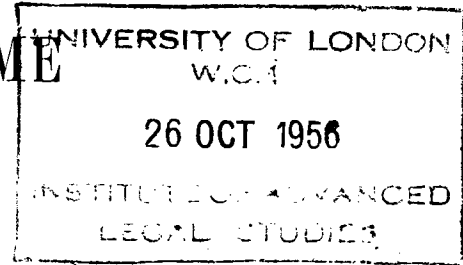


In the Privy Council.

No. 19 of 1942.

ON APPEAL FROM THE SUPREME COURT OF CANADA.



BETWEEN

ATLANTIC SMOKE SHOPS LIMITED (Plaintiff) APPELLANT

AND

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

AND

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

CASE FOR THE INTERVENANT

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC.

RECORD

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada, Rinfret, Crocket, Kerwin, Hudson and Taschereau, JJ., Sir Lyman P. Duff, C.J., and Davis, J., dissenting, dismissing an Appeal from a Judgment of the Appeal Division of the Supreme Court of New Brunswick, Baxter, C.J., Grimmer and Richards, JJ., which upon a special case submitted to the Court to determine the constitutionality of the New Brunswick Act, 4 George VI, 1940, Chapter 44, entitled: "An Act to provide for imposing a tax on the consumption of tobacco" held that Act to be constitutional and in consequence, as agreed in the stated case, dismissed the action. The Judgment of the Supreme Court of Canada declared the Act to be within the constitutional powers of the Province of New Brunswick with the exception of the provisions thereof making the agent liable for the tax.

p. 142

p. 3, l. 20

p. 6, et seq.

p. 26

p. 143, l. 8

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2.—This Statute provides, Section 4, that every consumer of tobacco purchased at a retail sale in the Province shall pay, at the time of making his purchase, a tax in respect of the consumption of such tobacco.

p. 7, l. 20

CASE FOR A.-G. QUEBEC

p. 7, l. 25

3.—Section 5 provides that every person residing or ordinarily resident or carrying on business in the Province, who brings into the Province or 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 report the matter to the Minister and pay the same tax.

p. 6, l. 30

4.—Section 2 (paragraph a) defines “ consumer ” as 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

p. 7, l. 5

5.—Section 2 (paragraph e) defines “ retail sale ” as a sale to a consumer for purposes of consumption and not for resale.

p. 7, l. 15

6.—Section 3 provides that no person shall sell tobacco in the Province for resale unless he holds a wholesale vendor's license and that no person shall sell tobacco in the Province at a retail sale unless he holds a retail vendor's license. 20

p. 8, l. 3

7.—Section 7 prohibits any retail vendor from advertising or holding out or stating to the public or to any consumer that the tax or any part thereof will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.

p. 8, l. 10

8.—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 regulations may prescribe.

p. 8, l. 18

9.—Section 10 provides that the consumer shall be and remain liable for the tax until it has been collected. 30

p. 9, l. 23

10.—Section 20 provides for the making of regulations by the Lieutenant-Governor in Council.

p. 9, l. 25

11.—Regulations were made under the authority of this Act.

p. 11, l. 7

12.—Regulation No. 6 provides that 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 Regulations.

13.—Regulation No. 19 provides that every licensed retail vendor is 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 the tobacco by the consumer. p. 12, l. 27

14.—Regulation No. 23 provides that a retail vendor shall account for and remit the amount of the tax collected to the tobacco tax commissioner within a certain delay. p. 12, l. 40

15.—Breach of these provisions involves a penalty and cancellation or suspension of the license. Regulation No. 31. p. 13, l. 35

10 16.—The Attorney-General for the Province of Quebec applied for and was granted leave to intervene before the Supreme Court of Canada to support the validity of the New Brunswick statute. p. 61, l. 25

17.—The reasons for this intervention were that the Legislature of the Province of Quebec had passed a Statute entitled "The Tobacco Tax Act," being Chapter 15 of the Statutes of 1940, 4 Geo. VI. p. 61, l. 27  
p. 64, l. 35

18.—The validity of that Statute was attacked before the Courts of that Province by a Petition for a Writ of Prohibition directed against proceedings for the recovery of penalties for the violation of the Act. p. 61, l. 30

20 19.—The Trial Judge and the Court of Appeals unanimously held the Act to be *intra vires*. p. 61, l. 34

20.—There could be no appeal in such a matter to the Supreme Court of Canada.

