1941

LOWER MAINLAND DAIRY PRODUCTS BOARD, MILK CLEARING HOUSE LIMITED, W. E. WILLIAMS AND E. D. BARROW (DEFENDANTS) ..... APPELLANTS;

* May 28, 29, 30.
* Oct. 7.

AND

ACTON KILBY (DEFENDANT)

AND

TURNER'S DAIRY LIMITED AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Natural Products Marketing (B.C.) Act—Order in council—"Scheme" to regulate marketing of milk—Constitution of Lower Mainland Dairy Products Board—Milk Clearing House Limited incorporated as a company to act as sole "agency"—Orders of Board—Providing for equalization of return to milk producers—Validity of orders—Obnoxious or exceeding delegated powers—Indirect taxation—Extrinsic evidence to prove intent or effect of orders—Admissibility—Natural Products Marketing (B.C.) Act, R.S.B.C., 1936, c. 165.

Under the provisions of the *Natural Products Marketing (B.C.) Act*, R.S.B.C., 1936, c. 165 the Lieutenant-Governor in Council passed an order in council creating a "scheme" to regulate the dairy business within a specified territory in British Columbia and constituted the appellant Board to administer the scheme, the appellants Williams and Barrow and the defendant Kilby being appointed as its members. The appellant The Milk Clearing House Limited was incorporated and an order of the Board designated that company as the sole "agency" through which the milk produced in that area was to be marketed. The appellant Board also passed other orders for the purpose of carrying out the scheme. Milk producers were prohibited from selling their milk otherwise than to this agency and the latter was given the exclusive right to sell milk to dairies and manufacturers. The Milk Clearing House was receiving the total receipts from the sale of the milk, and these receipts, less expenses, were divided amongst the producers at a certain period, called the settlement period: the amounts thus paid being based on a system of "quotas." A certain fixed percentage of the milk purchased by the Milk Clearing House from each producer was treated as having been sold in the "fluid-milk market" and the remainder was treated as having been sold in the lower-priced "manufactured-milk market," quite irrespective of where each producer's milk had actually been sold and without regard to the quantity of milk sold by each individual producer on the "fluid-milk" market: the amount being thus

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

paid to the producers on the basis of an equalized price. The trial judge held that the orders were *ultra vires* and his judgment was affirmed by the appellate court.

Held, affirming the judgment appealed from (56 B.C.R. 103), that the impugned orders of the appellant Board cannot stand, as they go beyond the limits of the powers granted to the Board by the Act.

Per the Chief Justice and Davis and Hudson JJ.:—There was sufficient evidence, (and it was so found by the trial judge whose findings were approved by a majority of the Court of Appeal) to support the view that the purpose and effect of the impugned orders was to enable the appellant Board, in co-operation with its agent the Milk Clearing House, to equalize prices as between producers who have a market for their milk in the more advantageous fluid milk market and producers whose milk is not sold in the fluid milk market but must be sold in the manufacturers market at a lower price; and to accomplish this by abstracting from the proceeds of the sales of the former class in the fluid milk market a sufficient part of the returns from the sale of their milk to enable the Board, by handing that part over to the other producers, to bring the several rates of return for the two classes into a state of equality. Such an administrative body as the appellant Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down; it is under a strict duty to use its powers in good faith for the purposes for which they are given. (*The Municipal Council of Sydney* v. *Campbell* ([1925] A.C. 338) and *Campbell* v. *Village of Lanark* (20 O.A.R. 372)). The impugned orders are obnoxious to this principle in the purpose disclosed by the orders themselves and the evidence adduced to accomplish indirectly what the King in Council has adjudged they cannot lawfully do directly, namely, by exacting monetary contributions from milk producers by a method constituting indirect taxation. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* ([1933] A.C. 168, at 176).

Per Rinfret, Crocket and Taschereau JJ.—The orders formulated by the appellant Board go beyond the authority granted by the Act, and the appeal could be dismissed on the ground that the Board has exceeded its delegated powers. But these orders could also be declared illegal on the further ground that the Board has attempted to do something upon which the legislature itself could not legislate and this is to impose indirect taxation. There is no substantial difference between the consequences that flow from the impugned orders and the results obtained under the *Dairy Products Sales Adjustment Act* of 1929, which had been declared *ultra vires* the province. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* ([1933] A.C. 168).

