13, 1952

No. 32 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE ATTORNEY-GENERAL OF CANADA and THE CANADIAN WHEAT BOARD - - - - - *Appellants*

AND

HALLET AND CAREY LIMITED and JEREMIAH J. NOLAN - - - - - - - - - *Respondents*

RECORD OF PROCEEDINGS

VOLUME 4

RECORD OF PROCEEDINGS VOL. 4

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No. 1.

REASONS FOR JUDGMENT.

(A) The Chief Justice :

I concur with my brothers Taschereau, Rand, Locke and Cartwright that this appeal should be dismissed with costs. As I agree substantially with the reasons delivered by them, I do not deem it necessary or advisable to state my reasons for coming to that conclusion as this would be merely a repetition of what they have already said to my satisfaction.

(B) Kerwin, J. :

10 These are appeals by the Canadian Wheat Board and the Attorney-General of Canada from the judgments of the Court of Appeal for Manitoba affirming judgments of the Chief Justice of the King's Bench in two separate actions dealing in substance with the same matter. While in the pleadings the question was raised that The National Emergency Transitional Powers Act, 1945 (hereafter called the statute), was *ultra vires* the Parliament of Canada, we were advised that the point was never argued in the King's Bench or in the Court of Appeal, and certainly no such contention was advanced before us. The matter may therefore be approached on the basis that the statute is *intra vires* and 20 that the sole question is whether parts of Order in Council P.C. 1292, of 3rd April, 1947, were within the powers conferred upon the Governor in Council by the statute. The Courts below have answered that question in the negative.

The statute came into force 1st January, 1946, and section 6 provides that on and after that date the war against Germany and Japan should, for the purposes of the War Measures Act, R.S.C., 1927, c. 206, be deemed no longer to exist. It was recognised, however, that chaos would result if all the measures adopted by the Governor in Council under the War Measures Act were abrogated and if no delegation of powers to that body 30 were made. This is shown by the recital in the statute :—

> " WHEREAS the War Measures Act provides that the Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada ; And whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability ; 40 And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing ; And whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act ; And whereas in the existing circumstances it may be necessary that certain acts and things done and

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Reasons for Judgment.

(B) Kerwin, J.,
continued.

authorised and certain orders and regulations made under the War Measures Act be continued in force and that it is essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency."

Subsection (1) of section 2 provides :—

"2.—(1) The Governor in Council may do and authorise such 10
acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of—

(*a*) providing for and maintaining the armed forces of Canada during the occupation of enemy territory and demobilisation and providing for the rehabilitation of members thereof,

(*b*) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace,

(*c*) maintaining, controlling and regulating supplies and services, 20 prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace ;

(*d*) assisting the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of the war ; or

(*e*) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war." 30

The important clauses are (*c*) and (*e*).

Jeremiah J. Nolan is a grain merchant residing in Chicago, Illinois, and is a citizen of the United States. Hallet and Carey Limited is a corporation duly incorporated under the laws of the Dominion of Canada and carries on the business of a grain merchant at Winnipeg, Manitoba. On or about 31st July, 1943, that Company, as agents for Nolan, purchased 40,000 bushels of No. 3 C.W. Six-Row Barley and obtained warehouse receipts for it from various warehousemen in Port Arthur/Fort William, Ontario. From time to time, in accordance with a practice in the grain trade, the barley was loaned by Nolan but was returned to him each time, 40 the last occasions being in December, 1946, and January, 1947. The warehouse receipts in existence at the relevant time are all dated in one or the other of these months.

Prior to 1st January, 1946, the date of the coming into force of the statute, various steps had been taken to regulate the price and the export of barley, oats and wheat. While we are primarily concerned with barley, its position in the general economy of Canada cannot be isolated from that of the other two products or taken from its setting in the overall picture of Canadian life under the War Measures Act and under the statute. Under the former, the Wartime Prices and Trade Board was constituted, 50 and that Board made regulations to provide safeguards under war conditions against any undue enhancement in the prices of food, fuel and other

necessities of life and to insure an adequate supply and equitable distribution of such commodities. The Canadian Wheat Board had already been created by Parliament in 1935 and it was appointed an administrative agency under the Wartime Prices and Trade Board. On 17th March, 1947, the Wheat Board issued " Instructions to Trade No. 59," addressed " To all Companies and Dealers in Oats and Barley." These instructions commenced: " In accordance with the new Government policy announced in Parliament 17th March, 1947, regarding oats and barley (an outline of which is attached), the Board issues the following instructions effective midnight, 17th March, 1947."

The outline of Government policy referred to in this statement and which as indicated was attached thereto, announced that the previous system of advance equalisation payments would be discontinued and that the Wheat Board would stand ready to buy all oats and barley offered to it at new support prices, which in the case of barley would be based on 90c. for One Feed Barley in place of the former support price of 56c. in store Fort William/Port Arthur, and other grades at appropriate differentials to be fixed from time to time by the Wheat Board. The support prices would remain in effect until 31st July, 1948. At the same time price ceilings for all grades would be raised, in the case of barley to 93c. and in the case of oats to 65c. basis in store Fort William/Port Arthur or Vancouver. These ceiling prices corresponded with the support prices for the highest grades of barley and oats. In order to avoid discrimination against producers who had already delivered barley during the current crop year, provision was made for an adjustment payment. By paragraph 4 of the outline of Government policy :—

> " 4. In order to avoid the fortuitous profits to commercial holders of oats and barley that would otherwise result from the action that has been described, handlers and dealers will be required to sell to the Wheat Board on the basis of existing ceilings of $64\frac{3}{4}$c. per bushel for barley and $51\frac{1}{2}$c. per bushel for oats, all stocks in their possession at midnight to-night, 17th March. Under certain conditions these stocks will be returned to the holder for re-sale. Allowances will be made for the purpose of taking care of such items as carrying charges in terminal positions, special selection premiums, etc., which are considered in the judgment of the Board fair and reasonable."

For the time being, because of the continuation of price ceilings on animal products, subsidies were provided for all oats and barley within the same conditions as a payment already authorised on wheat purchased for feed purposes, and it was stated that the payment of these subsidies would have the effect of leaving the cost of these feed grains to the feeder approximately at their present levels. The Wheat Board would become the sole exporter of oats and barley and any exports by the Board would be from grain acquired by it under the price support plan and the net profits therefrom would be paid into Equalisation Accounts for the benefit of producers for distribution. It was pointed out that producers would have an additional return on their oats and barley, in addition to which they would continue to receive any net profits realised by the Board as an additional payment at the end of the season. On the other hand, feeders would be protected against any important increase in costs of the oats and barley.

In the Supreme Court of Canada.

No. 1.
Reasons for Judgment.

(B) Kerwin, J., *continued.*

Reverting now to the instructions to the trade, these followed the outline of Government policy in all important respects and, while it may be said that so far no authority for any action by the Wheat Board existed, this was remedied by the Order in Council 1292 passed 3rd April, 1947. It recited :—

" WHEREAS it is necessary, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, for the purpose of maintaining, controlling and regulating supplies and prices to ensure economic stability and an orderly transition to conditions of peace, to make provision for— 10

(*a*) the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada and products of oats and barley in Canada ;

(*b*) the closing out and termination of any open futures contracts relating to oats or barley outstanding in any futures market in Canada ; and

(*c*) the prohibition of the export of oats or barley by persons other than the Canadian Wheat Board until otherwise provided ;

and other matters incidental thereto as set forth in the Regulations 20 set out below ; "

The Governor-General in Council, under the powers conferred by the statute, amended the existing Western Grain Regulations by substituting a new Part III. While both oats and barley are dealt with by the Order in Council, it will be sufficient from this time on to refer particularly to barley. By the new Part III barley means barley grown in a designated area, and barley in commercial positions means barley which was not the property of the producer and was in store in warehouses, elevators or mills, etc. (It should be here interpolated that it is common ground that the barley in question in these actions came from a designated area as 30 defined in an earlier part of the Western Grain Regulations and that it was in commercial positions.) All barley in commercial positions, except such as was acquired by the owner from the Wheat Board or from the producer thereof, on or after 18th March, 1947, was vested in the Wheat Board, which was directed to pay a person who was the owner at midnight on 17th March, 1947, an amount equal to the previous maximum price, subject to adjustment and storage or handling charges, etc. Other provisions are included to take care of cases other than those similar to that of Nolan. The Board was directed to sell and dispose of all barley vested in it at such prices as it might consider reasonable. Net profits 40 arising from such operations were to be paid into the Consolidated Revenue Fund.