21.—The two Statutes are very much alike, the only practical difference being that much less emphasis is laid in the Quebec Statute on the agency aspect of the question, the agent being referred to only in the definition of the word "person" which, of course, was meant to apply to all cases whenever the word "person" was used in the Statute.

30 22.—Further, there were in force for quite a number of years in Quebec several Statutes adopted by the Legislature of that Province which bear a close analogy to the Statute under consideration in this Appeal.

23.—There is an Act imposing a tax on retail sales of almost every kind of moveable property payable by the purchaser where the vendor is made the agent of the Minister to collect the tax, Chapter 88 of the Revised Statutes of the Province, 1941.

24.—There is also a similar Statute imposing a tax on the retail sales of gasoline, Chapter 83 of the same Revised Statutes.

25.—This tax is also imposed on the purchaser from a retail dealer, and the latter is entrusted with the duty to collect.

26.—There is also a tax known as the Amusement Tax, Chapter 85 of the same Statutes, which compels those operating a theatre, a cinema, a football, hockey, base-ball, or other game and other amusements, to which the public is admitted on payment, to collect for the Government a certain sum on each ticket sold.

27.—There is finally a tax known as the Hospital Tax levied in the same manner on meals sold in hotels and restaurants.

28.—The larger municipal corporations, including Montreal and Quebec, 10 under the authority of the Provincial Legislature, also collect sales taxes similar to those provided for by Chapter 88 of the Revised Statutes of Quebec, 1941, mentioned above.

p. 20, l. 22

29.—In New Brunswick, Baxter, C.J., held that Section 5 of the Act did not purport to impose a customs duty on the importation into the Province of tobacco, but imposed only a tax on the consumer once it had entered the Province; that the Province could impose on retail vendors, as a condition of their obtaining a license to carry on that business, the duty to collect and account for the tax; that this was direct taxation, as it was imposed on the consumer who could not pass it on and could not 20 resell without a license; that making the agent of the consumer liable to the tax did not make that tax an indirect one.

p. 18, l. 1

30.—Richards, J., concurred.

p. 25

31.—Grimmer, J., also concurred, stating that the tax was not in relation to a commercial transaction in a commodity and could not be passed on and was demanded from the very person who it was intended should pay it. It was not therefore indirect.

p. 114

p. 122, l. 40

p. 123, l. 5

32.—In the Supreme Court of Canada, Rinfret, J., held that the Statute was so framed that the Legislature indicated its intention that the person on whom the tax was imposed would bear it himself; that the general 30 tendency of the legislation alone must be considered, and exceptional cases must be ignored. He held that the agents' liability was an almost negligible feature; that in practically almost every case the tax would be insignificant and the purchaser would give to his messenger the necessary amount; that the cases where the messenger would advance the money would be extremely rare, and it was doubtful if that would be passing on the tax; that this would be a very slim reason for declaring a Statute unconstitutional, but that at all events this proviso was severable from the rest of the Act.

