HIS MAJESTY THE KING.....PLAINTIFF;

AND

NATIONAL FISH COMPANY, LTD.....DEFENDANT.

1931

Feb. 12.
March 2.
March. 9.

Crown—Statutes—Regulations—Interpretation—Delegated Powers—Scope —Order in Council—Taxation—Licence fee—Prohibition—Discrimination.

Section 69A of The Fisheries Act, as amended by 19-20 Geo. V, ch. 42, provided, among other things:—

That, under licence from the Minister a vessel registered as a British ship in Canada and owned by "a Canadian or a Canadian Company with its principal place of business in Canada," is allowed to use an "otter" or other similar trawl.

Moreover under this Statute, Rules and Regulations might be made by Order in Council, and the same were made providing that such licence could be granted only to "Canadian built" vessels and that after April, 1932, none but such would be eligible for licence, and further providing that after April 1, 1930, a licence fee of one cent a pound on the fish caught should be payable. This fee in the case of defendant would amount to between $130,000 to $150,000 a year.

Held that as the Regulations ignore the statutory limitation to British ships registered in Canada or owned by a Canadian, etc., and fix as the condition upon which the licence would issue that such ships be Canadian built, and such condition being obviously beyond the scope of the Act, and the delegated powers, such Regulations are ultra vires, unenforcible, null and void.

2. That Parliament had full and plenary powers to legislate both in respect of the provisions contained in the Act and in the Regulations, even if the result were prohibitive, oppressive or discriminative, and the only remedy is an appeal to those by whom the legislators are elected, but that statutory regulations made by the delegated power differ from the Statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with the condition precedent and if they are reasonable.

3. That such Regulations cannot of their own inherent power control or originate matters of taxation.

4. That delegated authority of this kind must be exercised strictly in accordance with the power creating it, and in the spirit of the enabling Statute.

The distinction between a licence charge and a business tax discussed.

1931

THE KING v. NATIONAL FISH CO. LTD.

Audette J.

INFORMATION by the Attorney-General of Canada seeking to recover the sum of $21,422.61 from the defendant, as representing the amount due under the Regulations aforesaid and being one cent per pound on fish caught.

The action was tried before the Honourable Mr. Justice Audette at Ottawa.

Hector McInnes, K.C., and *N. R. McArthur, K.C.*, for plaintiff.

N. W. Rowell, K.C., and *C. B. Smith, K.C.*, for defendant.

McINNES, K.C., argued that the act in question permitted the making of Regulations and that the Regulations as made were intra vires, proper, and that moreover the Court had no jurisdiction to pass upon their validity. He further argued that whether the effect of such Regulations was to make fishing thereunder practically prohibitive and whether the same was oppressive or discriminative was not a matter for the Court to deal with. That regulations made under a statute have the force of statute; and he cited: *Institute of Patent Agents* v. *Lockwood* (1894) A.C. 347; *The King* v. *Minister of Health* (1930) 2 K.B. 98; *In re Gray* (1918) 57 S.C.R. 150; *Fisheries Case* (1898) A.C. 700 at p. 713; *Pigeon* v. *Recorder of Montreal* (1889) 17 S.C.R. 495 at p. 503; *Youngblood* v. *Sexton* 32 Mich. Rep. 406 at p. 418.

N. W. ROWELL, K.C., argued that the right to fish on the seas was a matter of common law right. That Parliament by the Act in question only authorized the making of Regulations and the issuing of licences to that end and did not impose a tax nor delegate the authority to do so. That the power to licence and to fix the conditions upon which such licence may issue does not imply the power to charge a fee therefor nor to impose a tax, that such Regulations must be strictly within the power delegated by Statute. That the Regulations made by Order in Council are ultra vires because they do not strictly regulate but in effect actually prohibit; because they are in conflict with the Tariff Act; because the charge of one cent per pound is one made upon the business and not a condition precedent to issuing the licence and was a tax and not a

fee; because the Regulations are broader and go beyond the provisions of the Act and legislate upon matters not authorized by the same.

C. B. SMITH, K.C., argued upon the facts that the amount claimed as a licence fee would have the effect to prohibit and was oppressive and discriminative.