While it is said on behalf of Nolan that there was no possibility of loss, the Order in Council provided that the Board should be reimbursed in respect of any net losses arising from its operations in respect of barley vested in it out of moneys provided by Parliament. Additional clauses provided that there should be no export of barley except by the Wheat Board or with its permission.

Nolan was directed to deliver his barley and the documents of title thereto to the Wheat Board but declined, and the two actions followed. 50

Since the Governor in Council deemed it necessary or advisable by reason of the continued existence of the national emergency arising out of the war against Germany and Japan to promulgate P.C. 1292, for the purpose of maintaining, controlling and regulating supplies (section 2, subsection 1 (*c*) of the statute) and for the purpose of continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war (section 2, subsection 1 (*e*) of the statute), I am of opinion that looking only at the statute, the powers conferred by subsection 1 of section 2 were sufficient to authorise what was done. Taking the words in their ordinary and natural meaning, they include a power to appropriate barley (*inter alia*) and pay the price fixed by the Governor in Council. The action taken was in the opinion of the Governor in Council, necessary or advisable and it is not for the judiciary to question that decision : *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923] A.C. 695 ; *Co-operative Committee on Japanese Canadians* v. *Attorney-General of Canada* [1947] A.C. 87.

But it is said that a power to appropriate and fix compensation could never have been contemplated by Parliament if one looks at the provisions of the War Measures Act, which had been superseded by the statute. Under section 3 of the former appears clause (*f*) " Appropriation, control, forfeiture and disposition of property and of the use thereof " ; and by section 7, whenever any property or the use thereof has been appropriated and compensation is to be made therefor and has not been agreed upon, the claim is to be referred by the Minister of Justice to a named court or a judge thereof. It was pointed out that in the *Chemicals Reference* [1943] S.C.R. 1, it was decided that paragraph 4 of the Order in Council there under consideration was in conflict with section 7 of the War Measures Act as it provided for a method of fixing compensation other than that specified in section 7.

That was an entirely different case. In the statute here under consideration, the recital states that it is essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency. In view of this, I find it impossible to read the words of subsection 1 of section 2 and particularly clauses (*c*) and (*e*) as withholding from the Governor in Council the power to appropriate barley and pay the price fixed by him. The fortuitous profits envisaged by the Government policy actually emerged in Nolan's case and the means adopted to capture them were within the powers conferred by the statute.

The appeals should be allowed and the judgments of the Court of Appeal and King's Bench set aside. Under an order of 7th December, 1948, the barley was sold and the proceeds paid into court. By another order of 1st February, 1949, there were paid out of these proceeds the charges of the warehousemen, parties to the action brought by the Wheat Board, which warehousemen were by the same order, on consent dropped from the proceedings. According to the orders of the Court of Appeal of 10th March, 1949, disposing of the appeals in the two actions, there was in court the sum of \$38,454·70 and accrued interest. Of this amount Nolan would be entitled, at the most, to \$25,900 (being 64¾c. per bushel

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(B) Kerwin, J., *continued.*

for 40,000 bushels of barley), and accrued interest from the date of the payment into court. The Wheat Board is entitled to the balance with accrued interest.

The action by Nolan against Hallet and Carey Limited is dismissed with costs, payable by him to the Company. Upon motion by the Attorney-General of Canada, he was added as a party defendant in that action by an order of the Chief Justice of the King's Bench, dated 15th October, 1948, and was thereby ordered to pay the costs of the other parties of and incidental to the motion. The Attorney-General is entitled to his costs since that date as against Nolan, including the costs of the appeals to the Court of Appeal and to this court. Since Hallet and Carey Limited were acting as agents for Nolan, they are entitled to their costs of those appeals against him. 10

The Wheat Board is entitled as against Nolan to its costs of its action against him and Hallet and Carey Limited and of the appeals to the Court of Appeal and this court. Hallet and Carey Limited are entitled as against Nolan to their costs of that action and of the appeals to the Court of Appeal and to this court. They are also entitled as against Nolan to the amounts proper to be paid them by him for interest and storage. 20

All of the appropriate costs above referred to shall be taxed without regard to the limit fixed by section 31 of the Manitoba Court of Appeal Act or by King's Bench Rule No. 630. All the costs and the interest and storage charges directed to be paid by Nolan may be paid out of his share of the money in court. If there is any difficulty in working out the order, the matter may be spoken to.

(C) Taschereau, J.

(C) Taschereau, J. :

The main question that has to be decided, and which is sufficient to dispose of these two appeals, may be briefly stated as follows : " Does P.C. 1292 of 3rd April, 1947, fall within the ambit of the powers conferred by section 2 (1) (*c*) of the National Emergency Transitional Powers Act ? (9–10 Geo. VI Ch. 25)." 30

This Order-in-Council made provision for the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, and determined what compensation the Board should pay to the owners. The relevant section of the National Emergency Transitional Powers Act, which it is submitted on behalf of the Appellant, purports to give the necessary powers to the Governor in Council to enact P.C. 1292, reads as follows :—

" 2.—(1) The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of— 40

(*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace ; "

The validity of the National Emergency Transitional Powers Act has not been challenged before this court, but it is submitted that the 50

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(c) Taschereau, J., *continued.*

words " maintain," " control " and " regulate," are not wide enough to authorise the compulsory transfer of property to the Wheat Board, and the *ex parte* fixing of compensation to be paid.

There can be no doubt that under the War Measures Act, which ceased to be in force in Canada on the 1st of January, 1946, much wider powers were conferred upon the Governor in Council. For instance, section 3 (*f*) of the War Measures Act read as follows :—

> " 3. The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada ; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say :—
>
> (*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof."

The power to appropriate and dispose of property was clearly given to the Governor in Council, and it was further provided in section 7 of the Act that :—

> " 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court. 1914 (2nd session), c. 2, s. 7."

It is because this clause was in conflict with section 4 of the Order-in-Council, authorising the controller of chemicals in certain cases to determine the compensation payable for chemicals of which he had taken possession, that it was held by this court, that such a power could not be exercised. ([1943] S.C.R., p. 1, *In re Chemicals.*)

These powers to appropriate property which were given to the Governor in Council by the War Measures Act, have been deleted from the National Emergency Transitional Powers Act, and I think that it is fair to assume that it was the clear intention of Parliament, that such powers would not exist in the future. The National Emergency Transitional Powers Act is to my mind without doubt a clear curtailment of the powers that the Governor in Council could validly exercise during the war under the War Measures Act. As Estey, J., said in the *Japanese Reference* [1946] S.C.R. 248, in regard to the Transitional Powers Act :—

> " Parliament did recognise that the intensity and magnitude of the emergency had changed and diminished, and under the provisions of this Act curtailed the extensive powers exercised by the Governor in Council under the War Measures Act."