Held, also, that the extrinsic evidence given at the trial to show the intent and effect of the orders was admissible.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, D. A. McDonald J. (2) and maintaining the respondent's action.

The action was for a declaration that certain orders of the appellant Board were *ultra vires* and not binding on the respondents, who are milk producers, for an injunction restraining the Board from taking steps to compel the respondents to comply with the provisions of these orders; for an injunction restraining the appellant Milk Clearing House Limited from acting as the designated agency pursuant to these orders; for a declaration that the milk marketing scheme of the Lower Mainland of British Columbia, established by order in council, was *ultra vires* and for an injunction restraining the appellant Board from exercising any of the powers purporting to have been invested in it by that scheme. By the *Natural Products Marketing (B.C.) Act,* the Lieutenant-Governor in Council was empowered to establish marketing boards and to inaugurate schemes for the regulation of marketing of natural products in the province. The appellant Board was so constituted with extensive powers as set out in the scheme. Under the powers so conferred, the Board enacted the orders attacked in this action in August, 1939. On the trial, it was held that the orders complained of were *ultra vires* the appellant Board and the respondents were granted the relief sought. This judgment was affirmed by a majority of the Court of Appeal for British Columbia.

C. H. Locke K.C. for the appellants.

J. W. deB. Farris K.C. and *John Farris* for the respondents.

The judgment of the Chief Justice and of Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE—The learned trial judge in his reasons for judgment says:—

> The gravamen of the plaintiffs' complaint in the present action is that in order to escape the results of the decision in the *Crystal Dairy* case (1) the defendant Board adopted a colourable scheme whereby to make it appear that milk was actually being sold by the producers to

(1) 56 B.C.R. 103; [1941] W.W.R. 342; [1941] 2 D.L.R. 279.
(2) [1940] 3 W.W.R. 42; [1941] 2 D.L.R. 279, at 280.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

Duff C.J.

the defendant Milk Clearing House Limited and resold by the Clearing House to the distributors at prices fixed by the Board whereas there was in fact intended to be no sale at all. The contention is that the Clearing House was intended to operate as a mere conduit pipe, an instrument whereby the price to be paid to producers of milk should be equalized so that in effect the proceeds of milk produced by producer A should in certain proportions be taken from him and handed over to producer B, as had been in effect the practice under the earlier scheme.

The plaintiffs are met *in limine* with the objection that, admitting that the statute is *intra vires* and the scheme set up by the Lieutenant-Governor in Council under the statute is *intra vires* and the orders issued by the Board are plain on their face, it is not open to the courts to make any enquiry as to the motives which actuated the members of the Board in passing the orders which are now attacked.

* * *

The members of the Board who passed these orders knew that the agency theretofore existing would be attacked as being merely an agency formed for the purpose of equalizing prices and, hence, subject to being impugned under the decision in the *Crystal Dairy* case (1). With a view to escaping from that attack the Board was instrumental in having the defendant Milk Clearing House Limited incorporated under the *Companies Act*. It is pretended that it was so incorporated as an ordinary commercial concern whose object is to buy in the cheapest market and sell in the dearest market and in the ordinary course of trade to make a profit for its shareholders. I think the more one examines the evidence the more he must become convinced that this is a mere sham. I do not believe it was ever intended that the Clearing House should make any profit and if there were any doubt on this one needs only to examine the evidence of Mr. Sherwood, one of the directors of the company.

If, as I think, the real purpose and effect of the impugned orders are, as alleged in paragraph 25 of the statement of claim, "to take from the producer supplying the fluid market a portion of his real returns and to contribute the same to other producers for the purpose of equalization (and that) the so-called sales and resales to and by the agency so-called are colourable," then I am satisfied the orders cannot stand.

The learned trial judge's findings were approved by the majority of the Court of Appeal.

There was sufficient evidence to support the view that the purpose and effect of the impugned orders was to enable the Board, in co-operation with its agent the Clearing House, to equalize prices as between producers who have a market for their milk in the more advantageous fluid milk market and producers whose milk is not sold in the fluid milk market but must be sold in the manufacturers market at a lower price; and to accomplish this by abstracting from the proceeds of the sales of the former class in the fluid milk market a sufficient part of the returns from

(1) [1933] A.C. 168.

the sale of their milk to enable the Board, by handing that part over to the other producers, to bring the several rates of return for the two classes into a state of equality.

Mr. Locke, in his able argument, did not succeed in convincing me that the Board is entitled to employ its powers respecting marketing and the regulation of prices to do what it has attempted.