Mr. Rowell, K.C., cited: *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1914) A.C. 153; Cooley, 4th Ed., vol. 1, pp. 94 and 108; Maxwell, 7th Ed., p. 245; *Attorney-General of Canada* v. *Attorney-General of British Columbia* (1930) A.C. 111; *City of Toronto* v. *Virgo* (1896) A.C. 88; *Ross* v. *Township of E. Nissouri* 1 O.L.R. 353; *Waterford* v. *Murphy* (1920) 2 Ir. Rep. 165; *Booth* v. *The King* 51 S.C.R. 20; *Belanger* v. *The King,* 54 S.C.R. 265; *Jonas* v. *Gilbert* 5 S.C.R. 356; Hals. vol. 27, p. 181; *Talbot* v. *Peterborough* 12 O.L.R. 358; *Reg.* v. *Pharmaceutical Soc.* (1899) 2 Ir. Rep. 132; *Rex* v. *Morris & Stimmel* (1923) 4 D.L.R. 955; *Rowland* v. *Collingwood* (1908) 16 O.L.R. 272; *Foster* v. *Raleigh* 22 O.L.R. 26; *Adler* v. *Whitbeck* (1866) 44 Ohio Rep. 539.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (March 9, 1931), delivered the following judgment.

This is an Information exhibited by the Attorney-General of Canada whereby it is sought to recover, from the defendant, the sum of $21,422.61, for the months of April, May and June, 1930, representing the licence fee or tax alleged to be payable under a licence allowing the defendant to fish with a vessel using an "otter" or other trawl of a similar nature. The whole under the provisions of section 69A of The Fisheries Act (R.S.C., 1927, ch. 73) as amended by 19-20 Geo. V, ch. 42, and the regulations made thereunder.

To facilitate an understanding of the present controversy, it is thought advisable to recite the language of the above mentioned section of the Act and of the Regulations.

Section 69 of The Fisheries Act was amended by section 7 of ch. 42 of 19-20 Geo. V, by inserting section 69A immediately after section 69 thereof, and reads as follows, viz:

69A. (1) Every person shall be guilty of an offence, and shall incur therefor a penalty of not less than one hundred dollars and not more than

1931

THE KING v. NATIONAL FISH CO. LTD.

Audette J.

two thousand dollars, recoverable with costs upon summary conviction, who at any time, except under licence from the Minister,—

(a) with intent to fish or to cause any other person to fish with a vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea, leaves or departs from any port or place in Canada for the purpose of such fishing; or

(b) knowingly brings into Canada any fish taken or caught in the sea beyond the territorial waters of Canada with any vessel that uses an "otter" or other trawl of a similar nature, or any vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea beyond the territorial waters of Canada, if the leaving or departure from Canada of such vessel constituted an offence under this section, and moreover the fish or vessel so brought in shall be confiscated to His Majesty for violation of this Act, in the manner provided by section eighty-two of this Act.

(2) No such vessel shall carry on fishing operations from or to any Canadian port or ports, unless such vessel is registered as a British ship in Canada and is owned by a Canadian or by a body corporate incorporated under the laws of the Dominion of Canada or of one of the Provinces thereof, and having its principal place of business in Canada.

(3) No such vessel shall carry on fishing operations from or to any Canadian port or ports, unless it restricts its fishing operations to waters that are at least twelve miles distant from the nearest shore on the Atlantic sea-coast of Canada. The proof that such fishing operations are so restricted shall at all times lie on the Captain of the vessel: Provided that this subsection shall not apply to small draggers operated by inshore fishermen if exempted from the provisions of this subsection by special permit which the Minister is hereby authorized to issue for that purpose.

(4) The Minister may determine the number of such vessels that shall be eligible to be licensed.

(5) Regulations may be made under the provisions of section forty-six of this Act,—

(a) prescribing the form of licence;

(b) specifying the evidence to be submitted with an application for a licence;

(c) fixing the conditions under which a licence shall be issued;

(d) making any other provisions respecting licences. * * *

The Regulations made by the Governor in Council, under the provisions of section 69A and section 46 of The Fisheries Act, read as follows:

P.C. 2196

CERTIFIED to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 30th October, 1929.

The Committee of the Privy Council have had before them a report, dated 29th October, 1929, from the Minister of Marine and Fisheries, stating that, with a view to obtaining as complete information as possible as to the conditions under which fishing vessels using otter or other trawls of a similar nature should be permitted to engage in the fishing industry from Canadian Atlantic ports, he visited the various sections of such coast that are most directly affected by such method of fishing. He

also discussed the matter at a conference with the larger producers of fish on such coast.

