

ATLANTIC SMOKE SHOPS LIMITED }
(PLAINTIFF) } APPELLANT;

AND

JAMES H. CONLON, JOHN McDON- }
OUGH AND THE ATTORNEY - }
GENERAL FOR NEW BRUNSWICK } RESPONDENTS;
(DEFENDANTS) }

AND

THE ATTORNEY - GENERAL FOR }
QUEBEC } INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,
APPEAL DIVISION

Constitutional law—Tobacco Tax Act (N.B.)—Whether intra vires the province—Direct or indirect taxation within province—Whether tax equivalent to customs duty—Regulation of trade and commerce—Personal liability of agent for the tax—Tobacco Tax Act, 1940, (N.B.) 4 Geo. VI., c. 44, ss. 2 (a) (d) (e), 3 (2) (3), 4, 5, 7, 8, 10, 20 (2)—B.N.A. Act, ss. 91 (2), 92 (2), 121, 122.

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

1941
* Feb.
18, 19, 20.
* Oct. 7.

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.

The *Tobacco Tax Act*, 1940 (N.B.), c. 44, provides, *inter alia*, that "every consumer of tobacco purchased at a retail sale in the province shall pay to" the province "for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco" (section 4); and the Act also provides that "every person residing or ordinarily resident or carrying on business in" the province "who brings into the province or who 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 pay the same tax in respect of the consumption of such tobacco" (section 5). Section 10 provides that "a consumer shall be and remain liable for the tax imposed by the Act until the same has been collected." Under section 2 (a) "consumer" means not only any person who within the Province purchases tobacco for his own consumption, but also any other person who purchases tobacco in the Province as agent for his principal who desires to acquire such tobacco for consumption by such principal. It was also enacted (section 3 (2)) that only retail vendors licensed under the Act may sell tobacco at a retail sale in the province. Regulations made under the Act by Orders in Council were declared to have the force of statute (section 20 (2)). Regulation 6 provides that "every application for a (retail) vendor's license * * * shall contain an undertaking by the applicant to collect and remit the tax * * * and shall be in Form 2"; and when signing that Form, the applicant undertakes "to act as the agent of the Minister for the collection of the tax * * * and to account to the province * * * for all moneys so collected."

Held, by a majority of the Court, that the Act is within the constitutional powers of the province, except as to the provisions making the agent, who buys tobacco for his principal personally liable for the tax, which provisions are severable.

The Chief Justice and Mr. Justice Davis were of the opinion that the entire Act was *ultra vires* the province.

Mr Justice Rinfret and Mr. Justice Crocket were of the opinion that the entire Act was *intra vires* the province.

Mr. Justice Kerwin was of the opinion that section 5 and also the provisions making the agent personally liable for the tax were *ultra vires* the province.

Mr. Justice Hudson and Mr. Justice Taschereau were of the opinion that the Act was *intra vires* the province, except as to the personal liability of the agent for the tax.

APPEAL from the judgment of the Supreme Court of New Brunswick, appeal division (1), which held that the *Tobacco Tax Act*, (N.B.) was *intra vires* the province.

The question in issue in this case is the constitutionality of "An Act to provide for imposing a tax on the consumption of tobacco" (1940, (N.B.) 4 Geo. VI,

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.

c. 44), hereinafter referred to as *The Tobacco Tax Act*. The appellant caused a writ to issue in the Chancery Division of the Supreme Court of New Brunswick claiming an injunction restraining the respondents Conlon and McDonough, and each of them, from entering upon the store premises of the appellant, in the city of Saint John, or from accosting, questioning, or otherwise interfering with customers of the appellant while on those premises, or on the streets adjacent thereto, with reference to any purchase of tobacco, or the payment of any tobacco tax under the authority of the Act above mentioned, or the regulations under it.

The parties agreed upon the following statement of facts:

That the plaintiff, Atlantic Smoke Shops Limited, is a corporation duly incorporated by letters patent issued under the *Companies Act* of the Dominion of Canada and having its head office at the city of Saint John in the province of New Brunswick.

That on the eleventh day of May, A.D. 1940, the legislature of the province of New Brunswick purported to enact a statute, being chapter 44, 4 George VI, cited as *The Tobacco Tax Act*. The said Act came into force on the 1st day of October, A.D. 1940, by proclamation of the Lieutenant-Governor in Council.

That under the authority of the said Act the Lieutenant-Governor in Council purported to make regulations styled "Regulations Under *Tobacco Tax Act*."

That on the fifteenth day of October, A.D. 1940, the said Atlantic Smoke Shops Limited opened a store on the northeast corner of Waterloo and Peters streets in the said city of Saint John, and thereafter carried on and now carries on therein the business of selling tobacco, including cigars and cigarettes.

That the said plaintiff carried on and now carries on its said business without having obtained any license so to do under the *Tobacco Tax Act* or the said regulations.

That in its said store the said plaintiff has since the fifteenth day of October, A.D. 1940, sold and is now selling at retail sale tobacco, including cigars and cigarettes, manufactured in provinces of Canada other than the province of New Brunswick, to persons defined by section 2 (a) of the said *Tobacco Tax Act* as "Consumers" or "Consumers of Tobacco," without collecting the tax imposed by the said Act.

That the defendant, James H. Conlon, was on the coming into force of said *Tobacco Tax Act* appointed to the office of Tobacco Tax Commissioner, being the office created under the regulations hereinbefore referred to and has since occupied and now occupies said office.

That on the second day of November, A.D. 1940, and from time to time thereafter, the defendant John McDonough, an inspector appointed under the said Act, and others, all acting under the instructions of the other defendants, entered upon the plaintiff's said premises and proceeded to question customers of the plaintiff as to whether they had paid the provincial tax on the tobacco purchased by them from the plaintiff, to ask them to produce their tobacco tax receipts and to demand their

names and addresses. The said defendant John McDonough and other persons so entering the said premises as aforesaid refused to leave the same when requested so to do by the plaintiff, and claimed that they were entitled to remain therein and to question the said customers of the plaintiff by virtue of certain provisions of the said *Tobacco Tax Act* and the regulations made thereunder.

That by reason of the said actions of the defendants the said business of the plaintiff has been and is now being injuriously affected.

The question for the opinion of the Court was expressed in these terms:

The question for the opinion of the Court is whether the *Tobacco Tax Act*, or any of the provisions thereof, and/or the regulations made thereunder or any of them, and in what particular or particulars or to what extent are *ultra vires* of the legislature of the province of New Brunswick.

If the Court shall be of opinion that the said Act and Regulations are wholly *intra vires* this action shall be dismissed.

If the Court shall be of opinion that the said Act and Regulations are wholly *ultra vires*, judgment shall be entered in favour of the plaintiff and against the defendants for an injunction order in the terms of the claim endorsed on the writ of summons herein.

If the Court shall be of the opinion that the said Act and Regulations, or any of them are *intra vires* in part and *ultra vires* in part, the Court shall make such order, by way of declaration and/or by way of substantive relief to the plaintiff, as it shall deem right and proper.

The stated case was submitted to the Supreme Court of New Brunswick, appeal division, which held unanimously (1) that the Act was within the constitutional powers of the province.

From that judgment, the Atlantic Smoke Shops Limited appealed to this Court by special leave granted by the Appeal Division of the Supreme Court of New Brunswick.

The legislature of the province of Quebec has adopted in 1940 a statute, 4 Geo. VI, c. 15, entitled the *Tobacco Tax Act*, which is somewhat similar in its provisions to the New Brunswick statute. The Quebec Act has been held *intra vires* the province by the Superior Court, Trahan J. (2), which judgment was affirmed by the Court of King's Bench, appeal side (3). In view of that fact, the Attorney-General for the province of Quebec was allowed to intervene, on this appeal by order of this Court, in order to support the constitutionality of the New Brunswick Act.

The material provisions of the *Tobacco Tax Act* of New Brunswick are the following:

2. (a) "Consumer" or "Consumer of Tobacco" means any person who within the Province, purchases from a vendor tobacco at a retail

(1) (1940) 15 M.P.R. 278; [1941] 1 D.L.R. 416.

(2) (1940) Q.R. 78 S.C. 377.

(3) (1941) Q.R. 70 K.B. 101.

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.

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.

* * *

(d) "Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(e) "Retail Sale" means a sale to a consumer for purposes of consumption and not for resale.

(f) "Retail Vendor" means any person who, within the Province, sells tobacco to a consumer.

* * *

3. (2) No persons shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under authority of this Act and such license is in force at the time of sale.

(3) No wholesale vendor shall sell any tobacco in the Province for resale in the Province to a person who is not a vendor duly licensed under this Act.

* * *

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who 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 immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

* * *

7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act 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.

8. The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe.

* * *

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

* * *

20. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent or of supplying any deficiency therein the Lieutenant-Governor in Council may make such regulations, not inconsistent with the spirit of this Act, as are considered necessary or advisable, and without limiting the generality of the foregoing the Lieutenant-Governor in Council may make regulations:

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.

* * *

(2) Such regulations may from time to time be repealed, amended or varied and, if repealed, may be re-enacted, and such regulations shall have the same force and effect as if enacted by this Act and shall be published in the Royal Gazette.

The material Regulations made under the Act are the following:

6. 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 these Regulations and shall be in Form 2 of the Schedule to these Regulations, as near as may be. The applicant shall state in his application for a license an estimated amount of his normal monthly Tobacco Sales.

Form 2 contains the following:

I/We, upon acceptance of License to Retail Tobacco, agree and undertake to act as the Agent of the Minister for the collection of the Tax imposed by said Act and to account to the Province of New Brunswick for all moneys so collected as provided by the Act and regulations.

The other material Regulations are:

9. No person, other than the holder of an itinerant salesman's license issued under the provisions of Regulation 11, shall, either as principal or agent, sell tobacco at retail at any place other than a place of business designated in a valid, subsisting license, issued to such person; Provided that nothing in this or the next preceding Regulation shall be construed to prohibit or restrict the solicitation of orders for or the sale of tobacco by a licensed wholesale vendor to a licensed retail vendor at any place.

