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In the Privy Council.

No. 81 of 1937.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN :

GEORGE WALKEM SHANNON, THOMAS HEDLEY McDONALD AND MATTHEW BLACKWOOD McDERMID .. .. *Appellants,*

AND

LOWER MAINLAND DAIRY PRODUCTS BOARD .. *Respondents,*

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA *Intervener.*

APPENDIX OF JUDGMENTS.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

HAYWARD, et al

vs.

B.C. LOWER MAINLAND DAIRY PRODUCTS BOARD.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON.

In the Supreme Court of British Columbia.

Reasons for Judgment of Manson, J. *re Hayward vs. B.C. Lower Mainland Dairy Products Board.*

The Plaintiff Hayward is a dairy farmer carrying on business in the Lower Mainland of British Columbia and the Plaintiff the Independent Milk Producers' Co-operative Association is a co-operative Association incorporated under the Co-operative Associations Act R.S.B.C. 1924, Chap. 48. The Defendant is a marketing board constituted under the "Milk Marketing Scheme of the Lower Mainland of British Columbia," a scheme approved by Order-in-Council on 21st November 1934, under the Natural Products Marketing (British Columbia) Act, 1934, being Chap. 38 of the Statutes of British Columbia, 1934.

10 Under the Natural Products Marketing Act, 1934, being Chap. 57 of the Statutes of Canada, 1934, the "Milk Marketing Scheme of the Lower

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Mainland of British Columbia " was approved by the Governor in Council and thereunder was constituted a local board, the British Columbia Lower Mainland Dairy Products Board. The schemes Dominion and Provincial were distinct though identical in name and the Boards were distinct. The personnel of the two Boards was the same. They had a common secretary, a single minute book, a common staff, a common office and but one bank account.

The Provincial Act was passed on the 29th March 1934 and proclaimed pursuant to section 11 thereof on the 20th July 1934. The Dominion Act was passed on the 3rd July 1934. The Provincial Act was amended by chapter 34 of the Statutes of British Columbia 1936, which was passed on the 1st April 1936. Sections 2 and 7 of the amending Act became operative immediately and the other sections of the amending Act were proclaimed on the 18th June 1936 pursuant to section 8 (2) of the amending Act. The Provincial Act was further amended by chapter 30 of the statutes of British Columbia 1936 (Second Session) which was passed on the 20th November 1936. Sections 1 to 6 inclusive of the amending Act became operative forthwith and section 7 thereof has not yet been proclaimed. The amendments to the Provincial Act were of a substantial character.

" Marketing " is defined in the original Provincial Act to include " buying and selling, shipping for sale or storage, and offering for sale." To that definition was added by chapter 34, 1936, the words " and in respect of a natural product includes its transportation in any manner by any person." " Natural product " is by the same Act defined to mean " any product of " agriculture, or of the forest, sea, lake or river and any article of food or " drink wholly or partly manufactured or derived from any such product." The latter phrase, while more explicitly defined in the Dominion Act, is given a meaning substantially the same as in the Provincial Act.

It becomes necessary to make a somewhat detailed analysis of the provisions of the Provincial Act of 1934. By section 2 thereof the phrase " Dominion Act " is defined to mean " The Natural Products Marketing Act, 1934," passed, or which may be passed, at the present session of the Parliament of the Dominion and the phrase " Dominion Board " is defined to mean, " the Dominion Marketing Board constituted under the Dominion Act." By section 3 the Lieutenant-Governor in Council is empowered to constitute a " British Columbia Marketing Board " of not more than three members, to appoint the members of the Board, to fix their remuneration and to appoint a staff for the Board and to fix the staff salaries. It will be convenient to set out the remainder of the original Act below :—

" 4. (1) Subject to subsection (2), so far as the powers can be applied, " any Provincial Board shall have and may exercise the like powers in " relation to the marketing of natural products within Provincial jurisdiction as under the Dominion Act are had and exercisable by the " Dominion Board in relation to the marketing of natural products " within Dominion jurisdiction.

" (2) For the purpose of the adapting to the uses of any Provincial " Board of the powers of the Dominion Board and of vesting in any

" Provincial Board ample powers for the control of natural products in " co-operation with the Dominion Board, the Lieutenant-Governor in " Council may by regulations define the powers exercisable by the Pro- " vincial Board and the method of their exercise and application within " Provincial jurisdiction.

" 5. Every Provincial Board may co-operate with the Dominion " Board to regulate the marketing of any natural product of the Province " and may act conjointly with the Dominion Board, and may perform " such functions and duties and exercise such powers as are prescribed " by this Act or the regulations.

" 6. Every Provincial Board may, with the approval of the Lieu- " tenant-Governor in Council, perform any function or duty and exercise " any power imposed or conferred upon it by or pursuant to the Dominion " Act, with reference to the marketing of a natural product.

" 7. The Dominion Board may, with the approval of the Lieutenant- " Governor in Council, exercise any of its powers with reference to the " marketing of a natural product in any manner and under any circum- " stances within Provincial jurisdiction, to the like extent and with " the like effect as those powers are exercisable by it pursuant to the " Dominion Act with reference to the marketing of that natural product.

" 8. (1) The Lieutenant-Governor in Council may make such " regulations as are considered necessary or advisable for carrying out " the purpose and intent of this Act, and may vest in any Provincial " Board such authorities and powers as are considered necessary or " advisable with reference to the marketing of any natural product so " far as the same is within Provincial jurisdiction and to enable any " Provincial Board in co-operation with the Dominion Board to exercise " effective control of the marketing of natural products to the full extent " intended by this Act and the Dominion Act.

" (2) Without thereby limiting the generality of the provisions " hereinbefore contained, it is declared that the power of the Lieutenant- " Governor in Council to make regulations shall extend to :—

" (a) The appointment of marketing boards or agencies within " the Province to co-operate with and act as agents of the Dominion " Board :

" (b) The appointment of marketing board or agencies to " exercise within the Province any authority or function which may " be conferred on a local board under the Dominion Act, and other- " wise to co-operate and act in the administration and carrying-out " of any scheme for the regulation of the marketing of any natural " product authorised under the Dominion Act or this Act :

" (c) The approval of any scheme for the regulation of the " marketing of any natural product in respect of which the approval " of the Lieutenant-Governor in Council is necessary for any purpose " of the Dominion Act :

" (d) The authorising and giving effect to any scheme for the " regulation of the marketing within the Province of any natural " product :

" (e) The providing for the submission of any scheme for the " regulation of the marketing of any natural product to a plebiscite " within the area of the Province covered by the scheme :

" (f) The termination and annulment of any approval given or " scheme authorised by the Lieutenant-Governor in Council under " this Act :

" (g) The imposition of penalties for enforcing any provision of " the regulations.

" 9. Any approval which the Lieutenant-Governor in Council is " authorised or required to give for any purpose of this Act may be " given by general regulations applicable to all cases or any class or " classes of cases, or by special order in any particular case.

" 10. All moneys necessary to pay the salaries of the members of " any Provincial Board and its staff and to meet the expenses necessarily " incurred in the carrying out of this Act shall, in the absence of a special " vote of the Legislature for that purpose, be paid from the Consolidated " Revenue Fund."

" 11. This Act shall come into operation on a day to be fixed by the " Lieutenant-Governor by his Proclamation."

The schemes, Dominion and Provincial, were both with respect to " the marketing of milk and products processed or manufactured wholly or chiefly from milk." They had application to the same area, roughly the Lower Mainland or Lower Fraser Valley area of this province. Under both schemes a " producer " was defined to mean " a person producing within the area milk for sale in fluid form or for manufacturing purposes." And under both " regulated product " was defined to mean " milk or manufactured products as defined " in the scheme and the phrase " manufactured products " was identically defined in both schemes. Under both schemes " agency " meant " a group of producers joined in corporate form for the purpose of marketing the milk or manufactured products of its members." Under the Dominion scheme the local Board had power to " designate the agency or agencies through which the regulated product shall be marketed." And under the Provincial scheme the Provincial local board had not only that power but the additional power, " to prohibit the marketing of the regulated product except through the agency or agencies designated."

The purpose and definition of the Dominion scheme was set out in section 3 thereof, which read as follows :—

" 3. The purpose and definition of the scheme is :—

" (a) to regulate the marketing in inter-provincial and export " trade of the regulated product produced in the area of the Province " of British Columbia to which the scheme relates, and

" (b) to supplement the British Columbia Lower Mainland " Dairy Products scheme organised under the Natural Products " Marketing (British Columbia) Act, 1934, insofar as it may be " within the jurisdiction of the Parliament of Canada to do so, and

" (c) to impose tolls and charges in respect of the marketing " of the whole or any part of the regulated product to provide a fund " to compensate any person who has marketed any of the regulated " product in inter-provincial or export trade, and for all the purposes " of the Provincial Local Board or the Local Board."

The purpose of the Provincial scheme was set forth in section 4 thereof :—

" 4. The purpose of the scheme is to regulate, subject to the super- " vision of the Provincial Board, the marketing of the milk or manu- " factured product produced in the area."

The " Dominion Marketing Board " (called the Dominion Board in the Provincial Act—vide sec. 2) was a board established under sec. 3 of the Dominion Act. It had wide powers to regulate the marketing of natural products, and, *inter alia*, the power " to co-operate with any board or agency " established under the law of any province to regulate the marketing of " any natural product of such province, and to act conjointly with any such " provincial board or agency " (sec. 4 (1) (i)). And it had the power, further, to authorise a local board to exercise its powers so far " as may be necessary for the proper enforcement of the scheme of regulation " (sec. 4 (2)). It had power, whether exercising the powers conferred by the Dominion Act or by provincial legislation, to establish a separate fund in connection with any scheme of regulation and for the purposes of such scheme to impose charges and tolls (sec. 4 (4)). It might authorise a local board to collect and disburse the charges or tolls imposed (sec. 4 (5)), and under section 4 (6) whenever the board or a local board was co-operating or acting conjointly with any board or agency established under provincial law it might similarly impose charges or tolls in respect of the marketing of the whole or part of the product marketed under the direction of such board or agency and it might authorise such board or agency to act as the agent of the board in collecting and disbursing such charges or tolls. Under section 4 (7) a fund created by charges or tolls imposed in connection with a scheme of regulation might be utilised by the board or by the local board, if so authorised by the board, for the purposes of such scheme including the creating of reserves, and in the case of charges and tolls imposed in respect of the marketing of any product under the direction of any board or agency established under provincial law to regulate the marketing of any natural product, the board might direct that the charges or tolls be utilised by and for the purposes of such board or agency. The "British Columbia Marketing Board" (called the Provincial Board under the Dominion scheme—vide sec. 2 (1) (o) was a board constituted under sec. 3 of the Provincial Act. Under sec. 4 of the Provincial Act the Provincial Board was to have like powers in relation to the marketing of natural products within provincial jurisdiction as under the Dominion Act " are had and exer- " cisable by the Dominion Board in relation to the marketing of natural " products within Dominion jurisdiction," so far as the powers could be

applied and subject to the definition of its powers by Order-in-Council. No Order-in-Council, so far as appears from the evidence, seems to have been passed. Under sec. 10 of the Dominion Act the Governor-in-Council might authorise any provincial marketing board or agency to exercise the function of a local board with reference to a Dominion scheme, if the scheme related to an area confined within the limits of a province and under sec. 11 the board might exercise any power conferred upon it by or pursuant to provincial legislation and might authorise a local board to exercise any such power. Under the Provincial Act a provincial board might co-operate with the Dominion Board and, further, might act conjointly with the Dominion Board (sec. 5). It might, under approval of an Order-in-Council, exercise powers conferred or imposed by the Dominion Act (sec. 6) and the Dominion Board was empowered with the approval of the Lieutenant-Governor in Council to exercise any of its powers in any manner and under any circumstances within provincial jurisdiction to the like extent and the like effect as those powers might be exercised by it pursuant to the Dominion Act (sec. 7).

On the 22nd January 1935 the Plaintiff association on its own request, " pursuant to the provisions of the Milk Marketing Scheme of the Lower Mainland of British Columbia and under section 14, subsection (6) thereof " was designated by the Defendant an " agency " under the scheme.

This action was commenced on 8th August 1935 and the pleadings were closed about the end of September 1935. The Plaintiffs say that the Acts both Dominion and Provincial are *ultra vires* the legislatures which passed them. They claim to be relieved from all compliance with the Acts, and the schemes thereunder and an injuction to restrain the Defendant from collecting tolls or charges and from conducting a pool or pools in connection with the marketing of milk or products manufactured from milk and from otherwise interferring with the Plaintiff in the marketing within the province of their milk or milk products.

The Dominion Act since the commencement of this action has been held in this Court to be *ultra vires* following the opinions expressed by the Supreme Court of Canada and in the Judicial Committee upon questions referred— *vide Vancouver Growers Ltd.* v. *British Columbia Coast Vegetable Marketing Board et al* (1937) 1 W.W.R. 670. The report upon the reference of this Act to the Supreme Court of Canada will be found (1936) S.C.R. 398 and of the appeal to the Judicial Committee (1937) 1 W.W.R. 328. The validity of the Provincial Act and of the provincial scheme remains to be considered.

It is well recognised in construing statutes, as was said by Burton, J.A., in *Regina* v. *Wason* 17 O.A.R. 221 at 235, that " in cases of doubt every " possible presumption and intendment will be made in favour of the con- " stitutionality of the Act in question, the presumption being that when the " subject matter appears to be within the class of subjects assigned to the " particular legislative body which is assuming to deal with it, the enactment " is valid and constitutional, and that the presumption is not to be over- " come unless the contrary is clearly demonstrated ; in other words, it will " not be presumed that the Legislature entrusted by the Confederation Act " with these great powers will transcend its authority." To the same effect

is the language of Mr. Justice Duff speaking for the Judicial Committee in the *Reciprocal Insurers Case* [1924] A.C. 328 at 345.

It is to be observed that neither legislature seemed certain of its legislative jurisdiction. The Dominion Act by section 26 thereof enacted that if any of the provisions of the Act were found to be in excess of jurisdiction none of the other or remaining provisions should therefore be held to be inoperative or *ultra vires* but should stand as separate and independent enactments. In section 3 of the Dominion scheme (supra) the phrase " in so far as it may be within the jurisdiction of the Parliament of Canada to do so " was used. In section 4 (1) of the Provincial Act (supra) is found the phrase " so far as the powers can be applied " and in section 8 (1) (supra) the phrase " so far as the same is within Provincial jurisdiction." The expedient of attempting to safeguard the validity of legislation by the use of such phraseology almost invariably leads to litigation and, it is an expedient which, if I may say so with respect, has little if anything to commend it.

It is clear that the Acts Dominion and Provincial were intended to be complementary—and so too the schemes. Quite unusual and extraordinary provisions were inserted in the statutes to ensure that the whole field with respect to the marketing of natural products should be occupied by their operation. The language of section 4 of the Provincial Act (supra) and particularly of section 4 (2) (supra) makes this abundantly clear as does section 4 (1) (i) of the Dominion Act which reads as follows :—

> " 4. (1) The board shall subject to the provisions of this Act have
> " power
>
> " (i) to co-operate with any board or agency established under
> " the law of any province to regulate the marketing of any natural
> " product of such province and to act conjointly with any such pro-
> " vincial board or agency."

Something more than mere co-operation was attempted. Section 4 (2) of the Provincial Act speaks of co-operation—as does section 4 (1) (b) of the Dominion Act but the true interpretation of the statutes and of the schemes, as it seems to me, goes further than co-operation. The provisions of the statutes and of the schemes are interlocking and overlapping. The machinery of each Act is made auxiliary to that of the other. Sir Lyman Duff, C.J.C., said in the Supreme Court, when speaking with respect to the Dominion Act, at p. 412 of (1936) S.C.R. :—

> " Parliament cannot acquire jurisdiction to deal in the sweeping
> " way in which these enactments operate with such local and provincial
> " matters by legislating at the same time respecting external and inter-
> " provincial trade and committing the regulation of external and inter-
> " provincial trade and the regulation of trade which is exclusively local
> " and of traders and producers engaged in trade which is exclusively
> " local to the same authority."

It is equally true to say that a Provincial Legislature cannot acquire jurisdiction to deal in the sweeping way in which the Provincial Act has purported to do with inter-provincial and external trade by legislating at the same time

respecting property and civil rights in the Province or matters of a merely local or private nature in the Province and committing the regulation of intra-provincial trade (a matter of merely local or private nature in the Province) and the regulation of trade which is inter-provincial or external and of traders and producers engaged in trade which is exclusively inter-provincial or external to the same authority. In the *King* v. *Eastern Terminal Elevators* (1925) S.C.R. 434 at p. 448 Duff J. (as he then was) observed :—

> " It was pointed out that in a system involving a division of powers " such as that set up by the British North America Act, it may often be " that subsidiary legislation by the provinces or by the Dominion is " required to give full effect to some beneficial and necessary scheme of " legislation not entirely within the powers of either."

Lord Atkin said in the concluding paragraph of his speech in the Judicial Committee on the recent reference with regard to the Dominion Act as reported in (1937) 1 W.W.R. 328 at 332 :—

> " The Board were given to understand that some of the provinces " attach much importance to the existence of marketing schemes such " as might be set up under this legislation and their attention was called " to the existence of provincial legislation setting up provincial schemes " for various provincial products. It was said that as the provinces and " the Dominion between them possess a totality of complete legislative " authority, it must be possible to combine Dominion and provincial " legislation so that each within its own sphere could in co-operation " with the other achieve the complete power of regulation which is " desired. Their Lordships appreciate the importance of the desired aim. " Unless and until a change is made in the respective legislative functions " of Dominion and province it may well be that satisfactory results for " both can only be obtained by co-operation. But the legislation will " have to be carefully framed, and will not be achieved by either party " leaving its own sphere and encroaching upon that of the other."

Sections 4 to 8 inclusive of the original Provincial Act make clear that, despite the safeguarding phraseology used, the Province was not keeping within its own sphere, namely, that of legislating with respect to matters of a merely local or private nature in the Province. In view of the fact that I am of the opinion, for reasons given below, that section 4 is otherwise *ultra vires* the Legislature of the Province I shall say no more for the moment with regard to that section than to observe that I do not think the Legislature can adapt to the uses of any Provincial Board the powers of the Dominion Board. The powers of the Dominion Board must have their foundation in the jurisdiction of the Dominion to legislate under section 91 of the B.N.A. Act and no such powers thus conferred can be adapted to the use of a Provincial Board which can only receive its powers from the Legislature exercising legislative jurisdiction under section 92 of the said Act. Nor am I of the opinion that a Provincial Board can act conjointly with a Dominion Board. To act conjointly is to do something more than to co-operate. Lord Atkin makes it clear that each body must act within its own sphere—that neither can leave its own sphere. Conjoint action means that the two bodies must,

so to speak, lock arms, that involves encroachment by the provincial body within the Dominion sphere.