The Minister, in the light of his investigations, and with the advice of the Deputy Minister of Fisheries, recommends, under the authority of section 69A of the Fisheries Act, which section was established by 19-20, George V, Chapter 42, that a licence to any fishing vessel which uses an otter or other trawl of a similar nature, will not be granted except under the following conditions:—

1. That such vessel was built in Canada and is now operating under temporary licence or was built in Canada subsequent to November 1, 1929.

Provided, however, that existing fishing vessels, other than Canadian built, which use otter or other trawls of a similar nature, and in respect of which temporary licences are now in force, shall be eligible for licence but only during the period ending April 1, 1932.

2. On and after April 1, 1930, a licence fee at the rate of one cent per pound, shall be payable by the owner or operator of any such fishing vessel that was not built in Canada, and, at the rate of two-thirds of a cent per pound, shall be payable by the owner or operator of any such fishing vessel that was built in Canada, under regulations approved by the Minister of Marine and Fisheries, on all cod, haddock and halibut that are caught and landed on the Atlantic coast of Canada by any such fishing vessel. In determining the weights of such fish, in the case of cod and haddock, such shall be done with the heads on, but with the entrails removed, and in the case of halibut, with the heads off and with the entrails removed; provided that no licence fee shall be payable on fish caught and landed during the months of January, February and March in each year, nor on scrod,—that is, fish with the heads on, but with the entrails removed, that weigh less than two and one-half pounds each.

The Committee concur in the foregoing recommendation and submit the same for approval.

These Regulations were amended, on the 7th January, 1930, by a further Order in Council reading as follows:

P.C. 39

AT THE GOVERNMENT HOUSE AT OTTAWA

Tuesday, the 7th day of January, 1930.

PRESENT:

HIS EXCELLENCY THE ADMINISTRATOR IN COUNCIL

WHEREAS the Minister of Marine and Fisheries reports that the regulations adopted by Order in Council of October 30, 1929, (P.C. 2196) in connection with the licensing of fishing vessels using otter or other trawls of a similar nature, apply to small draggers operated by inshore fishermen as well, and the Minister of Marine and Fisheries states that this was not intended;

THEREFORE His Excellency the Administrator in Council, on the recommendation of the Minister of Marine and Fisheries and under the authority of the Fisheries Act, is pleased to amend the said regulations and they are hereby amended by adding thereto the following:

3. The provisions of sections 1 and 2 shall not apply to small draggers operated by inshore fishermen, for which draggers special licences may be issued by the Minister of Marine and Fisheries without the payment

1931

THE KING
v.
NATIONAL FISH CO. LTD.

Audette J.

of a fee; provided that after April 1, 1932, any such dragger that was not Canadian built shall not be eligible for a licence.

The defendant, among other things, avers, by its statement in defence, as follows:

7. As to the whole of the information herein the Defendant says that the said Order in Council P.C. 2196, of the 30th October, 1929, is ultra vires the Governor in Council for the following reasons, viz:—

(*a*) Because the Governor in Council had no power or authority to prescribe the conditions set out in the said Order in Council.

(*b*) Because Section 69A (2) of the Fisheries Act as amended by Ch. 42 of the Statutes of Canada, 1929, provides for the licensing of British ships registered in Canada owned by a Canadian or a body corporate incorporated under the laws of the Dominion of Canada or one of the Provinces thereof, and having its principal place of business in Canada; and the Governor in Council had no power or authority to impose as a condition of the granting of a licence that such vessel be built in Canada or that existing fishing vessels other than Canadian built which use otter or other trawls of a similar nature in respect of which temporary licences were then in force, should be eligible for licence only during the period ending April 1, 1932.

(*c*) Because the so-called licence fee prescribed by the said Order in Council is not a licence fee, but is a tax or duty levied on the owners or operators of such vessels in respect of fish caught and landed on the Atlantic coast of Canada by them, and the Governor in Council had no power or authority to levy such tax or duty.

(*d*) Because under section 12 of the Customs Tariff Act, R.S.C. (1927), Ch. 44, fish caught by fishermen in Canadian fishing vessels is admitted into Canada free of duty and the Governor in Council had no power or authority under the Fisheries Act to impose a tax or duty thereon.

