delivery of unstamped tobacco. 20

pp. 10-17.

**3.** The regulations made under the Act provided machinery for carrying the Act into effect. Among other provisions they require every application for a retail vendor's licence to contain an undertaking to collect and remit the tax (regulation 6), and charges for licences are prescribed (regulation 18). Regulation 19 constitutes every licensed retail vendor a government agent for collection and requires him to collect the tax at the time of purchase by a consumer, a commission of 3 per cent. being allowed by regulation 26.

p. 11, l. 17;

p. 16, l. 1.

p. 12, l. 21.

p. 12, l. 27.

p. 13, l. 12.

p. 4, l. 27-

p. 5, l. 20.

**4.** On and after the 15th October, 1940, the appellant company, without a licence, sold by retail to consumers at a shop in St. John tobacco manufactured in Canada outside New Brunswick without collecting the tax. Government officials, including the defendant John McDonough, on the instructions of the other defendants entered the shop and questioned customers under a claim of right. Accordingly the Appellant Company issued a writ on the 2nd November, 1940, claiming to restrain the Defendants from so interfering with the Appellant Company's business. The facts were then set out in a special case stated for the opinion of the Supreme Court of New Brunswick (Appeal Division) on the constitutionality of the Act. 30

pp. 1-3.

p. 3, l. 20.

**5.** The validity of the Act depends on the following provisions of the British North America Act :—

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 :— 40

2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial purposes.

Record.

\* \* \* \* \*

4. The Establishment and Tenure of Provincial offices and the Appointment and Payment of Provincial Officers.

\* \* \* \* \*

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

\* \* \* \* \*

13. Property and Civil Rights in the Province.

\* \* \* \* \*

16. Generally all Matters of a merely local or private Nature in the Province.

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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.

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.

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

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124. Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues ; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

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6. The Supreme Court of New Brunswick (Appeal Division) (Baxter C.J., Grimmer and Richards JJ.) by judgment dated the 3rd December, 1940, unanimously held the Act to be entirely valid. Baxter C.J., in whose reasons for judgment Grimmer and Richards JJ. concurred, summarised the material provisions of the Act and regulations and set out the grounds of objection to the validity of the Act. He rejected the arguments that the Act attempted by section 5 to impose a customs duty and that vendors could not be constituted agents for the collection of the tax without their consent. In his view the only real point was whether the taxation is direct or indirect. It is not a stamp tax, and a sales tax is not necessarily, in his opinion, indirect

p. 26.  
pp. 18-24.  
p. 25, l. 8 ;  
l. 27.  
p. 20, ll. 8-22.  
p. 20,  
ll. 23-39.  
p. 20, l. 40-  
p. 21, l. 6.  
p. 21, l. 7.  
p. 21,  
ll. 9-16.  
p. 20,  
ll. 17-27.

Record.  
p. 20, l. 28-  
p. 24, l. 16.

p. 24,  
ll. 17-32.

p. 24,  
ll. 33-44.

since transmissibility is the proper test. An examination of the authorities and an application of their principles to the Act shows that as the tax is imposed on the ultimate consumer it is a direct tax. The possible employment of an agent entitled to indemnity did not in his opinion make the tax indirect as there would be no sale by the agent to the principal. The tax is in the nature of an excise tax which is borne by the consumer and cannot be passed on, and is accordingly valid.

p. 26, l. 29.

p. 61, l. 25.  
pp. 70-75 ;  
64-70.

p. 75, l. 28.  
p. 90, l. 11.  
p. 90, l. 13-  
p. 101, l. 31.

7. The Appellant appealed to the Supreme Court of Canada and on the 1st February, 1941, the Attorney-General of Quebec was given leave to intervene. In Quebec there is a Tobacco Tax Act (4 George VI, chapter 15) 10 the validity of which was upheld by a judgment of the Superior Court at Montreal (Trahan J.) dated the 29th August, 1940, from which an appeal to the Court of King's Bench (Le Tourneau, St. Jacques, Francoeur, Walsh and Hall JJ.) was unanimously dismissed. There is a substantial similarity between the Quebec and the New Brunswick Acts.

p. 142.

pp. 107-113.

pp. 114-134.

pp. 134-135.

pp. 135-142.

8. The appeal was heard on the 18th, 19th and 20th February, 1941, and judgment was delivered on the 7th October, 1941. The Chief Justice of Canada and Davis J. thought the Act to be wholly invalid. Rinfret and Crocket JJ. thought the entire Act to be *intra vires* the provincial legisla- 20 ture. Kerwin J. considered section 5 and the attempt to impose personal liability on an agent to be *ultra vires*. Hudson and Taschereau JJ. held that the only invalid provisions were those making the agent liable for the tax. Accordingly in the result the appeal was dismissed and the Act was declared valid with the exception of these last provisions.

pp. 107-113.

p. 109, l. 34.

p. 109, l. 38-

p. 110, l. 11.

p. 110,

ll. 12-26.

p. 110, l. 29-

p. 112, l. 9.

