R. v. Wakabayashi

Between
Rex, and Wakabayashi
And between
Rex, and Lore Yip

[1928] B.C.J. No. 6

39 B.C.R. 310

British Columbia Supreme Court
Vancouver, British Columbia

Macdonald J.
(In Chambers)

Heard: January 5, 1928.
Judgment: January 10, 1928.

Counsel:

Wood, and Wismer, for the defendants.
J.A. Russell, and Nicholson, for the Crown.

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1 **MACDONALD J.**:-- Ichizo Wakabayashi pleaded guilty to unlawfully selling cocaine and morphine, without first obtaining a licence from the minister "contrary to the provisions of section 4(f) of The Opium and Narcotic Drug Act, 1923, as amended by Sec. 3 of Cap. 20 of the Statutes of Canada, 1925." He was sentenced to a term of three years' imprisonment.

2 Lore Yip (alias Londe Fong) was convicted of a similar offence, under said section of the Act and was sentenced to a like imprisonment.

3 Both these persons seek, through habeas corpus proceedings, to test the validity of their imprisonment.

4 Shortly stated, the basis of their applications is, that the said Opium and Narcotic Drug Act with its amendments, creating a crime and due punishment, is ultra vires of the Dominion Parliament and thus cannot support punishment thereunder.

5 When one considers, for a moment, that the traffic covered by such Act, in narcotics and improper use of opium and drugs, constitutes one of the greatest evils of modern times, and legislative [39 BCR Page311] efforts have been made in all civilized countries to control, and, if possible, destroy this evil, the importance of these applications becomes apparent. In fact, the matter has been considered so important from the world's standpoint, that it was dealt with by the League of Na-

tions. It is conceded, on behalf of the applicants, that the Dominion Parliament might, under its power, to make laws, "for the peace, order and good government of Canada" enact criminal legislation, and declare that the sale or distribution of drugs, as defined by the Act, should be a crime and subject an offender to punishment. It is, however, contended that the framework of The Opium and Narcotic Drug Act is such, that it cannot be properly construed as an Act of the Dominion Parliament, of that nature. That its terms, as to licensing, shew an infringement of Provincial rights and not criminal legislation. In this connection, the history of the legislation upon the subject is instructive. The discussion which took place in Parliament cannot be used to explain the meaning of legislation, but in the construction of a later Act, the earlier one may be utilized, to throw a light upon the Act then being considered. It sometimes furnishes a legislative interpretation of the earlier one. See Maxwell on Statutes, 6th Ed., p. 51.

6 In 1908, a short Act was passed by the Dominion Parliament (7-8 Edw. VII., Cap. 50) "to prohibit the importation, manufacture and sale of opium for other than medicinal purposes." This Act simply referred to "opium" and rendered persons violating its provisions guilty of an indictable offence and liable to imprisonment. This legislation remained in force until 1917, when it was repealed by a more extensive Act (2 Geo. V., Cap. 17) with a wider scope. It was, however, prohibitive and not of a licensing nature, and so termed, though extended in its operation. This Act was amended in 1920-1921. Then in 1923, the Act at present in force (13-14 Geo. V., Cap. 22) was passed and was still designated as intended "to prohibit the improper use of opium and other drugs." It has been subsequently amended, apparently with a view of more adequately coping with the evil, sought to be destroyed and imposing more severe punishment. It is worthy of note that the title to these Acts is prohibitory in its terms and not permissive, in the sense [39 BCR Page312] of licensing persons for a particular purpose: It is now settled law that the title of the statute is an important part of the Act: Lindley, M.R. in Fielding v. Morley Corporation (1899), 1 Ch. 1 at p. 3.

> "The title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act":

see Lord Macnaghten in Fenton v. Thorley & Co., Limited (1903), A.C. 443 at p. 447.

7 The Act in question has not heretofore, been the subject of attack on the ground of invalidity. Numerous convictions have occurred and imprisonments been imposed for violation of its provisions. Notwithstanding this situation and the consequences which would result from declaring the Act ultra vires, I should in considering the matter, bear in mind a portion of the judgment of Viscount Haldane in Toronto Electric Commissioners v. Snider (1925), A.C. 396 at pp. 400-1, viz.:

> "It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of its terms that has now been established by a series of authorities."

8 Still the burden is cast upon the applicants of satisfying the Court, as to the invalidity of the statute. Selwyn, L.J. in Smith's Case (1869), 4 Chy. App. 611 at p. 614 said:

> "It is not the duty of a Court of Law or of Equity to be astute to find out ways in which the object of an Act of the Legislature may be defeated."