(*e*) Because the said Order in Council is not a regulation of the business of fishing with vessels using an otter or other trawl of a similar nature, but by reason of the amount of the so-called licence fee is a prohibition of such business, and the Governor in Council had no power or authority to prohibit such business.

(*f*) Because the said alleged licence fee is so large in proportion to the value of the fish upon which it is imposed that it exceeds any amount that Parliament could reasonably have contemplated being imposed by way of licence fee.

(*g*) Because the so-called licence fee is an imposition which in its very nature is discriminatory and bears unequally on individuals and corporations engaged in the business of fishing, and there is no statutory authorization to the Governor in Council to impose any such discriminatory licence fee or tax.

Before approaching the question of the amplitude of the power conferred upon the Governor in Council under the above mentioned Act, it is well to state that the Parliament of Canada has undoubtedly full and plenary power to legislate both in respect of the provisions contained in the Act and in the Regulations, even if in the result the tax or fee imposed were excessive, prohibitive, oppressive or discriminative. The suggestion made in this case that

the regulations are oppressive and prohibitive is not one that would induce a Court of law to inquire into the power of Parliament to authorize the making of such regulations, or to place any limitation upon the ability of Parliament to tax either oppressively or benignantly. The supreme legislative power of Parliament in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it were, the only remedy is an appeal to those by whom the legislature is elected. *The Fisheries Case* (1), *Attorney-General (Canada)* v. *Attorney-General for Quebec,* et al.

However, it is quite otherwise in the case of a delegated power.

Statutory regulations differ from Statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with the condition precedent and if they are reasonable (2). The Regulation cannot of its own inherent power control or originate matters of taxation. Such an extreme step would be contrary to the whole scheme and spirit of the B.N.A. Act.

The tendency of modern legislation is to lay down general principles and to avoid going into administrative details. And it is within the competency of Parliament to delegate its authority for the making of Rules and Regulations.

Delegated authority of this kind must be exercised *strictly* in accordance with the power creating it and in the spirit of the enabling Statute, and regulations which have fulfilled all the conditions precedent to their validity have the force of Statute (3).

But the validity of Regulations made by the executive or administrative departments of State depends on the due observation of the conditions imposed by the Statute as to their making, contents and publication; and if the statutory conditions are not complied with the Court will treat the Regulations as invalid. Craies on Statute Law, 3rd Edition, p. 261.

The proper method of construction is to read the original Act and its amendments together with the Regulations, and in this way any excess of power assumed by the body

(1) (1898) A.C. 700, at p. 713. (2) 27 Hals. 122.
(3) 27 Hals. 123.

1931

THE KING v. NATIONAL FISH CO. LTD.

Audette J.

entrusted with the duty of making such Regulations would be revealed. They cannot enlarge or abridge the scope or substance of their delegated power. Such Regulations must be strictly construed. The Regulations must be so construed as to reserve to Parliament the initial power of taxation.

Parliament has entrusted to the Governor in Council the authority to make Regulations under section 69A of the Act; but it does not follow from that specific authority that it can endow with its own capacity a new legislative power not created by the Act to which it owes its existence. In re: *The Initiation and Referendum* (1).

In construing section 69A of the Statute one must be governed by the well known rule that, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. If the text were ambiguous, recourse must be had to the contents and scheme of the Act.

The Governor in Council can only make Regulations within the limited sphere and authority of the subject and area of the Act, with the object of carrying the statutory enactment into operation and effect, but not beyond the scope of such enactments.

The Regulations must not conflict with the specific enactments of the Statute and cannot operate as an amendment to the same. They can only provide for something to be done consistent with the requirements of the Statute. The Act supplies the governing rule and the Regulation is subordinate to it. One may even go so far as to say that the Regulations are subject to an implied proviso that nothing in them shall be considered to sanction a departure from the Statute.

Having set out the mode or method of construing these Regulations, we now come to the consideration of the wording of both the Act and the Regulation in question.