Section 6 of the Provincial Act suggests that the Dominion might impose or confer power upon a Provincial Board. I do not think the Dominion could do so. Lefroy in his *Canada's Federal System* at p. 70 reports Lord Watson on the argument in *Canadian Pacific R.W. Co.* v. *Bonsecours* [1899] A.C. 367 as having used these words :—

> " The Dominion cannot give jurisdiction or leave jurisdiction with " the Province. The Provincial Parliament cannot give legislative juris- " diction to the Dominion Parliament. If they have it, either one or " the other of them, they have it by virtue of the Act of 1867. I think " we must get rid of the idea that either one or the other can enlarge " the jurisdiction of the other or surrender jurisdiction "

to which language Lord Davey adds : " or curtail."

Section 7 of the Act appears to be a clear attempt on the part of the Provincial Legislature to confer a jurisdiction on the Dominion Board with which as a Dominion Board it could not possibly be clothed by the Dominion Parliament. The section does not purport to make the Dominion Board a Provincial Board for the purposes of the Provincial Act. It does not endeavour to make a piece of machinery common to both Acts. Section 8 (2), clauses (a), (b), and (c) are open to the same objection as sections 6 and 7. The endeavour to authorise a Provincial Board to receive authority or jurisdiction by virtue of Dominion legislation is abortive as is the endeavour to clothe the Dominion Board with jurisdiction to function in the provincial field. If authority were required to establish the abortive character of any such attempts we have it in the above quoted language of Lord Watson. To the same effect are the decisions in *Rex* v. *Zaslavsky* (1895) 2 W.W.R. 34, *Rex* v. *Thorsby* (1935) 3 W.W.R. 475 and *Rex* v. *Brodsky* (1936) 1 W.W.R. 186.

Returning to a consideration of section 4 we find, not legislation by reference, but no legislation at all. As pointed out above the Dominion Act had not been passed at the time the Provincial Act was assented to. The Provincial Legislature could not know with certainty what the terms of the Dominion Act might be nor whether a Dominion Act would be passed, nor could the Provincial Legislature delegate to another legislative body the power to determine the powers in whole or part of a board of its creation. This view is consistent with that of Lord Watson (supra).

The last clause of section 8 (1) is an enlightening one. Read with the preceding sections it makes clear that the true tenor of the Act is to confer power upon the Provincial Board to control or aid in the control of the marketing of natural products not only intra-provincially but inter-provincially and in the matter of export trade. The clause reads " and to enable any " Provincial Board in co-operation with the Dominion Board to exercise " effective control of the marketing of natural products to the full extent " intended by this Act and the Dominion Act." The Dominion Act could only have to do with the marketing of natural products by virtue of the " trade and commerce " clause of section 91 of the B.N.A. Act, and with

legislation in the matter of " trade and commerce " the Provincial Legislature can have no concern. One turns to the definition of the phrase " natural product " in the Act and realises at once that the Act has to do with the control of the marketing of products which to the extent of eighty or ninety per cent. at least are exported from the Province—namely the products of the forest and of the sea.

The Dominion Act by section 4 (1) (a) purported to empower the Dominion Board to regulate the time and place at which and to designate the agency through which the regulated product might be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that might be marketed by any person at any time and to prohibit the marketing of any of the regulated product of any grade, quality or class. By clause (f) of the same subsection the Dominion Board was empowered to require producers to register and take out a licence which might be cancelled for cause. In discussing these two clauses Sir Lyman Duff, C.J.C., in the *Reference case* (supra) at p. 411 made the following observation :—

> " It does not seem to admit of serious dispute that, if, regards " natural products, as defined by the Act, the provinces are destitute of " the powers to regulate the dealing with natural products in respect " of the matters designated in section 4 (1) (a) the powers of the provinces " are much more limited than they have generally been supposed to be. " If this defect of power exists in relation to natural products it exists " in relation to anything that may be the subject of trade. Furthermore, " if the Dominion has power to enact section 4 (1) (f) as a provision " falling strictly within ' the regulation of trade and commerce,' then " the provinces are destitute of the power to regulate, by licensing " persons engaged in the production, the buying and selling, the shipping " for sale or storage and the offering for sale, in an exclusively local and " provincial way of business of any commodity or commodities. The " acceptance of this view of the powers of the provinces would seem " to be inconsistant not only with *Hodge* v. *The Queen* (1883) O.A.C. 117 " but with the judgment in the Montreal Street Railway case [1912] " A.C. 33 as well as with the judgment in the Board of Commerce case " (1922) 1 A.C. 191. The judgment in this latter case seems very plainly " to declare that in the absence of very special circumstances such as " those indicated in the judgment of the Board, such matters as subjects " of legislation fall within the jurisdiction of the provinces under " section 92."

I do not infer from the language of the learned Chief Justice that he suggests that the Province could broadly exercise the powers contained in section 4 (1) (a) above cited but only that it might do so when regulating trade " in an exclusively local and provincial way of business " as he makes quite clear in dealing with section 4 (1) (f).

Finally upon this aspect of the provincial legislation let me reiterate—co-operation is one thing—encroachment is another. The Provincial Act of 1934, in my view, clearly encroached upon the Dominion legislative field. Interference with inter-provincial and export trade in natural products was

the substantial and not merely the ancillary or incidental effect of the operation of that Act.

I conclude that certain provisions of the Act are *ultra vires* for the particular reasons given and, having regard to the true scope and intendment of the Act as a whole, I am of opinion that it was beyond the legislative power of the enacting legislature.

Counsel for the Plaintiff strongly urged that the Act was *ultra vires* by reason of the fact that it is but a skeleton Act and that the Legislature delegated its legislative functions to the Lieutenant-Governor in Council. The delegation of legislative power is indeed a most conspicuous feature of the Act. The question of the right of a Legislature to delegate in such a comprehensive fashion is worthy of discussion. Counsel contended that legislation proper was one thing—that regulations for the purpose of carrying legislation into effect were another—that legislation proper was exclusively the function of the Legislature under the B.N.A. Act.

Let me premise my observations on this submission by quoting two very apposite statements made by Sir Lyman Duff, C.J.C., in his able and comprehensive remarks on the *Reference case* on the Dominion Act. At p. 408 of (1936) S.C.R. he uses this language in speaking of a judgment of the Judicial Committee upon a former case :—

> " The general expressions in this passage must, of course, be read " in the light of the controversy with which their Lordships were dealing."

And again the learned Chief Justice warns at pp. 417, 418, in speaking of another judgment of the Judicial Committee :—

> " Experience seems to show that there has been a disposition not " to attend to the limits implied in the carefully guarded language in " which the Board expressed itself."

Turning to *Hodge* v. *The Queen* [1883] 9 A.C. 117 Lord Fitzgerald, at p 132, says :—

> " It appears to their Lordships, however, that the objection just " raised by the Appellants is founded on an entire misconception of the " true character and position of the provincial legislatures. They are " in no sense delegates of or acting under any mandate from the Imperial " Parliament. When the British North America Act enacted that there " should be a legislature for Ontario, and that its legislative assembly " should have exclusive authority, to make laws for the Province and " for provincial purposes in relation to the matters enumerated in sec. 92, " it conferred powers not in any sense to be exercised by delegation from " or as agents of the Imperial Parliament, but authority as plenary and " as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within " these limits of subjects and area the local legislature is supreme, and " has the same authority as the Imperial Parliament, or the Parliament " of the Dominion, would have had under like circumstances to confide to " a municipal institution or body of its own creation authority to make

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" by-laws or resolutions as to subjects specified in the enactment, and " with the object of carrying the enactment into operation and effect.

" It is obvious that such an authority is ancillary to legislation, and " without it an attempt to provide for varying details and machinery " to carry them out might become oppressive, or absolutely fail. The " very full and very elaborate judgment of the Court of Appeal contains " abundance of precedents for this legislation, entrusting a limited " discretionary authority to others, and has many illustrations of its " necessity and convenience. It was argued at the bar that a legislature " committing important regulations to agents or delegates effaces itself. " That is not so. It retains its powers intact, and can, whenever it " pleases, destroy the agency it has created and set up another, or take " the matter directly into its own hands. How far it shall seek the aid " of subordinate agencies, and how long it shall continue them are " matters for each legislature and not for Courts of Law to decide."

Let us scrutinise closely the language of the above decision. It establishes that the Legislature had the authority the Imperial Parliament or the Dominion Parliament would have had under like circumstances to confide to a municipal institution or body of its own creation authority to do what —" to make by-laws or resolutions "—and what kind of by-laws—" By-laws as to subjects specified in the enactment "—and why—" with the object of carrying the enactment into operation and effect." The Board goes on and explains that such an authority is ancillary to the legislation and necessary to provide for details and machinery without which the legislation might fail in its operation. It is pointed out that abundance of precedents exists of a legislature doing what—" entrusting a limited discretionary authority to others." And the Board speaks of " important regulations " and " subordinate agencies." It cannot surely be contended that " by-laws " and " resolutions " and " important regulations " committed to " subordinate agencies " are legislation in the ordinary sense. The text of the language pertinent to the decision of the Board does not for a moment, in my opinion, support the proposition that a Legislature may create and endow with its own capacity a new legislative power.

In *In re Gray* (1918) 57 S.C.R. 150, in which the validity of certain war regulations made by the Governor-in-Council was called in question, Sir Charles Fitzpatrick, C.J.C., says at p. 156-7 :—

" The practice of authorising administrative bodies to make regula- " tions to carry out the object of an Act . . . is well known and its " legality is unquestioned.

" . . . Parliament cannot, indeed, abdicate its functions, but " within reasonable limits at any rate it can delegate its powers to the " executive government. Such powers must necessarily be subject to " determination at any time by Parliament, and needless to say the " acts of the Executive, under its delegated authority, must fall within " the ambit of the legislative pronouncement by which its authority is " measured.

" It is true that Lord Dunedin, in the case referred to (*Rex* v. " *Halliday* [1917] A.C. 260) said :—

" ' The British constitution has entrusted to the two Houses " ' of Parliament, subject to the assent of the King, an absolute " ' power untrammelled by any written instrument, obedience to " ' which may be compleled by some judicial body.'

" That, undoubtedly, is not the case in this country, which has its " constitution founded in the Imperial statute, the ' British North America " Act, 1867.' I cannot, however, find anything in that Constitutional " Act which, so far as material to the question now under consideration, " would impose any limitation on the authority of the Parliament of " Canada to which the Imperial Parliament is not subject."

The above decision was given under the stress of the Great War in July of 1918 and with respect to the right of the Dominion Parliament to delegate its legislative function to the Governor in Council. It may be that there is a right in the Dominion Parliament to delegate its legislative power which is wanting in the case of a Provincial Legislature as suggested by the Judicial Committee in the *Initiative and Referendum case* (infra) at p. 943. It was there observed :—

" Had the Provinces possessed the residuary (legislative) capacity, " as in the case with the States under the Constitutions of the United " States and Australia, this might have affected the question of the " power of their Legislatures to set up new legislative bodies. . . . " The language of s. 92 is important. That section commences by " enacting ' in such Province the Legislature may exclusively make laws " in relation to matters ' coming within certain classes of subjects."

In the *Gray case*, Idington J. in a strongly worded judgment dissented and with him Brodeur J. agreed. Duff J. (as he then was) and Anglin J. (as he then was) supported in equally strong words the broad view that the Dominion Parliament could delegate its legislative functions to the Executive Government. The Chief Justice in more guarded language (vide supra) took the same view and agreed with the reasons given by Anglin J., noting however in the course of his reasons the obvious objections to executive legislation. Four of the five learned Judges of the Supreme Court of Alberta, as noted by Anglin J. in *In re Lewis* 41 D.L.R. 1, were of a contrary opinion. Anglin J. observes at p. 176 :—

" A complete abdication by Parliament of its legislative functions " is something so inconceivable that the constitutionality of an attempt " to do anything of the kind need not be considered."

But time marches on and in 1934 the Legislature of this Province did for the period of a year, virtually, the very thing the learned Judge deemed so inconceivable. Vide : *Special Powers Act* (1934) B.C. Stats. c. 60. It is noteworthy that the learned Judge cites from *Hodge* v. *The Queen* in support of the view which he takes. That case decided the Imperial Parliament by the Act of 1867 had given plenary power to provincial legislatures to

In the Supreme Court of British Columbia.

Reasons for Judgment of Manson, J. *re Hayward vs. B.C. Lower Mainland Dairy Products Board —continued.*

*sic.

exclusively legislate within a limited field but I am unable, with respect, to find therein support for the conclusion of the majority of the Court. Has not the learned Judge fallen into the very error against which the present Chief Justice warns at pp. 408, 417, 418 of (1936) S.C.R. above cited. The emergency of war, one believes, bred strong opinions, and understandably so, and even Courts, as it seems to me, in an emergency involving the very life of the nation might not have *shewed with strictness to the judicial line. The Executive Government itself must have had grave doubts and misgivings as to the power it was exercising under the section of the Statute there under review because it took the precaution to have its proposed Order-in-Council approved by resolutions of both Houses of Parliament. The resolutions, of course, were of non-effect judicially. It is only with the very greatest hesitation and respect that I venture to express an opinion seemingly at variance with the pronouncement of such eminent interpreters of our Constitution as constituted the majority of the Court in the *Gray case* and it is conceded that the present Chief Justice speaks with more than the usual authority in constitutional cases. Nevertheless, I am constrained to do so when I bear in mind that six out of eleven Judges were of an opinion contrary to that held by the majority of the Supreme Court and when I bear in mind the cautious language of the then Chief Justice and still more am I constrained to do so when I read the language of one of the greatest of our constitutional lawyers and interpreters of the B.N.A. Act, the late Viscount Haldane. In the *Initiative and Referendum case* [1919] A.C. 935, a case decided after *In re Gray*, Viscount Haldane used this language at p. 945 :—

> " Section 92 of the Act of 1867 entrusts the legislative power in a " Province to its Legislature, and to that Legislature only. No doubt " a body, with a power of legislation on the subjects entrusted to it so " ample as that enjoyed by a Provincial Legislature in Canada, could, " while preserving its own capacity intact, seek the assistance of sub- " ordinate agencies, as had been done when in *Hodge* v. *The Queen*, the " Legislature of Ontario was held entitled to entrust to a Board of Com- " missioners authority to enact regulations relating to taverns ; but it " does not follow that it can create and endow with its own capacity " a new legislative power not created by the Act to which it owes its " existence. Their Lordships do no more than draw attention to the " gravity of the constitutional questions which thus arise."

The Viscount was speaking on behalf of a strong Board consisting of himself, Lord Buckmaster, Lord Dunedin, Lord Shaw of Dunfermline and Lord Scott-Dickson. He notes what was the pith of the *Hodge* v. *The Queen* decision and does not suggest that it supports the broad power of delegation of legislative power in support of which it was cited in the *Gray case*—quite the contrary. The Board put the stamp of invalidity on the Initiative and Referendum Act of Manitoba which it had under review. That Act had been passed by the Legislature of that Province and duly assented to by the Crown. It was held that under the B.N.A. Act the Lieutenant-Governor was an essential part of the legislative machinery and that the Legislature in the plenitude of its power could not empower the electorate to pass legislation to which the assent of the Lieutenant-Governor was not necessary—this despite the fact

that the Legislature could at any time repeal an Act passed under the Initiative and Referendum Act or the latter Act itself. The empowering legislation was held to be in contravention of the B.N.A. Act. And it was plainly intimated by the Board that an attempt by the Legislature to create and endow with its own capacity a new legislative power would raise grave constitutional questions—questions, as it seems to me, which arise directly as a result of the Act under review in the case at bar. As pointed out " Section " 92 of the Act of 1867 entrusts the legislative power in a Province to its " Legislature, and to that Legislature only "—*Powell* v. *Apollo Candle Company Ltd.* [1885] 10 A.C. 282 is not an authority to the contrary. It was there held that duties levied by an Order-in-Council issued under s. 133 of the Customs Regulation Act of New South Wales, were really levied by authority of the Legislature and not of the Executive and an examination of that section discloses that no real legislative discretion was given to the Executive. That a Legislature may seek the assistance of " subordinate agencies " for the purpose of enacting by-laws, resolutions and regulations ancillary to its legislation and necessary to give effect to legislation in its true sense is conceded. More than that is not conceded. The Provincial Act of 1934 was a skeleton Act and substantially the whole of the legislative power with regard to marketing of natural products was handed over to the Lieutenant-Governor in Council—vide especially sections 4 and 8. In my view, it was never contemplated, by the B.N.A. Act that the Lieutenant-Governor in Council should be other than an executive or administrative body. Chief Justice Sir Charles Fitzpatrick in his judgment in the *Gray case* notes the distinction in the position of the Imperial Parliament and that of the legislative bodies in Canada—that the former is untrammelled by any written instrument while the latter have their foundation in the B.N.A. Act. It is true he found nothing in our Constitution Act which, so far as material to the question then under consideration, would impose any limitation upon the authority of the Dominion Parliament to which the Imperial Parliament is not subject. But can anything be found in our Constitution Act authorising the Legislature to delegate its proper (not merely ancillary) legislative power ? Viscount Haldane suggested otherwise. The scheme of that Act contemplates an executive body—the Lieutenant-Governor in Council, and a legislative body—the Lieutenant-Governor by and with the advice and consent of the Legislative Assembly. The Province has power to amend its constitution except in respect of the position of the Lieutenant-Governor. But the Province of British Columbia has not done so and cannot do so indirectly but only by specific amendment. *Vide Cooper* v. *Commissioner of Income Tax* (1907) 4 C.L.R. 1304. Nor can it by amendment to its constitution vary the terms of sec. 92 of the B.N.A. Act or the scheme of that Act.

In my view, the delegating of legislative power to the Provincial Executive Government, as has been attempted here, is entirely inconsistent with the scheme of the B.N.A. Act. That scheme contemplates that the executive body and the legislative body shall be kept distinct and, regardless of what has been done or may be done in Britain, that is the scheme of things that has substantially prevailed in Britain through the centuries (though there not of necessity) and in the Dominions from the inception of Parliamentary Government therein. It is a scheme not to be departed from lightly.

Reference was made in the *Gray case* to the delegation of certain legislative powers to Legislative Councils in the Territories. The validity of that, so far as I recall, has never been directly passed upon. The delegation by the Legislature of legislative power to the Executive Council means the establishment of Fascism in this Province. The Courts have no concern with the merits or demerits of political systems. But the Courts have concern to see that our Constitution is not subverted. The Act under consideration, in my view, departs from the scheme of our Constitution Act.