This statement is quite in harmony with the preamble of the Act which, by section 14 of the Interpretation Act (R.S.C. 1927, Chap. I), is deemed a part of the Act, intended to assist in explaining the purport and object of the Act. The preamble states that it is essential in the national interest

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(c) Taschereau, J., *continued.*

that certain transitional powers continue to be exercisable by the Governor in Council; that in the existing circumstances certain orders and regulations made under the War Measures Act be continued in force, and that it is also essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency. Section 2 (1) (*c*) above quoted, which authorises the Governor-General to make from time to time orders and regulations as he may deem necessary or advisable, for the purpose of maintaining, controlling, and regulating prices to ensure economic stability and an orderly transition to conditions of peace, show as well as the preamble, the clear intention of Parliament to curtail the extensive powers that the Governor-General in Council exercised during the war under the War Measures Act.

Furthermore, the War Measures Act gave general powers to pass regulations deemed necessary or advisable, " for the security, defence, peace, order and welfare of Canada " ; and " for greater certainty, but not so as to restrict the generality of the foregoing terms," it is declared that the powers of the Governor in Council shall extend to certain matters specifically enumerated, among which the appropriation and forfeiture of property. Despite the generality of the terms of the War Measures Act, Parliament thought it necessary to deal specifically with appropriation and forfeiture of property. The National Emergency Transitional Powers Act does not contain the words " for the security, defence, peace, order and welfare of Canada " nor " for greater certainty, but not so as to restrict the generality of the foregoing terms," so that it seems clear that the powers of the Governor-General are limited to subsections (*a*), (*b*), (*c*) and (*d*) of section 2. The National Emergency Transitional Powers Act is enacted for five purposes and it is consequently in one of these purposes that the power to appropriate and fix compensation must be found.

I cannot find in this section 2 any words, general or specific, that can lead me to the conclusion that maintain, control and regulate, include compulsory taking and fixing the compensation to be paid. If it had been the intention of Parliament to give such a wide power to the Governor-General in Council, this power would have been specifically mentioned, as it has been in the War Measures Act, or it would be found in the opening words of the section. It would surely not have been deleted as it has been in the statute now under consideration.

The War Measures Act is a general Act but the new Act is limited in its purposes, and cannot be extended. As Chief Justice Sir Charles Fitzpatrick said in the *Gray* case, page 157 ([1918] 57, S.C.R.) :—

> " 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 the termination 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."

I have therefore reached the conclusion that under the guise of maintaining, controlling and regulating prices, the Governor-General in Council cannot compulsorily appropriate property and arbitrarily fix the compensation to be paid. The exercise of such powers would be beyond the authority conferred by statute.

For these reasons, I think that the provisions of P.C. 1292, dealing with the compulsory taking and vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, and fixing the compensation to be paid, are *ultra vires* of the Governor in Council.

10 I would dismiss the appeal with costs.

(D) Rand, J. :

(D) Rand, J.

This appeal challenges the power of the Dominion Government by Order-in-Council under the Transitional Powers Act of 1945 to appropriate barley in commercial elevator storage or in transit at Fort William and western points on 17th March, 1947, not owned by producers or by maltsters or manufacturers of pot and pearl barley at the then existing controlled price of 64¾c. a bushel. On the following day, 18th March, the price was raised to 93c. and in October of the same year the control was removed. The open price in the United States during this period was considerably 20 higher than in this country, and upon the release in October the price on the Grain Exchange at Winnipeg led off at over $1.20. The barley here in question was sold in October, 1948, at the price of $1.24. Although by the Order-in-Council all barley vested in the Wheat Board, the latter offered it back to the former owners at the new price of 93c., and in all cases apparently except that of the respondent the offer was accepted. The result of this was that the increase permitted by the operation of the control was appropriated by the Government, leaving the benefit of any subsequent uncontrolled increase, such as actually took place in October, 1947, to the owner.

30 The Transitional Powers Act retained to the Governor in Council certain of the powers exercised under the War Measures Act ; the latter, subject to such limitations as are contained in the Act itself and in the British North America Act, and except such acts as could not be deemed by the Governor in Council in good faith to be relevant to war, cover virtually the entire legislative field of both the Dominion and the Provinces. The reason is obvious : the political and social existence of the country is at stake ; that interest rises above all distribution of legislative jurisdiction, and the fundamental duty of preservation is cast upon Parliament, by which those powers have been entrusted to the Executive.

40 Under the War Measures Act, the purposes of the powers granted were the " security, defence, peace, order and welfare of Canada " including trade, production, and the appropriation, control, forfeiture and disposition of property and the use of it ; and the acts, things, orders and regulations authorised to be done or made were such as the Governor in Council should deem " necessary or advisable " to effect those ends. The corresponding objects of the Transitional Powers Act were specifically enumerated, and those relevant to this controversy are :—

> " (*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals,
> 50 employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace ;

* * * * *

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No. 1. Reasons for Judgment.

(D) Rand, J., *continued.*

"(*e*) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war;"

and the Governor in Council was empowered likewise to do whatever, for such purposes, he deemed "necessary or advisable."

The aftermath of war presents abnormal conditions which similarly are of national interest and concern and which likewise transcend the ordinary plane of legislation; but they are of lessened scope and somewhat changed in character. Parliament, therefore, passed the Act of 1945 as a truncated War Measures Act in which the jurisdiction enjoyed by the Executive under the former Act was reduced. As these continued powers are in the nature of a residue from the previous investment, we may properly look at both statutes to ascertain precisely the extent of authority continued. 10

The appropriation of property of individuals was specifically mentioned as a power conferred in item (*f*) of section 3 of the War Measures Act; and section 7, in the absence of agreement, submits the ascertainment of compensation to the courts.

It is significant, then, that neither the latter provision nor mention of appropriation or forfeiture appears in the later statute: and neither, in the same sense, can, in my opinion, be implied. There is also the specific mention of the "use and occupation of property" as distinguished from the "appropriation, control, forfeiture and disposition" of property. I find no evidence of an intention to enlarge any power continued beyond its scope under the former statute, and it would be inconsistent with the declared purpose of Parliament to imply in the continued authority what was express in the original enactment. 20

The appropriation of property for which the statutory compensation was provided means, I think, the absolute appropriation of the beneficial interest, for objects of the Government with which the individual had no private concern. But appropriation as a device for effecting an object validly incidental to price control presents a different question. 30

The object here, specifically set forth in the instructions to the trade issued by the Wheat Board on 7th April, 1947, and by the declaration of Government policy in Parliament, was to capture the profit "fortuitously," as it was stated, resulting from the increase of price directly effected by the order. The appropriation or limitation of profit so arising was not a new incident in fact in price control; the requirement that authorised increases in price should not apply to existing stocks was a matter of common knowledge; the method followed here had been authorised by Order-in-Council No. P.C. 3223 in force from 1939 to at least 1947, in relation to sugar; Order-in-Council No. P.C. 7942, issued 12th October, 1943, brought about a regulation of wheat of the most drastic sort: except with the permission of the Wheat Board, no person could buy wheat from a producer for re-sale; the Board could require any person to offer wheat owned by him for sale to any other person on terms prescribed by the Board; all futures contracts were voided; and any surplus resulting from the exclusive dealings in this grain by the Board went into the Consolidated Revenue Fund. These measures were well known to Parliament. The function of neither the Wheat Board nor the Sugar Controller was to acquire property as an immediate object in itself; it was to administer the commodity in the broadest sense as part of the total regulation of the country's economy in which equality of incidence 40 50

was a working principle ; and the decision of the Government that control of or elimination of other than actual service profit, as distinguished from capital profit, was "necessary or advisable," and the selection of the mode by which that was to be effected, as for instance by way of a charge, possessory or not, were, I think, clearly within the powers of price control committed to it under the War Measures Act : *The Japanese Reference* [1947] A.C. 87.