* * *

12. No person shall sell tobacco at retail elsewhere than a named place of business, either as principal or as agent, without having obtained an itinerant salesman's license. No person shall sell tobacco at retail elsewhere than a named place of business through an agent or salesman unless such agent or salesman is the holder of a valid subsisting itinerant salesman's license.

* * *

19. Every licensed retail vendor is hereby 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 tobacco by the consumer.

* * *

22. The retail vendor or his agent shall deliver to every purchaser, at the time of the sale, a receipt for the tax collected and no sale shall be made unless such receipt is given.

* * *

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.

30. No person shall purchase tobacco at retail without paying the tax or accept delivery of same without receiving from the retail vendor a receipt for such tax in accordance with the provisions of the Act and these Regulations.

The grounds of appeal raised by the appellant before this Court were as follows:

1. The Act is not legislation upon the matters assigned to the legislative jurisdiction of the province by sec. 92 of the *British North America Act*, but is in fact legislation upon matters within the exclusive legislative jurisdiction of the Dominion of Canada by virtue of sec. 91 of the *British North America Act*.

2. The Act purports to impose a tax for the raising of a revenue for provincial purposes, but such tax is neither,

(a) a direct tax, nor

(b) a tax within the province

as authorized by subsection 2 of sec. 92 of the *British North America Act*.

3. The tax is not confined in its effect to the province of New Brunswick nor to the persons upon whom it is levied.

4. The Act infringes upon the exclusive legislative jurisdiction of the Dominion of Canada to impose customs and excise duties.

5. The Act purports, in violation of the provisions of sec. 121 of the *British North America Act*, to impose a tax upon articles grown, produced or manufactured in another province of Canada when introduced into New Brunswick for purposes of consumption.

6. The licences provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under sec. 92 subsection 9 of the *British North America Act*.

7. The Regulations are invalid because the statute which authorizes them is wholly *ultra vires*.

W. F. Chipman K.C. and *J. F. H. Teed K.C.* for the appellant.

Peter J. Hughes K.C. for the respondents.

Aimé Geoffrion K.C. and *R. Genest K.C.* for the Attorney-General for Quebec.

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

THE CHIEF JUSTICE—It is necessary first to ascertain the characteristics of the tax, the validity of which is in question. The charging sections are sections 4 and 5 which must be read in light of the meanings attached to the phrases therein employed by the interpretation section. Sections 4 and 5 are as follows:—

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the

raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who 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 person at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

The material provisions of the interpretation section are 2 (a), (d) and (e), which are in the following words:—

2. (a) "Consumer" or "Consumer of Tobacco" means 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.

(d) "Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(e) "Retail Sale" means a sale to a consumer for purposes of consumption and not for resale.

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 the regulations may prescribe. The statute provides for the licensing of vendors and *inter alia* by section 3, subsection (2) that no person shall sell tobacco at a retail sale unless he holds a retail vendor's license.

The regulations, which have the force of statute (section 20, subsection 2)) provide (Regulations 5 and 6, Form II) that every application for a retail vendor's license shall contain an undertaking by the applicant to collect and remit the tax. The undertaking, in the Form, is that the applicant undertakes to act as agent for the Minister for the collection of the tax and to account to the province for all moneys so collected. On the license is printed a notice that failure on the part of a vendor to collect and remit the tax renders him liable to a fine and to imprisonment in default of payment. There are two forms of licenses, an itinerant salesman's license and

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

a license to carry on the business of a retail vendor at a named place of business. The effect of Regulations 9 and 12 is that no person shall, either as principal or agent, sell tobacco at retail, other than a person having a license in one or other of these forms.

The regulations contain important provisions touching the payment of the tax. By Regulation 19 the licensed retail vendor is

hereby constituted an agent of the Minister for the collection of the tax,

and the Regulation also provides that the retail vendor

shall collect the tax from the consumer at the time of purchase of tobacco by the consumer.

By Regulation 22 the retail vendor, or his agent, shall deliver to every purchaser at the time of the sale a receipt for the tax collected, and it also provides that no sale shall be made unless such receipt is given. By Regulation 30 it is enacted that

no person shall purchase tobacco at retail without paying the tax,

and it is further provided that no person shall "accept delivery" of tobacco

without receiving from the retail vendor a receipt for such tax.

The condition of the obligation to pay under section 4 is that the tobacco in respect of which the liability arises has been purchased at a retail sale. It is true the section describes the purchaser as "consumer," but consumer means, as we have seen, a person purchasing tobacco at a retail sale for his own consumption, or for the consumption of other persons at his expense. It is a condition of a legal purchase at a retail sale that the tax be paid and of a lawful delivery of the tobacco to a purchaser that a receipt of the tax be also delivered to him by the seller. There can be no legal purchase without the payment of the tax; there can be no legal sale without the delivery of a receipt for the tax. In the ordinary case, sales will be cash sales. The price demanded will be the "price to the consumer," to use the words of section 7; that is to say, the price to the purchaser, which includes the amount of the tax, a sum which is earmarked as such, of course, by the delivery of the receipt. In a practical sense, as far as the purchaser is concerned, it is part of the price he pays for his tobacco. As regards the vendor, it is the

sum for which he is accountable to the government and, in fact, it comes out of the "price to the consumer"—the price to the purchaser.

In other words, the payment of the tax is not only a condition of legal purchase; it is 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.

Moreover, the real security to the government for the payment of the tax is the vendor's responsibility. True enough, the statute declares that the consumer continues to be liable until the tax is collected, but the real sanction for the obligation of the purchaser lies in the fact that he cannot lawfully, or in practice, get his tobacco without paying the tax. There is no provision for keeping account of consumption. On the other hand, the vendor is obliged, as licensee, to keep account of his purchases, of his sales, of the tobacco he has on hand from time to time. Not only is his default in performing his duty to collect the tax a punishable offence, he must account for his stamps and as agent, under a contractual duty to collect the tax, he is directly responsible if he has made a sale of tobacco without performing that duty. The character of the tax, I think, can best be determined by considering the ordinary case and in the ordinary case, that is to say, in all but exceedingly few cases, the sale of tobacco by a licensed retail vendor will be carried out in the manner contemplated by the Act and the tax will be simply a predetermined fraction of the price to the purchaser which is paid to the vendor and by him remitted to the government. It seems to me to be proper to describe such a tax as a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser.

As regards section 5, the tax is imposed upon the importer of tobacco who imports it for his own consumption, or the consumption of others at his expense and that, I think, is a tax on tobacco in respect of the import of it for consumption.

To turn now to the legal questions involved. Section 5 imposes an import duty applying to imports from other parts of Canada, as well as from places outside of Canada. Although not collected in a manner in which customs duties are collected by the Dominion Government in this country, it is of the nature of a duty of customs.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

In the *Attorney-General for British Columbia v. McDonald Murphy Lumber Co.* (1), Lord Macmillan, speaking for the Lords of the Judicial Committee, said:—

In Wharton's Law Lexicon "Customs" are defined as "duties charged upon commodities on their importation into or exportation out of a country," and a similar definition is given in Murray's New English Dictionary.

I shall revert to section 5 after discussing the tax imposed by section 4.

The enactment in section 4 and the ancillary enactments in the statute and regulations are justified on the ground that they constitute legislation in relation to direct taxation within the province within the meaning of section 92 (2). The question whether the tax is an excise duty of the class falling within the exclusive authority of the Parliament of Canada to impose can be considered more conveniently with section 5.

If I may say so without presumption, the subject of direct and indirect taxation as it affects the application of section 92 (2) has been put in a very clear light in the judgment delivered by Lord Thankerton on behalf of the Lords of the Judicial Committee in the *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd.* (2). At p. 55 it is said, after a review of some of the previous decisions of the Judicial Committee, these decisions, in their Lordships' opinion, make clear that if the tax is demanded from the

very person who it is intended or desired should pay it, the taxation is direct.

His Lordship proceeds to point out that in the case of typical direct taxes, the taxation on property and income, for example, mentioned by Lord Cave in the *City of Halifax v. Fairbanks Estate* (3), such taxes

are imposed in respect of the particular taxpayer's interest in property or the taxpayer's own income, and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists.

Such taxes are contrasted with those as regards which the taxing authorities are indifferent as to who ultimately bears the burden, such as taxes in respect of transactions and

(1) [1930] A.C. 357, at 364. (2) [1934] A.C. 45.
(3) [1928] A.C. 117.

taxes in respect of some dealing in commodities, such as their import or sale. The words of the judgment are these:

* * * where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer.

I have said sufficient to show why, in my opinion, the tax imposed by section 4 is a tax in respect of a dealing with tobacco, the sale and purchase of it, and this dealing falls, I think, within the class of dealings with commodities envisaged by such passages in their Lordships' judgment.

On behalf of the respondent it is said that this is a tax in respect of consumption and that it stands in the same category as that in question in the *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd.* (1). The tax in question there was payable by every person who consumes fuel oil in the province in respect of the fuel oil consumed and at the rate of one-half cent a gallon. Every person consuming fuel oil was obliged to keep such books and records and furnish such returns as might be prescribed by the regulations, the failure to do so being a punishable offence. The amount of the tax was recoverable by action and in every such action the burden of proving the quantity consumed by the defendant was upon him. There are no such provisions in the statute before us. The tax is not payable by the consumer as such. It is payable by the purchaser, or the agent of the purchaser, and the statute itself contemplates that neither of them may be the consumer. No liability attaches to the consumer as such. To repeat, in the practical administration of the Act there can be no manner of doubt that the payment of the tax and the delivery of the receipt take place as acts in the transaction of sale and purchase. The matter of consumption never comes into question.

On behalf of the respondent it is argued that the purchase from the retail vendor is a purchase for consumption because the tobacco cannot lawfully be sold by the purchaser unless he takes out a vendor's license which

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

insures that he can never sell except at a loss. There is no limit, however, as to the quantity which may be purchased from a retail vendor and any purchaser is entitled to obtain a license as a retail vendor and the license fee is only fifty cents. However, as a rule, tobacco sold at retail, in the ordinary sense, is purchased with the intention that it will be consumed by the purchaser, or his friends or associates, and the vast majority of the purchases of tobacco at retail will be purchased for immediate consumption.