9 While The Opium and Narcotic Drug Act is not ambiguous in its terms, the rules, for construing an obscure enactment, are of assistance in determining the nature and effect of such legislation. These rules, as laid down in Heydon's Case (1584), 3 Co. Rep. 8 are referred to in Craies on Statute Law, 3rd Ed., at p. 91 as having been firmly established and continually cited with approval and acted upon. They are as follows:

> "'That for the sure and true interpretation of all statutes in general ... four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the [39 BCR Page313] commonwealth. (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and pro private commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico.'"

10 Fletcher Moulton, L.J. in Macmillan & Co. v. Dent (1907), 1 Ch. 107 at p. 120, said:

> "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act - not only the common law, but the law as it then stood under previous statutes - in order properly to interpret the statute in question."

11 It is, and must be contended by the applicants, in order to succeed, that the Act in question was not intended nor does it provide a remedy for a "mischief" and "defect" nor "cure a disease of the commonwealth" by creating a statutory crime with adequate punishment, but is an attempt to licence a traffic and then incorporate criminal provisions as ancillary to a system of licensing those who dealt in certain drugs. It is submitted that this should be the proper construction of the Act.

12 The applicants, in this respect, seek to obtain their main support from the result of a submission to the Privy Council, as to the validity of the Dominion Liquor Licence Act (1883, 46 Vict., Cap. 30) commonly known, as the "McCarthy Act." While the reasons for the judgment are not available, still the conclusion reached and the grounds therefor are referred to in subsequent cases. Duff, J. in Attorney General for Ontario v. Reciprocal Insurers (1924), A.C. 328 at p. 341, after referring to the fact that the preamble to such Act recited, that it is desirable to regulate the traffic in the sale of intoxicating liquors and expedient that provision should be made in regard thereto "for the better preservation of peace and order" said:

> "The statute provided for a licensing system, and prohibited, among other things, the sale of liquor by unlicensed persons, and imposed penalties by way of fine and imprisonment, including, as the penalty for a second or subsequent offence,

> imprisonment at hard labour in the common jail. In the course of the argument the view was advanced that the statute could be regarded as an exercise of the jurisdiction of the Dominion in relation to the criminal law; nevertheless the statute was held to be ultra vires as a whole."

13 Viscount Haldane in Toronto Electric Commissioners v. Snider, supra, at p. 411, in this connection said:

> "The McCarthy Act, already referred to, which was decided to have been [39 BCR Page314] ultra vires of the Dominion Parliament, was dealt with in the end of 1885."

14 Compare Attorney General of Canada v. Attorney General of Alberta (1916), 1 A.C. 596.

15 Russell v. The Queen (1882), 7 App. Cas. 829 decided that, what is commonly known as the "Scott Act" was within the competence of Dominion legislation. It was submitted as an authority in support of the Act in question, but the effect of the decision, as lending assistance is questioned and the following citation of the judgment of Viscount Haldane in Toronto Electric Commissioners v. Snider, supra, at p. 412 is pertinent:

> "It appears to their Lordships that it is not now open to them to treat Russell v. The Queen (1882), 7 App. Cas. 829 as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless that is so, if the subject-matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency."

16 Then does a comparison of the McCarthy Act, so termed, with The Opium and Narcotic Drug Act, afford the assistance contended for by the applicants? Such Act was undoubtedly, intended to regulate and license the liquor traffic throughout Canada and not to prohibit such traffic. All its punitive provisions were along these lines and to render such licensing system more perfect and feasible.

17 Can The Opium and Narcotic Drug Act originating, as it did, as a prohibitory Act and supplemented by further enactments be now, also considered as Dominion legislation for the purpose of licensing a traffic in the use of drugs and invading the civil rights of the Province?

18 I should, in coming to a determination on this point, apply the rules in Heydon's Case and subsequent decisions along similar lines. Portions of the judgment in Attorney General for Ontario v. Reciprocal Insurers, supra, at pp. 342-3 are also of assistance, viz.:

> "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Pro-

> vincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." [39 BCR Page315]
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> "Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways."

19 In an earlier judgment in In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919 (1922), 1 A.C. 191 at pp. 198-9 it was pointed out, that the Dominion had exclusive power to create new crimes

> "where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence."

20 And the judgment then concluded (p. 199):

> "It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

21 Then in Ouimet v. Bazin (1912), 46 S.C.R. 502, an Act respecting the observance of Sunday passed by the Legislature of the Province of Quebec, was considered. It was decided that, upon a proper construction of such legislation, treated as a whole, it purported to create offences against criminal law and was thus not within the legislative competence of the Provincial Legislature under the B.N.A. Act, and invalid. The Chief Justice, in his judgment, after regretting that he had to come to the conclusion that the particular section in question was not a "local, municipal or police regulation" but legislation designated to promote public order, safety and morals" then stated as follows (p. 505):

> "It must be accepted as settled that 'criminal law' in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament, subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the 'enumerative heads' of section 92 of the British North America Act, 1887."

