13, 1952

Factum of the Attorney-General of Canada ~~and the~~ Canadian Wheat Board

Factum of Appellants.

11249

PART I

STATEMENT OF FACTS

1. This is an appeal from a decision of the Court of Appeal of Manitoba rendered March 10, 1949, unanimously affirming a judgment of Williams C.J.K.B. of the Court of King's Bench in the Province of Manitoba, rendered June 19, 1948, in these two actions which were heard and disposed of together.

2. The first action was begun on May 22, 1947, by Jeremiah J. Nolan against Hallet and Carey Limited, for possession of certain barley and for the documents of title to the barley. The Attorney General of Canada was added as a party to the action by Order of October 15, 1948 (Record, Vol. 1, p. 20, and amending Order p. 35).

3. The second action was begun on October 8, 1947, by the Canadian Wheat Board against Manitoba Pool Elevators, Canadian Consolidated Grain Company Limited, the United Grain Growers Terminals Limited, and Fort William Elevator Company Limited (hereafter called the warehousemen) and against Hallet and Carey Limited, for the possession of the same barley and for the same documents of title. Jeremiah J. Nolan was added as a party by Order of the Court of King's Bench of March 22, 1948 (Record, Vol. 2, p. 10). The warehousemen ceased to be parties to the action pursuant to the Order of the Court of Appeal made February 1, 1949 (Record, Vol. 2, p. 49), the barley having been sold and the proceeds having been paid into Court to await disposition of the two actions. The Order under which the warehousemen ceased to be parties reserved the question of costs, however, and this question was ultimately disposed of by the Court of Appeal by the judgment under appeal. The warehousemen, therefore, were included in the style of cause since they were, in effect, parties to the Order under appeal but the Appellants do not seek any relief against them.

4. The two actions were tried together and appeals from the judgment were argued before the Court of Appeal. The subject matter of both actions is the same barley and the same documents of title and the issues raised are the same.

5. The facts are as follows. On or about July 31, 1943, Hallet and Carey Limited, as agents for and acting on the instruction of Jeremiah J. Nolan, purchased 40,000 bushels of barley for his account and obtained warehouse receipts from the warehousemen for the barley. In March and April, 1947, Hallet and Carey Limited, held corresponding warehouse receipts as agent for Jeremiah J. Nolan and the warehousemen held the barley covered by them in storage (Record, Vol. 3, p. 256, l. 4 to p. 257, l. 2).

Factum of Appellants.

6. During the war and the post war period, regulations were enacted by the Governor in Council annually with reference to the production, delivery, storage and marketing of grain. As regards oats and barley, these regulations and regulations made by the Wartime Prices and Trade Board established a complicated system of control as a result of which there was a " floor " price and a " ceiling " price and all transactions took place between this floor and ceiling. The floor price was the price at which the Wheat Board always stood ready to purchase all grain offered. This was to guarantee to the producer a minimum price. The ceiling price, on the other hand, was to protect the consumer (meat producers and others). The ceiling price was first established by the Wartime Prices and Trade Board December 2, 1941. In order to complete the control picture, it should be remarked that no export of oats and barley was allowed except under permit of the Canadian Wheat Board. During the period which is relevant as regards these actions, the price of oats and barley abroad, particularly in the U.S.A. greatly exceeded the Canadian floor and ceiling prices and it became absolutely necessary that these Canadian prices should be advanced as a step toward ultimate decontrol. In March and April 1947, the controls on the marketing of oats and barley were extensively adjusted.

7. As part of this adjustment, on April 3, 1947, Order in Council P.C. 1292 (Record, Vol. 3, p. 228) was passed by the Governor in Council under the powers conferred by the National Emergency Transitional Powers Act, 1945. The Order in Council revoked Part III of the Western Grain Regulations that had previously been made by Order in Council P.C. 3222 of July 31, 1946 (Record, Vol. 3, pp. 161–185) and substituted a New Part III for the Part revoked. Included in the new Part III was section 22 which provided 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 or after the eighteenth day of March, nineteen hundred and forty-seven, are hereby vested in the Canadian Wheat Board."