Section 8 (2) (e) enacts that the Lieutenant-Governor in Council may provide by regulation for the submission of a marketing scheme to a plebiscite. The word " plebiscite " is not defined in the Act or in the Interpretation Act. The scheme in paragraphs 34 and 35 thereof not only provides for the mode of taking what is referred to as a " poll " (quite a proper thing to be so provided for) but also as to who shall vote upon such a poll. It extends the privilege of voting to all " producers " regardless of nationality. No power is given by the Act to the Lieutenant-Governor in Council to say who shall be " electors," as they were called in the Liquor Control Plebiscites Act, R.S.B.C. c. 147. Even if one were to assume for the moment that the Act was valid the scheme is *ultra vires* in the foregoing respect.

As noted above the original Act was substantially amended in the two sessions of the Legislature in 1936. The first question to be considered is as to whether, if the original Act be *ultra vires*, the Legislature could amend it. If I am right in my conclusion that the Act was *ultra vires* then it was so *ab initio* and the amending Acts are of no validity unless, read by themselves, they could stand independently. They obviously could not do so and so must be held to be invalid.

Should it be that I am in error in holding the whole of the original Act invalid I shall proceed to a consideration of the legislation as it stood after the Second Session of 1936.

The true intendment of the legislation is to be sought. The title indicates that it is with regard to the " Transporation, Packing, Storage and Marketing of Natural Products." The references to the Dominion Act and Board in the original Act remain. Sections 5, 6, 7, and 8 (2) (a) (b) and (c) remain unchanged. I have already said that, in my opinion, these sections were invalid in the original Act. Their retention in the Act is indicative of an intention on the part of the Legislature to do something more than legislate with regard to trade within the Province. They show an intent on the part of the Legislature to concern itself with something entirely outside its legislative sphere, namely, trade of an inter-provincial and export character. The sections are of course nugatory because the Dominion Act is *ultra vires*. I look at them only as indicia of the true intendment of the legislation. There are no words of limitation in the title of the Act. The phrase " natural product " is given a meaning to include natural products nearly the whole of which, to common knowledge, are exported from the Province, to wit, the products of the forest, the sea and rivers. True, the fact that these last mentioned products are almost wholly exported does not prevent the Province legislating with regard to so much of them as are marketed within the Province

but one inevitably draws the conclusion when one finds the Province legislating with regard to products which almost entirely are exported from the Province that the intention is to deal with what is preponderatingly a matter of external trade. There are no words of limitation used in the definition of the word " Marketing." It would have been a simple matter to make clear that the Legislature had in mind only marketing within the Province. Section 4 (1) purports to declare the purpose and intent of the Act, namely, " to provide for the control and regulation in any and all respects of the " transportation, packing, storage and marketing of natural products within " the Province, including the prohibition of such transportation, packing, " storage and marketing in whole or in part." In an extended form the subsection would read " to provide—for the regulation—of the transportation " of natural products within the Province, of the packing of natural products " within the Province. . . ." This interpretation is borne out by the language of sec. 4 (2) which speaks of schemes to be established by the Lieutenant-Governor in Council for the control and regulation within the Province of the transportation—of any natural products.

The true intendment is not to be gathered from section 4 (1) alone but from the whole Act, and the indicia to which I have already referred make it clear that the Act intends to effect something more than the mere control and regulation of the marketing within the Province of British Columbian natural products. The phrase " natural products," insofar as the definition is concerned, extends to products of agriculture or of the forest, sea, lake or river produced anywhere in Canada. It is not contended that this Province can control and regulate the marketing in British Columbia of wheat produced in Saskatchewan—at least not so as to interfere with inter-provincial trade. Nor can the Province control or regulate for the purpose of controlling marketing, the transportation within the Province of British Columbia of natural products en route to another Province or to foreign parts. The language of the Act authorises the doing of both these things. It cannot be said that the control of the transportation of natural products for export is a necessary incident of the control of the marketing of our natural products within the Province. The Act purports to enable the prohibition of transportation etc. of natural products. Section 4 (a) enacts that the Lieutenant-Governor in Council may vest in any Provincial Board power (*inter alia*) " To regulate the time and place at which and to designate the agency through " which any regulated product shall be packed, stored, or marketed ; to " determine the manner of distribution, the quantity and quality, goods or " class of the regulated product that shall be transported, packed, stored or " marketed by any person at any time ; and to prohibit the transportation, " packing, storage or marketing of any goods, quality or class of any regulated " product." The section enables the Lieutenant-Governor in Council to empower the Board to exempt individuals from its orders, to require persons engaged in " production, packing, transporting, storing or marketing of the regulated product " to register, to fix licence fees for all concerned, to classify for the purpose of licence fees, to sue for licence fees and to cancel licences for violation of the board orders. Further authority is given to vest other powers in the Board to which it is unnecessary to specially refer. Nothing could be clearer than that "the central purpose of the legislation is to assume

direct control of the trade as trade " to use the language of Duff J. (as he then was) in the *Lawson case*, 1931 S.C.R. 357 at 365. Quoting further, because the language there used is applicable to this legislation as it was to the " Produce Marketing Act " there under consideration,—" Its aim is to " regulate the producer and shipper as trader ; as proprietor and contractor, " it affects him directly and necessarily, but only as a means of governing " him in carrying on his trade." The pith of the matter is that the Legislature has deliberately attempted to hedge in the producer by regulations with respect to the packing, transportation, storage and marketing of his product to a point far beyond that which is necessary to control the marketing of natural products of the Province within the Province. The aim obviously was to control the marketing of natural products regardless of their market destination. I again draw attention to the language of Duff J. (as he then was) in the *Eastern Terminal Elevator case* (supra) at p. 448 and to the more recent language of the Judicial Committee upon the reference on the Dominion Act (supra) at p. 332. The language of Lord Atkin is so directly in point that I quote it again :—

> " Unless and until a change is made in the respective functions of " Dominion and province, it may well be that satisfactory results for " both can only be obtained by co-operation. But the legislation will " have to be carefully framed, and will not be achieved by either party " leaving its own sphere and encroaching upon that of the other."

The Legislature has in this legislation, in my opinion, encroached upon the Dominion legislative field and the Act, I must, therefore, hold to be *ultra vires*.

In view of the submissions made by counsel for the Plaintiff and the intimation that the question of the validity of the Act, as it now stands, will be carried to the highest Court, I think it desirable, despite the conclusion at which I have already arrived, that I should discuss the further submissions of counsel.

The scheme of the Act remains as in the original Act. It is a skeleton Act and to the Lieutenant-Governor in Council is given the power to clothe the skeleton. The power given to the Executive Government to legislate on most important matters is thoroughly interwoven in sections 4, 4A and 8 with the power to enact regulations for the purpose of carrying the enactment into operation and effect. These sections purport to give the Lieutenant-Governor in Council the authority to vest the Board with the broadest of powers. The determining and conferring of these powers is the real enacting. I shall refrain from discussing the detail of the sections and confine myself to the statement again of what I consider the applicable rule. In my view the scheme of our Constitution makes it obligatory that the elected representatives of the people in the Legislature assembled shall do the legislating, subject, of course, to the assent of the Crown. Important matters in our economic life were before the Legislature and it was a departure from the law that the Legislature should hand over to the Executive Government the power to perform its duty. The Legislature cannot delegate its legislative functions to the Executive Council, nor can it delegate to the Executive the

power to delegate to Boards established by the Executive what, in substantial respects at least, are matters for legislation.

Section 4A purports to empower the Lieutenant-Governor in Council to vest in a Provincial Board the power to compel all persons engaged in the production, packing, transporting, storing or marketing of the regulative product to register and take out licences. The Board is to have power to classify such persons and to fix the licence fees payable by the members of different groups in different amounts. The licences may be cancelled for violation of any provision of the scheme or any order of the Board or of the regulations. The licence fees are enforceable by law—they can be sued for. They are imposed under the authority of the Legislature and by a public body which is invested with wide power of regulation and control within a great extent of territory. The Board acting in every way under the authority of Order-in-Council, enacted pursuant to the Statute, exercising compulsory powers as well as inquisitorial powers of a most exceptional character, is assuredly a public body. The licence fees are taxes. Question arises as to whether they are direct taxes such as the Province has power to impose by virtue of s. 92 (2) of the B.N.A. Act or indirect taxes. I do not think it can be fairly said that the licence fees are imposed upon the very persons who it is intended or desired should pay it. The fees were fixed by the Board upon the basis of the gallonage of fluid milk produced by a producer within the immediately antecedent period. Nothing could be more natural than that the producer would add the licence fee to his cost of production and pass it on to his consumer in the price charged. It was argued that because by virtue of s. 4A (g) the Lieutenant-Governor might empower the Board to fix prices the tendency to pass the licence fee on to the consumer would be offset but it does not so seem to me for doubtless the Board in fixing the price would allow for the licence fee required to be paid by the producer and in consequence the licence fee would in truth be paid by the consumer. In my view the licence fee is an indirect tax.

The question then arises as to whether the tax is such an one as is contemplated by s. 92 (9) of the B.N.A. Act which authorises " shop, saloon, " tavern, auctioneer, and other licences in order to the raising of an revenue " for Provincial, local or municipal purposes." In the *Lawson case* (supra) at pp. 363-4 this very matter is discussed. There Duff J. (as he then was) says, speaking of licence fees under s. 92 (9) of the B.N.A. Act :—

> " On the other hand, the last mentioned head authorises licences " for the purpose of raising a revenue, and does not, I think, contemplate " licences which, in their primary function, are instrumentalities for the " control of trade—even local or provincial trade. Here, such is the " primary purpose of the legislation. The imposition of these levies is " merely ancillary, having for its object the creation of a fund to defray " the expenses of working the machinery of the substantive scheme for " the regulation of trade. Even the licence fee is discretionary with the " Committee. This part of the statute would appear to be *ultra vires* " . . . the licence is not within s. 92 (9)."

In the Supreme Court of British Columbia.

Reasons for Judgment of Manson, J. *re Hayward vs. B.C. Lower Mainland Dairy Products Board —continued.*

What was said by Mr. Justice Duff in that case is apposite in the case at bar. In *Severn* v. *The Queen* 2 S.C.R. 70, in discussing s. 92 (9) of the B.N.A. Act, it was said by Chief Justice Sir William Buell Richards at p. 97 :—

> " Looking at the state of things existing in the Provinces at the " time of passing the British North America Act, and the legislation then " in force in the different Provinces on the subject, and the general scope " and object of Confederation then about to take place. I think it was " not intended by the words ' other licences ' to enlarge the powers " referred to beyond shop saloon and tavern licences in the direction of " licences to affect the general purposes of trade and commerce and the " levying of indirect taxes, but rather to limit them to the licences which " might be required for objects which were merely municipal or local " in their character."

It follows upon the authorities that the power purported to be given to the Lieutenant-Governor in Council to authorise the imposition of licence fees, as set out in s. 4A (d) is *ultra vires.*

I deem it unnecessary to discuss the schemes authorised by Order-in-Council. There were in those schemes sections which, even if the Statute was valid, it was not within the power of the Lieutenant-Governor in Council to sanction. To illustrate ; sections 11 and 13 of the scheme approved on the 27th October 1936. It is conspicuous too that the last mentioned scheme does not repeal the original scheme approved on the 21st November 1934.

The original Act and the amended Act being both *ultra vires* it follows that the Plaintiffs are entitled to the relief asked for by way of injunction as against the Defendant. For the reasons given by me in the action of *Independent Milk Producers Co-operative Association* v. *B.C. Mainland Dairy Produce Board et al* (1937) 1. W.W.R. 679 the Plaintiff cannot recover from the Defendant moneys paid over by it to the Defendant. The moneys were paid voluntarily under mistake of law.

The Plaintiffs will have their costs.

" A. M. MANSON J."

29th May 1937.

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

Reasons for Judgment.

Martin, C.J.A.

COURT OF APPEAL.

In the Matter of the " Constitutional Questions Determination Act," and in the Matter of the " Natural Products Marketing (British Columbia) Act " as amended by the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936," and the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session)."

REASONS FOR THE OPINION OF THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA.

Pursuant to sec. 3 of the " Constitutional Questions Determination Act," cap. 46, R.S.B.C. 1924, the following question was on the 2nd of June, 1986,

referred to this Court by His Honour the Lieutenant-Governor in Council, viz. :—

> " Is the ' Natural Products Marketing (British Columbia) Act ' as " amended by the ' Natural Products Marketing (British Columbia) Act " Amendment Act, 1936,' and the ' Natural Products Marketing (British " Columbia) Act Amendment Act, 1936 (Second Session),' or any of the " Provisions thereof, and in what particular or particulars or to what " extent *ultra vires* of the Legislature of the Province of British Columbia? "

The question came on for hearing on the 24th, 25th, 28th and 29th days of June and we reserved our opinion thereupon, and, in view of the public urgency of the matter, we on the 9th of July (though in vacation) " certified " to the Lieutenant-Governor in Council [our] opinion " (sec. 4) that " the " said referred Acts are not in any particular beyond the powers of the " Legislature of the Province of British Columbia " ; and my reasons for reaching that opinion follow.

It is to be noted that counsel for the Government of British Columbia informed us at the outset that our opinion on Part II of the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session) " was not required because it had not been brought into operation, as provided by sec. 8 thereof, and that it was not the intention of the Government to do so ; and we observe that this intention has been carried out in the new edition of the Revised Statutes of British Columbia, brought into force " on, from, and after the 30th day of June, 1937," which in cap. 165, vol. 2, omits the said Part II.

Several objections were raised against the validity of the Acts in question, the first of which is that the Legislature of this Province has illegally delegated its functions to the Lieutenant-Governor in Council because (as I understand the argument) it has passed only the skeleton of an Act and left it to the sole discretion of the Lieutenant-Governor in Council to clothe it with flesh and blood, thereby in effect abdicating its functions.

The answer to that submission depends upon the language of the Statute, and all that I can usefully say is that, after reading the whole Statute, it does not support the argument, but, on the contrary, discloses by sec. 4 a " purpose and intent " which to my mind is not vague and uncertain but definite and concrete, to control and regulate within this Province the marketing (in all its aspects) of its natural products by establishing " schemes " under the control of a " Provincial Board," or " marketing boards " (secs. 2, 3, and 5), which " schemes " are declared (sec. 4) to be :—

> " (2) . . . for the control and regulation within the Province of the " transportation, packing, storage, and marketing of any natural pro- " ducts, and may constitute marketing boards to administer such " schemes, and may vest in those boards respectively any powers con- " sidered necessary or advisable to enable them effectively to control " and regulate the transportation, packing, storage, and marketing of " any natural products within the Province, and to prohibit such " transportation, packing, storage, and marketing in whole or in part.

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

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Martin, C.J.A. —*continued.*

" (3) Any scheme may relate to the whole of the Province or to any " area within the Province, and may relate to one or more natural " products or to any grade or class thereof."

And by the next section, 5, power is given to the Lieutenant-Governor in Council to " vest in any Provincial board any or all of the following additional powers," which are specifically set out in eleven subsections that follow that bestowal, and nothing has been suggested to us to be lacking in said additional or preceding powers " considered necessary or advisable " to secure the practical working of any " scheme " established under said sec. 4. It is to me obvious that the powers of boards in sec. 5 called " additional " relate just as much, and only, to the " natural products within the Province " mentioned in sec. 4 as do the powers that section bestowed, and the term " regulated product " which occurs from the beginning to the end of the said eleven subsecs. of sec. 5 is in subject-matter identical with the term " regulate . . . the natural products " in sec. 4, and therefore the Lieutenant-Governor in Council is duly and jointly empowered by both sections to effectuate the establishment, regulation, and working-out of such " schemes " as he may think necessary. That the Legislature had the power to establish such " schemes " and " boards " has been, to my mind, beyond serious controversy since the decision of the Privy Council in *Hodge* v. *The Queen* (1883) 9 A.C. 117, wherein it was held that the Province of Ontario could delegate its authority over the sale of spirituous liquor to a board of Licence Commissioners who were empowered to regulate and determine by licence the sale thereof by and in taverns, shops, etc., and limit the number of licensees and regulate and prohibit sales, etc., their Lordships saying, p. 132 :—

" It appears to their Lordships, however, that the objection thus " raised by the appellants is founded on an entire misconception of the " true character and position of the provincial legislatures. They are in " no sense delegates of or acting under any mandate from the Imperial " Parliament. When the British North America Act enacted that there " should be a legislature for Ontario, and that its legislative assembly " should have exclusive authority to make laws for the Province and " for provincial purposes in relation to the matters enumerated in sect. 92, " it conferred powers not in any sense to be exercised by delegation from " or as agents of the Imperial Parliament, but authority as plenary and " as ample within the limits prescribed by sect. 92 of the Imperial Parliament in the plenitude of its power possessed and could bestow. Within " these limits of subjects and area the local legislature is supreme, and " has the same authority as the Imperial Parliament, or the Parliament " of the Dominion, would have had under like circumstances to confide " to a municipal institution or body of its own creation authority to " make by-laws or resolutions as to subjects specified in the enactment, " and with the object of carrying the enactment into operation and " effect.

" It is obvious that such an authority is ancillary to legislation, and " without it an attempt to provide for varying details and machinery to " carry them out might become oppressive, or absolutely fail. The very

" full and very elaborate judgment of the Court of Appeal contains " abundance of precedents for this legislation, entrusting a limited dis- " cretionary authority to others, and has many illustrations of its necessity " and convenience. It was argued at the bar that a legislature committing " important regulations to agents or delegates effaces itself. That is " not so. It retains its powers intact, and can, whenever it pleases, " destroy the agency it has created and set up another, or take the " matter directly into his own hands. How far it shall seek the aid of " subordinate agencies, and how long it shall continue them, are matters " for each legislature, and not for Courts of Law, to decide.

" Their Lordships do not think it necessary to pursue this subject " further, save to add that, if by-laws or resolutions are warranted, " power to enforce them seems necessary and equally lawful. Their " Lordships have now disposed of the real questions in the cause."

That language is so appropriate to this question that I need only further point out that the Legislature here has not delegated its authority to a mere Licensing Board, but to the highest Provincial tribunal, the Lieutenant-Governor in Council (as was pointed out in *Esquimalt & Nanaimo Ry.* v. *Wilson* (1921) 29 B.C. 353; (1922) 1 A.C. 202, at 214), a part indeed of its own constitutional structure and " directly answerable to " itself; and it is to be remembered that, as Lord Watson said :—

" A Lieutenant-Governor . . . is as much the representative of Her " Majesty for all purposes of provincial government as the Governor- " General himself is for all purposes of Dominion Government."