He then considered that the effect of the judgment of the Privy Council in Attorney General for Ontario v. Hamilton Street Railway (1903), A.C. 524 [39 BCR Page316] was that the phrase "criminal law" in section 91 of the B.N.A. Act was free from ambiguity and that, "construed by its plain and

ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say with offences against society rather than against the private citizen." Reference might be made at length, on this point, to the judgment in Russell v. The Queen (1882), 7 App. Cas. 829 but it will suffice to cite a portion at p. 839, as follows:

> "Laws of this nature [Canadian Temperance Act] designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights."

22 Then the validity of an Ontario Act, as to its being criminal legislation or otherwise, was considered in Regina v. Wason (1889), 17 O.R. 58; (1890), 17 A.R. 221. While all the judges agreed, that the case turned "upon the true character and nature of the legislation" they came to diametrically opposite conclusions in the Divisional Court, but in the Court of Appeal unanimously adopted the view taken by Street, J. as to the Act being valid. As to the question there requiring decision some extracts from the judgments are apposite:

> "Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheesemakers and their patrons, with punishments imposed for the protection of the former?":

Street, J., 17 O.R. 64.

> "If this be an Act merely to create offences in the interest of public morality, it may be argued that it is trenching on the forbidden ground of 'Criminal Law.' If it be, as I think it is, an Act to regulate the business carried on at these cheese factories, . . . I consider it to be within the powers given by the constitution to the Provincial Legislature":

Hagarty, C.J.O., 17 A.R. 231.

> "The regulation of their dealings between the persons supplying milk, and the persons to whom it is supplied, was not only the primary object, but the sole object of the Legislature":

Burton J.A., 17 A.R. 236.

> "The Act . . . is to be regarded as one, the primary object of which is not the creation of new offences generally and the prevention of dishonesty among all classes in relation to the kind of dealings mentioned therein, but the regulation of the contracts and dealings between the parties in a particular business or transaction. It is, I consider, designed more for the protection of civil rights than the promotion of public morals or the prevention of public wrongs":

Osler J.A., 17 A.R. pp. 241-2. [39 BCR Page317]

23 The principle of this case was recognized and adopted by the Supreme Court of Nova Scotia in The Queen v. Halifax Electric Tramway Co. (1898), 30 N.S.R. 469. Graham, E.J. in referring to a

Provincial Act forbidding labour on the Lord's Day, submitted the following query as affecting the validity of the Act. Is it aimed at a public wrong or is it a "shall not" in respect of civil rights? He then applied the language of the Privy Council already referred to.

24 The same point arose for decision in Attorney General for Ontario v. Reciprocal Insurers, supra. See p. 337 as follows:

> "The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the 'true nature and character' of the enactment: Citizens' Insurance Co. v. Parsons (1881), 7 App. Cas. 96; its 'pith and substance': Union Colliery Co. v. Bryden (1899), A.C. 580; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject-matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinized in its entirety': Great West Saddlery Co. v. The King (1921), 2 A.C. 91, 117."

25 The judgment of the Privy Council, as to the invalidity of the McCarthy Act was delivered in 1885, long prior to the Dominion legislation, now the subject of attack. Lord Blackburn in Young & Co. v. Mayor, &c., of Royal Leamington Spa (1883), 8 App. Cas. 517, 526 said that the Courts

> "ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law."

26 This assumption appears more weighty, when one considers that the judgment, with reference to the McCarthy Act, and its invalidity, on the ground that it licensed the liquor traffic throughout Canada, must have been a much discussed matter at the time and would presumably be in the mind of the members of Parliament when the prohibitory provisions, as to sale of drugs was extended, so as to provide for licensing a class who were allowed to sell under certain conditions. It was necessary to make such provision as the drugs mentioned in the Act were beneficial if properly administered.

27 When I view the "mischief" sought to be remedied and the manner in which this was to be accomplished, the state of the [39 BCR Page318] law, as it existed prior to the Act of 1923 and the nature of the remedy thus applied, I have no hesitation in holding, that the Act in question is criminal and not licensing legislation. The primary object was to create a crime and afford punishment for its infraction. The licensing provisions were necessary but did not affect the validity of the legislation. It was within the competence of the Dominion Parliament and did not invade the jurisdiction allotted to the Province by the B.N.A. Act.

28 While such legislation constituted a new crime, it was remedial, in order, if possible, to destroy an existing evil. It was for the promotion of "public order, safety and morals" and was enacted by Parliament for the public good. While not in doubt, as to the validity of the Act, I might add that it was entitled, under section 15 of the Interpretation Act, to receive such

> "fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit."

29 Both applications for release are refused and there will be orders accordingly.

Applications dismissed.