" Oats and barley in commercial positions " were defined in the regulations to mean " oats and barley which are not the property of the producer thereof and are in store in warehouses, elevators or mills whether licensed or unlicensed, or in railway cars or vessels or in other facilities in Canada for the storage or transportation of grain " (S. 21 (c), Record, Vol. 3, p. 229, l. 10).

8. Section 23 of the new Part III provided:

> " 23. (1) The Board shall pay to a person who, immediately prior to the coming into operation of section twenty-two, was the owner of oats or barley vested in the Board by the said section in respect of each bushel so vested,
>
> (*a*) if he was the owner of the oats and barley at midnight on the seventeenth day of March, nineteen hundred and forty-seven,—an amount equal to the previous maximum price thereof; adjusted as provided in subsection two of this section;

(*b*) if he became the owner of the said oats or barley on or after the eighteenth day of March, nineteen hundred and forty-seven, by reason of a purchase at a price not exceeding the previous maximum price thereof adjusted as provided in the said subsection two,—an amount equal to the said previous maximum price as so adjusted ; or

(*c*) if he became the owner of the said oats or barley on or after the eighteenth day of March, nineteen hundred and forty-seven, pursuant to a purchase at a price exceeding the previous maximum price adjusted as provided in the said subsection two,—an amount equal to the price per bushel at which he purchased the oats or barley.

(2) The previous maximum price of oats or barley referred to in subsection one may, in computing the amount payable by the Board be adjusted in respect of freight, storage or handling charges or special selection premiums, as may be determined by the Board." (Record, Vol. 3, pp. 229–30.)

Previous maximum price was defined in the regulations to mean

" (i) with respect to oats, fifty-one and one-half cents per bushel, and

(ii) with respect to barley, sixty-four and three quarter cents per bushel, basis in store Fort William/Port Arthur or Vancouver"

(S. 21 (*e*), Record, Vol. 3, p. 229, l. 20). These were the previous maximum prices under the Wartime Prices and Trade Board Regulations.

9. Section 36 of the New Part III provided as follows :

" 36. (1) For the purpose of giving effect to this Part, the Board may, by order . . .

(*c*) require any person to deliver to the Board any documents of title relating to, or documents entitling any person to delivery of, oats or barley vested in the Board by section twenty-two, that he has in his custody, possession or control." (Record, Vol. 3, p. 234.)

10. On April 7, 1947, by an order entitled " Instruction to the Trade " (included in the definition of an " order " of the Canadian Wheat Board in the Western Grain Regulations (S. 2 (1) (*r*), Record, Vol. 3, p. 163, l. 10) addressed to all companies and received by Hallet and Carey Limited, the Canadian Wheat Board ordered and directed all companies having in their possession or control receipts or other documents of title covering barley of the categories listed therein to deliver them forthwith to the Board and that settlement would be made in accordance with the Order. (Exhibit No. 1 (5), Record, Vol. 3, pp. 235–6.)

11. By letter of April 14, 1947, Jeremiah J. Nolan forbade Hallet and Carey Limited to deliver to the Canadian Wheat Board the warehouse receipts held by them on his account (Exhibit No. 1 (6), Record, Vol. 3, pp. 237–8). On April 18, 1947, a similar letter was written to Hallet and Carey Limited by the Solicitors to Mr. Nolan (Exhibit No. 1 (7), Record, Vol. 3, p. 239).

Factum of Appellants.

12. On May 22, 1947, Jeremiah J. Nolan commenced action against Hallet and Carey Limited, claiming possession of the barley and of the documents of title (Record, Vol. 1, p. 6).

13. On May 27, 1947, by an " Instruction to the Trade " the Canadian Wheat Board specifically ordered Hallet and Carey Limited to deliver to the Board all stocks of oats and barley in its possession vested in the Canadian Wheat Board by Order in Council P.C. 1292 and all warehouse receipts or documents of title relating thereto and then specified in detail the warehouse receipts to which these actions relate (Exhibit No. 1 (8), Record, Vol. 3, pp. 240–1).