Such an administrative body as the Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down; it is under a strict duty to use its powers in good faith for the purposes for which they are given. The application of this principle is illustrated in the judgments in the House of Lords in *The Municipal Council of Sydney* v. *Campbell* (1), and in *Campbell* v. *Village of Lanark* (2). The impugned orders are obnoxious to this principle in the purpose disclosed by the orders themselves and the evidence adduced to accomplish indirectly what the King in Council has adjudged they cannot lawfully do directly, namely, by exacting monetary contributions from milk producers by a method constituting indirect taxation. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* (3).

In view of some of the arguments advanced in the factums and elsewhere I think it is wise perhaps to call attention to the wide difference between a provincial legislature which exercises powers of legislation in the strict sense, the Crown being a party to its enactments, and an administrative body exercising powers of administration under statutory authority, such as the appellant Board.

The appeal will be dismissed with costs.

The judgment of Rinfret, Crocket and Taschereau JJ. was delivered by

TASCHEREAU J.—In their statement of claim, the plaintiffs-respondents attack the validity of Orders nos. 10, 12, 13, 14 and 15 formulated by the Lower Mainland Dairy Products Board, which has been established under the

(1) [1925] A.C. 338.
(2) (1893) O.A.R. 372.
(3) [1933] A.C. 168, at 176.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

Taschereau J.

authority of the *Natural Products Marketing Act* (Ch. 165, R.S.B.C., 1936), and submit that they are *ultra vires* of the Board. They also ask that the scheme created by Order in Council be declared illegal, and pray for an injunction restraining all the defendants from exercising any of the powers purported to have been invested in them.

Mr. Justice D. A. McDonald of the Supreme Court of British Columbia declared that Orders 11, 12, 13, 14 and 15 were *ultra vires,* ordered that the defendant Milk Clearing House Limited be restrained from acting as the agency pursuant to these Orders, and that the Board, and its members Williams and Barrow be also restrained from taking any steps to compel the plaintiffs to comply with the provisions of the Orders. The court further held that the action against the defendant Kilby, one of the members of the Board, and the claim of the plaintiffs for a declaration that the Milk Marketing scheme is *ultra vires,* should be dismissed. The defendants appealed from this judgment, and the plaintiffs cross-appealed claiming that the judgment should be varied by declaring that the Milk Marketing scheme is *ultra vires.* The Court of Appeal for British Columbia (Chief Justice MacDonald dissenting) dismissed the main appeal and the cross-appeal with costs. As there has been no cross-appeal here, this Court is concerned only with the validity of the Orders, and the injunction restraining the Board, the Milk Clearing House and the defendants Williams and Barrow, from taking any steps or proceedings to compel the plaintiffs to comply with the Orders.

The plaintiffs, except W. A. Hayward and Charles Hawthorne who produce milk for sale, are engaged in distributing milk and cream, and in carrying on a general dairy business in the cities of Vancouver and of New Westminster. In that region of the province of British Columbia there are two different markets for milk. One is called the Fluid Milk Market, where the milk is used in fluid form, and the second is known as the Manufacturers Market, where the milk is used for the manufacture of ice-cream, butter, condensed milk, etc. There is an excess of milk produced in that area over the requirements of the Fluid Milk Market, and some dairy farmers, therefore, in order to avoid a congestion of the Fluid Milk

Market, are necessarily obliged to market a portion of their milk in the form of manufactured products at world market prices, which are lower than the price obtained for milk in fluid form. A group of farmers called the Independent Farmers have sold in the past much more of their milk proportionally on the Fluid Market than another group of farmers of the Fraser Valley Milk Producers Association. This situation has existed for many years, and in order to meet the demand of the farmers the Legislature passed in 1929 the *Dairy Products Sales Adjustment Act,* which required all dairy farmers and distributors to make returns to the Committee of Adjustments of all milk sold and bought and the prices paid. This Committee has power to ascertain the price during each month of milk sold on both markets, and had also the power to spread the difference between the two sums, so that each dairy farmer would receive a uniform price for his milk per pound butterfat, regardless of the market in which the commodity was sold. The farmer receiving more than the ascertained equalized price was required to pay to the Committee an amount sufficient to reduce his return to the equalized price, and the Committee would then pay from the sum so received an amount sufficient to bring up to the same level the prices received by the vendors in the Manufacturers' Market.