9. The Chief Justice of Canada in his reasons for judgment in which Davis J. concurred examined the characteristics of the tax imposed by the Act and found the payment of the tax to be an integral element in the sale, passing from the purchaser to the vendor as part of the price. The sanction is the purchaser's inability to get his tobacco without paying the tax and, in the ordinary case, the tax is simply a predetermined fraction of the price. Section 30 5 imposed a tax on import which is a customs duty. The Chief Justice then considered whether section 4 and the provisions of the Act and regulations ancillary thereto could be justified as direct taxation within the province. The case of *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* (1934) A.C. 45 did not support such a contention for in that case there was a liability on the consumer as such whereas in the present case nothing in the statute gave the tax the character of a tax in respect of consumption except the declaration of the legislature and some collateral provisions. The Chief Justice thought that the tangible dividing line between direct and indirect taxation which the British North America Act contemplated 40 could not be shifted by declarations of the legislature. Returning to Section 5 the Chief Justice held the tax thereby imposed to be not only indirect but a tax governed by section 122 of the British North America Act. Moreover in his view the tax imposed by section 4 is an excise tax and indirect, and

p. 112,

ll. 10-23.

p. 112,

ll. 24-40.

p. 112, l. 40-

p. 113, l. 40.

section 5 not only comes within the ban of section 121 of the British North America Act but is also an enactment in relation to trade and commerce within the ambit of the Dominion's exclusive authority under section 91. Finally the provision making the tax payable by the purchaser's agent was invalid on the authority of *Attorney-General for Manitoba v. Attorney-General for Canada* (1925) A.C. 561. Accordingly the Chief Justice and Davis J. would have allowed the appeal.

Record.

p. 113,  
ll. 41-43.

10. In his reasons for judgment Rinfret J. set out the facts and the history of the proceedings and summarised the material provisions of the Act and regulations. The learned judge then stated the grounds upon which the Act was attacked, and proceeded to examine in detail the allegation that the tax was not a direct tax. The true nature of the tax, in his opinion, is a tax on consumption to be paid only by the consumer who cannot pass it on to someone else since the right of the consumer to resell is taken away. If the general tendency of the Act is considered and exceptional cases ignored the effect of the tax is confined to New Brunswick. From a practical point of view the taxing of an agent, so far as it is made a point against constitutionality is, in his opinion, almost negligible, as in almost every case the agent would have received his principal's money and the tax would be but a trifle; and the occurrence is not the "passing on" which is the characteristic of an indirect tax, as there is no enhancement of the cost. The learned judge was of opinion that even if, contrary to his view, the taxing of the agent was unconstitutional this feature of the Act is severable. Rinfret J. then turned to the argument that the tax was a duty of customs or excise. He did not think the tax a customs duty because the tax is not collected at the border of New Brunswick or before the tobacco is allowed to enter the province, and the only object of section 5 is to equalise the position between purchasers in the province and residents in the province who purchase outside of it. He also rejected the contention that section 121 of the British North America Act is infringed, as the tobacco enters freely into the province and the section only prevents the imposition of a tax or duty as a condition of admission. Even if section 5 was invalid Rinfret J. thought that it was obviously severable. Finally he considered and rejected the argument that the license required by the Act was not one authorised by section 92 of the British North America Act. Accordingly he held the Act to be wholly valid.

pp. 114-127.  
p. 118, l. 20-  
p. 120, l. 27.  
p. 120, l. 28-  
p. 121, l. 17.  
p. 121, l. 18-  
p. 122, l. 12.  
p. 122, l. 13-  
p. 123, l. 48.p. 124,  
ll. 1-13.p. 124,  
ll. 14-46.p. 125,  
ll. 1-7.p. 125,  
ll. 8-15.p. 125, l. 18-  
p. 126, l. 7.p. 126,  
ll. 8-29.

p. 126, l. 30.

p. 126, l. 33-  
p. 127, l. 12.

11. Crocket J. in his reasons for judgment agreed with Rinfret J. On the question whether the tax is a direct tax he thought that on the authorities the test is the practicability of the tax being passed on to other persons by resale and that possibility has been eliminated by the Act, for the relevant provisions impose the tax on the consumer in respect of his own consumption, and cannot reasonably be held to be a tax on any other person such as a servant or messenger making the purchase, for the money paid would, constructively at least, be the master's and the servant or agent is not compelled to pay the tax if the master or employer does not provide him with the money, for the Act prevents the servant or agent from re-selling to the master. Crocket J.

pp. 127-134.

p. 127, l. 29-  
p. 128, l. 13.p. 128, l. 14-  
p. 130, l. 26.