14. By letter dated May 27, 1947, the Commissioner of the Canadian Wheat Board informed the warehousemen that delivery of the warehouse receipts and barley had been demanded by the Board and that the barley had been vested in the Board (Exhibit No. 1 (9), Record, Vol. 3, pp. 242–3).

15. The warehouse receipts have never been delivered to the Canadian Wheat Board by Hallet and Carey Limited and the barley has never been delivered to the Canadian Wheat Board by the warehousemen (Record, Vol. 3, p. 258, l. 33).

16. On June 4, 1947, Hallet and Carey filed a defence to the action brought by Jeremiah J. Nolan pleading the Instructions to the Trade given by the Canadian Wheat Board and that the documents of title and the barley and the right to possession thereof had become vested in the Canadian Wheat Board (Record, Vol. 1, pp. 7–13, and particularly p. 13, l. 4).

17. On October 8, 1947, the Canadian Wheat Board commenced its action against the warehousemen and Hallet and Carey claiming possession of the barley and of the warehouse receipts (Statement of Claim, Record, Vol. 2, p. 1 at p. 3).

18. The amended Statements of Defence of the defendants raised the defence that the barley had not vested in the Canadian Wheat Board and the Canadian Wheat Board was not entitled to the warehouse receipts, as Order in Council P.C. 1292 did not vest them in the Board, on substantially two grounds, namely, because

(1) The National Emergency Transitional Powers Act, 1945, was beyond the authority of Parliament; and

(2) The regulations were beyond the authority of the Governor in Council under that Act.

19. On April 19, 1948, the learned Trial Judge, Williams C.J.K.B. gave judgment (Record, Vol. 3, p. 274) for Jeremiah J. Nolan in the first action and for the warehousemen and Hallet and Carey in the second action on the ground that Order in Council P.C. 1292 was beyond the powers of the Governor in Council under the National Emergency Transitional Powers Act, 1945.

20. The Court of Appeal for Manitoba unanimously affirmed the judgment of Williams C.J.K.B. on a number of grounds. (Record, Vol. 3, p. 321.)

21. The sole issue in both actions is the legal question whether the provisions of Part III of the Western Grain Regulations as enacted by Order in Council P.C. 1292 of April 3, 1947 were validly made by the Governor in Council under the National Emergency Transitional Powers Act, 1945, for if they were, the barley and the warehouse receipts in issue belonged to the Canadian Wheat Board. To understand the legal effect of this Order in Council it is necessary to consider the previous provisions of Part III of the Western Grain Regulations that were in force before it was enacted and which it amended. The previous provisions of Part III consolidated the provisions of several Orders in Council made earlier by the Governor in Council under the War Measures Act. To understand their effect it is necessary to refer to the original Orders in Council which were so consolidated. It is also necessary to refer to related regulations that also had application to trading in oats and barley. These were the Wartime Prices and Trade Regulations, which it will be seen from the references made below were referred to in the Orders in Council specifically on oats and barley. The following paragraphs outline the relevant Orders in Council in chronological order. Factum of Appellants.

22. The Wartime Prices and Trade Regulations made by Order in Council P.C. 8528 of November 1, 1941 under the War Measures Act, were the first regulations in point of time to apply to trading in oats and barley. These regulations, which constituted the Wartime Prices and Trade Board, conferred wide powers on that Board to control prices and establish maximum prices for substantially all goods and services. S. 7 (1), (2) and (7) of those regulations read as follows :—