This legislation was submitted to the Supreme Court of British Columbia (1), and Mr. Justice Murphy before whom the case was tried, found that this adjustment by the Committee constituted a tax on one farmer and a bonus to the other. He also came to the conclusion that this tax, and the levy collected to pay certain expenses was indirect taxation, not within the legislative competence of the Province. This judgment was upheld by the Court of Appeal of British Columbia (2) and also by the Judicial Committee of the Privy Council (*Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* (3).

In view of this decision of the Privy Council declaring the Act of 1929 *ultra vires,* the Legislature of British Columbia enacted in 1934 (amended in 1936) the *Natural*

(1) (1931) 44 B.C.R. 508. (2) (1932) 45 B.C.R. 191.
(3) [1933] A.C. 168.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

Taschereau J.

Products Marketing British Columbia Act. This law purported to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the province; and marketing was defined as buying and selling, for sale or storage; and natural products included any product of agriculture, or of the forest, sea, lake, or river and any article of food or drink wholly or partly manufactured or derived from any such product. This definition clearly included milk.

Under paragraph 2 of section 4 of the Act, the Lieutenant-Governor in Council was empowered to establish, amend and revoke schemes for the control and regulation within the province of any natural products, and was also authorized to constitute marketing boards to administer such schemes. The validity of this legislation was again contested before the courts, and in 1938 the Judicial Committee (1) held that this legislation was *intra vires* and, consequently, the impugned statute was held to be within the legislative powers of the province of British Columbia.

On the 31st of March, 1939, an Order in Council was passed providing a scheme to regulate the transportation and marketing of milk and certain milk products in the Lower Mainland of the province of British Columbia. As a consequence of this Order in Council, the Lower Mainland Dairy Products Board was established and the three defendants Messrs. Williams, Barrow and Kilby were appointed members of that Board. The defendant the Lower Mainland Dairy Products Board passed certain Orders nos. 1 to 9. Later, Orders 3, 4, 5, 6, 7, 8 and 9 were repealed, and Orders nos. 11, 12, 13, 14 and 15 were passed and, in one of these Orders, one of the defendants the Milk Clearing House Limited, a company incorporated under the laws of British Columbia, was appointed sole agency through which all the milk produced in the Lower Mainland area is to be marketed. Although a certain price to be paid to the farmers per pound butterfat has been determined by the Board, the payment is to be made only after going through quite complicated proceedings. All dairy farmers in the area are prohibited from selling their milk to any one but a single agency which is the appellant,

(1) *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708.

the Milk Clearing House Limited, and which is also given sole power to sell to dairies and manufacturers. The Milk Clearing House Limited receives the total receipts from the sale of the milk, and at a certain period, which is called the settlement period, divides amongst the producers these receipts less expenses. This payment to the producers, however, is not made in the usual way, but each farmer has a base, which is the quantity of butterfat determined from the average daily weight and butterfat test of eligible milk marketed in cans by a producer, during the first three and last three calendar months of the previous calendar year, and during which period the producer has been a consistent marketer of eligible milk in cans. The dairy farmer then receives an amount for his fluid milk determined by his base in proportion to the total bases. This is called his *quota*. Quota in other words is

> the percentage of a producer's base as all milk marketed by the Clearing House for the Fluid Milk Market in cans during such settlement period is of the total of all bases for milk marketed in cans.

If a farmer has a base of 1,000 pounds and if the total bases are 100,000 pounds, and if the total sales by the agent amount only to 50,000 pounds butterfat of fluid milk, which is 50 per cent of the milk available, then this farmer will be paid only for 50 per cent of what he sold, which is 500 pounds. This 50 per cent or 500 pounds is the quota of this farmer. Assuming now that, only 400 pounds of another producer's milk, who has also a base of 1,000 pounds, has been sold on the Fluid Market, he would nevertheless on account of his base and quota be paid for 500 pounds. For the amount of milk sold in excess to the Clearing House, these dairy farmers receive the manufacturers' price which is substantially lower. Under the Act of 1929 which was declared *ultra vires* of the British Columbia Legislature in the *Crystal* case (1), equalization was obtained by allowing the farmer to receive the full amount of the price of his commodity, and compelling him to pay to the Board such portion as would reduce his balance to the equalized price. The amount paid by the farmer was declared to be an indirect tax, and, therefore, *ultra vires*.