Section 69A prohibits fishing with otter or trawl without a licence, but allows it with a "licence from the Minister." By subsection 2 of this section 69A it is enacted as a condition precedent that no vessel shall carry on such fishing operations, unless she is "*registered* as a *British ship in Canada* and is *owned by a Canadian* or by a body

(1) (1919) A.C. 935 at 945.

corporate, incorporated, etc." These are the statutory requirements for any vessel to obtain a licence from the Minister.

Yet the Regulations (Ex. No. 1) ignoring this statutory limitation to a British ship registered in Canada or owned by a Canadian, etc., fix and settle the condition of the licence on the *basis* of a *Canadian built ship or not*. This is obviously beyond the scope of the Act and the delegated power. The introduction of this condition of "Canadian built" is in absolute derogation to the Statute, which is quite silent in that respect and which has clearly stated and limited the conditions for allowing vessels to operate to those which are registered as a British ship in Canada. The Statute is a tyrant, it must be strictly adhered to. The Regulations must flow from the Statute.

The Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament.

In construing provisions imposing a duty, strict attention must be paid to the actual words used by the legislature. Reading the words of the Act in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, it must be found that there is therein nothing to show that Parliament intended to deal with *ships built in or out* of Canada. Therefore, since Regulations are resting on this basic subject-matter, it must be found that they are dealing with a matter clearly inconsistent with the declared intention of Parliament.

The Regulations go still a deal further, because they provide that after the 1st April, 1932, only Canadian built vessels will be eligible for licence to fish with otter or trawl. This is also clearly *ultra vires* of the Governor in Council under the circumstances of the case.

This last provision is absolutely in conflict with the Statute; it almost abolishes trawling. A Statute cannot be evaded by doing indirectly that which it forbids to do directly, what you cannot do directly you cannot do indirectly. This last provision is a clear act of trespass on the Act. The author of this Regulation, labouring under the misconception of the true meaning of section 69A, overstepped the mandate by making Regulations beyond the

1931

THE KING v. NATIONAL FISH CO. LTD.

Audette J.

scope of the Statute and the delegated power. These Regulations are an ineffectual display of authority and jurisdiction,—a *brutum fulmen.*

Therefore, it is ordered and adjudged that these Regulations do not fulfil the conditions precedent to their validity, that they are beyond the delegated power given by the Act, and they are unenforcible, null and void.

Having so found it may however be mentioned that by certain sections of the Fisheries Act it is provided that a licence must be obtained from the Minister before fishing and in all such cases a fixed sum, as a licence fee, is determined by the Act.

The real distinction between a licence charge and a business tax is that the non-payment of a licence charge normally renders the exercise of the business illegal, while the non-payment of a business tax does not. More broadly, it may be stated that a licence charge is a condition precedent, while a business tax is a condition (if a condition at all) subsequent. A licence charge, however, may be either a licence fee or a licence tax. When the licence is imposed to cover the *cost of regulation* or to meet the outlay incurred for some improvement of special advantage to the business, it may truly be said that the licensee gets a special benefit from the privilege, a special benefit measured by the cost. The charge would then be a fee. When, however, the charge for the licence is to *carry on a business,* which before the imposition of the restrictive law was open to any one, is purposely so high as to bring in a distinct *net revenue* to the Government above the cost of regulation, we can no longer properly speak of special benefits to the licensee, since the special benefit is converted into a special burden; the charge is then no longer a licence fee, but a licence tax.

In the present case the payment is not conditioned upon taking out the licence, but the Regulations impose the licence tax upon the business. The condition is not precedent but subsequent. *Cf. E. Seligman, Essays in Taxation,* 10th Edition, pp. 410, 411.

It would appear that the Regulations in this case have entirely ignored the spirit of the Act which when licences are required, fixes the fee in a lump sum and no tax imposed upon the business. Notwithstanding that the Act

makes trawling permissive, whether the Regulations impose such a heavy business tax upon trawling as to make it burdensome and practically prohibitive—because in this case the evidence discloses that the defendant would have to bear a yearly tax of between $130,000 to $150,000 which it cannot—is perhaps a question worthy of mention in the interests of trade and industry, but which need not be answered in the view I have taken of the case.

There are a number of other important questions raised both at trial and by the statement in defence which would also militate in favour of the defendant; but having found upon the grounds above stated that the Regulations are *ab initio* null and void and *ultra vires*, it becomes unnecessary to pass upon these several other questions so raised.

There will be judgment dismissing the action with costs.

Judgment accordingly.