Price control was continued under the Transitional Act in the broadest terms ; and as the subsidiary object of profit limitation was a recognised measure in the total regulation, and the device of vesting title a known means of accomplishing it, in the absence of some indication to the contrary in the Transitional Act both should be taken to be continued : to change principles in bringing controls to a conclusion would give legitimate grounds for protest from those to whom they had been applied in the heat of the day. What, then, is the effect upon either or both of them of the omissions in the Transitional Act of the powers mentioned ?

As a striking illustration of a circumstance frequently met, the conclusion on that question depends upon the extent to which the background facts are taken into account. If we look at the acquisition of the grain as an isolated act, detached from its context, it does seem to bear the countenance of a despotic exercise of power over which individualists may wax lyrical and which Parliament cannot be taken to have intended to confer ; but if we envisage it in the body of the economic life of Canada, regulated in varying degrees from 1939 to the present time, the transaction becomes in reality a minor item of a vast, complex and consistent administration, of which, as observed, the operative principles incorporated in the earlier stages ought to be, and certainly could be, carried through to the end. It was under that control that Nolan was able to buy the barley in 1943 at the price he did ; and who can say what the conditions in the trade would have been without it ? What is complained against is the law of Parliament and the policy of government ; but to the total interests of the Dominion in such an emergency and its aftermath that of the individual must be subordinated : and so long as he is dealt with on the basis of a rationally justifiable principle, he has no ground to object on moral, much less legal, considerations.

Set against the price increase and the appropriation of profit, and as elements in the body of regulation, were the increase of 10c. in the subsidy to producers and the subsidy of 25c. to stock owners of feed in the East. That producers and consumers should be specially dealt with, even at the expense, by restriction, of the Respondent's normal activity of profit making, was obviously a matter of Governmental policy ; and it would be out of the question for any court, except at least in a case of demonstrated bad faith, to attempt to substitute its judgment for that of the Executive. For that reason I get no assistance from the evidence led to show the conditions of the barley trade : those conditions were only a part of the wider objects and concerns of the Government. When Parliament enables the Executive to take such meaures for the purposes mentioned as it may "deem necessary or advisable," an endowment of legislative power which is here admitted to be valid, it will require more convincing reasons than have been addressed to us to satisfy me that the Government, in so acting, has exceeded the authority conferred upon it or has been guilty of misrepresenting its purpose.

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(D) Rand, J., *continued.*

The capture of the so-called profit, was, in my opinion, a legitimate measure in price control; but whether it could be achieved by the device of appropriating title is a question which I find unnecessary to answer because I am unable to construe the appropriation under the Order-in-Council to be limited to that purpose. The position of the Crown is that title was taken absolutely and that there was no obligation on the Crown to do more than to pay the maximum price then established, 64¾c. a bushel: such a step is not, in my opinion, authorised by the Transitional Act and was *ultra vires* of the Governor in Council.

I would, therefore, dismiss the appeal with costs. 10

(E) Estey, J.

(E) Estey, J.:

The Canadian Wheat Board claims 40,000 bushels of barley and the warehouse receipts covering same by virtue of paragraph 22 of Part III of the Western Grain Regulations as enacted by Order-in-Council P.C. 1292 passed the third day of April, 1947, pursuant to the provisions of the National Emergency Transitional Powers Act, 1945 (S. of C. 1945, c. 25). Paragraph 22 reads as follows:—

> "22. All oats and barley in commercial positions in Canada, except such oats and barley as were acquired by the owner thereof from the Canadian Wheat Board or from the producers thereof on 20 or after the eighteenth day of March, nineteen hundred and forty-seven, are hereby vested in the Canadian Wheat Board."

The issue in this appeal turns upon the Respondent's contention that this paragraph is invalid because Parliament, under the N.E.T.P. Act, 1945, did not confer powers upon the Governor in Council to enact it.

The barley in question was the property of J. J. Nolan. On 31st July, 1943, Hallet and Carey Limited, acting as agents for J. J. Nolan, purchased 40,000 bushels of barley and obtained the warehouse receipts covering same. Nolan never disposed of this 40,000 bushels of barley and as owner held it under warehouse receipts on 3rd April, 1947. 30

The price of barley, along with other commodities under the circumstances of the war, was fixed on 1st November, 1941. Thereafter floor and ceiling prices were fixed and export prohibited except by permit. On 17th March, 1947, the Government announced in Parliament certain changes in its policy with respect to oats and barley. On the same date and pursuant to that policy the Canadian Wheat Board issued Instructions to Trade No. 59 and attached thereto a copy of the statement of policy. These instructions and the attached statement of policy were sent to all members of the trade.

The relevant portions of these instructions are that they became 40 effective midnight 17th March, 1947; advance equalisation payments were discontinued; support prices were fixed on the basis of No. 1 feed Canada Western barley 90c. per bushel, basis Fort William; the maximum price of barley grown in Western Canada was raised to 93c. per bushel, basis Fort William; and the export of barley was prohibited except by the Canadian Wheat Board. It also provided for an adjustment payment of 10c. per bushel on barley delivered and sold between 1st August, 1946, and 17th March, 1947, to producers within the "designated area" (briefly

defined as western grain growing areas). In paragraph 5 of these instructions it was provided :—

> " All western oats and barley in commercial channels in Canada as at midnight 17th March, 1947, must be sold to the Canadian Wheat Board basis 51½c. per bushel for all grades of oats and 64¾c. per bushel for all grades of barley in store Fort William/Port Arthur or Vancouver."

In the foregoing paragraph 5 the phrase " commercial channels " is used, while in Order-in-Council P.C. 1292, paragraph 22, the phrase " commercial positions " is used. Nothing turns upon this difference in terminology and both may be briefly defined as oats and barley not the property of the producer in storage or transit (Part III, section 21 (*c*), Western Grain Regulations as enacted by Order-in-Council P.C. 1292).

The policy announced by the Government contained the following :—

> " In order to avoid the fortuitous profits to commercial holders of oats and barley that would otherwise result from the action that has been described, handlers and dealers will be required to sell to the Wheat Board on the basis of existing ceilings of 64¾c. per bushel for barley and 51½c. per bushel for oats, all stocks in their possession at midnight to-night, 17th March. Under certain conditions these stocks will be returned to the holder for resale. Allowances will be made for the purpose of taking care of such items as carrying charges in terminal positions, special selection premiums, etc., which are considered in the judgment of the Board fair and reasonable."

and it further stated :—

> " the Government to continue to pay freight on grain for feeding purposes and millfeeds shipped East from Fort William/Port Arthur and West from Calgary and Edmonton into British Columbia until 31st July, 1948."

The essentials relative to this discussion are that the maximum price was raised to 93c. per bushel, except that the price of barley in commercial positions would remain at 64¾c. per bushel and must be sold to the Wheat Board ; that, though the price was increased to the producer by appropriate subsidies, those purchasing barley for feeding purposes were " protected against any important increase in costs . . . of barley."

Instructions to Trade No. 59 were generally ignored by holders of oats and barley in commercial positions with the result that oats and barley so held remained in commercial positions and unsold, while the authorities believed that at least a very large portion thereof was necessary for feeding purposes and, therefore, should have been made available in the market.

In these circumstances the Governor in Council was fully justified in taking such steps as he deemed necessary or advisable within the limits of the powers conferred upon him by the N.E.T.P. Act, 1945. He deemed it necessary or advisable to enact Order-in-Council P.C. 1292 under section 2 (1) of the latter Act.

> " 2.—(1) The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary, or advisable for the purpose of—

* * * * *

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(E) Estey, J., *continued.*

(*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace ; "

The preamble of the N.E.T.P. Act, 1945, recites that the War Measures Act provided wide powers to be exercised by the Governor in Council by reason of the existence of the war ; that the national emergency arising out of the war still continues and that certain transitional powers should, in the national interest, be continued in the Governor in Council and that "it is preferable that such transitional powers be exercised hereafter under special authority," then, after reciting that certain orders and regulations made under the War Measures Act should be continued, it recites :— 10

> "that it is essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency."