Under the new scheme the proceeds of the sale are kept by the agent but the amount that the farmer vendor is to

(1) [1933] A.C. 168.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

Taschereau J.

receive is determined only at the end of the month when the returns of the dairies are in. From that total amount which the agent receives, each month the expenses incurred are deducted and the balance is paid to the farmers on the basis of an equalized price, and without regard to the quantity of milk sold by each individual farmer on the Fluid Market.

It seems plain that the orders go beyond the authority granted by the Act and that the appeal could be dismissed on the ground that the Board has exceeded its delegated powers. But, it has gone a step further in the field of illegality, and has attempted to do something upon which the legislature itself could not legislate, and this is to impose indirect taxation. For I fail to see any substantial difference between the results obtained under the Act of 1929, and the consequences that flow from the impugned orders.

In the *Crystal* case (1) the farmer had to reimburse a portion of what he had received for the benefit of another one, and under the new scheme, a part of the money to which he is entitled is intercepted and paid to one of his less fortunate competitors. Both schemes have indeed the same object which is to effect equalization by two different methods in form, but similar in substance. As in the *Crystal* case (1), the amount of which the farmer is deprived is a tax. These adjustments are compulsorily imposed by a statutory committee which is a public authority, are enforceable by law and imposed for public purposes. I do not think that this Clearing House which has been created alters the situation which arose under the Act of 1929, in any substantial manner. It came to life for the sole purpose of evading the legal consequences of the judgment of the Judicial Committee in the *Crystal* case (1), and of doing indirectly all that has been declared *ultra vires*. As Lord Thankerton said in the *Crystal Dairy* case (1):—

> The substantive provision of the Act is to transfer compulsorily a portion of the returns obtained by the traders in the Fluid Milk Market to the traders in the Manufactured Products Market * * * In the opinion of their Lordships the adjustment levies are taxes * * * it seems to follow that the expense levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes.

(1) [1933] A.C. 168.

The orders of the Board are also levies imposed on the farmers to obtain revenues, and to equalize the returns of the farmers by giving to some of them out of the receipts more than they should get, and to some others less than what they are entitled to, and for the reasons given by Mr. Justice O'Halloran of the Court of Appeal of British Columbia, and with whom I agree, I believe that this tax is indirect, and, therefore, invalid. Under the orders, the farmers for the fluid milk receive from the Clearing House 56 cents per pound butterfat, and the dealers pay 60 cents to the same Clearing House. These prices are substantially higher than the prices paid before, and it seems clear that the tendency will be to pass that increase on to the ultimate consumer, thus bringing the tax within the well known principles that make it indirect, and therefore invalid.

The appellants have also submitted that some evidence given to show the intent and effect of the orders was improperly admitted. I agree with the majority of the Court of Appeal, that the evidence was admissible and that the objection cannot stand. In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers. The Privy Council took similar views in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), and Lord Maugham delivering judgment for the Judicial Committee said:—

(*Re* Object or Intent.)

> A closely similar matter may also call for consideration, namely, the *object* or *purpose* of the act in question. It is not competent either for the Dominion or a province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other. Here again matters of which the Court would take judicial notice must be borne in mind and *other evidence* in a case which calls for it.

(1) [1939] A.C. 130.

1941

LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL. v. TURNER'S DAIRY LIMITED ET AL.

Taschereau J.

(*Re* Effect.)

The next step in a case of difficulty will be to examine the *effect* of the legislation. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice and may in a proper case require to be *informed by evidence* as to what the effect of the legislation will be.

I believe that this is the law that should govern this case. It applies to the interpretation of federal and provincial statutes, and I cannot see why the courts should withhold its application to orders of a board which is an emanation of a body subject to this rule.

The appeal should be dismissed, but with a slight variation in the formal judgment. In their statement of claim the respondents asked that Orders 10, 12, 13, 14 and 15 be declared *ultra vires*. The Supreme Court of British Columbia and the Court of Appeal declared *ultra vires* Orders nos. 11, 12, 13, 14 and 15. Order no. 10 which is the order repealing previous orders should stand as decided by the courts below, but Order no. 11 has obviously been set aside by mistake. It provides for the licensing of producers, dairies, producer vendors, etc., and the Act authorizes the fixing and collection of licence fees which are within the powers of the Legislature.

The respondents will be entitled to their costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Williams, Manson & Rae.*

Solicitors for the respondents: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*