—*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892) A.C. 437, 443.

And he went on to point out that, as a result thereof, the revenues derived by the provinces under the " British North America Act " " continued to be vested in Her Majesty as the sovereign head of each province," p. 444. It is not therefore too much to say that powers entrusted by the Legislature to an officer of such high degree should be viewed and construed in a correspondingly wide light; a delegation to the Lieutenant-Governor in Council is indeed no less than a delegation to the " Executive Government " itself, " a governing body who have no powers and no functions except as the representatives of the Crown."—Lord Watson supra, p. 443.

It was, however, submitted that the effect of *Hodge's* case is reduced by the decision of the Supreme Court of Canada *In re Gray* (1918) 57 S.C.R. 150, but the result of that case is no more than to hold that when the nation is in peril, then that emergency justifies the National Government in invading by an extraordinary exercise of its " peace, order, and good government " powers (sec. 91, B.N.A. Act) the ordinary powers of the Provinces over " property and civil rights in the Province " (sec. 92, 13) during the existence of the emergency; there is nothing in the case to indicate, once the power is acquired by the Nation or a Province in whatever way, that the general principles of delegation enunciated in *Hodge's* case are altered; on the contrary, it is cited in *Gray's* case by Anglin, J. (later Chief Justice), to support his view at p. 176, 57 S.C.R., that :—

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Re The Natural Products Marketing Act Reference.

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Martin, C.J.A. —*continued.*

" A complete abdication by Parliament of its legislative functions " is something so inconceivable that the constitutionality of an attempt " to do anything of the kind need not be considered. Short of such an " abdication, any limited delegation would seem to be within the ambit " of a legislative jurisdiction certainly as wide as that of which it has " been said by incontrovertible authority that it is ' as plenary and as " ' ample . . . as the Imperial Parliament in the plenitude of its powers " ' possessed and could bestow.' "

On p. 181 he proceeds, in justification of the delegation of the particular " extraordinary measures " under review, to say :—

" Again, it is contended that should section 6 of the ' War Measures " Act ' be construed as urged by counsel for the Crown, the powers con- " ferred by it are so wide that they involve serious danger of our Parlia- " mentary institutions. With such a matter of policy we are not con- " cerned. The exercise of legislative functions such as those here in " question by the Governor-in-Council rather than by Parliament is no " doubt something to be avoided as far as possible. But we are living " in extraordinary times which necessitate the taking of extraordinary " measures. At all events, all we, as a court of justice, are concerned " with is to satisfy ourselves what powers Parliament intended to confer " and that it possessed the legislative jurisdiction requisite to confer them."

And further, p. 182 :—

" It has also been urged that such wide powers are open to abuse. " This argument has often been presented and as often rejected by the " courts as affording no sufficient reason for holding that powers, however " wide, if conferred in language admitting of no doubt as to the purpose " and intent of the legislature, should be restricted. In this connection " reference may be made with advantage to the observations of their " Lordships in delivering the judgment of the House of Lords in *The* " *King* v. *Halliday* (1917) A.C. 260. As Lord Dunedin there said : ' The " ' danger of abuse is theoretically present ; practically, as things exist, " ' it is, in my opinion absent.' "

He had already said, p. 171, on the same " War Measures Act," that :—

" there was not only no abandonment of legal authority, but no indica- " tion of any intention to abandon control and no actual abandonment " of control in fact, and the council on whom was to rest the responsi- " bility for exercising the powers given was the Ministry responsible " directly to Parliament and dependent upon the will of Parliament for " the continuance of its official existence.

" The point of constitutional incapacity seems indeed to be singularly " destitute of substance."

See also the similar views expressed by Duff, J. (now Chief Justice), on pp. 168-9, and on p. 170 he said :—

" There is no attempt to substitute the executive for parliament in " the sense of disturbing the existing balance of constitutional authority " by aggrandizing the prerogative at the expense of the legislature. The

" powers granted could at any time be revoked and anything done under " them nullified by parliament, which parliament did not, and for that " matter could not, abandon any of its own legislative jurisdiction. The " true view of the effect of this type of legislation is that the subordinate " body in which the law-making authority is vested by it is intended " to act as the agent or organ of the legislature and that the acts of the " agent take effect by virtue of the antecedent legislative declaration " (express or implied) that they shall have the force of law. Maitland's " Constitutional History, pp. 1, 15, *et seq.*"

With great respect, therefore, I find myself unable to take the view of *Gray's* case that is expressed by the Appellate Division of Alberta in *Credit Foncier Franco-Canadien* v. *Ross* (1937) 2 W.W.R. 353, which was invoked to support the attack upon the present Statute. There is, moreover, no real similarity between *Hodge's* case and the Manitoba *Initiative and Referendum Act* case (1917) 27 Man., R. 1 ; (1919) A.C. 935, because, as the Privy Council said in the latter case, p. 945 (after citing the former with approval), there had been an unconstitutional attempt by the Legislature to :—

" create and endow with its own capacity a new legislative power not " created by the act to which it owes its own existence."

The second objection to this Statute was that it interfered with the National power of " The regulation of trade and commerce " (sec. 91 (2) B.N.A. Act) ; and in regard to this we are fortunate in having the very recent unanimous decision of the House of Lords on the " Northern Ireland Milk and Milk Products Act, 1934," in *Gallagher* v. *Lynn* (1937) 3 All E.R. 598, wherein the exercise of powers conferred upon the Parliament of Northern Ireland to protect the health of its inhabitants had put an end to the trade in milk between the farmers of Donegal (in the Irish Free State) and their " foreign " customers in Derry, and their Lordships, per Lord Atkin, said, p. 601, upon the objection to the validity of the Act :—

" My Lords, the short answer to this is that this Milk Act is not a " law ' in respect of ' trade, but is a law for the peace, order, and good " government of Northern Ireland ' in respect of ' precautions taken to " secure the health of the inhabitants of Northern Ireland, by protecting " them from the dangers of an unregulated supply of milk. These " questions affecting limitation on the legislative powers of subordinate " parliaments, or the distribution of powers between parliaments in a " federal system, are now familiar, and I do not propose to cite the whole " range of authority which has largely arisen in discussion of the powers " of Canadian parliaments. It is well established, by *Russell* v. *R.* 7 App. " Cas. 829, that you are to look at the ' true nature and character of the " legislation . . . the pith and substance of the legislation.' If, on the " view of the Statute as a whole, you find that the substance of the legis- " lation is within the express powers, then it is not invalidated if, inci- " dentally, it affects matters which are outside the authorised field. The " legislation must not, under the guise of dealing with one matter, in " fact encroach upon the forbidden field. Nor are you to look only at " the object of the legislator. An Act may have a perfectly lawful " object, e.g., to promote the health of the inhabitants, but may seek

" to achieve that object by invalid methods, e.g., by a direct prohibition " of any trade with a foreign country. In other words, you may certainly " consider the clauses of an Act to see whether they are passed ' in respect " of ' the forbidden subject. In the present case, any suggestion of an " indirect attack upon trade is disclaimed by the appellant. There " could be no foundation for it. The true nature and character of the " Act, its pith and substance, are that it is an Act to protect the health " of the inhabitants of Northern Ireland, and, in those circumstances, " though it may incidentally affect trade with county Donegal, it is not " passed ' in respect of ' trade, and is therefore not subject to attack on " that ground."

That language is so applicable to the present direct exercise, " in pith and substance," by means of this Act, of the said exclusive powers of " property and civil rights " conferred upon this Legislature that I shall not presume to enlarge upon it, but simply note the recent and prior decision of the Privy Council, delivered also by Lord Atkin in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1937) A.C. 377, at 387, which obviously he had in mind ; and I also add *Attorney-General of Canada* v. *Cain* (1906) A.C. 542, at 546, recently followed, with *Hodge's* case, in *British Coal Corporation* v. *The King* (1935) A.C. 500, 517-8 ; and finally the important and similar, in principle, case of *Standard Sausage Co. Ltd.* v. *Lee* (1933) 47 B.C.R. 411, wherein we held that the National Government was justified in exercising in this Province its criminal powers to protect the national health, though in so doing the powers of the Province over " property and civil rights " might be incidentally encroached upon—*cf.* pp. 423-5, 429-30.

The third objection to this Statute is that it is invalid because it empowers a board by sec. 5 (d), to fix and collect licence fees from all persons producing and marketing natural products, which, it is submitted, is indirect taxation. It cannot be reasonably argued that the licensing or registering of such persons is not a necessary part of a marketing scheme ; that course, indeed, is adopted in the corresponding Statutes in Great Britain, and in Northern Ireland, e.g., the English " Agricultural Marketing Act " of 1931, secs. 4-7, 18 dealing with and controlling and assessing " registered producers " of " regulated products " (the amendments to which and the schemes in force are set out in Butterworth's Statutes, 1933, vol. 30, pp. 9, and 31-3), and under the " Agricultural Marketing Act, 1933," cap. 31, sec. 6, " producers " under a " development scheme " must take out from the " development board " " a producer's licence " before they can produce " secondary products " within the area of the scheme ; and in the case of *Gallagher* v. *Lynn*, hereinbefore considered, the requirements of the licensing provisions of the " Northern Ireland Milk Products Act, 1934," are in part recited, and, briefly stated, they prohibit the sale of milk unless the seller obtains a licence from the Minister of Agriculture " upon payment of the appropriate fee " and " upon the prescribed conditions." It may here be noted that in *Rowell* v. *Pratt* (1937) 3 All E.R. 660 [H.L.] Lord Maugham said, p. 665, in a case arising out of the Potato Marketing Scheme (Approved) Order, 1933 :—

" It is true . . . that the Potato Marketing Board is not a depart-
" ment of state but is merely a domestic executive body which the legis-

" lature has thought fit in the public interest to entrust with important " statutory powers."

It is conceded (as to which presently) that these licence fees are taxes, but it was submitted that they are in no sense indirect but wholly direct because they are imposed as a personal condition upon would-be producers before they can participate in the " scheme " and in my opinion that submission is correct, and I see nothing in the language of Mr. Justice (now Chief Justice) Duff in *Lawson* v. *Interior Tree Fruit*, etc., *Committee* (1931) S.C.R. 357, 364, to the contrary when the facts and circumstances to which he speaks are understood as they must be—*Quinn* v. *Leathem* (1901) A.C. 495, 506—and when also it is borne in mind that he is speaking of unlawful schemes which cannot be saved by a mere ancillary licence, but the present scheme is a lawful one, for which it is necessary that the producers should be licensed or registered ; the learned Judge's real intention, indeed, appears from his remarks in *Re the Natural Products Marketing Act* 1934 (1936) S.C.R. 398, at 412, where he in effect recognises that the Provinces have :—

" the power to regulate, by licensing persons engaged in the production, " the buying and selling, the shipping for sale or storage, and the offering " for sale, in an exclusively local and provincial way of business of any " commodity or commodities."

Here the object is the direct one of personal qualification, to " require " the producers " to register with and obtain licences from the board " (sec. 5 (b)) to comply with the conditions of their licences, and to pay the appropriate fees therefor, and it may be noted that power to license, and regulate bakeries is given to municipalities by sec. 55 (127) of the " Municipal Act," cap. 199, R.S.B.C. 1936.

It is erroneous to regard the power to impose purely revenue licences of the classes authorised by sec. 92 (9) as being the same power that flows necessarily from the effective exercise of powers initiated under head (13), because the subject-matters are entirely distinct in their nature, object, and scope of operation, of which the present case is a good illustration, the object of the " scheme " in question being not to augment the revenue in general but to aid the efficient working of a special object in one department of " property and civil rights " ; i.e., agriculture and the development of natural projects of certain, but far from all classes, the great and varied " natural products " of our different mines, being, e.g., excluded from its scope ; and furthermore, it is to be noted that " the expenses of administering any scheme under this Act " cannot be paid from the Consolidated Revenue Fund, unless a special vote of the Legislature authorises it—sec. 14. That the fees may, in the board's discretion, be payable at different times and in different amounts by different classes of producers is not only, to my mind, unobjectionable, but commendable, because that enables the board to adjust the fees to meet the exigencies of the moment brought about by the ever-varying course of the seasons and unpredictable weather conditions to be expected, with corresponding varying consequences to and treatment of the " regulated product," and it would be obviously unjust to require an individual orchardist working twenty acres to pay the same fee as a large company working five thousand. This principle of requiring a personal licence

to exploit natural products has from the very beginning of our legal history been recognised by our Mining Acts, commencing with Governor Douglas' Proclamation of 26th March, 1853, respecting gold-mining " within the Colony of Queen Charlotte's Island " (1 M.M.C. 536), down to, e.g., the present Lode and Placer Acts, of which, e.g., the " Mineral Act " (cap. 181, R.S.B.C. 1936) fixes the fee for a free miner's certificate at $5 and for company's from $50 to $100, and a free miner may get a special certificate for a fee $15, but a company must pay $300 therefor—sec. 8; and prospectors for coal and petroleum must pay $100 for their licence (sec. 4, cap. 175, R.S.B.C. 1936).

I have been assuming, so far, that these fees for registering and licensing are taxes, as was conceded at the argument, but on further consideration I think that in their essence they are not of that nature but are really service fees, paid for the special services of the board and its machinery and equipment, upon the same principle that we held that the Crown (Dominion) must pay the fees that this Province exacts for the use of the special services of its land registration system—*Attorney-General of Canada* v. *Registrar of Titles* (1934) 48 B.C.R. 544, 552.

Then objection was also taken to the control and regulation and prohibition of the transportation of natural products authorised by said secs. 4 and 5, but when the sections are rightly comprehended in their true relation it becomes apparent that transportation is properly treated in connection with and as inseparable from the packing, storing, marketing, and " the manner of distribution " (sec. 5 (a)), as regards quantity, quality, grade, and class of the regulated produce. It is obvious that products cannot be brought to packing-houses, and storage plants, and markets without being " transported " by land, air, or waterways within the Province, and if the Province has the power, as it unquestionably has, to reduce or prohibit production of any kind of natural product in any area where it may deem it desirable to do so, in order, e.g., to control the wide destruction caused by soil-drifting and dust-storms, and restore original grazing and range conditions, or for any other reason that it may think beneficial, then it also has the power to control or prohibit the " distribution " by " transportation " of any natural product in such a way as it thinks will best promote the public interest economically, or protect the public health by requiring sanitary conditions, by, e.g., not permitting milk to be " transported " and " marketed " (as some of us have seen in other and ancient lands) by driving goats to the doors of the customers then and there to be milked and their natural product " distributed " to the extent of the customers' requirements; or, as all of us have seen in this land, and relatively recently, by transporting it in large cans and distributing it openly therefrom by pouring it into customers' open receptacles in the public streets. It is to be noted that the power to regulate and control the delivery of milk and cream, and prescribe the methods of delivery (i.e., transportation), has been delegated to municipalities by sec. 55 (119) of the " Municipal Act " (1936), cap. 199, R.S.B.C.; and also that the admittedly valid " Liquor Control Act," cap. 160, R.S.B.C. 1936, sec. 123 (x), empowers the Liquor Control Board to regulate the time, manner, methods, and means by which brewers and distillers shall deliver liquor and the " manner, methods, and means by which liquor may be lawfully conveyed or carried within the Province."

Then it was further objected that the power " to exempt from any determination or order, etc.," conferred by subsec. (b) of sec. 5, is invalid, and the *Credit Foncier* case, supra, was again relied upon, pp. 356 ; but with great respect I am unable to see why a power to exclude things or classes from the operation of a Statute is invalid when a power to include them is unquestionably valid. In *Hodge's* case, indeed, that very thing—exclusion or exemption from operation—formed a part of the impugned, but confirmed, Statute, as appears at pp. 126-7, and 131-3, whereby the Licence Commissioners were delegated the power (sec. 4 (3)) to " exempt " certain cities and towns " from the necessity of having all the tavern accommodation required by law." It is, however, due to the learned Judges in the *Credit Foncier* case to say that they seemed really to base their decision on this point on the fact that they were able to extract from the evidence before them an indirect and therefore unconstitutional motive on the part of the Lieutenant-Governor in Council " completely to nullify the Act " by excluding various classes of debts under five Orders in Council ; as to which ground I say nothing because it is foreign to this case, but otherwise, with every respect, I am unable to agree with their reasoning on this point. One (out of many that might be given) illustration in a leading Statute, constantly before the Courts of Canada, of a delegated and unquestioned power to the Governor-in-Council to include classes of things within the operation of a Criminal Statute is to be found in the " Opium and Narcotic Drug Act," cap. 49, R.S.C. 1927, sec. 24.

In conclusion, and generally with respect to the delegation of legislative powers, it should be remembered that at one time the whole of the colonial portion of the British Empire was, and much of it still is, governed by the Sovereign in Council, of which the early history of the two former Colonies of Vancouver Island (1849) and British Columbia (1858) afford striking examples, their absolute government for several years being delegated to their respective Governors, Blanshard and Douglas, and instructive references to their exercise of supreme authority (including the trial of capital cases)—(*cf.* Article " Gallows Point " in Captain Walbran's " British Columbia Coast Names," p. 197, Ottawa, Dept. of Marine, 1909)—are to be found in *Attorney-General* v. *Ludgate* (1901) 8 B.C.R. 242. A later and interesting reference after the United (in 1866) Colonies were taking steps to enter the Dominion of Canada (in 1871) is to be found in Her Majesty's Order in Council of the 9th August, 1870, in the preamble of which the very word " delegation " is thus used :—

> " Whereas by the ' British Columbia Government Act, 1870,' Her " Majesty was empowered by Order or Orders in Council to constitute " a Legislature consisting of the Governor and a Legislative Council " for the Colony of British Columbia, and to make such provisions and " regulations in respect of such Legislature, or either branch thereof, " as might seem to be expedient, and further to delegate certain powers " therein mentioned to the Governor of the said Colony :
>
> " It is hereby ordered by Her Majesty, by and with the advice of " Her Privy Council, and in pursuance and exercise of the powers vested " in Her Majesty by the said Act of Parliament, as follows, that is to " say : . . ."

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Martin, C.J.A. —*continued.*

And a recent illustration of a reversion to delegation on the grand scale by the Dominion of Canada in making provision for the government of the Northwest Territories is cited by Mr. Justice Duff in *Gray's* case, supra, p. 171, as a " degree of devolution " that was " strictly a grant (within limitation) of local self-government."