> " 7 (1) Subject to any lower price that may be required by the operation of the provisions of subsection (1) of Section 8 of these regulations, no person shall on or after December 1, 1941, sell or offer to sell any goods or services at a price that is higher than the maximum price for such goods or services pursuant to these regulations ; but nothing in this Section shall be construed so as to prevent any person from selling or offering to sell any goods or services at a price lower than the maximum price.
>
> (2) The highest lawful price at which any person sold any goods or services during the basic period shall be the maximum price at which such person may sell or offer to sell goods or services of the same kind and quality ; provided, however, that the provisions of this subsection shall not apply so as to supersede or vary any specific or maximum or minimum price fixed prior to December 1, 1941, by or on behalf of or under authority of the Board, or fixed or approved prior to December 1, 1941, by any other federal, provincial or other authority with the written concurrence of the Board, nor so as to fix any maximum price with respect to—
>
> " (*a*) any sale of goods for export where such export is made by the seller or his agent ;
>
> (*b*) the sale by any person of his personal or household effects ;
>
> (*c*) isolated sales of goods or services by any person not in the business of selling such goods or services ;
>
> (*d*) bills of exchange, securities, title deeds and other similar instruments ;

(*e*) sales of goods by auction in cases where such procedure is the normal practice and is followed in good faith and without any intention of evading or attempting to evade the provisions of these regulations or of any order."

"(7) Nothing contained in this Section shall be deemed to supersede any provision of any order or to derogate from any power conferred on the Board, and without restricting the generality of this provision, the Board may vary any maximum price, may concur in any variation of a maximum price, may prescribe other or additional terms or conditions of sale, may exempt any person or any goods or services or any transaction wholly or partly from the provisions of these regulations, and may withdraw any such exemption or any exemption contained in subsection (2) of this Section, either generally or in specific cases and subject to such terms and conditions as the Board may prescribe."

"Goods" were defined to include "any articles, commodities substances or things" (S. 2 (1) (*e*)). The expression "basic period" was defined to mean "the four weeks from September 15, 1941, to October 11, 1941, both inclusive" (S. 2 (1) (*b*)).

23. The Wartime Prices and Trade Board was authorized to exercise its powers by order or otherwise and to delegate to any person and to authorize any person to exercise from time to time such of the powers of the Board on such terms as the Board deemed proper. (S. 3 (4).)

24. The effect of these regulations was to fix the maximum prices at which a person in Canada could sell oats or barley at the highest price at which he had sold oats or barley during the basic period. Subsequently, on December 2, 1941, the Canadian Wheat Board, acting under the authority of the Wartime Prices and Trade Board, fixed uniform ceiling prices of $51\frac{1}{2}$ cents for oats and $64\frac{3}{4}$ cents for barley, basis in store Fort William/Port Arthur.

25. The next relevant Order in Council that was passed by the Governor in Council dealt specifically with oats and barley and was Order in Council P.C. 1801 of March 9, 1942 (Proclamations and Orders in Council relating to the War, Vol. 6, p. 181). This Order in Council recited as follows:

"Whereas the Minister of Trade and Commerce reports that by reason of war conditions it is considered necessary to provide means whereby feed grain production in Western Canada will be so encouraged that feed grain supplies will be adequate in all parts of Canada for increased livestock population and that, if possible, a surplus will be available for export;

"That the expansion of livestock production is necessary to fill extraordinary demand from the United Kingdom and to provide a partial substitute for the reduced supplies of animal fats and vegetable oils; and

"That it is necessary for the attainment of such objectives that the producers of oats and barley in Western Canada be assured of a stable and fair price for their product."

Sections 2 and 3 of the Regulations made by this Order in Council provided : Factum of Appellants.

"2. The Canadian Wheat Board is empowered to buy Winnipeg barley futures or cash barley whenever the spot price per bushel, basis Fort William/Port Arthur, of No. 1 Canada Western Two Row . . . is 60 cents, or No. 3 Canada Western 58 cents, or No. 1 Feed 56 cents.

"3. The Canadian Wheat Board is empowered to buy Winnipeg oats futures or cash oats whenever the spot price per bushel basis Fort William/Port Arthur of No. 2 Canada Western Oats is 45 cents or Extra No. 3 Canada Western, No. 3 Canada Western or Extra No. 1 Feed, 42 cents or No. 1 Feed 40 cents."