It does not at all follow from this that the tax is a tax in respect of consumption, especially when it is so obviously a tax in respect of the sale and purchase. There is nothing in the statute, truly, which can fairly be said to give to the tax the character of a tax in respect of consumption, except the declaration of the legislature to that effect and some collateral provisions which are relied upon as supporting the contention that such is its character.

I do not think too much importance can be attached to the declaration of the legislature that the tax is payable in respect of consumption. The *British North America Act* "must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies" (*Bank of Toronto v. Lambe* (1), *City of Halifax v. Fairbanks' Estate* (2). Nor was it probably contemplated that the "tangible dividing line" between direct and indirect taxation could be shifted at will by the declarations of the legislature as to its expectations, or intentions, in respect of the ultimate incidence of a tax. It is especially important, I think, in the application of Mill's test not to be led away by legislative declarations, or collateral legislative provisions, imparting to the legislation a form calculated to give a colour of legality to the legislative effort.

I return now to section 5. As I have said it imposes a duty in respect of import. Such a duty is one of those mentioned in the passage quoted from Lord Thankerton's judgment (3) as being not imposed as a peculiar contribution upon one of the parties and as being, consequently,

(1) (1887) 12 A.C. 575, at 581. (2) [1928] A.C. 117, at 124.

(3) *Attorney-General for British Columbia v. Kingcome Manufacturing Co. Ltd.* [1934] A.C. 45.

an indirect tax. It seems clear, moreover, to be a tax within section 122. There were customs duties levied on manufactured tobacco by the provinces at the time of Confederation. The Dominion has always imposed customs duties in respect of imports of tobacco and it would seem an extraordinary thing if each one of the provinces could impose such duties upon persons who import for their own consumption and who should be obliged to pay this duty after paying the duty imposed by the Dominion; and equally extraordinary in the case of raw tobacco imported by an importer in Montreal, who has paid the customs duty upon it and manufactured it there, that it should, on shipment into New Brunswick to a consumer, be subjected to a further import duty in that province. The importation which brings section 5 into operation seems clearly to be a dealing in tobacco within the meaning of the judgment quoted above. So also, I think, the tax imposed by section 4 is an excise duty within the contemplation of that judgment. At pp. 58, 59, Lord Thackerton says:—

In their Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in the judgments in *Fairbanks'* case (1) and the *McDonald Murphy Lumber Co.'s* case (2), are duties which are imposed in respect of commercial dealings in commodities, and they would necessarily fall within Mill's definition of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a license duty, such as was considered in *Lambe's* case (3). Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.

The tax imposed by section 4 fulfils the conditions of this "definition of customs and excise duties," as the judgment describes this passage. The distinction between the New Brunswick statute and the provisions of the British Columbia Fuel-Oil Act, with which the judgment is concerned, is brought out very clearly in the part of the judgment I now quote at p. 59:—

Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else.

(1) [1928] A.C. 117.

(2) [1930] A.C. 357.

(3) (1887) 12 A.C. 575.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Duff C.J.

Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act.

I should add that section 5, in my opinion, comes within the ban of section 121. I do not think either the decision in the *Gold Seal* case (1), or the observations in the judgments, are in any way in conflict with this.

The duty imposed by section 5, as I have already observed, being a duty imposed by a provincial legislature, is, of course, not collected through the machinery of the customs, but levied in New Brunswick prior to Confederation it would have been levied as a customs duty; and considered even from the point of view of its application to goods imported from other provinces, it is of the nature of a customs duty, if the expression is properly applicable in such circumstances. Section 5 is moreover, in my opinion, an enactment in regulation of trade and commerce within the ambit of the exclusive authority in relation to that subject vested in the Dominion by section 91.

I should add that the tax under section 4 is payable by the purchaser's agent where the purchase is made by an agent. On the principle of the *Manitoba Grain* case (2), this provision appears to be invalid.

For these reasons, I think the appeal should be allowed.

RINFRET J.—The question in this case is about the constitutionality of "An Act to provide for imposing a tax on the consumption of tobacco" (c. 44 of the Acts of New Brunswick, 1940), hereinafter referred to as *The Tobacco Tax Act*.

The appellant caused a writ to issue in the Chancery Division of the Supreme Court of New Brunswick claiming an injunction restraining the defendants, and each of them, from entering upon the store premises of the appellant, in the city of Saint John, or from accosting, questioning, or otherwise interfering with customers of the appellant while on those premises, or on the streets adjacent thereto, with

(1) (1921) 62 Can. S.C.R. 424.

(2) [1925] A.C. 561.

reference to any purchase of tobacco, or the payment of any tobacco tax under the authority of the Act above mentioned, or the regulations under it.

The parties concurred in stating the questions arising for the opinion of the Court as follows:

The appellant is a Dominion company having its head office in the city of Saint John, in the province of New Brunswick.

On May 11, 1940, the legislature of the province of New Brunswick enacted *The Tobacco Tax Act*, which came into force on October 1st, 1940, by proclamation of the Lieutenant-Governor in Council.

Certain regulations were made under the authority of the Act.

On October 15, 1940, the appellant opened a store, in the city of Saint John, and thereafter carried on, and now carries on, therein the business of selling tobacco, including cigars and cigarettes, without having obtained any license so to do under *The Tobacco Tax Act*, or the regulations.

In its store, the appellant sells at retail sale tobacco, including cigars and cigarettes, manufactured in provinces of Canada other than the province of New Brunswick, to persons defined, by section 2 (a) of the said *Tobacco Tax Act*, as "consumers" or "consumers of tobacco," without collecting the tax imposed by the said Act.

The respondent James H. Conlon was, on the coming into force of the said *Tobacco Tax Act*, appointed to the office of Tobacco Tax Commissioner, it being an office created under the regulations.

On November 2, 1940, and from time to time thereafter, the respondent John McDonough, an inspector appointed under the Act, and others, while acting under the instructions of the other respondents, entered upon the appellant's premises and proceeded to question customers of the appellant as to whether they had paid the tax on the tobacco purchased by them, to ask them to produce their tobacco tax receipt and to demand their names and addresses. They refused to leave the premises when requested so to do by the appellant, and claimed that they were entitled to remain therein and to question customers by virtue of the said *Tobacco Act* and the regulations made thereunder.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

By reason of these actions of the respondents, the business of the appellant has been and is now injuriously affected.

The question for the opinion of the Court is whether the *Tobacco Tax Act*, or any of the provisions thereof, and the regulations made thereunder, or any of them, are *ultra vires* of the legislature of New Brunswick; and, if so, in what particular, or particulars.

It was agreed that, if the Court should be of the opinion that the Act and the regulations were wholly *intra vires*, the appellant's action should be dismissed. If the Court should be of opinion that the Act and the regulations are wholly *ultra vires*, judgment should be entered in favour of the appellant and against the respondents for an injunction order in the terms of the writ of summons herein. If the Court should be of opinion that the Act or regulations, or any of them, are *intra vires* in part and *ultra vires* in part, the Court should make such Order by way of declaration or of substantive relief to the appellant, as shall be deemed right and proper.

The special case was submitted to the Appeal Division of the Supreme Court; and, after argument heard, the judgment of that Court was delivered by the Chief Justice of the province of New Brunswick, in which Grimmer and Richards JJ. concurred.

The Court unanimously held that the Act was within the constitutional powers of the Province.

After having quoted the material sections of the Act, the learned Chief Justice stated that the regulations had not been attacked, except upon the ground that, the Act being *ultra vires*, they fell with it.

He proceeded to enumerate the grounds of objection to the validity of the Act:

- (1) That the transaction was not within the Province;
- (2) That it was an attempt to impose a tax upon inter-provincial or international transactions;
- (3) That dealers in tobacco could not without their consent be constituted agents for the Crown for the collection of a tax, as it would constitute them public officers;
- (4) That the tax was indirect as falling upon transactions in commodities especially;

(5) That it was an indirect tax as being in essence a sales tax;

(6) That the taxation of an agent was vital to the scheme of the Act and that taxation so imposed upon an agent gave him a right to be indemnified by his principal, thus indirectly imposing the tax upon the principal.

Dealing first with grounds of objection 1 and 2, the judgment failed to see that the legislature had attempted to impose a customs duty upon the importation of tobacco into the Province, contrary to the contention of counsel for the appellant. In the opinion of the Appeal Division, the legislation did not purport to affect any person who was outside of the Province, nor the commodity when it was not within the Province. In fact, it did not affect the commodity at all.

As to objection no. 3, the Court thought that it also failed and that it must be competent for the legislature to provide for collectors of revenue, if that revenue derives from a direct tax.

Objections 4 and 5 were taken together. In the Court's opinion, they raised the only real point in the case, viz.: Whether the statute imposes direct or indirect taxation.

The attempt made to treat the Act as imposing a stamp tax and thus bringing it within *Attorney-General for Quebec v. Queen Insurance Company* (1), and *Attorney-General for Quebec v. Read* (2), was disregarded. It was said by the Court that what was called a "stamp" in argument is not a stamp at all. It was not regarded as such nor intended to be affixed to anything. It was simply a receipt for payment; and Regulation 20 was referred to.

As to the attempt of counsel for the appellant to assimilate the tax to a sales tax, and, therefore, to an indirect tax, the Court thought that transmissibility is the proper test for the present case. On this ground, reference was made to *Attorney-General for Manitoba v. Attorney-General for Canada* (3), where the tax was on persons selling grain for future delivery; and to *Attorney-General for British Columbia v. Canadian Pacific Railway* (4), where the Privy Council stated that fuel-oil, being a marketable commodity, those who purchased it, even for their own use, acquired a right to take it into the market;

1941

ATLANTIC
SMOKE
SHOPS LTD.v.
CONLON
ET AL.Rinfret J.
—

(1) (1878) 3 A.C. 1090.

(3) [1925] A.C. 561.

(2) (1884) 10 A.C. 141.

(4) [1927] A.C. 934.

1941

ATLANTIC
SMOKE
SHOPS LTD.

v.

CONLON
ET AL.

Rinfret J.

and that, therefore, a tax levied on the first purchasers of fuel-oil came within the general principle which determines that the tax is an indirect one.