I shall not, however, pursue at length this subject, because, to use the language of the Privy Council *In The Queen* v. *Burah* (1878) 3 A.C. 889, 906, " The British Statute Book abounds with examples of it " and a consideration for several days of our early and late " statute-book " discloses such a surprising number of delegations to various persons and bodies in all sorts of subject-matters that it would take several pages even to enumerate them, and it would also bring about a constitutional débâcle to invalidate them : I must therefore content myself by selecting four Statutes only, viz., the first being the " Vancouver Island Settlers Rights Act Amendment Act " (1917), cap. 71, wherein the very unusual powers of a " judicial character " thereby bestowed upon the Lieutenant-Governor in Council were confirmed by the Privy Council in the *Esquimalt & Nanaimo Ry.* case, supra (1922) 1 A.C. 202, 212 ; the second is the " Codling-moth Control Act, 1922," cap. 10, whereby *carte blanche* powers were delegated over affected fruit lands areas to cope with that pest ; the third is the " Municipal Act," R.S.B.C. 1936, cap. 199, sec. 59, which, by sec. 59 alone, delegates power to Municipal Councils to " make, alter, and repeal by-laws " for no less than 266 distinct " purposes " of civic existence, from the regulation of elections to the prohibition of erection of buildings in certain areas and noxious trades, and, be it noted, the licensing (e.g., 127-8, 135-45) and registration of many and various trades and callings, and of the inspection and sale of food and seizure and destruction of tainted food (89 and 106 *et seq.*) ; and the fourth is the Act constituting this Court, 1936, R.S.B.C., cap. 57, sec. 37, whereby (and also by the Supreme Court Act and County Courts Act, caps. 56 and 58) power is conferred upon the Lieutenant-Governor in Council to make rules of the widest scope and the first importance in our system of jurisprudence, whereby our whole civil practice and procedure, appellate and trial, are regulated and constituted to such an extent that even the sittings we hold are thereto subjected.

As to the other objections raised, I do not (to adopt the final words of *Hodge's* case) think it necessary or useful to " advert to minor points of discussion."

It follows that the question referred to us should in my opinion be answered as hereinbefore set out.

ARCHER MARTIN, C.J.B.C.

McPhillips, J.A.

REASONS FOR THE OPINION OF THE HONOURABLE MR. JUSTICE A. E. McPHILLIPS.

To the Lieutenant-Governor in Council :

The reasons for the opinion of Mr. Justice A. E. McPhillips, of the Court of Appeal of British Columbia, are hereby certified on the question referred, namely, as to the validity of the " Natural Products Marketing (British

Columbia) Act " as amended by the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936," and the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session) " (now contained in the Revised Statutes of British Columbia, 1936, being chapter 165 thereof, and may be cited as the " Natural Products Marketing (British Columbia) Act ").

The argument that took place had reference to the Act as set forth in the Revised Statutes of B.C., 1936, being chapter 165 thereof—as that Act is now the law and in no substantial particular differs from the Acts that preceded it. I may say at the outset that my opinion is that the " Natural Products Marketing (British Columbia) Act, 1934, ch. 38 " as amended by the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936, ch. 34," and the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936, ch. 30 (Second Session) " are not in any particular beyond the powers of the Legislature of the Province of British Columbia.

In passing, it may be noted that the " Natural Products Marketing Act, 1934, ch. 57 " (Dominion) has been recently held by the Privy Council to be *ultra vires*—so that now the standing legislation is Provincial only.

The arguments addressed to this Court of Appeal in support of the contention made that the Provincial legislation was *ultra vires* were somewhat numerous—the one perhaps that was most strongly pressed was that there was a complete delegation of legislative authority to the Lieutenant-Governor in Council. I must confess that I see no virtue in any such argument as the Statute is only to be read to wholly displace any such contention ; further, to so read the Act and give effect to it would displace a large body of legislation upon the Provincial statute-book. I think it sufficient upon this point to refer to *In re Gray* (1918) 57 S.C.R. 150, where the Chief Justice of Canada, at pp. 156 and 157, said : " Parliament cannot indeed abdicate its " functions, but within reasonable limits at any rate it can delegate its powers " to the executive government. Such power must necessarily be subject to " determination at any time by Parliament, and needless to say the Acts of " the executive under its delegated authority must fall within the ambit of " the legislative pronouncements by which its authority is measured."

Here we have the Province legislating in respect to what may well be said to be exclusive powers—under the " British North America Act "—that is to say, " Property and Civil Rights." What is being dealt with here ? Natural products within the Province and was construed by the Privy Council but a little time ago in the judgment of the Privy Council delivered by Lord Atkin as having relation to a matter wholly Provincial. In this connection I would refer to the case of *McGregor* v. *Esquimalt and Nanaimo Railway Company* (1907) A.C. 462, at 468, the judgment dealt with the powers of the British Columbia Legislature when dealing with property and civil rights in the Province and the challenged legislation was upheld by the Privy Council. It would seem to me that the contention made that the legislation here challenged is *ultra vires* can be said to be wholly met by the two recent decisions before the Supreme Court of Canada and the Privy Council—reference *re The Natural Products Marketing Act* (1934) *and its Amending Act* 1935, (1936) S.C.R. 398, Duff, C.J., particularly at pp. 416-426, and

Attorney-General for Canada v. *Attorney-General for Ontario* (1937) vol. 1, W.W.R. (P.C.) 299, and I would refer to what Lord Atkin said at p. 311 :—

" But the validity of the legislation under the general words of " sec. 91 was sought to be established not in relation to the treaty-making " power alone, but also as being concerned with matters of such general " importance as to have ' attained such dimensions as to affect the body " politic,' and to have ' ceased to be merely local or provincial and to " have become matters of national concern.' It is interesting to notice " how often the words used by Lord Watson in *Atty.-Gen. for Ont.* v. " *Atty.-Gen. for Can.* (Local Prohibition Case) (1896) A.C. 348, 65 L.J.P.C. " 26, have unsuccessfully been used in attempts to support encroach- " ments on the provincial legislative powers given by sec. 92. They " laid down no principle of constitutional law, and were cautious words " intended to safeguard possible eventualities which no one at the time " had any interest or desire to define. The law of Canada on this branch " of constitutional law has been stated with such force and clarity by " the Chief Justice in his judgment in the reference concerning the " Natural Products Marketing Act, 1934, ch. 57, beginning at p. 65 of " the record in that case ((1936) S.C.R. 398, at pp. 414-426) and dealing " with the six Acts there referred to, that their Lordships abstain from " stating it afresh. The Chief Justice naturally from his point of view " excepted legislation to fulfil treaties. On this their Lordships have " expressed their opinion. But subject to this they agree with and " adopt what was there said. They consider that the law is finally " settled by the current of cases cited by the Chief Justice on the principles " declared by him. It is only necessary to call attention to the phrases " in the various cases, ' abnormal circumstances,' ' exceptional con- " ditions,' ' standard of necessity ' (*Board of Commerce* case (1922) 1 " W.W.R. 20 (1922) 1 A.C. 191, 91 L.J.P.C. 40), ' some extraordinary " peril to the material life of Canada,' ' highly exceptional,' ' epidemic or " pestilence ' (*Snider's* case (1925 1 W.W.R. 785, (1925) A.C. 396, 94 " L.J.P.C. 116), to show how far the present case is from the conditions " which may override the normal distinction of powers in secs. 91 and 92. " The few pages of the Chief Justice's judgment will, it is to be hoped, " form the *locus classicus* of the law on this point, and preclude further " disputes."

The Chief Justice of Canada in his learned judgment deals with secs. 91 and 92—and we have here in particular to deal with sec. 92, " Exclusive Powers of Provincial Legislatures," and the Dominion " Marketing Act " was held by the Chief Justice of Canada to be *ultra vires*, and in that opinion he was sustained by the Privy Council. It is in my opinion patently clear, upon the reading of the judgment of the Chief Justice of Canada and the judgment of the Privy Council delivered by Lord Atkin, that the challenged legislation here in question is within sec. 92 (13) of the " British North America Act," and we have Duff, C.J., saying at p. 416 (1936) S.C.R. : " It is settled " by the decisions of the Judicial Committee that the phrase ' Property and " Civil Rights ' is used in the ' largest sense,' subject of course to the limita- " tion arising expressly from the exception of the enumerated heads of 91

" and impliedly from the specification of subjects in sec. 92." I think it well that the judgment of the Privy Council as delivered by Lord Atkin in Attorney-General for B.C. and Attorney-General for Canada *re* " The Natural Products Marketing Act, 1934," should be carefully read ; it of course is plain that the powers sought to be exercised by the Dominion Marketing Act were powers exclusively within the Province. It reasonably follows that the Provincial legislation on the subject must be valid unless in the enacting measure it in some way transcends the ambit of authority so exclusively conferred under Property and Civil Rights—that I cannot see. I would particularly call attention to what Lord Atkin in (1937) Vol. 1, Western Weekly Reports, 328, at p. 330, said :—

> " There can be no doubt that the provisions of the Act cover trans-
> " actions in any natural product which are completed within the province,
> " and have no connection with inter-provincial or export trade. It is
> " therefore plain that the Act purports to affect property and civil rights
> " in the province, and if not brought within one of the enumerated classes
> " of subjects in sec. 91 must be beyond the competence of the Dominion
> " Legislature. It was sought to bring the Act within the class (2) of
> " sec. 91, namely, the regulation of trade and commerce. Emphasis was
> " laid upon those parts of the Act which deal with inter-provincial and
> " export trade. But the regulation of trade and commerce does not
> " permit the regulation of individual forms of trade or commerce confined
> " to the province."

Here in the Provincial legislation we have clearly " the regulation of individual forms of trade or commerce confined to the province."

The Court of Appeal had before it a case where the Marketing Act legislation was under review in 1936—*Chung Chuck and Mah Lai* v. *Gilmore et al.*, 51 B.C.R., p. 189. It was on appeal from Murphy, J., the Court was divided —the Court was three in number ; Murphy, J., had granted an Injunction ; upon the appeal the majority judgment set aside the Injunction—Macdonald, C.J.B.C. (then the Chief Justice of B.C., dissenting—and now retired). The judgment of the Court was delivered by myself, and I think it well to set forth the judgment here :—

COURT OF APPEAL.

BETWEEN

CHUNG CHUCK AND MAH LAI

AND

LESLIE GILMORE, A. W. McLELAN, AND A. H. PETERSON, ACTING AS THE B.C. COAST VEGETABLE MARKETING BOARD AND THE SAID B.C. COAST VEGETABLE MARKETING BOARD, S. J. CREECH, AND HARRY A. PATERSON. } JUDGMENT.

McPHILLIPS, *J.A.*: This is an appeal from an order or Injunction of the 8th of July, 1936, inhibiting the Appellants from interfering with the Plaintiffs in transporting potatoes for marketing in wagons upon the public highways without first complying with regulations of the B.C. Coast Vegetable Marketing Board acting under the provisions of the " Natural Products Marketing (British Columbia) Act, 1934," and the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936." At the outset it may be said that a great number of regulations have been made, but the following regulations may be said to fully indicate the powers of the Board and under which the Board acted :—

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Reasons for Judgment.

McPhillips, J.A. —*continued.*

" B.C. COAST VEGETABLE MARKETING BOARD,

" June 29, 1936.

" Pursuant to the provisions of the B.C. Coast Vegetable Marketing Scheme and as " authorized under the provisions of the ' Natural Products Marketing (British Columbia) " Act, 1934,' and the ' Natural Products Marketing (British Columbia) Act Amendment " Act, 1936,' the B.C. Coast Vegetable Marketing Board (hereinafter called the ' Board ') " hereby orders and determines :—

" 1. That the marketing of the regulated products in sacks or bags in any but new " sacks or bags is prohibited.

" 2. That all persons engaged in the growing and the marketing of potatoes shall stamp " or mark the name of the variety of such potatoes on the tag designated by the Board and " attach to the container in which the said potatoes are marketed.

" Wherever used in this Order, the words defined in section 2 of the B.C. Coast Vegetable " Marketing Scheme, approved under the provisions of the ' Natural Products Marketing " (British Columbia) Act ' as amended, shall, unless the context otherwise requires, have " the meaning set forth in the said section.

" Dated at Vancouver, British Columbia, this 29th day of June, A.D. 1936.

" By Order of

" B.C. COAST VEGETABLE MARKETING BOARD.

" I hereby certify the foregoing to be an Order known as Order No. 7, made by the B.C. " Coast Vegetable Marketing Board, at Vancouver, British Columbia, on the 29th day of " June, A.D. 1936.

" A. PETERSON,

" *Secretary, B.C. Coast Vegetable Marketing Board.*

" B.C. COAST VEGETABLE MARKETING BOARD,

" June, 29, 1936.

" Pursuant to the provisions of the B.C. Coast Vegetable Marketing Scheme and as " authorized under the provisions of the ' Natural Products Marketing (British Columbia) " Act, 1934,' and the ' Natural Products Marketing (British Columbia) Act Amendment " Act, 1936,' the B.C. Coast Vegetable Marketing Board (hereinafter called the ' Board ') " hereby orders and determines :—

" 1. All persons are hereby prohibited from carrying or transporting the regulated " product within the area without first obtaining the written authority of the Board so to do.

" 2. In respect of shipments by rail or water, such written authority may be given by " endorsement by any member of the Board of the Bill of Lading or other contract under " which such regulated product is to be carried.

" 3. All persons are prohibited from carrying or transporting within the area the " regulated product unless the same is tagged or marked in such manner as the Board may " designate.

" 4. That any of the regulated product kept, transported, or marketed in violation of " this or any Orders of the Board shall be seized and disposed of through the agency desig- " nated by the Board. All costs and charges occasioned by such seizure and disposing shall " be paid by the person so keeping, transporting, or marketing the regulated product, and " the amount of such costs and charges shall be deducted and retained from any moneys " realized from the sale of the regulated product so seized and applied in satisfaction of such " costs and charges.

" Wherever used in this Order, the words defined in section 2 of the B.C. Coast Vegetable " Marketing Scheme, approved under the provisions of the ' Natural Products Marketing " (British Columbia) Act ' as amended, shall, unless the context otherwise requires, have " the meaning set forth in the said section.

" Dated at Vancouver, British Columbia, this 29th day of June, A.D. 1936.

" By Order of

" B.C. COAST VEGETABLE MARKETING BOARD.

" I hereby certify the foregoing to be an Order known as Order No. 8, made by the " B.C. Coast Vegetable Marketing Board at Vancouver, B.C., on the 29th day of June, " A.D. 1936.

" A. PETERSON,

" *Secretary, B.C. Coast Vegetable Marketing Board.*

" B.C. COAST VEGETABLE MARKETING BOARD,

" June 30, 1936.

" Pursuant to the provisions of the B.C. Coast Vegetable Marketing Scheme and as " authorized under the provisions of the ' Natural Products Marketing (British Columbia) " Act, 1934,' and the ' Natural Products Marketing (British Columbia) Act Amendment " Act, 1936,' the B.C. Coast Vegetable Marketing Board (hereinafter called the ' Board ') " hereby orders and determines :—

" 1. That the regulated products or any part thereof shall not be marketed, carried, " transported, shipped, warehoused, or stored, unless all bags, boxes, crates, or other " containers in which the regulated product is packed are marked with tags, labels or " stamps as from time to time designated by the Board.

" 2. That tags as hereinafter designated are hereby designated as the tags which shall " be securely attached to all bags, boxes, crates, and other containers in which the regulated " product is packed for marketing :—

" *For Potatoes :* Early and Second Early Varieties, marketed before August 1, 1936, " tags issued by the Board, Red in colour and serially numbered.

" *For Vegetables :* Other than potatoes, tags issued by the Board, Manila Brown in " colour and serially numbered.

" 3. That tags shall be obtained only at the office of the B.C. Coast Vegetable Marketing " Board, 175 Water Street, Vancouver, B.C., or from District representatives of the Board. " The stub portions of tags must be delivered to the agency with delivery of the regulated " product.

" Wherever used in this Order, the words defined in section 2 of the B.C. Coast Vegetable " Marketing Scheme, approved under the provisions of the ' Natural Products Marketing " (British Columbia) Act ' as amended, shall, unless the context otherwise requires, have the " meaning set forth in the said section.

" Dated at Vancouver, British Columbia, this 30th day of June, A.D. 1936.

" By Order of

" B.C. COAST VEGETABLE MARKETING BOARD.

" I hereby certify the foregoing to be an Order known as Order No. 10, made by the " B.C. Coast Vegetable Marketing Board, at Vancouver, B.C., on the 30th day of June, " A.D. 1936.

" A. PETERSON,

" *Secretary, B.C. Coast Vegetable Marketing Board.*

" B.C. COAST VEGETABLE MARKETING BOARD,

" June 30, 1936.

" Pursuant to the provisions of the B.C. Coast Vegetable Marketing Scheme and as " authorized under the provisions of the ' Natural Products Marketing (British Columbia) " Act, 1934,' and the ' Natural Products Marketing (British Columbia) Act Amendment " Act, 1936,' the B.C. Coast Vegetable Marketing Board (hereinafter called the ' Board ') " hereby orders and determines :—

" That the person in charge of any vehicle in which the regulated product could be " transported is hereby required to permit any member or employee of the Board to search " the vehicle.

" Wherever used in this Order, the words defined in section 2 of the B.C. Coast Vegetable " Marketing Scheme, approved under the provisions of the ' Natural Products Marketing " (British Columbia) Act ' as amended, shall, unless the context otherwise requires, have " the meaning set forth in the said section.

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

Reasons for Judgment.

McPhillips, J.A. —*continued.*

" Dated at Vancouver, British Columbia, this 30th day of June, A.D. 1936.

" By Order of

" B.C. COAST VEGETABLE MARKETING BOARD.

" I hereby certify the foregoing to be an Order known as Order No. 11, made by the " B.C. Coast Vegetable Marketing Board, at Vancouver, British Columbia, on the 30th day " of June, A.D. 1936.