It was provided that the Order in Council should come into operation on August 1, 1942 and should expire on August 1, 1943. These provisions established "floor prices" for oats and barley and subsequently, with amendments, became sections 33 to 36 of Part III of the Western Grain Regulations.

26. Subsections (2) and (3) of Order in Council P.C. 1801 of March 9, 1942, were revoked by Order in Council P.C. 10577 of November 19, 1942 (Canadian War Orders and Regulations, 1942, Vol. 1, 389) and new provisions were substituted. The recitals to this Order in Council read as follows :

"Whereas the Minister of Trade and Commerce reports that by reason of war conditions it is considered necessary to provide means whereby feed grain production in Western Canada will be so encouraged that feed grain supplies will be adequate in all parts of Canada for increased livestock population and that, if possible, a surplus will be available for export ; and

"That the expansion of livestock production is necessary to fill an extraordinary demand from the United Kingdom and to provide a partial substitute for the reduced supplies of animal fats and vegetable oils ;

"That it is necessary for the attainment of such objectives that the producers of oats and barley in Western Canada be assured of a stable and fair minimum price for their product ;

"That The Canadian Wheat Board has been authorized to buy barley futures or cash barley and oats futures or cash oats by Order in Council P.C. 1801, dated March 9, 1942 ;

"That as a result of congested transportation and terminal storage facilities it has become apparent that in order to assure a continuous market to producers in Western Canada and a fair and stable minimum price for their product as aforesaid it is necessary for the Board to purchase oats and barley at prices which include provision for storage of grain until it can be delivered at terminal markets ; and

"That it is necessary and desirable that the following changes and additions be made in and to the regulations made by Order in Council P.C. 1801 dated March 9, 1942."

Factum of Appellants.

The provisions enacted by the Order in Council were substantially similar to those they replaced except that they fixed different "floor" prices at which the Board was empowered to purchase oats and barley until July 31, 1943.

27. Order in Council P.C. 4450 of June 1, 1943 (C.W.O. and R., 1943, Vol. 2, 570) was enacted in relation to oats and barley for the crop year commencing August 1, 1943, and ending July 31, 1944. The recitals to this Order were as follows:

> "Whereas the Minister of Trade and Commerce reports that by reason of war conditions it is considered necessary to provide means whereby feed grain production in Western Canada will be so encouraged that feed grain supplies will be adequate in all parts of Canada for the increased livestock population and that, if possible, a surplus will be available for export;
>
> "That the expansion of livestock production is necessary to fill extraordinary demand from the United Kingdom and to provide a partial substitute for the reduced supplies of animal fats and vegetable oils;
>
> "That, in the attainment of such objectives, the producers of oats and barley in Western Canada must be assured of a suitable and fair price for their product;
>
> "That as a result of war conditions it is necessary that the price ceiling on oats and barley be maintained in order that these grains can be marketed in the Canadian domestic market in accordance with the National Price Control Policy;
>
> "That the said grains may be exported from time to time at prices which allow exporters to receive net prices in excess of the said ceiling levels;
>
> "That it is considered desirable to control exports of said oats and barley and ensure that any above normal profits arising from excess of export prices over the said ceiling levels received as aforesaid from the sale of oats and barley in the export market be equitably distributed amongst producers of such grains; and
>
> "That the regulations made and established by Order in Council P.C. 1801 of March 9, 1942, are effective until the 31st day of July, 1943, and that new regulations relating to the export of oats and barley grown in Western Canada and delivered subsequent to the 31st day of March, 1943, and to deliveries in the crop year commencing on the 1st day of August, 1943, are necessary and desirable and have been recommended by The Canadian Wheat Board."