The opening words of section 2 (1) of the N.E.T.P. Act above quoted are identical with the opening words of section 3 of the War Measures Act and read :— 20

> "The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may, by reason of . . ."

The foregoing provision was described by Anglin, J. (later C.J.), in a judgment concurred in by Sir Charles Fitzpatrick, C.J., and Sir Louis Davis, J. (later C.J.) : "More comprehensive language it would be difficult to find." *In Re Gray* [1918] 57 S.C.R. 150, at 178. In the same case Duff, J. (later C.J.), at 166, stated :— 30

> "The words . . . are comprehensive enough to confer authority for the duration of the war to make orders and regulations covering any subject falling within the legislative jurisdiction of Parliament, subject only to the condition that the Governor in Council shall deem such orders and regulations to be, by reason of the existence of real or apprehended war, . . . advisable."

In the *Chemicals Reference* Rinfret, J. (now C.J.), at p. 17, stated :—

> "The powers conferred upon the Governor in Council by the War Measures Act constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war ; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself." *In Re Chemicals Reference* [1943] S.C.R. 1. 40

The foregoing emphasises the very wide and comprehensive powers conferred upon the Governor in Council by section 3 of the War Measures Act. In determining the intent of Parliament in re-enacting the identical language in section 2 of the N.E.T.P. Act, 1945, regard must be had for

the provisions of section 21 (4) of the Interpretation Act (R.S.C., 1927, c. 1) :—

> " 21.—(4) Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

At common law the re-enactment of a legislative provision already judicially construed raised a presumption that the Legislature adopted 10 that judicial construction. Broom's Legal Maxims, page 395. The enactment of section 21 (4) did away with that presumption. Thereafter the identical provision, when re-enacted, remained to be construed by the courts without the assistance of the presumption. Even without that presumption, however, the courts have shown a disposition to conclude that Parliament, having re-enacted the words with knowledge of the judicial construction, in fact, intended that such should be adopted. In *The Canadian Pacific Railway* v. *Albin* [1919] 59 S.C.R. 151, section 155 of the Railway Act (R.S.C., 1906, c. 37) was under consideration. That section, in identical language, was first enacted by Parliament as section 92 20 of the Statute of 1888, had been re-enacted in 1903 and continued in the revision of 1906. Mr. Justice Anglin (later C.J.), with whom the Chief Justice and Mr. Justice Mignault agreed, after pointing out that section 21 (4) of the Interpretation Act has been in force since 1890 (53 Vict., c. 7, section 1), continued :—

> " We cannot assume that the Dominion Legislature when they re-enacted the clause *verbatim* (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that (section 92 of the Act of 1888) must have been acted upon in the 30 light of that interpretation. *Casgrain* v. *Atlantic and North West Ry. Co.* (1), at page 300. It is unreasonable to suppose that if Parliament were not satisfied that its intention had been thereby given effect to it would have re-enacted the section in the same terms."

In *Rex* v. *Adkin* (1948), 2 W.W.R. 1023, Chief Justice Sloan, with whom Smith, J.A., agreed, stated, in construing section 750 (*a*) of the Criminal Code at p. 1025 :—

> " However, it seems to me it is a fair inference notwithstanding said section 21 (4) that if the construction put upon section 750 (*a*) 40 by the cases decided prior to 1938 was contrary to the intention of Parliament apt language would have been used in the 1938 re-enactment of the section to effectuate its original purpose."

Both the War Measures Act and the N.E.T.P. Act, 1945, were enacted to deal with an emergency. That provided for in the War Measures Act is " the existence of real or apprehended war . . .," while under the N.E.T.P. Act, 1945, it is " the continued existence of the national emergency arising out of the war." The latter was never an emergency so wide or great in its scope.

It is not suggested that under the War Measures Act the Governor in 50 Council did not possess by virtue of the identical language legislative power to appropriate or vest commodities. It is, however, contended that

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(E) Estey, J., *continued.*

though Parliament adopted this identical language, it has evidenced an intention that it should not be construed to the same effect. The provisions of the Statute do not appear to support such a contention. That Parliament recognised the narrower or more restricted scope of the emergency and the possibility of its continuing to diminish is very evident. In these circumstances what Parliament did was to restrict the exercise of the powers conferred upon the Governor in Council to matters specified under sub-paragraphs (*a*) to (*e*) inclusive of section 2. Parliament, however, could not anticipate all the circumstances with regard to which legislative measures might be necessary to effect the ends and purposes specified in 10 these sub-paragraphs and, therefore, conferred upon the Governor in Council the same wide and comprehensive powers for the attainment of these specific purposes as it had conferred upon the Governor in Council for the attainment of the more general purposes set out in the War Measures Act.

It is particularly contended that the omission of any specified method for the determination of compensation for appropriated or vested property as was contained in section 7 of the War Measures Act discloses an intention on the part of Parliament that the Governor in Council should not possess the power to appropriate or vest. That Parliament did realise the necessity 20 for appropriation of property on any such scale as during hostilities no longer existed must be conceded. Parliament does not, however, evidence any intention that it might not be sometimes necessary in dealing with the more restricted fields. The mere omission of such a provision is not sufficient to support a conclusion that Parliament intended the identical language so long and so recently construed to include appropriation should here be differently construed and does not rebut the *prima facie* intention that Parliament intended that the same construction should be adopted. Indeed, it may well be that Parliament did not carry forward into the N.E.T.P. Act any such provision as in section 7 of the War Measures Act 30 in order that the very difficulty encountered in *the Chemicals Reference* (*supra*) might be avoided. There an Order-in-Council specifying the method of determining compensation was declared to be contrary to section 7 of the War Measures Act and, therefore, invalid as beyond the powers conferred upon the Governor in Council. Without such a provision the Governor in Council might provide for the determination of compensation in any manner that he might deem appropriate to the particular circumstances he was called upon to deal with. That is, in effect, the position which now exists under the N.E.T.P. Act. In this particular case there was no question of compensation. The Wartime Prices and Trade Board 40 had fixed it and there was no suggestion that that price should not be paid.

The appeal should be allowed, the action of the Plaintiff Nolan should be dismissed with costs throughout and the action of the Canadian Wheat Board allowed throughout with costs and judgment directed that the Canadian Wheat Board is entitled to the barley in question and to the documents of title in respect to same.

(F) Locke, J.

(F) **Locke, J.** :

On 3rd April, 1947, the Respondent Nolan was the owner of 40,000 bushels of No. 3 C.W. Six Row Barley which was then in store with various 50

warehousemen at the head of the Lakes and in respect of which they had issued their warehouse receipts. These were then held by the Respondents Hallet and Carey, Limited, on his behalf.

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(F) Locke, J., *continued.*

On that date His Excellency the Governor General in Council, assuming to act under the powers conferred by the National Emergency Transitional Powers Act, adopted Order-in-Council P.C. 1292, which recited that by reason of the continued existence of the national emergency arising out of the war against Germany and Japan "for the purpose of maintaining, controlling and regulating supplies and prices, to ensure economic stability and an orderly transition to conditions of peace" it was necessary, *inter alia,* to make provision for the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, the closing out and termination of any open future's contracts relating to such grain outstanding in any future's market in Canada and the prohibition of its export. By this Order, Part III of the Western Grain Regulations which had been put into effect by P.C. 3222, of 31st July, 1946, was revoked and new Regulations substituted which, in so far as they are relevant to the first question to be considered, declared that all oats and barley in commercial positions in Canada, except such as were acquired by the owner from the Canadian Wheat Board or from the producers thereof on or after 18th March, 1947, were thereby vested in the Board. Nolan's barley was in "commercial positions" in Canada, as that expression was defined by the Order; he had acquired the grain in the year 1943 and, by the terms of the Order, the Board was required to pay to him for it the sum of 64¾c. per bushel basis in store Fort William or Port Arthur. This was the maximum price at which barley might have been sold on 17th March, 1947, under existing Wartime Prices and Trade Board Regulations. The Board was required to buy all oats and barley offered for sale thereafter from time to time at an increased floor price, which in the case of barley was 90c. for No. 1 feed. The maximum prices had been fixed by the Wheat Board acting under the authority of the Wartime Prices and Trade Board and acting upon the same authority the former Board had on 17th March, 1947, in advance of the making of the Order-in-Council, issued instructions to the trade addressed to all dealers in oats and barley increasing that maximum price to 93c. for barley.