" A. PETERSON,

" *Secretary, B.C. Coast Vegetable Marketing Board.*"

Now it would appear that when the Board only desired, so far as the facts would appear, to search the vehicles containing the potatoes this was refused by the Respondents. It was evident, though, that the potatoes in the vehicles were not tagged. Then it was that the potatoes were seized under the authority residing in the Board and in pursuance of the regulations—to be disposed of through the agency of the Board. Now the question is, did the Appellants act in any manner contrary to the Statute and regulations ? If the Board did not, then—where was the right to the order or Injunction granted and now under appeal ? If we turn to the argument of Counsel for the Respondents, it is this only. It was stated upon the highway that the potatoes were for export and that was sufficient to oust the authority of the Board. If this be a sufficient answer, it would result in complete paralysis of the functions of the Board and effectively destroy the whole Provincial Statute law in the matter. It cannot but be said to be idle contention to have a Provincial Statute so dealt with. We have here a Statute well within the constitutional powers of the Province—that is, " Property and Civil Rights " within the Province ; that being so, how is it possible to say here that the Board acting under the Provincial Act has been guilty of an illegal act ? There is no interference with the use of Public Highways ; if it were, it would be lawful enough if authorized by Provincial legislation—notably, take the case of Toll Gates. Here we have in the Board the legislative authority. It is not the case of the Board interfering with the right to export the potatoes at all—the requirements are merely in the way in which property in the Province is to be held and dealt with. So long as the property is in the Province it must be subject to the law of the Province. Nothing was done by the Appellants to prevent export—as a matter of fact, all that was desired to be done was the right to inspect the property in the wagons, although it was evident that the bags were untagged. If the bags of potatoes had been tagged and there had been compliance with the regulations of the Board generally, the potatoes would not have been interfered with. Nothing that was done by the Board can be said to have invaded the realm of Dominion legislation—compliance with the Provincial law is in no way an interference with Dominion constitutional powers. All that the Respondents had to do was comply with the Provincial law and so doing could without trammel of any nature or kind export the potatoes if so advised. In truth, we have upon the Statute Books of both the Dominion and the Province joint action, and the Acts were framed so that where the power did not reside in the Dominion it resided in the Province. In the " Natural Products Marketing (British Columbia Act), 1934," we find this section :—

" 5. Every Provincial Board may co-operate with the Dominion Board to regulate the " marketing of any natural product of the Province and may act conjointly with the " Dominion Board and may perform such functions and duties and exercise such powers as " are prescribed by this Act or the regulations."

Then we see that there was further legislation in 1936—the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936," and we see that all that the Board has done here is completely authorized—*see* sections 5 and 6.

" 5. Said chapter 38 is amended by inserting therein the following as section 4A :—

" ' 4A. Without limiting the generality of any of the other provisions of this Act, the " ' Lieutenant-Governor in Council may vest in any Provincial board any or all of the " ' following additional powers :—

" ' (*a*) To regulate the time and place at which and to designate the agency through " ' which any regulated product shall be marketed, to determine the manner of " ' distribution, the quantity and quality, grade or class of the regulated product " ' that shall be marketed by any person at any time, and to prohibit the " ' marketing of any grade, quality, or class of any regulated product :

" ' (*b*) To exempt from any determination or order any person or class of persons
" ' engaged in the production, processing, or marketing of the regulated product
" ' or any class, variety, or grade of such product :

" ' (*c*) To require any or all persons engaged in the production, processing, or marketing
" ' of the regulated product to register with and obtain licences from the board :

" ' (*d*) To fix and collect annual, quarterly, or monthly licence fees from any or all
" ' persons producing, processing, or marketing the regulated product ; and for
" ' this purpose to classify such persons into groups and fix the licence fees
" ' payable by the members of the different groups in different amounts :

" ' (*e*) To cancel any licence for violation of any provision of the scheme or of any
" ' order of the board or of the regulations :

" ' (*f*) To require full information relating to the production, processing, and marketing
" ' of the regulated product from all persons engaged therein ; and to require
" ' periodic returns to be made by such persons, and to inspect the books and
" ' premises of such persons :

" ' (*g*) To fix the price or prices, maximum price or prices, minimum price or prices,
" ' or both maximum and minimum prices at which the regulated product, or
" ' any grade or class thereof, may be sold in the area within the Province to
" ' which the scheme relates ; and may fix different prices for different sections
" ' of the said area :

" ' (*h*) To require the person in charge of any vehicle in which the regulated product
" ' could be transported to permit any member or employee of the board to
" ' search the vehicle :

" ' (*i*) To seize and dispose of any of the regulated product kept, transported, or
" ' marketed in violation of any order of the board :

" ' (*j*) To make such orders, rules, and regulations as are deemed by the board necessary
" ' or advisable to regulate effectively the marketing of the regulated product,
" ' and to amend or revoke the same.'

" 6. Said chapter 38 is amended by inserting therein the following as section 9A :—

" ' 9A. All powers vested in the Lieutenant-Governor in Council or in any board or
" ' person by or under this Act may, after the coming into operation of this section, be
" ' exercised to their fullest extent, notwithstanding the fact that the Dominion Act may
" ' or may not be then existing or operative or that the Dominion Board may or may not
" ' be then existing or operative.' "

Upon the facts as sworn to and before the learned Judge upon the application for the Injunction—it was evident that the Respondents could not support their contention that there was any *bona-fide* intention to export the potatoes—it was said warehouse accommodation had been arranged for ; that was denied by the named warehouseman, and, further, the Respondents admitted that some of the potatoes might not be exported. Now, the guiding principle in the Courts as to granting or not granting an injunction is this : it must be just and convenient. In my opinion it is a flagrant attempt to flout the law. It cannot be for a moment admitted that all that is needed to be said by the person driving a wagon filled with potatoes is immune from complying with the Statute laws and the regulations thereunder by the mere statement " these potatoes are for export," and admittedly here the bags of potatoes were without the tags, labels, or stamps designated by the Board. I would here refer to secs. 3 and 4 of the regulations of June 29, 1936, which read as follows :—

" 3. All persons are prohibited from carrying or transporting within the area the
" regulated product unless the same is tagged or marked in such manner as the Board may
" designate.

" 4. That any of the regulated produce kept, transported, or marketed in violation of
" this or any Orders of the Board shall be seized and disposed of through the agency desig-
" nated by the Board. All costs and charges occasioned by such seizure and disposing shall
" be paid by the person so keeping, transporting, or marketing the regulated product, and
" the amount of such costs and charges shall be deducted and retained from any moneys
" realized from the sale of the regulated product so seized and applied in satisfaction of
" such costs and charges."

It will be seen that the Respondents refusing to comply with regulations of the Board persisted in their contention that they were entitled to proceed along the highway within the Board

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

Reasons for Judgment.

McPhillips, J.A. —*continued.*

area although there was non-compliance with the regulation that the bags should be tagged. What followed ? The Appellants did what they were entitled by Statute law, seized the potatoes—not for confiscation at all—as they said they would be sold for the best possible price and the moneys accounted for. This was acting under the Statute law. *See* amended sec. 5 of the " Natural Products Marketing (British Columbia) Act Amendment Act, 1936."

It is plain upon the facts, as I read them, that there was an absence of *bona fides* on the part of the Respondents throughout. The requirements of the Board—covered by Statute law and regulation—were binding upon the Respondents and they did not comply with them ; they are binding even if the potatoes were to be exported ; they can be complied with with no inhibition or curtailment of right to export. The Provincial law is supreme as to Property and Civil Rights, and the property being in the Province so long as it is—it is subject to the Provincial law ; here nothing was done or attempted to be done which would interfere in any way with Export or Trade and Commerce ; if the Respondents had complied with the Provincial law they could have proceeded on their way and could, if so minded, have exported the potatoes. Can it be said that anything that was done by the Appellants was contrary to law ? With great respect to the learned Judge who granted the Injunction—I am compelled to say that it was not a case for an interim injunction (until after the trial)—there was nothing in the case to at all establish that the Board was in any way " interfering or preventing the Plaintiffs (the Respondents), their servants or agents, from exporting potatoes "; the duty upon the Respondents was to comply with the Provincial law, then export the potatoes when they were so minded.

The appeal of course only has reference to an interlocutory injunction and I do not find it necessary to cite authorities going into the merits of the action.

That the Provincial law is effectual in respect of " Property and Civil Rights " is beyond question ; that being the case, there must be compliance with that law. The Respondents have not complied with it and seek, by the statement only that the potatoes are for export, to escape from compliance with the provisions of the Provincial law—the Provincial law in no respect affecting the right to export the potatoes. To admit of any such claimed right would be the complete nullification of the Provincial law.

No questions of *ultra vires* as to the Provincial Marketing Act requires to be dealt with as the learned Counsel for the Respondents stated he was not contending that.

I would allow the appeal—the Injunction to be set aside.

(Sgd.) A. E. McPHILLIPS, *J.A.*

Vancouver, B.C., 4th November, 1936.

COURT OF APPEAL.

CHUNG CHUCK AND MAH LAI vs. LESLIE GILMORE *et al.* } JUDGMENT OF THE HONOURABLE MR. JUSTICE McQUARRIE.

I agree with my learned brother McPhillips that this appeal should be allowed and the Injunction dissolved and discharged.

(Sgd.) W. G. McQUARRIE, *J.A.*

Vancouver, B.C., 4th November, 1936.

I may say upon that argument practically the same grounds of argument were advanced as have been advanced here, although technically the contention of *ultra vires* was not advanced. I do not propose to refer to what I might say of the multitude of cases to which we have been referred where questions of *ultra vires* have received consideration in the Courts during past years. Of course I look upon them with the greatest respect, but it will well be said that they in the main have reference to the particular facts of each case. Here we have a Constitution Act passed by the Imperial Parliament in 1867—Canada and its various Provinces have advanced by leaps and bounds since that time—and time has developed wonderful changes in the business and industrial life of the people and legislation is of course necessary to cope with conditions in the industrial and agrarian life of the people. The scheme of the Constitution is democratic and the legislation may

well be presumed to be the voice of the people. Here we have legislation upon a subject-matter wholly and exclusively within the power of the Legisture of the Province coming within " Property and Civil Rights " ; my conception of the principle to be borne in mind is that all reasonable and proper legislative control of—as we have here—Natural Products must reside in the Provincial Legislature, and it is idle to contend otherwise; if not, the statutory grant of exclusive authority becomes wholly abrogated. It cannot be the province of the Courts to say that this or that conferred authority shall not be exercised when what is legislated may be fairly and reasonably considered to be incidental to the exercise of the express constitutional power conferred. We have had submission after submission from Counsel at the Bar—which would, if given effect to, be absolutely prohibitive of anything being done to exercise the constitutional powers conferred upon the Legislature of the Province—" levies are illegal "—I will not go on to detail them—and if given effect to it would be impossible to bring about reasonable control in marketing within the Province. The Natural Products are the growth and production of the Province and the Legislature in the public interest has legislated in respect thereto—being something to be done with the Natural Products of the Province—such as orderly and systematic growth and production and method of control in marketing. Wherein can it be said that there is the exercise of legislative authority within the Province beyond that conferred by Statute ? The legislation is not approved by all—that is profitless contention.

The Legislature of the Province is clothed with the constitutional and statutory authority in the premises—namely, " Property and Civil Rights "—and it is an exclusive authority. In my opinion, and with the greatest respect to all contrary opinion, when constitutional powers are to be considered there must be some elasticity in the construction ; the constitutional authority is not for the day only of its passage and enactment—it must be read—with the changing conditions of the times—always to be applied to the requirements not only of the time of the passage and enactment, but to the continuing development and industrial advancement and change that years bring about. I am reminded of what Lord Shaw said in *Att.-Gen. for Nigeria* v. *Holt & Co.* 84 L.J.P.C. (1915), at p. 105 :—

> " The law must adapt itself to the conditions of modern society and " trade."

Here we have had great development in the long years since 1867, and in the wisdom of the Legislature it is deemed in the public interest to provide for the regulation of the marketing and disposition within the Province of the Natural Products of the Province. Can it be reasonably said that this is not a conferred constitutional power and an exclusive one under the " British North America Act "—enjoyed by the Province ? In my opinion it cannot, and if that be a correct view of the law I cannot see in what respect the Act called in question may be said to be *ultra vires.*

A. E. McPHILLIPS, J.A.

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

Reasons for Judgment.

Macdonald, J.A.

REASONS FOR THE OPINION OF THE HONOURABLE MR. JUSTICE M. A. MACDONALD.

In discussing the finding that the " Natural Products Marketing (British Columbia) Act " is, to its full extent, *intra vires* of the Provincial Legislature, I will refer to the provisions of a Consolidated Act placed before us by Counsel during argument for convenience only, as it includes in proper form and place the two amendments to the main Act of 1934 (B.C. Stats., 1934, chap. 38 ; B.C. Stats., 1936, chap. 34 ; and B.C. Stats., 1936 (2nd Session), chap. 30). It may now be found in the R.S.B.C. 1936 as chap. 165.

The question may best be dealt with by considering the grounds upon which it was submitted that the Act is *ultra vires* of the Provincial Legislature.

(1) It was said—not I think with much confidence—that because by sec. 2 the words " Dominion Act " wherever found is defined to mean the " Natural Products Marketing Act, 1934," of the Dominion of Canada recently held to be *ultra vires* by the Judicial Committee of the Privy Council, together with a definition of the " Dominion Board " in the same section and further references elsewhere (e.g., in secs. 6, 8, and 11) to Dominion Boards created, or to be created, that the whole Act is, if not *ultra vires* of the Provincial Legislature, at least valueless. That is not so. We look at the Act as it stands. The Dominion " Natural Products Marketing Act, 1934," has no longer any validity, but it is not fatal to the Provincial Act to mention by name that legislative effort. It is still at least a paper writing capable of identification by reference. The draftsman may have had in mind that the Dominion Parliament at some future date may pass complementary marketing legislation within its powers as recently defined. If so, by a slight amendment —assuming a new Dominion Act will have another title—the definition of " Dominion Act " may be altered to refer to one of a later date. For the present the phrases are harmless and no objection should be raised to permitting them to remain in the Act in suspension for possible future use. As a Statute is always speaking, on the passage of a Dominion Marketing Act, these references will have a meaning and may remain in the meantime without affecting, much less destroying, the presently operative sections of the Act.

Sec. 7, for example, providing that :—

> " Every Provincial board may, with the approval of the Lieutenant-
> " Governor in Council, perform any function or duty and exercise any
> " power imposed or conferred upon it by or pursuant to the Dominion
> " Act, with reference to the marketing of a natural product "—

is academic at present, but may be operative in the future. If so, there is, I think, no doubt that the Provincial Legislature may clothe a Board of its own creation with the capacity to perform functions and to carry out duties conferred upon it by a Dominion Act. If the Dominion Parliament confers on a Provincial Board certain duties sec. 7 creates a capacity to undertake it (*Bonanza Creek Gold Mining Company, Ltd.* v. *The King* (1916) 1 A.C. 566). Conversely, by sec. 8 similar powers may be exercised by a Dominion Board if created by later legislation. The same principle applies to sec. 9 (1). We are not concerned with the details of marketing schemes and it will not be presumed that under these sections, either a Provincial or Dominion Board, acting independently, in co-operation, or as an agent, will exercise powers

beyond the competency of either Parliament to bestow. Any incident of that kind should be dealt with if, and when, it arises as an Act without statutory sanction.

(2) Another objection raised to the whole Act was based on an alleged unauthorised delegation of legislative authority to the Lieutenant-Governor in Council. The powers conferred, it was submitted, are not merely ancillary to the provisions of the Act designed to make it effective, but rather amount to an abdication of legislative authority. *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General of Alberta* (1937) Vol. II, W.W.R. 353, was relied upon and the legislation there considered compared with the Act under review herein. I will only consider our own Act.

The first answer to this contention is that there is no abrogation of legislative authority. The main Act is not merely a skeleton Act without any substantive statement of policy or intent. Its scope and purpose, apart from any reference to the Lieutenant-Governor in Council, is disclosed in sec. 4 (1), reading as follows :—

> " 4. (1) The purpose and intent of this Act is to provide for the
> " control and regulation in any or all respects of the transportation,
> " packing, storage, and marketing of natural products within the Province,
> " including the prohibition of such transportation, packing, storage, and
> " marketing in whole or in part."

This section makes, not general but detailed provision for each phase of the regulation and control of the marketing of natural products as defined in sec. 2, viz., in so far as transportation (distribution), packing, storage, and marketing is concerned, including prohibitions necessary to enforce control. It is then followed by subsec. (2), authorising the Lieutenant-Governor in Council to establish, vary, and revoke schemes and to regulate and control marketing not beyond the scope of sec. 4 (1), but within it. True, it gives to the Lieutenant-Governor in Council power to constitute marketing boards, but that power, in principle, is similar to powers given to the Board of Licence Commissioners considered by the Judicial Committee in *Hodge* v. *The Queen* and later referred to. In fact, after comparing, as I have done, the two Acts, one need not go further to justify this legislation in so far as the question of delegation is concerned.

It was said, however, that by sec. 5 *additional* so-called legislative powers were conferred on the Lieutenant-Governor in Council, eleven in all (subsecs. (a) to (k), both inclusive) not covered by substantive provisions in the Act. If these were in fact additional powers it would not, I think, be material, so long as they relate—as they do—to marketing and control. In fact, however, no additional powers are conferred. It was not necessary to insert the word " additional " in the introductory clause in sec. 5. All the powers conferred, speaking generally, relate to the regulation of the packing, storing, marketing, and distribution of natural products within the Province. Licensing and price-fixing is part of that regulation and control. No authority is given to regulate or control in an adjoining Province.

The suggestion appeared to be that the details found in the subsections to sec. 5 and contemplated therein should each be the subject of an independent legislative enactment. That is not possible, desirable or necessary. A

number of boards are contemplated for a large variety of products, each with schemes differing in detail and subject, doubtless, to constant changes as exigencies arise. The only practical way of legislating in respect to this question of property and civil rights within the Province and in relation to matters of a merely local nature such as this, was to entrust details to boards under the general supervision of the Lieutenant-Governor in Council, with, however, the main Act (sec. 4) outlining policy and specifying the specific features of marketing and control dealt with by the Legislature.

We were referred by Senator Farris to the decision of the Supreme Court of Canada *In re Gray* (1918) 57 S.C.R. 150, on the question of delegation. It was discussed by Harvey, C.J.A., in *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General of Alberta*, supra, in giving the judgment of the Appellate Division, and this decision was relied upon by Mr. Hossie. At p. 358 Harvey, C.J.A., said :—

> " In that case (*In re Gray*) there had undoubtedly been given legis-
> " lative authority to the Governor-General in Council. But as pointed
> " out that was a case of emergency and urgency. It was a war measure
> " and it has been more than once pointed out by the Judicial Committee
> " that in such a case the residuary power conferred by section 91 upon
> " the Dominion Parliament may be resorted to."

His Lordship added, referring to the Alberta Act :—

> " This is neither a war measure nor is it Dominion legislation, so
> " the case cited would appear to have no application."

With the greatest respect I cannot agree with this view. It was not said in *Re Gray*, as I read the reasons for judgment, that it was a case of emergency and urgency and because of that aspect the delegation ought to be treated as valid ; nor is there any intimation that if the Supreme Court of Canada had under consideration peace-time legislation of comparable import the decision would be different. Once it is found that the Federal or Provincial Parliament is legislating in respect to a subject-matter within its competence, I do not think, on principle or on authority, powers of delegation are enlarged or restricted by the presence or absence of a state of war or any other emergency. On the contrary, the governing principles are outlined in a well-known passage in *Hodge* v. *The Queen*, later discussed and the principles there stated are not subject to alteration by national exigencies.