Reference was also made by the learned Chief Justice to *Rex. v. Caledonian Collieries Ltd.* (1), which dealt with a percentage tax imposed on mine owners on the gross revenue of coal mines, and where it was held that the general tendency of the tax upon the sums received from the sale of the commodity which the mine owners produced was that they would seek to recover it in the price charged to the purchaser, and that, although, under the particular circumstances, the recovery of the tax be economically undesirable or practically impossible, nevertheless the general tendency of the tax remained. The effect of the Privy Council decision in *Lower Mainland Dairy v. Crystal Dairy* (2), and of the decision of this Court in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (3), was also examined; and the Court found that the cases were not in the same category as the present case.

The Court then discussed the judgment of Lord Thankerton in *Attorney-General for British Columbia v. Kingcome Navigation Company* (4), where the noble Lord reviewed previous judgments of the Board and said that:

These decisions made clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax.

* * *

The ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties in the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon that one of the parties to the trading in the particular commodity who is selected as the taxpayer.

Of the *Fuel Oil Tax Act* of British Columbia, Lord Thankerton said that it was clear that the Act purported to exact the tax from a person who had consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed, and the Act did not relate

(1) [1928] A.C. 358.

(2) [1933] A.C. 168, at 176.

(3) [1931] S.C.R. 357, at 364.

(4) [1934] A.C. 45.

to any commercial transaction in the commodity between the taxpayer and someone else. Although it was, of course, possible that individual taxpayers may recoup themselves by the contract or arrangements under which the oil was acquired, this could not, in their Lordships' opinion, affect the nature of the tax.

The Appeal Division, in the present case, then pointed out that the differences between the Act considered by the Privy Council in the *Kingcome* case (1) and the case at present under review were two:

Firstly, the British Columbia tax was imposed upon the person "who has consumed fuel-oil"; the New Brunswick Act imposed the duty "before consumption of the commodity." It was shown that by actual consumption, under the British Columbia Act, the purchaser became the ultimate consumer. The Appeal Division thought that the same result was attained by the express provisions of sec. 3 (2) of the New Brunswick Act, which took away the right of resale from the purchaser from a retail dealer. The statute thereby made him the ultimate consumer. As a result of that action, it seemed impossible to conceive that the purchaser attempting to resell could have a market, unless he was prepared to sell the commodity at a definite loss.

Secondly, there was no definition of the word "consumer" in the British Columbia Act, and obviously there could be none, while section 2 (a) of the New Brunswick Act contained a definition and by it the consumer could purchase from a vendor by "means of an agent." The principal must be one who desires to acquire the tobacco for consumption by himself, or by other persons at his expense. The appellant contended that the tax necessarily paid by the agent would be "passed on" to the principal, which would bring the transaction within the trading cases to which reference has already been made. To this argument, the Court thought the answer was: "That there is not, and cannot be, a sale by the agent to his principal." True, the agent, if he had not the required money in advance, would be entitled to be indemnified by his principal; but indemnity is not sale. "*Qui facit per alium facit per se*" applies. This is only part of the machinery of the Act. *Forbes v. Attorney-General of Manitoba* (2).

1941

ATLANTIC
SMOKE
SHOPS LTD.v.
CONLON
ET AL.

Rinfret J.

(1) [1934] A.C. 45.

(2) [1937] A.C. 260.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

Summing up, the learned Chief Justice came to the conclusion that the tax was not imposed upon the vendor, it was not imposed upon the goods; it was imposed upon the consumer, and measured and valued by the extent of his purchases. The consumer paid the tax at the time of the sale to him. The vendor paid no tax; and the tax could not by any possibility enter as a factor into the price charged by him. That there was a perception of the tax at the moment that the commodity passed from the vendor to the buyer did not make it a sales tax. It seemed to fall within the class of excise taxes which may be levied by a provincial legislature. But it was immaterial how it was described; the incidence of the tax fell upon and was borne by the ultimate consumer and could not be passed on.

For these reasons, the Court held that the Act was within the constitutional power of the Province.

From that judgment, Atlantic Smoke Shops now appeals to this Court by special leave granted therefor by the Appeal Division of the Supreme Court of New Brunswick; and the Attorney-General of the province of Quebec intervenes to support the constitutionality of the New Brunswick Act, in view of the fact that the legislature of Quebec has adopted a similar statute.

The *Tobacco Tax Act* now in question enacts, in sec. 3, that

(2) No person shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under the authority of this Act and such license is in force at the time of sale;

(3) No wholesale vendor shall sell any tobacco in the Province to a person who is not a vendor duly licensed under this Act.

By section 4, it is enacted that

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchases.

By section 5:

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who 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 immediately report the matter to the Minister and forward or produce to him the invoice, if

any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

In the Act, "Consumer" or "Consumer of tobacco"

means 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. (Section 2a).

"Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province (Section 2d).

"Retail sale" means a sale to a consumer for purposes of consumption and not for resale (Section 2e).

"Retail vendor" means any person who, within the Province sells tobacco to a consumer (Section 2f).

By section 7:

7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act 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.

By section 9:

9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax.

And finally, by section 10:

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

For the purpose of carrying into effect the provisions of the Act, the Lieutenant-Governor in Council was authorized to make such regulations, not inconsistent with the spirit of the Act, as were considered necessary, or advisable (section 20); and, amongst other things, for

(a) providing for the affixing of stamps on tobacco or on the packages in which it was sold, before or at the time it is sold to the consumer, as evidence of the tax having been paid;

and it is enacted that such regulations shall have the same force and effect as if enacted by the Act and that they shall be published in the *Royal Gazette* (section 20-2).

1941

ATLANTIC
SMOKE
SHOPS LTD.

v.

CONLON
ET AL.

Rinfret J.

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.
 Rinfret J.

Of the regulations so made, only the following should be quoted:

19. Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer, etc.

23. The retail vendor shall account for and remit the amount of tax collected to the Tobacco Tax Commissioner within ten days immediately following the calendar month during which any sale has taken place and shall with his remittance forward to the Tobacco Tax Commissioner a statement containing the information required by Form 4 in the Schedule of these regulations.

Retail vendors are required to make an application for the license to sell at retail. That application is signed by them and the form so signed contains the following undertaking:

I/we hereby make application for a license as indicated above under the provisions of The Tobacco Tax Act, 1940.

I/we, upon acceptance of license to retail tobacco, agree and undertake to act as the agent of the Minister for the collection of the tax imposed by said Act and to account to the Province of New Brunswick for all moneys so collected, as provided by the Act and Regulations.

The form of license itself contains the following prescriptions:

Penalty as prescribed by the Act.

Failure on the part of a vendor to collect the tax renders him liable to a fine of not less than ten or more than five hundred dollars, and costs; and, in default of payment, to imprisonment to a term not exceeding three months.

The form of tobacco tax return provides for the deduction of a commission of 3%, being the allowance to the vendor for his services in collecting the tax; and it contains the following:

Enclosed find the sum of \$ * * * which is the amount of Tobacco Tax collected by me during the month of _____ after deductions being made as described above.

And attached to the return is a declaration which has to be signed by the vendor to the effect that the remittance is a true return of all taxable sales made during the last preceding months, and that the return herein truly represents all tax imposable by law accruing upon such sales or transactions as are chargeable under the *Tobacco Tax Act*.

The attack made upon that Act by the appellant and the grounds of appeal from the Appeal Division of the Supreme Court of New Brunswick, which upheld the Act, are:

(1) The Act is not legislation upon the matters assigned to the legislative jurisdiction of the provinces by sec. 92 of the *British North America Act*;

(2) The Act purports to impose a tax for the raising of a revenue for provincial purposes, but it is neither

(a) a direct tax, or

(b) a tax within the Province,

as authorized by subsection 2 of section 92;

(3) The tax is not confined in its effect to the province of New Brunswick, nor to the persons upon whom it is levied;

(4) The Act infringes upon the exclusive legislative jurisdiction of the Dominion Parliament to impose customs or excise duties;

(5) The Act purports, in violation of the provisions of section 121 of the *British North America Act*, to impose a tax upon articles grown, produced or manufactured in other provinces of Canada when introduced into New Brunswick for purposes of consumption;

(6) The licenses provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under section 92, subsection 9, of the *British North America Act*.

(7) The Regulations are invalid because the statute which authorizes them is wholly *ultra vires*.

It is to be observed, as already pointed out in the reasons for judgment of the Appeal Division, that the regulations are not brought into question except in so far as they are authorized by the statute and that they will have to be found *ultra vires* only if the statute itself is held unconstitutional. They may, therefore, be disregarded for the purpose of the present discussion; and that disposes of ground of appeal no. 7.

Ground no. 1 is only a general statement of the objections of the appellant, the details of which are enumerated in grounds 2, 3, 4, 5 and 6. Those, therefore, are the grounds which have to be examined in order to decide the present appeal.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

1941

ATLANTIC
SMOKE
SHOPS LTD.v.
CONLON
ET AL.Rinfret J.
—

It is alleged in ground of appeal no. 2 that the tax imposed is not a direct tax, contrary to the powers of a provincial legislature under head 2 of sec. 92.

"Direct taxation" alone may be imposed by a Province, and it must be "taxation within the Province".

It was said by this Court, in *City of Charlottetown v. Foundation Maritime Limited* (1):

It is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy ed., 1886, vol. II, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2 (*Fairbanks* case (2)). Mill's definition was held to embody "the most obvious indicia of direct and indirect taxation" and was accepted as providing a logical basis for the distinction to be made between the two (*Bank of Toronto v. Lambe* (3)). The expression "indirect taxation" connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on (*The King v. Caledonian Collieries* (4)). It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated.

The definition of John Stuart Mill, above referred to, states:

Taxes are direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs.

Now the appellant contends that the tax we are now examining comes under the definition of an indirect tax because it is imposed upon the taxpayer with respect to, and by reason of, his entering into a commercial transaction or trade in commodities; also because it taxes all agents who purchase tobacco on behalf of their principals or who bring tobacco into the province of New Brunswick on behalf of their principals.

(1) [1932] S.C.R. 589, at 594.

(2) [1928] A.C. 117, at 125.

(3) [1887] 12 A.C. 575, at 582

(4) [1928] A.C. 358.

Of course, the question of the nature of the tax is one of substance. It does not turn only on the language used by the legislature which imposed it; and in testing the validity of the statute, the first requisite is to ascertain the real nature of the tax imposed.