p. 124, l. 1

p. 124, l. 27

- 33.—As to Section 5, he held that this was not a Customs duty within the meaning of that word as generally understood ; that the tax was not collected until after the tobacco had entered the Province and had come into the possession of the consumer ; that this Section 5 was of no other purpose but to maintain equality between purchases in the Province, and purchases outside by persons in the Province ; it might be styled legislation incidental to the Tobacco Tax Act ; that there was no violation of Section 121 of the British North America Act as the Act did not prevent tobacco from entering freely into the Province ; that this Section 121 was only aimed at the prohibition of customs duties between the Provinces ; that this Section 5 was also severable ; that the proviso under Section 3 requiring a license for the vendors was within the power of the Provincial Legislature.
- 34.—Crockett, J., agreed with Rinfret, J. His reasoning is practically similar, though expressed somewhat differently.
- 35.—Kerwin, J., agreed that this tax is a direct tax. He, however, held the Statute unconstitutional and *ultra vires* in two respects which he said are severable, imposition of the tax on the agent, he held to be indirect taxation and Section 5 infringed according to his view Section 121 of the British North America Act.
- 36.—Hudson, J., agreed with Rinfret, J., except as to the personal liability imposed on an agent which he thought *ultra vires*.
- 37.—Taschereau, J., held the tax to be direct, as it could not be passed on. He held Section 5 not to impose a Customs duty ; and that the tax was due only after the goods had entered the Province. He held that Section 3, requiring a license from the vendors was not *ultra vires*, but he held that the proviso making the agent personally responsible, constituted indirect taxation but was severable.
- 38.—Duff, C.J., with whom Davis, J., concurred; held that the payment of the tax was not only a condition of the legal purchase, but was 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 ; that the real security to the Government for the payment of the tax was the vendor's responsibility ; that this was a tax in respect of a commercial dealing between the retail vendor and the purchaser ; that the tax was not payable by the consumer as such ; that it was payable by the purchaser or the agent of the purchaser, and the Statute itself contemplated that neither of them might be the consumer ; that the payment of the tax and the delivery of the receipt took place as acts in the transaction of sale and purchase, the matter of consumption never coming into question.

p. 125, l. 38

p. 126, l. 8,  
et seq.

p. 127, l. 20

p. 134, l. 20

p. 135, l. 17

p. 137, ll. 20-30

p. 137, l. 41

p. 139, l. 23

p. 140, l. 8

p. 141, l. 37

p. 107, l. 30

p. 109, l. 17

p. 109, l. 35

p. 109, l. 38

p. 110, l. 8

p. 111, l. 32

p. 111, l. 38

p. 112, l. 23  
p. 112, l. 28  
p. 112, l. 40  
p. 113, l. 28  
p. 113, l. 38

39.—As to Section 5, he held, that this imposed a duty in respect of imports ; that it was a tax within Section 122 of the British North America Act ; that the tax imposed by Section 4 was an excise duty ; that the tax imposed by Section 5 came within the ban of Section 121 of the British North America Act ; that further, it was an enactment in Regulations of Trade and Commerce within the ambit of the exclusive authority in relation to that subject, vested in the Dominion by Section 91 of the same Act.

40.—The Attorney-General for the Province of Quebec submits that the Judgment of the Supreme Court of Canada should be affirmed and, further, that the Act should be declared valid even as respects the provisions 10 concerning the agents for, among other reasons, the following

### REASONS.

- (1) Because the tax is a direct tax on the consumer ;
- (2) Because whether it is payable before or after consumption is immaterial ;
- (3) Because every possible precaution is taken by the Statute to prevent any one but the consumer having to pay it ;
- (4) Because every possible precaution is taken by the Statute to prevent the tax being passed on to others ;
- (5) Because it is very difficult if not impossible to pass this tax 20 on to others ;
- (6) Because that and that alone is a true test of the distinction between a direct and indirect tax ;
- (7) Because exceptional cases where the person who has paid the tax might be able to pass it on, if there are any, are irrelevant ;
- (8) Because there is no objection from a constitutional point of view to the vendor being made the collector of the tax and made liable to a penalty if he does not collect it ;
- (9) Because the provisions requiring licenses from vendors are 30 valid ;
- (10) Because making the agent, who will never be more than a messenger and who practically always is provided in advance with the money, liable for the tax does not make of that tax an indirect one, even in the cases where the messenger will freely advance the funds to pay the tax ;
- (11) Because at all events this proviso is severable from the rest of the Act ;

- (12) Because Section 5 of the Act does not levy a Customs duty nor is it imposed in connection with the importation of tobacco in the Province, but is levied from the consumer once he is in possession for purposes of consumption.
- (13) For the other reasons given in the Courts below.

(Sgd.) AIMÉ GEOFFRION,  
,, WALTER MONCKTON,  
,, ROSARIO GENEST.

*Of Counsel for the Intervenant the Attorney-  
General of the Province of Quebec.*

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