In *Fort Frances Pulp and Paper Co.* v. *Manitoba Free Press* (1923) A.C. 695, it was held by the Judicial Committee that in an emergency the Federal Parliament might legislate for the general welfare of Canada although the subject-matter of the legislation related to property and civil rights ; in other words, were it not for the emergency such legislation would be within the competency only of a Provincial Legislature. It was pointed out that when the emergency passed legislation of this character, if retained, would become *ultra vires ;* i.e., " when it is not longer called for " (p. 106). That principle does not apply to delegation of authority, viz., *intra vires* at one stage ; *ultra vires* at another. The decision of the Board was based upon an interpretation of the " British North America Act."

I do not think any interpretation of that instrument will support the

view, however, that wider powers of delegation arise with the approach of an emergency. Viscount Haldane, at p. 105, said :—

> " The general control of property and civil rights for normal pur-
> " poses remains with the Provincial Legislatures, but questions may
> " arise by reason of the special circumstances of the national emergency
> " which concern nothing short of the peace, order, and good government
> " of Canada as a whole."

Within the meaning of the words at the commencement of sec. 91, questions relating to peace, order, and good government, under a proper interpretation of the " Constitution Act," may arise, as an overriding consideration where under ordinary circumstances a question of civil rights only is involved. Such a decision is in harmony with the provisions of the " British North America Act " ; " It is proprietary and civil rights in new relations which " they do not present in normal times, which have to be dealt with ; and these " relations which affect Canada as an entirety, fall within section 91, because " in their fullness they extend beyond what section 92 can really cover " (p. 105). This view, or interpretation, is also supported by a reference to the fact that residuary powers were given to the central government, " and " the preamble of the statute declares the intention to be that the Dominion " should have a constitution similar in principle to that of the United " Kingdom." The Judicial Committee do not say, in dealing with legislation of this character affecting property and civil rights passed by the Dominion Parliament during an emergency, that the terms of the " British North America Act " may be ignored. It is freely interpreted.

When we turn to the question of delegation of authority to subordinate bodies, no support can be found in the constitution for the view that it is affected by emergencies. That authority, as intimated, is based on well-known principles discussed in *Hodge* v. *The Queen* (1883) 9 A.C. 117, where at p. 132 it is said :—

> " When the British North America Act enacted that there should be
> " a legislature for Ontario, and that its legislative assembly should have
> " exclusive authority to make laws for the Province and for provincial
> " purposes in relation to the matters enumerated in sect. 92, it conferred
> " powers not in any sense to be exercised by delegation from or as agents
> " of the Imperial Parliament, but authority as plenary and as ample
> " within the limits prescribed by sect. 92 as the Imperial Parliament in
> " the plenitude of its powers possessed and could bestow. Within these
> " limits of subjects and area the local legislature is supreme, and has the
> " same authority as the Imperial Parliament, or the Parliament of the
> " Dominion, would have had under like circumstances to confide to a
> " municipal institution or body of its own creation authority to make
> " by-laws or resolutions as to subjects specified in the enactment, and
> " with the object of carrying the enactment into operation and effect.
>
> " It is obvious that such an authority is ancillary to legislation, and
> " without it an attempt to provide for varying details and machinery to
> " carry them out might become oppressive, or absolutely fail."

I am referring at present to the principles governing delegation of authority,

In the Court of Appeal for British Columbia.

Re The Natural Products Marketing Act Reference.

Reasons for Judgment.

Macdonald, J.A. —*continued.*

not to whether or not the delegation itself in the case at bar is simply ancillary to legislation or an attempt at independent legislative efforts.

While it is clear that an emergency may change the aspect of property and civil rights giving it a national character, without offence to the instrument, it is, I think, impossible to say that the legal principles referred to applicable to delegation of authority change their complexion with the state of the nation. That would be a new and, I think, an unwarranted conception.

If, however, the Supreme Court of Canada in *Re Gray* held otherwise, leaving aside for the moment the decision in *Hodge* v. *The Queen*, we would be governed by it. One should not be misled by the fact that a War Measures Act (Statutes of Canada, 1915, chap. 2) was considered, i.e., emergency legislation. The question decided was the validity of sec. 6 conferring special powers on the Governor in Council and an Order in Council or regulations passed thereunder. If the Court intended to hold that this was a valid delegation only because of the nature of the legislation itself and the state of the country, it would doubtless say so with the clearness displayed by Viscount Haldane in the *Fort Frances Pulp and Paper Co.* decision. The then Chief Justice of Canada made no reference to this aspect. He referred (p. 156) to sec. 6 of the " War Measures Act, 1914," and said :—

> " The practice of authorising administrative bodies to make regula-
> " tions to carry out the object of an Act, instead of setting out all the
> " details in the Act itself, is well known and its legality is unquestioned.
> " But it is said that the power to make such regulations could not con-
> " stitutionally be granted to such an extent as to enable the express
> " provisions of a statute to be amended or repealed ; that under the
> " constitution parliament alone is to make laws, the Governor-in-Council
> " to execute them, and the Court to interpret them ; that it follows that
> " no one of these fundamental branches of government can constitutionally
> " either delegate or accept the functions of any other branch."

Then the Chief Justice proceeded to say :—

> " In view of *Rex* v. *Halliday* (1917) A.C. 260, I do not think this
> " broad proposition can be maintained."

Rex v. *Halliday*, although concerned with the "Defence of the Realm Act," was not decided on the basis that an emergency altered the existing law. Lord Finlay, L.C., said, at p. 264 :—

> " It is beyond all dispute that Parliament has power to authorise
> " the making of such a regulation. The only question is whether *on a*
> " *true construction of the Act it has done so.*" [The italics are mine.]

Further, at p. 157, *In re Gray*, the Chief Justice said :—

> " Parliament cannot indeed abdicate its functions but within reason-
> " able limits at any rate it can delegate its powers to the executive
> " government. Such powers must necessarily be subject to determina-
> " tion at any time by Parliament, and needless to say the acts of the
> " executive, under its delegated authority, must fall within the ambit
> " of the legislative pronouncement by which its authority is measured."

This language employed in a decision binding upon us is applicable to the case at bar. In further support of the view that the opinion of the Chief

Justice was not affected by any consideration except a question of interpretation and of general powers of Parliament, he said, at p. 157 :—

" I cannot, however, find anything in that Constitutional Act which,
" so far as material to the question now under consideration, would
" impose any limitation on the authority of the Parliament of Canada
" to which the Imperial Parliament is not subject."

His decision is based on the view that " the language of section 6 is admittedly " broad enough to cover power to make regulations for the raising of military " forces " (p. 157). Nor does it follow because his Lordship states at p. 159 that " the enlightened men who framed that section and the members of Parliament who adopted it, were providing for a very great emergency," that he found the delegation could only be supported on the ground that an emergency existed, because he proceeded to say that as they were providing for an emergency " they must be understood to have employed words in their natural sense and to have intended what they have said." Nor do I think the conclusion, that this delegation was only considered valid because of conditions, can be reached from the final words of the Chief Justice, at p. 160, viz. :—

" Our legislators were no doubt impressed in the hour of peril with
" the conviction that the safety of the country is the supreme law against
" which no other law can prevail. It is our clear duty to give effect to
" their patriotic intention."

The passage preceding this extract makes it clear that his Lordship was referring merely to the passage of the " War Measures Act " itself and to the duty of giving effect to it.

I turn to the judgment of Duff, J., now the Chief Justice of Canada. He simply expressed the view that (p. 168) :—

" unless the language of the first branch of section 6 is affected by a
" qualifying context or by subsequent statutory modification the order-
" in-council of the 20th April (the subject-matter of which in the above
" expressed view is indisputably within the scope of the ' War Measures
" Act ') is authorised by it."

At p. 169, referring to the function of the Court in construing legislative enactments, his Lordship said :—

" It ought not, moreover, to be forgotten in passing upon this argu-
" ment *for a narrow construction*, that this Act of Parliament supervened
" upon a decision which was the most significant, indeed the most
" revolutionary decision in the history of the country, namely—that an
" Expeditionary Force of Canadian soldiers should take part in the war
" with Germany as actual combatants on the Continent of Europe ; a
" decision which would entail as everybody recognised, measures of
" great magnitude ; requiring as a condition of swift and effective action
" that extraordinary powers be possessed by the executive."

This excerpt was referred to by Mr. Hossie in support of the contention that, in the view of the present Chief Justice a state of war gave validity to the delegation of powers under consideration. That was not the subject matter under discussion. He was, the context shows, contesting the view that a

narrow construction should be given to sec. 6, not in relation to unwarranted delegation of powers, but rather as to whether or not authority was given to the Governor in Council to repeal the "Militia Act." The question of whether or not an emergency affected the *extent* of delegated authority was not discussed. That would be a concrete subject calling for pointed discussion. It is clear, too, from the following passage that his Lordship brought to the consideration of this aspect of the case no such adventitious aid. At p. 170 he said :—

> "It is a very extravagant description of this enactment to say that "it professes (on any construction of it) to delegate to the Governor-in- "Council the whole legislative authority of parliament. The authority "devolving upon the Governor-in-Council is, as already observed, strictly "conditioned in two respects: First—It is exercisable during war only. "Secondly—The measures passed under it must be such as the Governor- "in-Council deems advisable by reason of war. There is no attempt to "substitute the executive for parliament in the sense of disturbing the "existing balance of constitutional authority by aggrandising the "prerogative at the expense of the legislature. The powers granted "could at any time be revoked and anything done under them nullified "by parliament, which parliament did not, and for that matter could "not, abandon any of its own legislative jurisdiction. The true view of "the effect of this type of legislation is that the subordinate body in "which the law-making authority is vested by it is intended to act as "the agent or organ of the legislature and that the acts of the agent "take effect by virtue of the antecedent legislative declaration (express "or implied) that they shall have the force of law."

Again—and I regard it as conclusive—there would be no point to the example his Lordship gave of "a striking instance of the delegation, so called, of "legislative authority with which the devolution effected by the War Measures "Act may usefully be contrasted" (p. 170), viz., in the example afforded in the government of the North West Territories by a council, exercising extensive legislative powers, if his judgment was based on the view that an emergency only justified, in law, the delegation of authority under the "War Measures Act" reviewed by the Court. The validity of that Act, with its large delegation of powers, was, he said, "never doubted," and it "of course "involved a degree of devolution far beyond anything attempted by the "'War Measures Act.'" That of course was not emergency legislation. He proceeded to say, p. 171 :—

> "In the case of the 'War Measures Act' (and it is equally true of "the Marketing Act) there was not only no abandonment of legal "authority, but no indication of any intention to abandon control and "no actual abandonment of control in fact, and the council on whom "was to rest the responsibility for exercising the powers given was the "Ministry responsible directly to Parliament and dependent upon the "will of Parliament for the continuance of its official existence. The "point of constitutional incapacity seems indeed to be singularly destitute "of substance."

The judgment of Anglin, J., later Chief Justice, remains to be considered. He summarised the only points raised for discussion at p. 175, as follows :—

> " Against the validity of the orders-in-council it is urged that " Parliament cannot delegate its major legislative functions to any other " body ; that it has not delegated to the Governor-in-Council the right " to legislate at all so as to repeal, alter or derogate from any statutory " provision enacted by it ; that if such power has been conferred it " can validly be exercised only when parliament is not in session."

If the point was taken that, in any event, the delegation was valid only because of war conditions he would in all likelihood have mentioned it. Significantly enough, no one made that statement nor is there any reference to it in the report of arguments of Counsel. Anglin, J., rested his decision, not on special grounds of that character, but quite properly, if I may say so, on the authority of *Hodge* v. *The Queen* and similar decisions. He said, at p. 176 :—

> " A complete abdication by Parliament of its legislative functions " is something so inconceivable that the constitutionality of an attempt " to do anything of the kind need not be considered. Short of such an " abdication, any limited delegation would seem to be within the ambit of " a legislative jurisdiction certainly as wide as that of which it has been " said by incontrovertible authority that it is as plenary and as ample " . . . as the Imperial Parliament in the plenitude of its powers possessed " and could bestow. . . . I am of the opinion that it was within the " legislative authority of the Parliament of Canada to delegate to the " Governor-in-Council the power to enact the impugned orders-in- " council. To hold otherwise would be very materially to restrict the " legislative powers of Parliament."

References to the existence of war and the defence and welfare of Canada found at p. 178, and to apprehend war and emergency at p. 180, do not disclose that in his Lordship's view the extent and scope of the delegation was only justified thereby. These expressions naturally appear because of the subject-matter of the Act. When, too, at pp. 181 and 182, he said : " We " are living in extraordinary times which necessitate the taking of extra- " ordinary measures," he is referring to the passage of the " War Measures Act " itself, not to the principles upon which delegation of authority is based. This is shown by the passage immediately following :—

> " At all events all we, as a court of justice, are concerned with is to " satisfy ourselves what powers Parliament intended to confer and that " it possessed the legislative jurisdiction requisite to confer them. Upon " both these points, after giving to them such consideration as has been " possible, I entertain no doubt. . . ."

He concludes :—

> " It has also been urged that such wide powers are open to abuse. " This argument has often been presented and as often rejected by the " courts as affording no sufficient reason for holding that powers, however " wide, if conferred in language admitting of no doubt as to the purpose " and intent of the legislature, should be restricted."

I think, therefore, *In Re Gray* is a decision applicable to the case at bar. I refer also to the language of Davies, J., in *Ouimet* v. *Bazin* (1912) 46 S.C.R. 502, at 514.

The judgment of the Judicial Committee in *Hodge* v. *The Queen* (1883) 9 A.C. 117, holding that the Legislature had authority under the Ontario " Liquor Licence Act " of 1877 to delegate to a Board of Licence Commissioners power to make police or municipal regulations, create offences, and fix penalties supports the validity of the Act under review. Assuming that the Legislature had the right to exercise the powers conferred on the Licence Commissioners, could it delegate such powers to the Board ? We assume for the present that it was within the competency of the Provincial Legislature to pass the Marketing Act and to legislate in respect to all the matters entrusted to the Lieutenant-Governor in Council. In the Court of Queen's Bench in Ontario the unanimous judgment of that Court, later reversed by the Court of Appeal, was delivered by Hagarty, C.J. Sir Barnes Peacock, in delivering the judgment of the Judicial Committee, referred to this judgment at p. 124. That Court expressed the view now advanced in support of the contention that the Act under review herein is a skeleton Act without substantive provisions and therefore *ultra vires*. Hagarty, C.J., said :—

> " The Legislature had not enacted any of these (referring to the " resolutions of the Board) but has merely authorised each Board in its " discretion to make them. It seems very difficult, in our judgment, to " hold that the Confederation Act gives any such power of delegating " authority, first of creating a quasi offence and then of punishing it by " fine or imprisonment. We think it is a power that must be exercised " by the legislature alone."

As stated, the Court of Appeal, holding that the delegation was justified, reversed that decision.

The Act considered (Ontario Revised Statutes, 1877, chap. 181) should be read, particularly secs. 3, 4, and 5, to compare it with similar sections in the " Natural Products Marketing (British Columbia) Act," and to observe the drastic powers to decide and to legislate conferred upon the Board of Licence Commissioners. What might be termed legislative power by a subordinate body was given to the Board. To refer to a few only, power was given to define by resolution (or, as the Judicial Committee say, by by-laws, p. 135) the conditions and qualifications necessary to obtain tavern or shop licences ; to limit the number of licences ; to declare that a limited number of persons qualified to have tavern licences might be exempted from the necessity of providing all the tavern accommodation otherwise required by law ; to regulate licensed taverns and shops ; define the duties and powers of licence inspectors, and to impose penalties for infraction of the Board's resolutions. Power was given to the agent of the Legislature to create offences not provided for in the substantive provisions of the Act and to impose penalties (sec. 5). Some of these powers are covered by substantive provisions in the main Act (e.g., exemption from the necessity of providing the hotel accommodation required by law—*see* sec. 19), while others are not.

These powers, the Judicial Committee say at p. 131, were " similar to, " though not identical in all respects with, the powers then belonging to

" municipal institutions under the previously existing laws passed by the local " parliaments."

It was contended that the Imperial Parliament had not conferred on the local legislature authority to delegate these powers, and " that the power " conferred by the Imperial Parliament in the local legislature should be " exercised in full by that body and by that body alone," and " the maxim *delegatus non potest delegare* was relied on " (pp. 131-2). As to this contention their Lordships said :—

" The objection thus raised by the appellants is founded on an entire " misconception of the true character and position of the provincial " legislatures. They are in no sense delegates of or acting under any " mandate from the Imperial Parliament. When the British North " America Act enacted that there should be a legislature for Ontario, " and that its legislative assembly should have exclusive authority to " make laws for the Province and for provincial purposes in relation to " the matters enumerated in sec. 92, it conferred powers not in any sense " to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its " power possessed and could bestow. Within these limits of subjects " and area the local legislature is supreme, and has the same authority " as the Imperial Parliament, or the Parliament of the Dominion, would " have had under like circumstances to confide to a municipal institution " or body of its own creation authority to make by-laws or resolutions " as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

" It is obvious that such an authority is ancillary to legislation, and " without it an attempt to provide for varying details and machinery " to carry them out might become oppressive, or absolutely fail."

Again, at p. 132, " it was argued . . . . that a legislature committing important " regulations to agents or delegates effaces itself." As to that submission, repeated in the case at bar, the Board said :—

" That is not so. It retains its powers intact, and can, whenever it " pleases, destroy the agency it has created and set up another, or take " the matter directly into his own hands. How far it shall seek the aid " of subordinate agencies, and how long it shall continue them, *are* " *matters for each legislature*, and not for Courts of Law, to decide." [The italics are mine.]

And at pp. 133-34 :—

" The provincial legislature having thus the authority to impose " imprisonment with or without hard labour had also power to delegate " similar authority to the municipal body which it created called the " Licence Commissioners."

The Judicial Committee treated the powers conferred as similar to those exercised by municipal institutions—municipal or police regulations, interfering with liberty of action to the extent necessary to prevent disorder and abuses. In the case at bar authority is delegated to a higher body, viz., to

the Lieutenant-Governor in Council, for a purpose precisely similar having regard to the character of the legislation, viz., to interfere with liberty of action and to control to the extent necessary to carry out the purely local and provincial purpose of the Act to regulate and control the marketing of natural products within the Province. It is " a limited discretionary authority " (p. 132).