It may be admitted as a principle, which generally proves to be true, that a tax upon a person with respect to his consumption of some commodity within the Province is direct taxation and *intra vires*, even although, in some instances and circuituously, he is enabled to pass the burden on to someone else.

It may be assumed that, generally speaking, a tax upon a person with respect to a commercial transaction, such as a sale or purchase, based upon and with respect to the price of the commodity, is indirect taxation and *ultra vires* of a province, even although, in some instances, the party taxed may not pass the burden to anyone else.

In the *Kingcome* case (1), the tax was imposed on the consumer of fuel oil according to the quantity which he consumed within the province. It was held that this was direct taxation and *intra vires*. The British Columbia Act, in their Lordships' view, did not relate to any transaction in the commodity between the taxpayer and some one else.

Here, the appellant argues that the tax is upon the purchaser of commodities, imposed at the time of the purchase, and with respect to the commodity purchased; and that it is accordingly an indirect tax and *ultra vires*. He relies on a long line of decisions of the Privy Council upholding this principle.

If we turn to the New Brunswick statute, we find that the charging section (sec. 4) imposes the tax only on the consumer of tobacco, in respect of the consumption of such tobacco, and computed at the rate of ten per centum of the retail price of the tobacco purchased.

The statute makes it clear that the only person who it is intended or desired should be taxed is the consumer. It is just as much a consumption tax as was the British Columbia tax in the *Kingcome* case (1).

For the purpose of deciding whether such a tax is a direct or an indirect tax, it does not matter that the tax is imposed before or after consumption of the commodity.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

The point is that the tax is imposed in respect of the actual consumption, that the legislature intends that it should be a tax with respect to consumption and that the language of the statute is so guarded that, except in extremely exceptional and almost inconceivable cases, it makes it impossible for the consumer to pass it on to someone else, or, in the words of Mill, to "indemnify himself at the expense of another."

In fact, the statute is framed in such a way that the legislature has indicated its intention that the person on whom the tax is imposed will bear it himself; and it has taken every precaution to prevent the consumer from indemnifying himself at the expense of another. This must be inferred both from the form in which the tax is imposed and from the results which, in the ordinary course of business transactions must be held to have been contemplated. Indeed, it may not only be inferred from the statute itself, but it is there expressly so stated.

The consumer who is taxed is a person who, within the province, purchases tobacco at a retail sale, in the province, for consumption of himself, or of other persons at his expense. By definition, "purchaser" means a person within the Province purchasing from a retail vendor at a retail sale in the Province. A "retail vendor" means a person, within the Province, selling tobacco to a consumer, and that is to say: a person who holds a retail vendor's licence, issued to him under the authority of the Act, and whose licence is in force at the time of the sale. And, also by definition, a "retail sale" means a sale to a consumer for purposes of consumption and not for resale.

The right of the consumer to resell is taken away by the provisions of the Act, thus meeting the possibility suggested by Viscount Haldane, in *Attorney-General for British Columbia v. Canadian Pacific Railway Co.* (1). It was stated in that case that

it may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to resell the oil they have bought. The principle of construction as established is satisfied if this is practicable and does not for its application depend on the special circumstances of individual cases.

(1) [1927] A.C. 934.

In the present case, this possibility has been provided against; and no legal resale by the consumer may take place within the province. Not only that; but the fact that the tax is imposed upon a consumer purchasing at a retail sale, in view of the definition of the words "retail sale" in the Act, means that the tax is imposed only in respect of a "sale to a consumer for purposes of consumption and not for resale"; and it follows that if some alleged consumer purchased tobacco with the concealed intention of reselling it, he might, as a consequence, become open to a penalty for violating the Act; but he would not, within the precise terms of the Act, come under the provisions of the charging section (sec. 4), and conceivably he might not render himself liable to the tax.

Here, on account of the prescriptions of the Act, the possibility of a resale cannot be said to be according to the common understanding of men; and the legislature, by its statute, has taken every means to provide against that possibility. *The King v. Nat Bells Liquors Ltd.* (1).

It is the general tendency of the legislation that must be considered, and exceptional cases must be ignored. The suggestion made by the appellant that the purchaser may go outside the province and resell there can hardly be entertained. Section 4, read with sections 2 (a) and 2 (e), imposes the tax on one who purchases in the Province for consumption there. The purchaser may exceptionally go outside and consume the tobacco sold in the province; but this would be an exceptional case resulting from the free act of the purchaser once he has become the absolute owner of the tobacco; and this isolated case cannot make of the statute one imposing a tax outside the province.

The effect of the tax is intended to be confined to the province of New Brunswick. It is imposed upon the consumers of tobacco in New Brunswick; and it does not pretend to have any effect at all outside the province.

But it is argued that the tax is indirect because the Act taxes the agent with respect to his transaction on behalf of his principal; and the Privy Council's decisions in *Cotton v. The King* (2), and in *Attorney-General for Manitoba v. Attorney-General for Canada* (3), and in *Provincial Treasurer of Alberta v. Kerr* (4), are relied on.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

(1) [1922] 2 A.C. 128, at 135, 136.

(2) [1914] A.C. 176.

(3) [1925] A.C. 561.

(4) [1933] A.C. 710.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

The Act taxes the "consumer"; and, by definition, "Consumer" includes a 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 * * * 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.

And the Act further says that a consumer, and therefore an agent, in the circumstances within the definition,

shall be and remain liable for the tax imposed by this Act until the sale has been collected.

From a practical point of view, it may be said that this feature of the Act, so far as it is made a point against its constitutionality, is almost negligible.

Under the Act, the

tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

(section 4). The circumstance no doubt contemplated by the Act, when a person would purchase tobacco "on behalf of or as agent for a principal," would be where the purchaser sends a messenger to a tobacco store, with the object of buying for him the tobacco which he intends to consume. The purchasers meant to be so covered are purchasers of tobacco "at a retail sale," and "for consumption" by the principal. In ninety-nine cases out of a hundred, the tax, in such cases, would amount to something between ten to fifty cents, the latter being an extreme suggestion. It is to be assumed that, in almost every case, the messenger would have received his principal's money to pay both for the tobacco and for the tax. The amount of the tax, at all events, would be but a trifle; and the instances where it may happen that the messenger would advance the money would be extremely scarce. I would be very loath to declare a provincial statute unconstitutional on such a slim objection.

Moreover, it is very doubtful whether the occurrence in such a case could really be described as "passing on." This, to my mind, is not the kind of "passing on" deemed to be, in the decided cases, the characteristic of an indirect tax. The "agent," in this instance, would not be paying for himself, but for and on behalf of the principal.

There would be, as a consequence, no enhancement of the actual cost as between the agent and his principal.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

Moreover, should this feature of the Act be found unconstitutional—which, in my view, it should not—it is severable, and it may not be allowed to defeat either the whole Act or its principle. The objection would be met by deleting the provision concerning agents in the definition of “consumer.” As the tax must be paid immediately “at the time of making the purchase,” no valid retail sale may be made without the tax being paid at once, and there is no perceivable object in enacting that the agent will remain responsible for it.

I have now discussed the grounds of appeal nos. 1, 2 and 3. The others do not require elaborate consideration.

As to ground no. 4, I cannot agree that the Act infringes upon the exclusive legislative jurisdiction of the Parliament of Canada to impose customs and excise duties. Section 5 of the Act is relied on for the appellant’s argument on this point. It provides that a

person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the province or who receives delivery in the province of tobacco for his own consumption or for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense, shall immediately report the matter to the Minister and forward or produce to him the invoice in respect of such tobacco, etc. * * * and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the province at the same price.

In regard to this, it should be observed that it affects only persons residing, or ordinarily resident, or carrying on business in New Brunswick. But it is argued that, since it covers such a person

who brings into the province, or who receives delivery in the province of tobacco from outside, the tax is an attempt to impose customs duties, which are of the exclusive competency of the Dominion Parliament.

I do not think that it is a customs duty within the meaning of those words as they are generally understood.

Under section 5, the tax is not collected at the border of New Brunswick, or before the tobacco is allowed to enter the territory of the Province. That section covers

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Rinfret J.

the case of a resident of New Brunswick, or of a person carrying on business therein, who brings into the Province tobacco

for his own consumption, or for the consumption of other persons at his own expense.

The consumer of tobacco is not called upon to pay the tax before the tobacco comes into the province, or before he receives possession of the tobacco. He pays after delivery, or after he has come into possession. Surely there must be a moment when property entering a province becomes property in the province subject to be taxed by the province.

To my mind, section 5 has no other purpose than to equalize between purchasers in the Province and purchasers residing in New Brunswick who happen to have purchased tobacco outside of it. It may be styled legislation incidental to the scheme of *The Tobacco Tax Act*; it cannot be regarded as imposing a customs duty.

Then, as ground of appeal no. 5, the appellant urges that the Act purports, in violation of the provisions of section 121 of the *British North America Act*, to impose a tax upon articles grown, produced or manufactured in any one of the provinces, when introduced into the province of New Brunswick for purposes of consumption.

Under the provisions of the Act, tobacco enters perfectly free into the Province; but the consumer is taxed in connection with the consumption of a commodity which is in the consumer's possession in the Province. The legislature has assumed that one who acquires for the purpose of consumption will consume. The exceptional cases where he might change his mind after introducing into the province the tobacco he has purchased for consumption are legitimately ignored by the legislature.

It would seem further that section 121 of the *British North America Act* only aims at the prohibition of customs duties when the articles of the growth, produce or manufacture of any one of the provinces are carried into any other province (*Gold Seal Ltd. v. Dominion Express Company & The Attorney-General of the province of Alberta* (1). On the occasion of their importation from other provinces, the admission into the province must be free

and that is to say that no tax or duty can be imposed as a condition of such admission (*The King v. Nat Bell Liquors Ltd.* (1)).

Incidentally, it need hardly be said that the invalidity of section 5 could not affect the rest of the statute (*Toronto Corporation v. York Corporation* (2)).

The last ground of appeal is that the license required from the vendors is not one authorized by Head 9 of sec. 92 of the *British North America Act*.