This Order in Council established regulations consisting of three Parts. Part I dealt with interpretation. Part III substantially re-enacted the provisions of Order in Council P.C. 1801 of March 9, 1942, amended as already mentioned, providing for floor prices for oats and barley, with an additional provision that it was the duty of the Board to buy all oats and barley offered for sale by producers at the prices established by the

regulations. Part II was new. Its provisions prohibited the export of oats or barley from Canada except under a permit from The Canadian Wheat Board to be obtained on payment of a fee or charge. The fees or charges for permits to export oats and barley (fixed by the Board from day to day as representing approximately the difference between the Canadian price and the American price, less transportation costs) were to be paid into an " Oats Equalization Fund " and a " Barley Equalization Fund," respectively, which after the end of the crop year were to be distributed amongst producers who delivered oats or barley for sale during that crop year.

28. Order in Council P.C. 8898 of November 18, 1943, (C.W.O. and R., 1943, Vol. 4, 453) revoked Part II of the regulations made by P.C. 4450 (the part relating to " Equalization Funds ") and re-enacted a new Part II. The Order in Council recited :

> " Whereas it was considered necessary to provide by the enactment of Order in Council P.C. 4450 of the first day of June, 1943, means to ensure that any above normal profits arising from the excess of export prices over the domestic maximum prices be equitably distributed amongst producers of such grains and for that purpose to empower The Canadian Wheat Board to regulate and control the export of oats and barley and any products containing oats and/or barley from Canada and to issue permits for the exportation of oats and/or barley or any such products from Canada for such consideration, charge or fee as said Board may determine and to instruct The Canadian Wheat Board to deposit any monies arising from the imposition and collection of any such charges or fees in funds known as the Oats Equalization Fund and the Barley Equalization Fund for distribution equitably amongst producers in accordance with the provisions of the said Order in Council ;
>
> " And whereas the Minister of Trade and Commerce reports that it has become necessary to divert abnormally large supplies of oats and barley to Eastern Canada to relieve the effects of crop shortage there and this has reduced the amount of oats or barley or products thereof available for export, resulting in a reduction of the sums deposited by the Board in the said Funds and the reduction of the monies ultimately distributable to producers as aforesaid which are estimated at ten cents per bushel for oats and fifteen cents per bushel for barley ;
>
> " That it is considered desirable and necessary to give to producers the full estimated benefit of exports as aforesaid and to empower the Board to pay to producers as an initial advance against the ultimate distribution of the funds aforesaid of the sum of ten cents per bushel for oats and fifteen cents per bushel for barley sold and delivered by producers in addition to the present maximum price therefor."

The Order in Council made provision for the payment of " Advance Equalization Payments," that is, provided for an advance payment of anticipated equalization surpluses. It was subsequently amended to a minor extent by Orders in Council P.C. 1397 of March 4, 1944 (C.W.O. and R., Vol. 1, 144, 520) and P.C. 3372 of May 5, 1944 (C.W.O. and R., 1944, Vol. 2, 276).

Factum of Appellants.

29. Order in Council P.C. 5998 of July 31, 1944 (C.W.O. and R., 1944, Vol. 3, 270) enacted regulations entitled the " Oats and Barley Regulations, 1944–45," applicable to the crop year beginning August 1, 1944 and ending July 31, 1945. This Order in Council recited :

> " Whereas the Minister of Trade and Commerce reports that the regulations made and established by Order in Council P.C. 4450 of the first day of June nineteen hundred and forty-three and amended by Orders in Council P.C. 8898 of the eighteenth day of November, nineteen hundred and forty-three, P.C. 1397 of the fourth day of March, nineteen hundred and forty-four and P.C. 3372 of the fifth day of May, nineteen hundred and forty-four, providing for the regulation of the exportation of oats and barley, the making of Advance Equalization Payments, the purchase of oats and barley by The Canadian Wheat Board and conferring powers on The Canadian Wheat Board for such purposes during the crop year commencing the first day of August, nineteen hundred and forty-three, expire on the thirty-first day of July, nineteen hundred and forty-four ; and
>
> " That it is necessary, by reason of the war, for the security, defence, peace, order and welfare of Canada, that the annexed regulations, conferring the said powers on The Canadian Wheat Board for the crop year commencing the first day of August, nineteen hundred and forty-four, be made."