It is of assistance to mention that the Board referred to " the very full and elaborate judgment of the (Ontario) Court of Appeal " containing " abundance of precedents for this legislation " (p. 132). In view of this statement in approval, I refer to the report of that decision found in 1881-2/ 7 Ont. A.R. 246. It supports the view that a legislature may delegate " whatever may be necessary to carry into effect the enactments of the legislature " itself " (p. 254). The examples given by Spragge, C.J., at pp. 254 and 255, include legislation delegating to the judiciary the power to make rules and orders of Court, a power now conferred in this Province on the Lieutenant-Governor in Council. He points out, at p. 255, that the Imperial Parliament has from time to time " delegated large powers of a like nature to the judiciary, " and in the recent judicature acts powers that are essentially legislative in " their character." In fact, should the Courts now declare that Provincial Legislatures, functioning for so many years with the authority of the Judicial Committee as disclosed in *Hodge* v. *The Queen*, have not the authority to delegate taken in the legislation under review, many long-standing Acts of similar import will be open to attack. Such a view would cripple legislative efforts. This is particularly true in legislation of the character under review, concerned with economic planning. Dealing with the marketing of a great variety of natural products by a large number of distinct boards, with different schemes suited to the product dealt with; with rules and regulations too differing in respect to each commodity and the necessity to alter and repeal arising from time to time it is impossible to avoid conferring large discretionary powers of a regulatory character on the delegatee and equally impossible to outline such powers, except in a general way, in the substantive portions of the Act.

The Act under review does not create a new deliberative body with the right to legislate. It would not be wise to attempt to define the area over which a power to delegate may be exercised. " In all these questions of " *ultra vires* it is the wisest course not to widen the discussion by considera- " tions not necessarily involved in the decision of the point in controversy " (*Hodge* v. *The Queen* (1883) 9 A.C. at p. 128). It is enough to say, having regard to the particular powers delegated in the Act under review, they are, in view of the decisions discussed, within the competency of the Provincial Legislature to bestow.

I may add that, on principle, or authority, or in the " British North America Act " itself, I cannot find any support for Mr. Hossie's submission that the full powers of delegation existing in the Imperial Parliament before 1867, and considered in *Hodge* v. *The Queen*, are exercisable only by the Legislatures of Ontario and Quebec. I can find no authority in the sections of the " British North America Act " to which we were referred—sec. 65 and others—for this novel view.

The views expressed heretofore are not affected by the judgment of the

Judicial Committee in " The Initiative and Referendum Act " (1919) A.C. 935. There a Manitoba Act was held to be *ultra vires* because it purported to alter the position of the Lieutenant-Governor by compelling him to submit a proposed Act for enactment to the electors, not the Legislature. That point does not arise in this appeal. The Board refer incidentally to the question of delegation at p. 945, pointing out that sec. 92 of the " British North America Act " " entrusts the legislative power in a Province to its legislature and to that legislature only." " No doubt," Viscount Haldane continues, " a body with a power of legislation on the subjects entrusted to it so ample " as that enjoyed by a Provincial legislature in Canada could while preserving " its own capacity intact seek the assistance of subordinate agencies " (*Hodge* v. *The Queen*). " But it does not follow that it can create and endow with " its own capacity a new legislative power not created by the act to which " it owes its existence. Their Lordships do no more than draw attention to " the gravity of the constitutional questions which thus arise." This language, although not necessary to the decision may well be accepted. Their Lordships were considering an Act where the " new legislative power " was not the Governor-in-Council, a part of the Legislature, but a body further removed from the source of power, viz., the electors of the Province. Further, there is no ground for the submission that under the " Natural Products Marketing Act " a new legislative body with powers equal to that of the Legislature has been created. There is no surrender of legislative functions. The Manitoba Act attempted to change the constitution. I may add that apparently it was not suggested that the powers of delegation of the Manitoba Legislature were more restricted than in Ontario.

(3) A further objection was based on sec. 91 (2), viz., that it purports to regulate trade and commerce ; also that it contravenes sec. 121 of the " British North America Act." I do not think the latter point calls for discussion. As to " trade and commerce," interference by the Provincial Legislature with the storing, packing, transporting, marketing, and distribution of natural products, native to the Province and within it, can be fully explained as a local function. It does not affect general trade. We were referred to the phrase " prohibition of such transportations " in sec. 4 (1) of the Act and to the word " transporting " in sec. 5 and elsewhere. This, however, is not general legislation purporting to control transportation as a Railway Board might control it. Transportation is affected as an incident only, in the regulation and control of marketing. The Provincial Legislature could prevent the transportation, within the Province of articles injurious to health or likely to spread blight or disease. If it can regulate, within the Province, the distribution of natural products, it can, to the extent necessary to enforce its own regulations, interfere with transportation. Distribution involves transportation. Nor can immunity from interference be obtained by a declaration of the owner that the goods are in transit to foreign parts. He may be stopped. Further, an official, properly authorised, doing so would not be doing an act in relation to inter-provincial trade. The right of a Provincial Government to regulate a fleet of trucks as to speed, weight, etc., could not be disputed on the ground that they were engaged only in transporting products from one province to another. That would not be an interference with trade and transportation. Provincial legislation in respect to,

or in relation to property and civil rights and to matters of local concern, is valid although it might *affect* inter-provincial trade. It would not be legislation *in relation* to inter-provincial trade.

It was submitted that the definition of " Natural Products " in sec. 2 includes agricultural and other products produced anywhere in Canada. That is not so. Clearly it does not apply to Alberta wheat. This is a Provincial Act speaking with a local voice and natural products within the Province only are contemplated. The Act should be so read and construed if it is reasonably possible to do so. As often pointed out, it should be assumed that the Legislature meant to act constitutionally. As long as the products remain in the Province they are subject to control by legislation in respect to property and civil rights. Once they pass beyond the boundary-line, control ceases. This Act, unlike the legislation considered in *Lawson* v. *Interior Tree Fruit & Vegetable Committee* (1931) S.C.R. 389, does not profess to operate extra-provincially. Regulation and control begins and ends within the Province.

The meaning of the words " regulation of trade and commerce " was discussed by the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons* (1881) 7 A.C. 96, at pp. 112 and 113. While the Board carefully " abstain on the present occasion from any attempt to define the limits of the authority of the Dominion parliament in this direction " deciding only the point before it, they say, at p. 113, that the phrase " the regulation of " trade and commerce does not comprehend the power to regulate by legisla- " tion the contracts of a particular business or trade, such as the business of " fire insurance in a single province and therefore that its legislative authority " does not in the present case conflict or compete with the power over property " and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92." The legislation under review deals with the business of particular trades within the Province. To the same effect is the judgment of the Chief Justice of Canada, approved by the Judicial Committee. *In Re the (Dominion) Natural Products Marketing Act* (1934) 1936, S.C.R. 398. At p. 419, he said, after referring to a number of cases :—

> " It would appear to result from these decisions that the regulation of " trade and commerce does not comprise in the sense in which it is used " in sect. 91, the regulation of particular trades or occupations or a " particular kind of business such as the insurance business in the " provinces (or I would add the fruit and vegetable business) or the " regulation of trade in particular commodities (e.g., milk, fruit, etc.) in " so far as it is local in a provincial sense."

As intimated, the legislation we are concerned with on this reference differs materially from the Act considered in *Lawson* v. *Interior Tree Fruit & Vegetable Committee*, supra. It was held to be legislation in respect to trade and commerce because it purported to regulate the conduct of people (and of trade) beyond the Province. That is abundantly clear from a perusal of the Act and the judgment of the Chief Justice of Canada. Our legislation deals with matters of local and provincial import only.

Strong support may be found in the judgment of the Chief Justice of Canada, reported in 1936 S.C.R. 398, at p. 410 *et seq.*, for the view, having regard to the terms of the Dominion Marketing legislation, considered in *Re The (Dominion) Natural Products and Marketing Act*, 1934, and comparing

it with the legislation under review, that the latter legislation is *intra vires* of the Provincial Legislature. I refer, without quoting it, to the last paragraph on p. 411, continuing on p. 412. The sec. 4 (1) (*a*) and (*f*) referred to will be found at p. 404. It bears a close resemblance to sections of our Provincial Marketing Act. Lord Atkin, too, in delivering the judgment of the Judicial Committee on the same Act ((1937) 1 W.W.R. 328, at 330), said:—

> " There can be no doubt that the provisions of the Act cover trans-
> " actions in any natural product which are completed within the Province
> " and have no connection with inter-provincial or export trade. It is
> " therefore plain that the Act purports to affect property and civil
> " rights in the Province, and if not brought within one of the enumerated
> " classes of subjects in sect. 91 [and it was not] must be beyond the
> " competence of the Dominion legislature."

This language is susceptible of literal application to the Act under review. Lord Atkin said further, at p. 330 :—

> " Emphasis was laid upon those parts of the Act which deal with inter-
> " provincial and export trade. But the regulation of trade and com-
> " merce does not permit the regulation of individual forms of trade and
> " commerce confined to the Province."

Then follows an extract from the judgment of Duff, C.J., quoted with approval. Lord Atkin finds that " there is no answer to the contention that the act in substance invades the provincial field " (p. 330). When, therefore, we have a Provincial Act, stripped of the extra-provincial features considered by the Supreme Court of Canada, in the *Lawson* case, supra, dealing solely with regulation and control of natural products within the Province, in the light of the views referred to, there can be little, if indeed any doubt at all, as to the competency of the Provincial Legislature to pass this Act. With, too, " a totality of complete legislative authority " in the two legislative bodies, Federal and Provincial, it would be strange indeed if with the fate of the Dominion Act before us dealing with the same subject-matter, this legislation should also fail, more particularly, as in my opinion at all events, expressed with deference to other views, the Provincial Legislature was careful not to leave " its own sphere and encroach upon that of the other " (p. 332).

In my view the only ground—although I do not think it is a sound one —upon which this legislation could possibly be regarded as invalid is stated by Mr. Tilley in his argument in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* (1933) A.C. 168, at 171. He submitted that " a province cannot legislate to regulate a trade which *may* pass outside the Province." These regulated products in many instances do finally pass beyond the Province to find a market, but there is no interference beyond the boundary-line. No effect was given by the Judicial Committee to this submission, although it should be added that it was not necessary to do so.

(4) A final point raised at the bar calling for discussion was that regulation by licensing is not permissible. This feature of the Act was attacked on the ground that the power given to boards to fix and to collect licence fees amounts to the levy of an indirect tax. I do not agree. I think, too, we have gone a long way in reaching a conclusion on this point if we are right

in the view that this legislation is *intra vires*, affecting property, and civil rights and not " the regulation of trade and commerce." " Licences " " in their primary function " may be " instrumentalities for the control of trade—even local or provincial trade " (Duff, C.J., in *Lawson* v. *Interior Tree Fruit and Vegetable Committee* (1931) S.C.R. 357, at 364). This decision was relied upon by Mr. Hossie. We must, in applying the views of the Chief Justice in this decision, where reference is made to levies, remember that he is speaking in reference to an Act *ultra vires* of the Province. On the same page his Lordship said : " the imposition of these levies is merely ancillary, having " for its object the creation of a fund to defray the expenses of working the " machinery of the substantive scheme for the regulation of trade." In other words, levies were used as a means to that end.

The parts of the Act in reference to licensing are found in sec. 5, reading as follows :—

" 5. Without limiting the generality of any of the other provisions " of this Act, the Lieutenant-Governor in Council may vest in any " Provincial board any or all of the following additional powers :—

* * * * * * *

" (c) To require any or all persons engaged in the production, " packing, transporting, storing, or marketing of the regulated " product to register with and obtain licences from the board ;

" (d) To fix and collect yearly, half-yearly, quarterly, or monthly " licence fees from any or all persons producing, packing, transport- " ing, storing, or marketing the regulated product ; and for this " purpose to classify such persons into groups, and fix the licence " fees payable by the members of the different groups in different " amounts ; and to recover any such licence fees by suit in any " Court of competent jurisdiction ;

" (e) To cancel any licence for violation of any provision of the " scheme or of any order of the board or of the regulations ;

* * * * * * *

" (j) To use in carrying out the purposes of the scheme and " paying the expenses of the Board any moneys received by the " Board."

It will be observed that the licence fee is required from " persons " and is not levied on commodities. In one aspect at least, it is an incident in regulation and control. Compulsory regulation and control cannot be carried out without a system of licensing or some other similar plan. As an incident too, revenue is obtained for the Board.

Senator Farris referred us to the views expressed by the Chief Justice of Canada in *Re The Natural Products Marketing Act* (1934) 1936 S.C.R. 398, at 411. The difficulty was that his Lordship in the *Lawson* case, in the extract quoted, in referring to licences as instrumentalities for the control of trade, added the words " even local or provincial trade," implying, as Mr. Hossie submitted, that a system of licences as instrumentalities for the control of even local or provincial trade would be *ultra vires* of the Province. As stated, the words must be read in reference to the character of the Act con-

sidered. This phrase was used in considering the application of sec. 92 (9) of the " British North America Act." In any event, in the case referred to in 1936 S.C.R., at p. 411, the Chief Justice, after referring to *Hodge* v. *The Queen* and stating that a Province may regulate by a local licensing system the trade in liquor, said, at p. 411 :—

> " It does not seem to admit of serious dispute that, if, regards natural " products, as defined by the Act, the provinces are destitute of the " powers to regulate the dealing with natural products in respect of the " matters designated in section 4 (1) (a) the powers of the provinces are " much more limited than they have generally been supposed to be. If " this defect of power exists in relation to natural products it exists in " relation to anything that may be the subject of trade. Furthermore, " if the Dominion has power to enact section 4 (1) (f) as a provision " falling strictly within ' the regulation of trade and commerce,' then " the provinces are destitute of the power to regulate, *by licensing* [the " italics are mine] persons engaged in the production, the buying and " selling, the shipping for sale or storage and the offering for sale, in an " exclusively local and provincial way of business of any commodity or " commodities."

Sec. 4. (1) (f) of the Dominion Act, found at p. 404 of the report and referred to in this extract, is a licensing section. His Lordship, I think, clearly indicates that the provinces have the right to regulate " by licensing persons " engaged in the production, the buying and selling, the shipping for sale " or storage, etc., in an exclusively local and provincial way."

I stated that a power to license appears to be inseparable from the compulsory regulation of the buying and selling of commodities in a local and provincial way, and while the extract referred to is not a decision on the provisions of the Act under review, still, having regard to its provisions, it plainly indicates a view favourable to its validity in this regard. A province can regulate matters clearly within its legislative powers by a system of licensing.

The judgment in *Lower Mainland Dairy Products* v. *Crystal Dairy Ltd.* (1933) A.C. 168, is of no assistance. The Court was there concerned not with licences on individuals, but with adjustment levies imposed on traders in the fluid-milk market imposed in the special manner set out in the Statute and referred to at p. 173 of the report. It was levied on the products sold and entered into the price. In addition to the adjustment levies, an " expense levy " was collected from farmers to meet outlays of the committee. The latter is relied upon as comparable to the licences imposed by the Act under review. That is not so. It was levied for a special purpose, not as here, for at least a double purpose, one being an element in regulation. In any event it does not follow that if the " expense levy " stood alone it would be deemed a direct tax. It fell with the adjustment levies. At p. 175, Lord Thankerton said :—

> " It seems to follow that the expenses levies in the present case " *which are ancillary to the adjustment levies* must also be characterised " as taxes." [The italics are mine.]

It would be, I think, difficult to justify the view that boards, instituted under an *intra vires* Act to regulate local trading, could not as a means of

regulation, and to defray expenses, compel individuals concerned to procure a licence, and to adjust it in the manner provided in this Act. If a province can regulate the marketing of its own natural products it can do all things necessary—including the use of a licensing system—to make it effective. Licensing is a common feature of many provincial Acts. Because in *Russell* v. *The Queen* (1882) 7 A.C. 829, at 837, in discussing heading 9 of sec. 92, it is said " that the power of granting licences is not assigned to the Provincial " legislature for the purpose of regulating trade but 'in order to the raising " of a revenue for Provincial, local, or municipal purposes,' " it does not follow that, speaking generally, a licence may not be an incident of, or a necessary factor in, the regulation and control of natural products in the same way that " grading " might be provided for as an aid in price regulation. Nor would it be material if as an additional use it provided revenue to carry on the work of the Board. This reference by the Judicial Committee was based on heading (9) of sec. 91.

Then it was said that this is indirect taxation. I think not. It may be said that, in some way, every licence imposed by provincial authority on an auctioneer, fisherman, or lawyer enters into the cost of some commodity or service and has a tendency to be passed on to others. That possibility does not determine the character of the levy as a direct tax. *In Brewers and Malsters Assn.* v. *Att-Gen. Ontario* (1897) A.C. 231, at 237, Lord Herschell said :—

> " It is of course possible that in individual instances the person on " whom the tax is imposed may be able to shift the burden to some other " shoulders. But this may happen in the case of every direct tax."

One must look at the primary purpose of the tax. If it is placed on a named commodity for a specified amount, one knows that it is imposed, not for general purposes, but in relation to an article of commerce ; that it enters into its cost and must be added (or will likely be added) to the selling price. That cannot be said of every licence fee imposed on individuals. It is graduated according to the productive power of the licensee. It follows that, viewing it reasonably, it has not a tendency to enter into and to enhance the price of any product in the sense disclosed in the cases. That is not the purpose nor in fact the normal operation of the levy. It is doubtless so infinitesimal, having regard to the total volume of trade, that no thought is given, first, to estimating it, and, secondly, to adding it to the price. These licence fees in substance for " the nature of a tax is one of substance " (*Attorney-General Manitoba* v. *Attorney-General for Canada* (1925) A.C. 561, at 566) are demanded from the person intended to pay it without expectation or intention to indemnify himself at the expense of another. It may be of some assistance to point out that Viscount Haldane, in the case just referred to, in agreeing with the Supreme Court of Canada that the tax on contracts made for the sale of grain for future delivery was an indirect tax, said in support of that view, at p. 567 : " The tax is not a licence tax."

It follows that I would answer the question submitted in the negative. It is wholly *intra vires* of the Provincial Legislature.

M. A. MACDONALD, J.A.

Victoria, B.C., July 8th, 1937.

In the Privy Council.

No. 81 of 1937.

On Appeal from the Court of Appeal for British Columbia.

BETWEEN :

GEORGE WALKEM SHANNON, THOMAS HEDLEY McDONALD AND MATTHEW BLACKWOOD McDERMID ... ... *Appellants,*

AND

LOWER MAINLAND DAIRY PRODUCTS BOARD ... ... *Respondents,*

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA ... . *Intervener.*

APPENDIX OF JUDGMENTS.

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