It has been repeatedly held that the licenses specifically enumerated in Head 9 of section 92 are not the only licenses which provincial legislatures may provide for. It has been held also that the words "other licenses" in sub-head 9 are not limited to licenses *ejusdem generis* (*Brewers & Malsters Association v. Attorney-General for Ontario* (3); *Attorney-General for Manitoba v. Manitoba License Holders Association* (4); *Shannon v. Lower Mainland Dairy Products Board* (5)). Provincial legislatures can provide for licenses not only for the purpose of revenue, but also for the purpose of regulating matters within their powers. For example, they have the power of requiring licenses as an incident of any of their other powers, apart from the power to require licenses merely for the purpose of raising a revenue.

A license can, therefore, be required by a Province as a means of collecting a tax which is valid, or as a means of compelling those who are entrusted with the duty of collecting a tax to comply with that duty. Such is the case here. It may be said, as a matter of fact, that the license required under *The Tobacco Tax Act* is a means of enabling the Province to possess a list of the names of the agents who are entrusted with the collection of the tax.

In the *Kingcome Navigation* case (6), the statute there considered also provided for a license.

Under all the circumstances, I think that the judgment appealed from was right and *The Tobacco Tax Act* was competently enacted by the legislature of the province of New Brunswick.

(1) [1922] 2 A.C. 128.

(2) [1938] A.C. 415.

(3) [1897] A.C. 231.

(4) [1902] A.C. 73.

(5) [1938] A.C. 708.

(6) [1934] A.C. 45.

1941

ATLANTIC
SMOKE
SHOPS LTD.

v.

CONLON
ET AL.Rinfret J.
—

The appeal should, therefore, be dismissed with costs, except that there will be no costs to the Intervenant, the Attorney-General of the province of Quebec.

CROCKET J.—I agree with my brother Rinfret and the judgment of the Appeal Division of the Supreme Court of New Brunswick that *The Tobacco Tax Act*, as enacted by the Legislature of that Province, is wholly *intra vires*.

My brother Rinfret has so methodically and exhaustively dealt with the various points involved in the appeal as argued before us that, agreeing with him, as I do, in all his conclusions thereon, I find it difficult to state my own reasons for arriving at the same conclusion without reiterating much of what he has so pointedly said. However, in the circumstances, I feel, even at that risk, I should do so.

Apart from the objection that the vendors' licenses provided for by the statute are not licenses within the meaning of s. 92 (9) of the B.N.A. Act, all the grounds upon which its constitutional validity was challenged here, as in the court below, centre around the question as to whether the tax thereby imposed is a direct tax within the meaning of s. 92 (2) of that Act.

As to the nature or form of the tax imposed, the appellant of course contends that it is an "indirect," rather than a "direct" tax, for the reason that it arises out of a commercial or trading transaction, to which the intended taxpayer is a party, and that it therefore falls within the meaning of the so-called trading cases, which were so strongly relied upon to support the appeal, as well as for the reason that upon the true construction of s. 2 (a) the tax is imposed, not only upon the purchasing prospective consumer, but alternatively upon his agent in making the purchase for him. As to the cases thus relied upon, it will be found on examination that they all proceed upon the ground that, although a tax purports to be imposed upon one party to a commercial or trading transaction, its real nature is determinable by the practicability of its being passed on to other persons by means of a resale and thus absorbed in the purchase price obtained on its resale. The pronouncement of Viscount Haldane in *Attorney-General for British Columbia v. Canadian Pacific*

Railway Company (1) was especially relied upon in this regard, as stated by my brother Rinfret.

In the present case, as Baxter C.J., in the court below distinctly held, and as clearly appears from the very careful analysis my learned brother here has made of the relevant provisions of the New Brunswick Act, this possibility has been definitely eliminated by the statute itself.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

Not only does s. 3(2) expressly enact that

no person shall sell any tobacco in the province at a retail sale unless he holds a vendor's license issued to him under authority of this Act and such license is in force at the time of sale,

but clause (e) of s. 2 declares that "retail sale" means a sale to a consumer for the purposes of consumption and not for resale. Furthermore, s. 4 in the most explicit terms imposes the tax on the consumer in respect of the consumption of the tobacco purchased, and makes it payable at the time the purchaser makes his purchase. It is true that the word "consumer," as defined in s. 2 (a), includes, not only a person, who purchases tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense, but one who purchases the tobacco

on behalf of or as the agent for a principal, who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal,

and that s. 10 provides

that a consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

So far, however, as purchases made in the Province are concerned, it is plain that the tax must be paid at the time of the purchase, and that if the tax is not then paid no purchase can lawfully be made, so that s. 10 cannot very well be intended to apply to the purchase of any tobacco within the Province. It is obviously intended to apply to the provisions of s. 5 in any case where a person residing or ordinarily resident or carrying on business in the Province may be found to have brought into the Province or have received delivery in the Province of tobacco purchased outside the Province for his consumption, when he is required to report the fact to the Minister and then to pay the same tax in respect of the consumption of such

(1) [1927] A.C. 934, at 938.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

In any event, as I read the relevant provisions, the tax is imposed upon the consumer in respect of his own consumption of it or the consumption of it by other persons at his expense, whether the tobacco be purchased by him personally or by someone whom he has requested to make the purchase for him, either within or without the Province. It cannot reasonably, in my opinion, be held to be a tax imposed upon any other person than upon the consumer himself in respect of tobacco purchased for his own consumption or consumption by other persons at his expense. It was surely never intended to make a servant or a messenger, who might be sent by his employer to buy a package of tobacco or cigarettes for consumption by his employer or his employer's friends at his employer's expense, liable for the tax so explicitly imposed by the statute in respect of the consumption of the tobacco thus purchased. The fact that the purchase is made for the master and intending consumer by a servant or messenger does not make the purchase any less the purchase of the master, either at law or according to the common understanding of men, than if the master—the intending consumer—went to the retail store to make it personally. No purchase being possible without payment of the tax, there could in the ordinary course of events be but few instances where a master would send a servant or messenger to a retail vendor's shop to buy tobacco for him without giving him the money to pay both the tax and the price of the tobacco. It would only be in a case where the intending consumer at the moment found himself without the necessary money that there would be any likelihood of the messenger himself paying either the tax or the purchase price with any other than the consumer's own money. In such a contingency the master might borrow the necessary money from someone else, or possibly the servant might himself for the time being lend the money to his master, if he had the change in his own pocket. Constructively at least the money paid to the vendor would none the less be the master's. The tax itself would not amount at the most in such a case to more than five or ten cents, for the

statute provides for the computation of the tax to the nearest cent (one-half cent being considered as one cent) at the rate of ten per centum of the retail price of the tobacco purchased.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

For my part I would, like my brother Rinfret, be very loathe to hold that the mere fact of the purchase being made by a servant or by a special messenger under such exceptional circumstances could have the effect of converting what is otherwise so plainly a direct tax upon a consumer in respect of his own consumption of tobacco, and thus within the constitutional power of a Provincial Legislature, into an indirect tax entirely beyond the legislative power of any of the Provinces.

The statute intends the payment of but one tax in respect of each separate purchase of tobacco in the Province. This, as I have said, it definitely requires to be paid at the time the purchase is made by or in behalf of the prospective consumer. If the servant or messenger in the circumstances I have indicated, either for his own or for his master's convenience, voluntarily makes the payment for his master with his own money or with money borrowed by him for the purpose, it surely cannot well be said that he thereby becomes the "consumer" within the meaning of the charging section of the statute, and that the statute imposes the tax upon him and not upon his master as the prospective consumer. The statute certainly does not compel the servant or agent to pay the tax if the master or employer does not provide him with the money for the purpose. It would in such circumstances be purely a voluntary payment upon his part wholly incompatible with the legal conception of a tax. It seems to me that there would be quite as much reason for saying that if the prospective consumer, not having the money in his pocket at the moment, borrowed it from a servant or from anybody else, went to the vendor's shop himself, made the purchase and paid the tax with the borrowed money, the lender, and not the purchaser, would thereby become the consumer and the taxpayer.

Even if the alternative provision contained in s. 2 (a) concerning the purchase within the province from a retail vendor by an agent for his principal for consumption by the latter or by other persons at his expense must be con-

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.
 —
 Crocket J.
 —

strued as constituting the servant or agent, and not the principal, for whom the purchase is made, the intended taxpayer in such circumstances as above suggested; the servant or agent would not surely find it any less practicable or possible to pass on the tax to his master by means of a resale to him, than the master would to pass it on by the same means to anybody else—in the face of the express statutory prohibition against any resale in any manner whatsoever. Perhaps I should in this connection mention s. 7 in addition to the other sections I have referred to. This section, so far as all retail vendors are concerned, precludes as effectually as any statutory provisions can the absorption of the tax in the retail price or its recoupment in whole or in part to the purchaser.

Reading all the material sections together, it is impossible, I think, to conceive how the Legislature could more effectually have indicated its intention that this tax should be demanded from the very persons, who it intended or desired should pay it. This is the essential characteristic of “direct,” as distinguished from “indirect” taxation, and constitutes the true criterion for determining whether a particular tax falls under the former or the latter category, as expounded by John Stuart Mill in his well known treatise on Political Economy, and adopted by the Judicial Committee of the Privy Council in *Bank of Toronto v. Lambe* (1) and in *Cotton v. Rex* (2), and other cases, and so distinctly reaffirmed by Lord Thankerton in the recent case of *Attorney-General for British Columbia v. Kingcome Navigation Co.* (3), as to the meaning of the term “direct taxation” in s. 92 (2) of the *British North America Act*. In the face of the various provisions of the statute itself, how can it logically be said that the tax imposed by the impugned statute is a tax which the Legislature intended should be borne by any other person than the prospective consumer himself, or that it is a tax, the general tendency of which is to enhance or in any way affect the retail price of tobacco either within or without the Province? The definite provisions of the statute itself in my judgment make the question as to the general tendency of the tax quite irrelevant, unless indeed one is disposed to question the good faith of the Legislature and regard the whole

(1) (1887) 12 A.C. 575.

(2) [1914] A.C. 176.

(3) [1934] A.C. 45.

scheme of the statute as a mere pretence or colourable arrangement in order to disguise what is claimed to be "indirect taxation," which is not within its legislative powers, as "direct taxation," which is. For my part I am not disposed to do so.