On 17th March, when these instructions to the trade were issued by the Board, and on 3rd April, when the Order-in-Council was made, these maximum prices for barley were very much less than that at which barley was quoted on the Minneapolis and Chicago Grain Exchanges and of the price for which it could have been sold were it not for the continuing price control in Canada. The effect of the Order-in-Council, if lawfully made, was to deprive Nolan of the profit he could have at once realised by selling at the new ceiling prices or, if he elected to hold his grain, of the much larger gain he could have made when price control of barley in Canada was terminated in the following October.

It is contended for the Respondent Nolan that the National Emergency Transitional Powers Act, 1945, did not authorise the Governor General in Council by enacting Part III of the Western Grain Regulations or otherwise to divest him of title to his barley and, if this contention be right, the other issues raised in this matter which have been so fully argued before us need not be considered.

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(F) Locke, J., *continued.*

By the War Measures Act, 1914, far-reaching powers were vested in the Governor in Council, the exercise of which of necessity would trespass upon the legislative fields assigned to the provinces by section 92 of the British North America Act. The validity of that legislation has long since been determined, and the Respondents did not contend in the argument addressed to us in the present case that the National Emergency Transitional Powers Act, 1945, or the amending statute of 1946 were *ultra vires*. The War Measures Act, by section 3, authorises the Governor in Council to do and exercise such acts and things and make such orders and regulations :—

> " as he may by reason of the existence of real and apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada." 10

The interests of the residents of all the provinces, the interference with whose property and civil rights was thus authorised, were safeguarded by the terms of section 7 of the statute providing that whenever any property or the use thereof has been appropriated by His Majesty under the provisions of the Act or any Order-in-Council, order or regulation made under it and compensation is to be made therefor, the amount, in the absence of agreement, shall be referred by the Minister of Justice to the Exchequer Court or a Superior Court or County Court of the Province within which 20 the claim arises, or to a judge of any such court.

The National Emergency Transitional Powers Act, 1945, came into force on 1st January, 1946, as of which date the war against Germany and Japan for the purposes of the War Measures Act was declared no longer to exist. The preamble to this Act, after stating that during the national emergency arising by reason of the war measures had been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability, that the emergency so arising still continued, that it was essential in the national interest that certain transitional powers should continue to be exercisable by the Governor 30 in Council during the continuation of the exceptional conditions brought about by the war, recites that :—

> " WHEREAS in the existing circumstances it may be necessary that certain acts and things done and authorised and certain orders and regulations made under the War Measures Act be continued in force and that it is essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance in an orderly manner, as the emergency permits, of measures 40 adopted during and by reason of the emergency."

Under the heading " Powers of Governor in Council," section 2 (1) provides :—

> " The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable."

for certain defined purposes. The language quoted is an adaptation of the opening phrase of section 3 of the War Measures Act with a significant 50

change. In the latter statute the word "advisable" is followed by these words :—

> "for the security, defence, peace, order and welfare of Canada; and for greater certainty but not so as to restrict the generality of the foregoing terms it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated."

which do not appear in section 2 (1) or elsewhere in the Transitional Powers Act. The power of "appropriation, forfeiture and disposition of 10 property" given by subsection (*f*) of section 3 of the War Measures Act and the method of determining the compensation to be paid to persons whose property had been appropriated by His Majesty under the provisions of that Act are also absent.

The purposes for which the powers vested in the Governor in Council by the Transitional Powers Act might be exercised are defined by subsection (1) of section 2. Of these, only subsections (*c*) and (*e*) appear relevant to the matter under consideration. These read :—

> "(*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, 20 employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;
>
> (*e*) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war."

This language may be contrasted with that of the comparable section of the War Measures Act where the text, by the use of the words "but not so as to restrict the generality of the foregoing terms," indicates that the powers to be exercised are not restricted to the defined purposes.

From very early times a petition of right lay when the property of a 30 subject had been converted to the King's use. The history of such proceedings is given in the judgment of Erle, C.J., in *Tobin* v. *The Queen* (1864), 16 C.B. (N.S.) 312. In *Feather* v. *The Queen* (1865), 6 B. & S. 257, Cockburn, C.J., delivering the judgment of the Court of Exchequer, said that the only case in which the petition of right was open to the subject was where the lands or goods or money of the subject had found their way into the possession of the Crown and the purpose of the petition was to obtain restitution or, if restitution could not be made, compensation in money. Statutes are not to be construed as taking away or authorising the taking away of the property rights of the subject, unless their language 40 makes that intention abundantly clear. In *Western County Railway Company* v. *Windsor and Annapolis Railway Company* (1882), 7 A.C. 178, where it was contended that the rights of the respondents under an existing agreement to operate the Windsor Branch Railway had been extinguished by an Act of Parliament of Canada (37 Vict. cap. 16), Lord Watson in delivering the judgment of the Judicial Committee said (page 188) :—

> "Neither in the Act 37 Vict. c. 16, nor in the schedules appended to it, is mention made of the agreement of the 22nd of September, 1871, or indeed of any right or interest of the respondent company 50 in the Windsor Branch Railway. The canon of construction

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(F) Locke, J., *continued.*

applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in Barrington's case (8 Rep. 138a), and was recognised in the recent case of *The River Wear Commissioners* v. *Adamson* (2 A.C. 743). The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shown that the Legislature have authorised the thing to be done at all events, and irrespective of its possible interference with existing rights." 10

In *Attorney-General* v. *Horner* (1884), 14 Q.B.D. 245 (affirmed 11 A.C. 66), Brett, M.R., said in part (page 256):—

"It was, however, urged, and very strongly, on the part of the plaintiff, that the result of the Paving Acts of Geo. 3 was to interfere with and take away the rights of the owner of the market franchise. Now it is to be observed that if those Acts have taken away and interfered with such rights they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so." 20

The rule is stated to the same effect by Slesser, L.J., in *Consett Iron Company* v. *Clavering* [1935] 2 K.B. 42, at 65. In Maxwell on Statutes, 9th Ed. 290, the effect of the authorities appears to me to be accurately summarised. 30

This principle was held clearly in mind when the War Measures Act was first enacted in 1914. No doubt, any question of *ultra vires* aside, a sovereign Parliament or Legislature in Canada may appropriate to His Majesty's use without compensation property within its legislative jurisdiction. That nothing of this kind was intended when any such property was appropriated, disposed of, or made use of, under the extraordinary powers vested in the Governor in Council under the War Measures Act was made clear by section 7 of that statute with its provision that the quantum of compensation should be determined by the courts. In Nolan's case what was attempted was the outright expropriation of his property with the consequent loss above mentioned in return for what was shown to be wholly inadequate compensation. The power to appropriate property was not expressly vested in the Governor in Council by the National Emergency Transitional Powers Act, 1945, and the question is as to whether such power is to be implied from the language employed in section 2. If such power is to be implied, then it was not merely a power to appropriate property to His Majesty's use but to do so, if His Excellency the Governor in Council saw fit, without compensation. The fact that partial compensation for the barley to be taken was directed by the terms 40 50

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(F) Locke, J., *continued.*

of the Order-in-Council is aside from the point, since the question is the proper construction of the statute. While the price of barley had been controlled for several years during the war under Wartime Prices and Trade Board Regulations, the commodity had not been appropriated, so that it cannot be said that the Order-in-Council fell within subsection (*e*) of section 2 (1). To the contention that the appropriation was a step taken in " maintaining, controlling and regulating supplies and prices to ensure economic stability and an orderly transition to conditions of peace " within subsection (*c*), the conclusive answer is, in my opinion, that if, as
10 essential to the exercise of those powers or any of them, it was necessary to trespass upon the property and civil rights of the subject by appropriating his property, either with or without recompense, Parliament would no doubt have vested in the Governor in Council the power to do so in express terms and that it has not done so. Apart from the fact that no such power is given, either in terms or by plain implication, the omission of the provisions dealing with the subject contained in the War Measures Act from the National Emergency Transitional Powers Act, 1945, is a plain indication that it was not intended that the Governor in Council should be vested with any such power.