Record.  
p. 130, l. 27-  
p. 131, l. 6.

thought that the legislature in the most effectual way possible had indicated its intention that the tax should be demanded from the very persons intended to pay it and that was the essential characteristic of a direct tax unless the Act was a colourable arrangement to disguise indirect taxation, and he was not disposed so to regard it. The learned judge regarded the references to purchases by an agent in the definition of "consumer" as quite unnecessary, and severable. Section 5, in his view, was to prevent evasion by making anyone who buys tobacco outside the province and brings it into the province or receives delivery in the province for consumption as liable to the tax in respect of its consumption as if he had bought it at a retail store in the province; and if the main charging section is valid the subsidiary section preventing evasion must also be valid. The contention that the tax was a customs or excise duty had been disposed of, in the opinion of Crocket J., by the decision in the *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* (1934) A.C.45. He also held that section 5 did not infringe section 121 of the British North America Act as the Act neither prohibits nor obstructs as between vendor and purchaser the passage of any article from one province to another nor imposes any condition to the importation or admission of tobacco into New Brunswick, since the tax is not payable until after the tobacco has been brought into the province or there received for consumption. On the provisions for licenses he agreed with Rinfret J.

p. 131,  
ll. 7-20.  
p. 131,  
ll. 21-40.

p. 131, l. 41-  
p. 132, l. 9.

p. 132, l. 10-  
p. 134, l. 11.

p. 134,  
ll. 12-15.

pp. 134-135.

p. 134,  
ll. 34-38.

p. 134, l. 39-  
p. 135, l. 11.

**12.** In his reasons for judgment Kerwin J. held the tax to be direct because imposed on the very person who is intended to bear it, and imposed in respect of consumption and not sale. He considered the Act *ultra vires* as far as it attempted to impose the tax on an agent, though this part is clearly severable. Section 5, which he also thought severable, was in his opinion also *ultra vires* as infringing section 121 of the British North America Act, for the fact that entry into the province precedes taxing makes the tax none the less an impost upon the production or manufacture of another province or, if the tobacco is brought from a foreign country, a customs duty. The regulation of external trade involved could not be justified as ancillary to the main purpose of imposing direct taxation. With those two exceptions Kerwin J. held the Act to be valid.

p. 135,  
ll. 11-15.

p. 135,  
ll. 17-21.

**13.** Hudson J. agreed with Rinfret J.'s conclusions except that he thought the personal liability imposed on an agent oversteps the limits of provincial jurisdiction.

pp. 135-142.

p. 137, l. 20-  
p. 138, l. 25.

p. 138,  
ll. 26-44.  
p. 139, l. 1-  
p. 140, l. 7.

**14.** In his reasons for judgment Taschereau J. referred to the facts, to section 4 of the Act and the definition of "consumer" and to the distinction between direct and indirect taxes as shown by the authorities. The Act imposes a tax on the last purchaser of tobacco who is intended to pay it without passing it on. The tax is therefore, in the view of the learned judge, undoubtedly a direct tax, and also a tax within the province. As regards section 5 Taschereau J. held that the tax was not a customs duty nor an excise tax; for customs duties impose a condition on the admission of the commodity

before it reaches the consumer and the Act does not impose such a tax and so does not infringe section 121 of the British North America Act. The objection based on licenses was also, in his view, unsound because the province may require licenses as an incident of any of their legislative powers. The learned judge then considered the effect of taxing an agent and, after reviewing the authorities, held that as the agent was made personally liable but was obviously intended to indemnify himself, the taxation was indirect and *ultra vires*, although, being severable, these provisions do not affect the rest of the Act, which was *intra vires*.

Record.  
p. 140,  
ll. 8-16.

p. 140, l. 17-  
p. 142, l. 4.

10     **15.** The Attorney-General of Canada respectfully submits that the reasoning of the Chief Justice of Canada and Davis J. is to be preferred to that of the other judges in the Supreme Court of Canada and in the Supreme Court of New Brunswick, and that the Act is wholly invalid. Alternatively, the Attorney-General of Canada submits that section 5 is *ultra vires* of the Legislature of New Brunswick and that section 5 cannot be severed from the rest of the Act but is an essential part of the whole scheme of taxation. It cannot be assumed that the legislature would penalise the retail trade in tobacco in the province by imposing a 10 per cent. tax on every consumer buying tobacco from a retail vendor whereas if a consumer buys from a vendor outside the  
20 province no tax would be payable. Accordingly, it is submitted that even if the Act without section 5 and the provisions making an agent liable for the tax could be held (contrary to the contention of the Attorney-General of Canada) to be within provincial competence, the whole Act would fall with section 5. In any event it is submitted that the authorities show that the provisions which make an agent liable are invalid as imposing indirect taxation.

**16.** The Attorney-General of Canada accordingly respectfully submits that the appeal should be allowed and that the Tobacco Tax Act of New Brunswick should be declared to be in its entirety *ultra vires* of the Legislature of New Brunswick for the following amongst other

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## REASONS

1. Because the tax imposed by the Act is an indirect tax.
2. Because the Act imposes customs or excise duties.
3. Because section 5 infringes sections 121 and 122 of the British North America Act.
4. Because of the other reasons given by the Chief Justice of Canada.

FRANK GAHAN.

In the Privy Council.

No. 19 of 1942.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

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BETWEEN

ATLANTIC SMOKE SHOPS LIMITED (*Plaintiff*) *Appellant*,

AND

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

AND

THE ATTORNEY-GENERAL OF THE PRO-  
VINCE OF QUEBEC and THE ATTOR-  
NEY-GENERAL OF CANADA ... *Intervenants*.

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CASE FOR THE ATTORNEY-GENERAL  
OF CANADA.

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