With all respect, the only ground to my mind upon which any argument could possibly be based in support of the contention that the tax imposed by the Act is not a direct tax within the competency of the Provinces under the provisions of s. 92 (2) of the *British North America Act* is that of the inclusion of the alternative provision regarding purchases by agents in the definition of "consumer" in s. 2 (2) of the impugned statute. The most that can be said as to this is that the language of the alternative clause may be confusing. Seeing that no retail purchase could lawfully be made within the Province without the tax being immediately paid, this clause would appear to have no perceivable object and to be quite unnecessary to the levying of the intended tax. For this reason the draftsman would have been well advised, in my opinion, to omit it. It could be deleted at any time without affecting the vital object of the Act.

As to s. 5, it is directed only against persons ordinarily resident or carrying on business in New Brunswick, who might otherwise seek to avail themselves of favourable opportunities to buy their tobacco outside the Province and thereby easily evade the tax, which s. 4 so plainly intends to apply to all consumers alike in the Province. Its only and perfectly obvious purpose is to close such an inviting opening to such persons as might be inclined to dodge the intended tax by such convenient means. The section merely places such persons on the same footing in respect of their consumption of tobacco purchased by or for them outside the Province as all "consumers," who buy their tobacco within the Province. It does not purport in any sense to prohibit any one from buying tobacco outside the Province, but makes it clear that when one does so and brings it into the Province or receives delivery of it in the Province for his own consumption he does not thereby free himself of liability to pay the same tax in respect of its consumption as if he had bought it at a retail store within the Province at the same price. Surely if the charging section

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.
 —
 Crocket J.

of the statute is itself within the legislative competency of the Province, such a purely subsidiary section—having no other perceivable object than the prevention or the evasion or defeat of the intended tax—cannot well be held to be beyond it.

As to the contention that the intended tax is in reality a customs or excise duty and consequently an “indirect tax,” and that its attempted imposition therefore infringes the exclusive legislative jurisdiction of the Dominion Parliament in relation to the creation or alteration of such duties, as expressly conferred by s. 122 of the B.N.A. Act, precisely the same objection was made in the *Kingcome* case (1) regarding the imposition of the fuel oil tax by the British Columbia *Fuel Oil Tax Act*, 1930, c. 71, as amended by the statute of 1932, c. 51, upon every consumer of fuel oil according to the quantity which he has consumed. The Judicial Committee overruled the objection as inconsistent with its own decisions, “which,”—to quote the language of Lord Thankerton—

go back to the year 1878, and settled that the test to be applied in determining what is “direct taxation,” within the meaning of s. 92, head 2, of the Act of 1867 is to be found in Mill’s definition of direct and indirect taxes.

That is surely conclusive as to this ground of appeal.

It is argued as well that s. 5 of the New Brunswick statute contravenes s. 121 of the B.N.A. Act, as interposing an obstacle to the free admission of tobacco as an article

of the growth, produce or manufacture of any one of the Provinces into each of the other Provinces,

within the meaning of that enactment.

This section came before this Court for interpretation for the first time in 1921, in the case of *Gold Seal Ltd. v. Attorney-General for Alberta* (2), on the question of the constitutional validity of an enactment of the Parliament of Canada contained in ch. 8, 10 Geo. V, 1919, prohibiting the importation of intoxicating liquor into those Provinces, where its sale for beverage purposes is forbidden by provincial law. The case was heard by Sir Louis Davies, C.J., and Idington, Duff, Anglin and Mignault, JJ. Duff, J., dealing with the construction of s. 181, held that

(1) [1934] A.C. 45.

(2) (1921) 62 Can. S.C.R. 424, at 439.

the phraseology adopted, when the context is considered in which the section is found, shows that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any Province of the Union.

Anglin, J., expressed the view that the impugned legislation was not obnoxious to s. 121 of the B.N.A. Act.

The purpose,

he said,

of that section is to insure that articles of the growth, produce or manufacture of any Province shall not be subjected to any customs duty when carried into any other Province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

Mignault, J., thought that

the object of s. 121 was not to decree that all articles of the growth, produce or manufacture of any of the Provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say, without any tax or duty imposed as a condition of their admission.

The essential word here,

he continued,

is "free," and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade.

The clear effect of these three several pronouncements as read together, it seems to me, is that the words "admitted free," as used in s. 121, mean admitted free of customs duties, and for that reason, and that reason only, even an express prohibition of the import of intoxicating liquor from one province to another in aid of provincial temperance legislation is not within the purview of the section. That is precisely how the head-note of the case states the decision of the court on the construction of the section relied on as invalidating the legislation there in question. Whether or not that decision means that the section only applies to Dominion legislation, it plainly implies, I most respectfully think, that the Parliament of Canada may validly go so far as to expressly prohibit the admission from one Province to another of any article of the growth, produce or manufacture of another Province, so long as the prohibition does not involve the imposition of a customs duty. If that be so in respect of the application of the section to Dominion legislation, how can this Court now consistently hold that a provincial enactment, which

1941
 ATLANTIC
 SMOKE
 SHOPS LTD.
 v.
 CONLON
 ET AL.
 Crocket J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

neither prohibits nor in any sense obstructs nor restrains, as between vendor and purchaser, the passage of any such article from one Province to another, does fall within the purview of the intended ban? No one contends or could well contend that intoxicating liquor is not quite as much an article of the growth, produce or manufacture of one or more of the Provinces of Canada as tobacco. Surely s. 121 of our Constitutional Act was never intended to have one meaning in its application to Dominion legislation and quite another meaning in its application to provincial legislation. And for my part I cannot see how the fact that in the *Gold Seal* case (1) the court was considering an enactment of the Parliament of Canada in relation to the importation of intoxicating liquor from one Province to another can justify us in completely discarding the construction so explicitly placed on s. 121 of the B.N.A. Act in that case, and now construing the words "admitted free," as used therein, in such a sweeping sense as that contended for in support of this appeal.

If we were being called upon to interpret the section for the first time, and if I may say so with all respect, I should be disposed to regard it in precisely the same light as Mignault, J., so clearly expounded it in the passage I have quoted, and to hold that it was inserted in the Imperial Act

merely to secure that they (articles of the growth, produce or manufacture of any of the Provinces) should be admitted "free" (in each of the other Provinces), that is to say, without any tax or duty imposed as a condition of their admission,

and that

what is prohibited is the levying of customs duties or *other charges of a like nature* in matters of interprovincial trade.

This treats the section as applicable to Dominion and provincial legislation alike, and in no way concerns the distribution of legislative powers as between the Dominion and the Provinces. It recognizes on the one hand the exclusive power of the Dominion to create and impose both customs and excise duties, and on the other the exclusive right of the Provinces to impose direct taxation within the Province for the purpose of raising revenue for provincial purposes, so long as the imposition of such duties

(1) (1921) 62 Can. S.C.R. 424, at 470.

or taxes by either authority does not constitute an obstacle to the admission of articles grown, produced or manufactured in any one or more of the Provinces into any other Province in the sense of imposing any condition to such admission. For the reasons already stated, I cannot see how the New Brunswick *Tobacco Tax Act* imposes any condition whatever to the importation or admission into that Province of tobacco, whether it be the produce of any other Province of Canada or of any foreign country.

The tax or charge contemplated by s. 5 is a tax or charge which, I repeat, is not payable until after the tobacco has been brought into the Province by the prospective consumer or received by him within the Province for consumption by himself or others at his expense. Indeed the tax is neither leviable nor in any manner recoverable until after the intending consumer has reported to the Provincial Secretary-Treasurer the fact that he has brought the tobacco into the Province or received delivery of it within the Province for that purpose, and the price paid for it to the outside vendor.

The objection that the statute's requirements regarding vendors' licenses are *ultra vires* of the Legislature as not falling within the purview of s. 92 (9) of the B.N.A. Act, is equally untenable for the reasons so convincingly stated by my brother Rinfret.

I agree with him that the appeal should be dismissed with costs against the appellant, but with no costs to the intervenant, the Attorney-General of the Province of Quebec.

KERWIN J.—Speaking generally, the tax in question is, in my opinion, a direct tax for the raising of a revenue for provincial purposes within the meaning of head 2 of section 92 of the *British North America Act*. The mere insertion, by the legislature, of the phrase in section 4 of the Act “a tax in respect of the consumption of such tobacco” is not conclusive but upon consideration it appears to me that the tax is imposed upon the very person it is intended should bear it and who, in the ordinary course, will not be able to pass it on. The “consumer” of tobacco purchasing it at a retail sale in the Province is ordered to pay the tax at the time of

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Crocket J.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Kerwin J.

purchase, and the vendor is made the collecting agency for the Province. In my view the tax is not imposed on one of the parties to a sale of tobacco in respect of that transaction, and the fact that it is imposed before consumption (instead of after consumption as in the *Kingcome* case (1)) is not of importance if my conclusion as to the true nature and tendency of the tax is correct.

In two respects the statute is partially *ultra vires*. The attempt by that part of the definition of "consumer" or "consumer of tobacco" to impose the tax on an agent must, I think, fail as being indirect taxation. However, the principal is liable for the tax and the part relating to the agent is clearly severable.

Section 5, which is also severable, is *ultra vires* because it infringes the provisions of section 121 of the *British North America Act*. The statute before this Court in the *Gold Seal* case (2) was a Dominion enactment and there is nothing in any of the judgments inconsistent with this conclusion. It is true that the person who brings into New Brunswick tobacco for his own consumption reports the matter to the Minister but the fact that the entry into the Province may, or always will, precede the reporting and payment of the tax, makes it none the less an impost upon the production or manufacture of another province if the tobacco in question falls within that class. If, of course, the tobacco is brought from a foreign country, the tax directed to be paid by section 5 is a customs duty and beyond the powers of a provincial legislature. The main purpose of the statute is to impose direct taxation within the Province but it is not ancillary to that purpose to attempt to regulate external trade in a particular commodity or to impose a customs duty thereon. A provincial legislature is not authorized thus to seize a power that was expressly withheld from it.

With the two exceptions mentioned, the statute is *intra vires* and as the repugnant provisions are severable, the plaintiff appellant, which carries on the business of selling tobacco in New Brunswick, is unable to succeed in its action which by the judgment *a quo* stands dismissed. The appeal should be dismissed but there should be no costs.