20 Since this is decisive of the matter, I express no opinion on the other questions which were argued before us. I would dismiss this appeal with costs.

(G) **Cartwright, J. :**

(G) Cartwright, J.

The facts of this case are fully stated in the reasons of other members of the court and need not be repeated.

I propose to deal with one only of the several questions argued before us; that is as to whether or not those provisions of P.C. 1292 of 3rd April, 1947, which purported to vest in the Canadian Wheat Board the barley which was Nolan's property and to fix the compensation to be
30 paid to him therefor were *intra vires* of His Excellency the Governor-General in Council.

The order in question purports to be made under the powers conferred by the National Emergency Transitional Powers Act, 1945. The validity of that Act was not questioned before us and it is upon its proper construction that the solution of the question under consideration depends.

Mr. Varcoe's able argument satisfies me that the court cannot say that the Governor in Council did not deem the enactment of P.C. 1292 necessary or advisable for the purposes set out in clauses (*c*) and (*e*) of subsection (1) of section 2 of the National Emergency Transitional Powers
40 Act. Assuming then that the order was made for an authorised purpose, it remains to be considered whether the statute conferred the power to make it. The words relied upon as conferring the power are the opening words of section 2 (1) :—

> " The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of "

It will be observed at once that these words are so wide and general that,
50 if they alone are considered, they would seem to give power to the Governor

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(G) Cartwright, J., *continued.*

in Council to enact any order which would be within the competence of Parliament itself provided it is enacted for one or more of the specified purposes.

It is, I think, well settled that words so general must be construed with caution. "*Verba generalia restringuntur ad habilitatem rei vel personæ*" (Bac. Mac. Reg. 10 ; Broom's Legal Maxims, 10th Edition, 438).

In *Cox* v. *Hakes* [1890] 15 App. Cas. 506, at page 518, Lord Halsbury says :—

"From these and similar examples a canon of construction has been arrived at which has often been quoted but which is so 10 important with reference to the question now before your Lordships that I quote it once again :—

'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always 20 been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.' See *Stradling* v. *Morgan*, Plowd., at 205 (A)."

I am in agreement with the statement in Maxwell on Interpretation of Statutes (9th Edition, 1946) at page 63 :— 30

"It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more, in their literal meaning and natural force ; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. 40 It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular ; that is, they must be understood as used with reference to the subject-matter in the mind of the Legislature, and limited to it."

By section 14 of the Interpretation Act (R.S.C., 1927, c. 1) it is provided :—

"The preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act. R.S., c. 1, section 14." 50

Quite apart from this statutory provision it has long been held that the preamble may be regarded as part of the statute " for the purpose of explaining, restraining or even extending enacting words, but not for the purpose of qualifying or limiting express provisions couched in clear and unambiguous terms " (*vide* Halsbury's Laws of England, 2nd Edition, Vol. 31, page 461, section 558, and cases there cited). The preamble to the National Emergency Transitional Powers Act reads as follows :—

" WHEREAS the War Measures Act provides that the Governor
10 in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada ; and whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability ; and whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and
20 Japan and is still continuing ; and whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act ; and whereas in the existing circumstances it may be necessary that certain acts and things done and authorised and certain orders and regulations made under the War Measures Act be continued
30 in force and that it is essential that the Governor in Council be authorised to do and authorise such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency."

The War Measures Act and the National Emergency Transitional Powers Act are *in pari materia* and the comparison of their terms is a proper aid in the construction of the latter statute. When the two statutes are read together and due consideration is given to the preamble
40 to the latter, it appears to me that, at the time of passing the National Emergency Transitional Powers Act, Parliament envisaged a gradual and orderly discontinuance of the measures which had been enacted by the Governor General in Council during the emergency arising by reason of the war and an immediate reduction of the powers which during that emergency had been delegated to the executive.

It will be observed that section 3 of the War Measures Act expressly declares, albeit for greater certainty only, that the powers of the Governor in Council shall extend to all matters coming within certain enumerated classes of subjects of which one is " (*f*) appropriation, control, forfeiture
50 and disposition of property and of the use thereof." The exercise of this

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continued.

express power is however subject to the terms of section 7 of the Act reading as follows :—

> " WHENEVER any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any Order-in-Council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court."

It was held by this Court in *the Chemicals Reference* case [1943] S.C.R. 1 that section 4 of the Order-in-Council there under consideration, providing that if the controller took possession of any chemicals (as by other sections of the order he was empowered to do) the compensation to be paid in respect thereof should be such as was prescribed and determined by the controller with the approval of the Minister, was *ultra vires* of the Governor in Council as conflicting with section 7 of the War Measures Act quoted above. 10

The National Emergency Transitional Powers Act makes no express reference to appropriation of property and contains no provision similar to section 7 of the War Measures Act. The appellant cannot succeed unless the general words of the National Emergency Transitional Powers Act are construed as delegating to the Governor in Council a wider power than was conferred upon him under the War Measures Act, that is to say power not only to take over property but to fix the compensation to be paid therefor. I cannot think that such a construction would be in accord with the intention of Parliament. Had Parliament wished to confer upon the executive by the National Emergency Transitional Powers Act a power more sweeping than it had seen fit to delegate in the midst of actual war it appears to me that it would have used express words declaring that intention. 20

For these reasons I am of opinion that the provisions of P.C. 1292 which purported to vest the title to Nolan's barley in the Board and to fix the compensation to be paid to him were *ultra vires* of the Governor in Council. 30

I would dismiss the appeal with costs.

In the Supreme Court of Canada.

No. 2.
Formal Judgment (First Action), 20th November 1950.

No. 2.

FORMAL JUDGMENT (First Action).

IN THE SUPREME COURT OF CANADA.

Monday, the Twentieth day of November, A.D. 1950.

Present :—

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF CANADA.
THE HONOURABLE MR. JUSTICE KERWIN.
THE HONOURABLE MR. JUSTICE TASCHEREAU.
THE HONOURABLE MR. JUSTICE RAND.
10 THE HONOURABLE MR. JUSTICE ESTEY.
THE HONOURABLE MR. JUSTICE LOCKE.
THE HONOURABLE MR. JUSTICE CARTWRIGHT.

BETWEEN

THE ATTORNEY-GENERAL OF CANADA . . Appellant

AND

JEREMIAH J. NOLAN . . . . . . Respondent

AND

HALLET AND CAREY LIMITED . . . Respondent.

The Appeal of the above-named Appellant from the Judgment of the 20 Court of Appeal for Manitoba pronounced in the above cause on the tenth day of March in the year of Our Lord one thousand nine hundred and forty-nine affirming the Judgment of The Honourable The Chief Justice of the Court of King's Bench for Manitoba rendered in the said cause on the twenty-second day of December in the year of Our Lord one thousand nine hundred and forty-eight having come on to be heard before this Court on the eighth, ninth, tenth, eleventh and twelfth days of May in the year of Our Lord one thousand nine hundred and fifty in the presence of counsel as well for the Appellant as for the Respondents, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased 30 to direct that the said Appeal should stand over for Judgment and the same coming on this day for Judgment.