The regulations made by this Order in Council were divided into four Parts. Part I dealt with interpretation. Part II was entitled " Equalization Payments " and re-enacted, with some minor additions, the provisions of the Orders in Council applicable to the preceding crop year in this respect. Part III was entitled " Oats and Barley Price Stabilization " and substantially re-enacted the provisions for " floor prices " applicable to the preceding crop year. Part IV was entitled " General " and conferred powers and duties on the Board with regard to administration.

30. Order in Council P.C. 2550 of April 12, 1945 (C.W.O. and R., 1945, Vol. 2, 77) enacted for the crop year beginning August 1, 1945 and ending July 31, 1946, regulations known as the " Western Grain Regulations, 1945–46 (The Canadian Wheat Board)". This Order in Council consolidated several separate regulations relating to operations of The Canadian Wheat Board with respect to different grains into one set of regulations. It recited :

> " Whereas the regulations made and established by Order in Council P.C. 5240 of the 10th day of July, A.D. 1944, providing for the regulation of deliveries of grain and conferring powers on The Canadian Wheat Board for such purposes during the crop year commencing on August 1, 1944, expire on the 31st day of July, 1945 ;
>
> " And whereas the regulations made and established by Order in Council P.C. 5998 of the 31st day of July, 1944, providing for the regulation of the exportation of oats and barley, the making of the Advance Equalization Payment, the purchase of oats and barley

by The Canadian Wheat Board and conferring powers on The Canadian Wheat Board for such purposes during the said crop year, expire on the 31st day of July, 1945 ;

" And whereas the regulations made and established by Order in Council P.C. 1350 of the 6th day of March, 1944, empowering The Canadian Wheat Board to regulate and control all flaxseed in store in Canadian elevators and all flaxseed delivered by producers in the said crop year also expire on the said 31st day of July, 1945 ;

" And whereas the regulations made and established by Order in Council P.C. 7942 of the 12th day of October, 1943, providing *inter alia* for the payment to producers delivering wheat to the Board during the said crop year of an initial advance of $1.25 per bushel, basis No. 1 Manitoba Northern Wheat in store Fort William/Port Arthur or Vancouver and for the discontinuance of wheat trading and conferring powers on the Board for such purposes, also expire on the 31st day of July, 1945 ;

" And whereas the Minister of Trade and Commerce reports that it is necessary by reason of the war for the security, defence, peace, order and welfare of Canada, that the annexed regulations be made for the crop year commencing August 1, 1945."

Parts I and II were entitled " Delivery of Grain " and " Wheat " and corresponded substantially to Parts I and II of the " Western Grain Regulations " now before the Court. Part III was entitled " Oats and Barley " and corresponded to Part III of the Western Grain Regulations as they were in force before Order in Council P.C. 1292 of April 3, 1947, was enacted. It re-enacted, with some refinements, the provisions relating to " Advance Equalization Payments " and " floor prices." Part IV dealt with " Flaxseed " and Parts V, VI, VII and VIII dealt with " Offences," " Powers of the Board," " Duties of the Board " and " General."

31. The foregoing regulations were all passed by the Governor in Council under the authority conferred by the War Measures Act.

32. Order in Council P.C. 3222 of July 30, 1946 (Record, Vol. 3, p. 161) re-enacted under the powers conferred by the National Emergency Transitional Powers Act, 1945, for the period after August 1, 1946, " Western Grain Regulations " substantially similar to those for the previous crop year. That Order in Council recited :—

" Whereas regulations made and established by Orders in Council P.C. 859 of the 9th day of February, 1945, P.C. 2550 of the 12th day of April, 1945, as continued by Order in Council P.C. 7414 of the 28th day of December, 1945, conferring upon The Canadian Wheat Board the powers and duties therein specified, expire on the 31st day of July, 1946 ;

" And whereas the Minister of Trade and Commerce represents that it is deemed necessary and advisable, 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, prices and transportation to ensure

economic stability and an orderly transition to conditions of peace and for the purpose of assisting the relief of suffering and the restoration and distribution of essential supplies in Canada and in foreign countries, that are in grave distress as a result of the war, that the annexed regulations be made and established."