(1) (1934) A.C. 45.
(1) (1921) 62 Can. S.C.R. 424, at 470.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Rinfret and agree with the conclusions at which he has arrived, except on one point, that is, the personal liability imposed on an agent. This, I think, oversteps the limits of Provincial legislative jurisdiction but, with this qualification, I would dismiss the appeal.

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Hudson J.
Taschereau J

TASCHEREAU J.—The Supreme Court of New Brunswick, Appeal Division, held that the *Tobacco Tax Act* and regulations thereunder are constitutional. The Atlantic Smoke Shops Limited now appeals to this Court, and the Attorney-General for the province of Quebec (where a law substantially similar has been enacted) having been allowed to intervene, joins with the Attorney-General for New Brunswick, and submits that the Act is *intra vires* of the province.

The Act which was enacted on the 11th of May, 1940, came into force on the first day of October of the same year by Proclamation of the Lieutenant-Governor in Council.

The appellant has a retail store in the city of Saint John and carries on the business of selling tobacco, including cigars and cigarettes, and has refused to obtain the license required by the Act. It has also neglected to collect the tax imposed upon every purchaser.

The appellant submits that this tax is not a direct tax, nor a tax within the province; that the Act infringes upon the executive legislative jurisdiction of the Dominion to impose customs and excise duties, and that the license provided for is not within the category of licenses for which, under section 92, subsection 9, of the *British North America Act*, the provinces have legislative powers.

The principal sections of the Act which have to be considered are the following:—

Section 4, which is the taxing section, reads:—

Every consumer of tobacco purchased at a retail sale in the province shall pay to His Majesty the King in the right of the province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

1941

The word "consumer" is defined as follows:—

ATLANTIC
SMOKE
SHOPS LTD.

v.

CONLON
ET AL.

Taschereau J.

2. In this Act, unless the context otherwise requires

(a) "Consumer" or "Consumer of Tobacco" means 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.

The Act further provides that the purchaser must purchase from a retail vendor who must obtain a license issued from the proper authorities; and a retail sale is defined as being a "sale to a consumer for purposes of consumption and not for sale." Every licensed retail vendor is constituted an agent of the Minister for the collection of the tax, and he must collect it from the purchaser upon whom the tax is imposed, at the time the purchase is made within the Province.

The provinces draw their powers to impose direct taxation from section 92, subsection 2 of the *British North America Act*, and in order to determine whether this particular tax is direct or indirect, the rule many times adopted by this Court and by the Judicial Committee of the Privy Council has once more to be applied.

In *City of Charlottetown v. Foundation Maritime Limited* (1) Mr. Justice Rinfret, delivering the judgment of the Court, analyzed the various pronouncements on this matter and said:—

At the time of the passing of the Act,—and before,—the classification of the then existing species of taxes into these two separate and distinct categories was familiar to statesmen. Certain taxes were then universally recognized as falling within one or the other category. The framers of the Act should not be taken to have intended to disturb "the established classification of the old and well known species of taxation." (*City of Halifax v. Fairbanks' Estate* (2)).

Customs or excise duties were the classical type of indirect taxes. Taxes on property or income were commonly regarded as direct taxes.

These taxes had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies. (*Bank of Toronto v. Lambe* (3)).

As to the taxes outside these classifications

the meaning of the words "direct taxation" as used in the Act, is to be gathered from the common understanding of these words which pre-

(1) [1932] S.C.R. 589, at 593.

(2) [1928] A.C. 117, at 125.

(3) (1887) 12 A.C. 575, at 582.

vailed among the economists who had treated such subjects before the Act was passed.

It is now settled that the tax is direct, if it is demanded from the very person who it is intended or desired shall pay it, and it is indirect, if it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

It is also the general tendency of the legislation that has to be considered, although in exceptional cases the person made liable by the law to pay the tax may succeed in passing it on, and indemnify himself upon a resale of the commodity. (*Attorney-General for British Columbia v. Canadian Pacific Railway* (1); *Rex. v. Caledonian Collieries Limited* (2)). When the ultimate incidence of the tax, in its ordinary and normal operation, is uncertain, then the tax is indirect, because the question whether the tax is direct or not cannot depend upon those special events which may vary at the time of payment. (*Attorney-General for Quebec v. Read* (3); *Attorney-General for British Columbia v. Kingcome* (4)).

In the case submitted to this Court, (I will deal later with the clause making the agent personally liable) the tax is clearly imposed upon the purchaser of tobacco, who is the last purchaser. It is a purchasing tax, not imposed on the transaction of the commodity, but upon every purchaser at the time of making his purchase at a retail sale in the Province. This purchaser is the person intended by the Legislature to pay the tax, and he does pay it at the time of the purchase. Under section 10 of the Act, he is made liable for the tax imposed until it has been collected. There is no expectation or intention that this purchaser from whom the tax is demanded shall pass it on and indemnify himself, and that someone else than the person primarily taxed will pay it eventually.

The appellant has cited the case of the *Attorney-General for British Columbia v. Canadian Pacific Railway* (1), where it was decided that a tax imposed upon every person purchasing fuel oil within the Province for the first time after its manufacture, was an indirect tax, and therefore *ultra vires*. The Judicial Committee came to the conclusion that fuel oil is a marketable commodity, and that

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Taschereau J.

(1) [1927] A.C. 934, at 938.

(3) (1884) 10 A.C. 141, at 143.

(2) [1928] A.C. 358, at 361, 362.

(4) [1934] A.C. 45, at 52.

1941

ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.

Taschereau J.
—

those who purchase it for the first time after its manufacture, even for their own use, acquire the right to take it into the market and indemnify themselves at the expense of others. This, therefore, brought the tax within the principles which made it an indirect tax.

In the present case, it is the last purchaser who is taxed and it is, therefore, quite impossible that the tax can be passed on. In the case already cited of the *Attorney-General for British Columbia v. Kingcome* (1), the Judicial Committee upheld the validity of the second fuel oil tax enacted by the province of British Columbia. The Legislature imposed a tax upon every consumer of fuel oil according to the quantity consumed. It was held that the tax was direct taxation, because it was demanded from the very person who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity, it does not fall within the category of customs and excise duties which are within the legislative powers of the Dominion.

In that case, Lord Thankerton expresses himself as follows:—

It is clear that the Act (fuel act) purports to exact the tax from a person who has consumed fuel oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangements under which the oil is consumed, though it is of course possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot affect the nature of the tax. Accordingly, their Lordships are of opinion that the tax is direct taxation within the meaning of section 92, head 2, of the *British North America Act*.

I have no doubt that this tax is a direct one, and, therefore, within the powers of the Legislature of New Brunswick.

The next point raised is that the tax is not a tax within the Province. The argument is that the Legislature is attempting to tax a non-resident of the province of New Brunswick with respect to his consumption of tobacco outside the Province. The Act provides that the tax is levied only when the purchaser purchases in the Province. It is undoubted that it is within the powers of the Legislature

(1) [1934] A.C. 45.

to tax any person found in the Province, whether that person is therein domiciled or not, if taxed directly. *Bank of Toronto v. Lambe* (1); *Forbes v. Attorney-General for Manitoba* (2)).

1941
ATLANTIC
SMOKE
SHOPS LTD.
v.
CONLON
ET AL.
Taschereau J.

The purchaser pays the tax at the time and place he purchases the commodity. Although this tax has been called a consumption tax, it is more a purchasing tax which is paid by the last purchaser who is deemed to be the consumer. As section 2 (a) of the Act says, "consumer" means any person who within the Province purchases * * * for his own consumption. As the purchase is made within the Province, it seems clear that the taxation is imposed within the Province, even if by exception the tobacco purchased is consumed in a different Province. It is only in exceptional cases resulting from the act of the purchaser that the tobacco may be consumed outside the Province.

The appellant has also raised the contention that this tax is *ultra vires* because it violates the disposition of section 121 of the B.N.A. Act, which says:—

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.

The argument of the appellant is that the Act purports to impose a tax upon articles produced or manufactured in another province of Canada when introduced into New Brunswick. In the submission of the appellant the objectionable clause of the Act is section 5, which reads as follows:—

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who 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 immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

This tax, in my opinion, is not a customs duty nor an excise tax. In *Attorney-General for British Columbia v. Kingcome* (3), Lord Thankerton said:—

- (1) (1887) 12 A.C. 575, at 584. (2) [1937] A.C. 260.
(3) [1934] A.C. 45.

1941

ATLANTIC
SMOKE
SHOPS LTD.v.
CONLON
ET AL.

Customs and Excise duties are in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.

In the case of *Bank of Toronto v. Lambe* (1), Lord Hobhouse expressed himself in the following manner:—

Taschereau J.

It is not like a customs duty which enters into the price of the taxed commodity.

These customs duties impose a condition on the admission of the commodity before reaching the consumer, and as Mr. Justice Mignault says in *Gold Seal Limited v. Dominion Express Company* (2):—

I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed *as a condition of their admission*. The essential word here is "free" and what is prohibited is the levying of customs duties or other charges of a like nature in matters of inter-provincial trade.

The tax contemplated by the Tobacco Act is imposed only once the importation is made, and such importation in the province of New Brunswick does not depend *upon the payment of the tax*. If we were to adopt the construction suggested by the appellant, no purchaser of a commodity coming from a different province could ever be taxed. When the commodity has entered into the Province, I see no valid reason why the purchaser could not be compelled to pay a tax to the provincial authorities.

It has also been submitted that the retail vendors are subject to the payment of a licence and that the licensing provisions found in the Act are not authorized by the *British North America Act*. I fail to see how the appellant can succeed on this ground. The licenses provided for in section 92, subsection 9, of the *British North America Act* are not the only licenses in relation to which the various provinces may enact laws. They may provide for licenses not only for the purpose of raising a revenue, but they have also the right to require licenses as an incident to any one of their other powers.

The appellant has submitted also that the Tobacco Act purports to tax not only the principal but also the agent who, on behalf of his principal, purchases tobacco. The

(1) (1887) 12 A.C. 575, at 582. (2) (1921) 62 Can. S.C.R. 424, at 470.