THIS COURT DID ORDER AND ADJUDGE that the said Judgment of the Court of Appeal for Manitoba should be and the same was affirmed and that the said Appeal should be and the same was dismissed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Appellant should and do pay to the said Respondents the costs incurred by the said Respondents in this Court.

(Signed) PAUL LEDUC,
Registrar.

In the Supreme Court of Canada.

No. 3.
Formal Judgment (Second Action), 20th November 1950.

No. 3.

FORMAL JUDGMENT (Second Action).

IN THE SUPREME COURT OF CANADA.

Monday, the Twentieth day of November, A.D. 1950.

Present :—

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF CANADA.
THE HONOURABLE MR. JUSTICE KERWIN.
THE HONOURABLE MR. JUSTICE TASCHEREAU.
THE HONOURABLE MR. JUSTICE RAND.
THE HONOURABLE MR. JUSTICE ESTEY. 10
THE HONOURABLE MR. JUSTICE LOCKE.
THE HONOURABLE MR. JUSTICE CARTWRIGHT.

BETWEEN

THE CANADIAN WHEAT BOARD . . . Appellant

AND

HALLET AND CAREY LIMITED et al . . Respondents

AND

JEREMIAH J. NOLAN . . . . . Respondent.

The Appeal of the above-named Appellant from the Judgment of the Court of Appeal for Manitoba pronounced in the above cause on the tenth 20 day of March in the year of Our Lord one thousand nine hundred and forty-nine affirming the Judgment of The Honourable The Chief Justice of the Court of King's Bench for Manitoba rendered in the said cause on the nineteenth day of April in the year of Our Lord one thousand nine hundred and forty-eight having come on to be heard before this Court on the eighth, ninth, tenth, eleventh and twelfth days of May in the year of Our Lord one thousand nine hundred and fifty in the presence of counsel as well for the Appellant as for the Respondents, whereupon AND UPON HEARING what was alleged by counsel aforesaid, this Court was pleased to direct that the said Appeal should stand over for Judgment and the 30 same coming on this day for Judgment.

THIS COURT DID ORDER AND ADJUDGE that the said Judgment of the Court of Appeal for Manitoba should be and the same was affirmed and that the said Appeal should be and the same was dismissed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Appellant should and do pay to the said Respondents the costs incurred by the said Respondents in this Court.

(Signed) PAUL LEDUC,
Registrar.

In the Privy Council.

No. 4. Order of His Majesty in Council granting Special Leave to Appeal, 11th July 1951.

No. 4.

ORDER of His Majesty in Council granting Special Leave to Appeal.

AT THE COURT AT BUCKINGHAM PALACE.

The 11th day of July, 1951.

Present :—

THE KING'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL	Sir HUMPHREY O'LEARY
Mr. Secretary EDE	Mr. GRENFELL
Mr. NOEL-BAKER	Mr. YOUNGER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 5th day of July 1951 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) the Attorney-General of Canada (2) the Canadian Wheat Board in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and (1) Hallet and Carey Limited (2) Jeremiah J. Nolan Respondents setting forth : that the Petitioners desire special leave to appeal from a Judgment of the Supreme Court pronounced on 20th November 1950 but not settled until 17th January 1951 which dismissed the Petitioners' Appeals from a Judgment of the Court of Appeal of Manitoba pronounced on 10th March 1949 affirming a Judgment of the Court of King's Bench pronounced on 19th April 1948 in two actions which had been heard together : that on the outbreak of the war in 1939 measures were taken by the Governor in Council under the authority of the War Measures Act to control and regulate the economy of Canada by *inter alia* controlling and regulating supplies and prices of commodities : that Regulations up to 1st January 1946 were enacted under the authority of the War Measures Act and subsequent regulations up to 15th May 1947 under the authority of the National Emergency Transitional Powers Act 1945 (thereafter referred to as the 1945 Emergency Act) : that on 17th March 1947 the 2nd Petitioner issued Instructions to the Trade No. 59 addressed to all companies and dealers in oats and barley in accordance with a change in policy announced that day by the Government in Parliament : that the change in policy was implemented *inter alia* by Order in Council P.C. 1292 dated 3rd April 1947 made under the authority of the 1945 Emergency Act : that the Order in Council provided *inter alia* for the vesting in the Wheat Board of oats and barley then in commercial positions and required the

In the Privy Council.

No. 4.
Order of His Majesty in Council granting Special Leave to Appeal, 11th July 1951,
continued.

Wheat Board to pay for such oats and barley in general at the previous maximum prices: that while barley was under price control the 2nd Respondent a grain merchant of Chicago in 1943 bought through his agent the 1st Respondent 40,000 bushels of certain barley then in various elevators for which the 1st Respondent as his agent held warehouse receipts: that this barley was included in the barley vested in the Wheat Board by the Order in Council: that on 22nd May 1947 the 2nd Respondent commenced an action against the 1st Respondent in the Court of King's Bench in Manitoba claiming the barley bought by it and the documents of title thereto: 10 that the Attorney-General was added as a party Defendant in this action: that on 8th October 1947 the 2nd Petitioner commenced an action in the same Court against the 1st Respondent claiming possession of the barley and of the warehouse receipts: that the 2nd Respondent was added as a Defendant to that action and the two actions were tried together: that the major issues raised by the Respondents in their pleadings in these actions were—(A) the constitutional validity of the 1945 Emergency Act under the British North America Act and (B) the constitutional validity of the Order in Council (P.C. 1292): that the trial Judge held the 1945 Emergency 20 Act to be valid but found that the Act did not authorise those parts of the Order in Council which appropriated or were ancillary to the appropriation of property: that the Court of Appeal for Manitoba dismissed the Petitioners' Appeals from the Judgment of the trial Judge on the ground *inter alia* that in the view of the majority of the Court both the Act and the Order in Council relied for their justification and legality upon the continued existence of the national emergency arising out of the war against Germany and Japan: that in their view there was no emergency at the date of the Order in Council and thereby in effect they held that the 30 continuation in force of the Act was *ultra vires* of the Parliament of Canada: that the Petitioners appealed to the Supreme Court of Canada: that on 1st March 1950 after the Petitioners appealed but before the Appeal was heard the Supreme Court on a question as to the continued validity of Wartime Leasehold Regulations held that the Continuation of Transitional Measures Act 1947 was *intra vires* of Parliament as legislation in relation to an existing national emergency: that the effect of upholding the validity of the 1947 Act was to put beyond question the validity of the 1945 Emergency Act: that as a result the question of the validity of 40 the 1945 Emergency Act was not argued in the Supreme Court in the present case: that the Supreme Court by a majority dismissed the Appeal: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 20th November 1950 and to make such further or other Order as to Your Majesty in Council may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof 50 and in opposition thereto Their Lordships do this day agree humbly

In the Privy Council.

No. 4. Order of His Majesty in Council granting Special Leave to Appeal, 11th July 1951, *continued.*

to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 20th day of November 1950 upon the following terms (a) that the Orders already made as to the costs of each Respondent in the Courts in Canada shall stand and that the Petitioners shall pay those costs before the hearing of the Appeal (b) that the Petitioners shall in any event pay to the 1st Respondent the sum of £350 3s. 2d. for its costs as between solicitor and own client of opposing the said
10 Petition and (c) that the Petitioners shall in any event pay the 2nd Respondent's cost of opposing the said Petition and of the Appeal:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was
20 pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

No. 32 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE ATTORNEY-GENERAL OF CANADA and THE CANADIAN WHEAT BOARD - - - - - *Appellants*

AND

HALLET AND CAREY LIMITED and JEREMIAH J. NOLAN - - - - - - - - - *Respondents*

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