These regulations amended in some respects those for the preceding crop year and applied in respect of succeeding crop years rather than in respect only of the one crop year. They were not included in the Schedule to the Continuation of Transitional Measures Act, 1947 (Ch. 16, Statutes of 1947), which came into force on May 16, 1947, when the National Emergency Transitional Powers Act, 1945, expired. They were continued in force until July 31, 1947, however, by section 6 of " An Act to amend The Canadian Wheat Board Act, 1935 " (Ch. 15, Statutes of 1947), and expired on that day.

33. The legal position on March 17, 1947, under regulations made during wartime and the transitional period with respect to trading in oats and barley may be summarized as follows :

(1) Under the Wartime Prices and Trade Regulations the ceiling price at which oats and barley could be sold was $51\frac{1}{2}$ cents and $64\frac{3}{4}$ cents, respectively. This ceiling price had been in effect unchanged since December 2, 1941.

(2) Under Part III of the Western Grain Regulations the following provisions required The Canadian Wheat Board to purchase all oats and barley at the following " floor prices " :—

" 35. It shall be the duty of the Board to buy all oats and barley offered by the producers for sale at the prices established in accordance with sections thirty-three and thirty-four."

" 33. The Board is hereby empowered to buy Winnipeg barley futures or cash barley at a price per bushel which will assure that producers in Western Canada will be continuously offered the following prices per bushel for barley basis in store Fort William/Port Arthur :—

" No. 1 Canada Western Two-Row or Six-Row or No. 2 Canada Western Two-Row or Six-Row	60 cents
No. 3 Canada Western	58 cents
No. 1 Feed	56 cents

and such prices for each other grade of barley as in the opinion of the Board brings such grade into proper relationship with the grades of barley hereinbefore named " ;

" 34. The Board is hereby empowered to buy Winnipeg oats futures or cash oats at a price per bushel which will assure that producers in Western Canada will be continuously offered the following prices per bushel for oats basis in store Fort William/Port Arthur :—

No. 2 Canada Western Oats	45 cents
Extra No. 3 Canada Western, No. 3 Canada Western or Extra No. 1 Feed	42 cents
No. 1 Feed	40 cents

and such prices for each other grade of oats as in the opinion of the Board brings such grade into proper relationship with the grades of oats hereinbefore named."

(Western Grain Regulations, Record, Vol. 3, p. 176.)

(3) The export of oats and barley was prohibited except under permits obtained on payment of equalization fees which were to be placed in the "Oats Equalization Fund" and the "Barley Equalization Fund" (Ss. 21 and 22, Western Grain Regulations, Record, Vol. 3, p. 170). Provision was made for the payment, subject to certain minor exceptions, of "Advance Equalization Payments" to producers at the time of sale of oats or barley (Ss. 23, 24 Record, Vol. 3, pp. 170–172). Provision was made for the repayment of "Advance Equalization Payments" where a person who had received an "Advance Equalization Payment" for oats or barley sold by him subsequently purchased oats or barley or in like circumstances. This had necessitated the establishment of a system of "Feed Purchase Permits." (Ss. 25, 26, 27, 28, 29 and 30; Record, Vol. 3, pp. 172–175.) Provision was then made for distribution to producers of any surplus remaining in the Equalization Funds at the end of the crop year (ss. 31–32, Record, Vol. 3, p. 175).

34. At this time the price of barley in the U.S. was higher than the price in Canada. The learned Trial Judge indicated that it was between $1.60 and $2.00 per bushel. (Record, Vol. 3, p. 311, l. 32; also Exhibit No. 14, Record, Vol. 3, p. 265). This difference existed because of the control of prices in Canada and of exports from Canada.

35. On March 17, 1947, the Canadian Wheat Board issued Instruction to the Trade No. 59 addressed to all companies and dealers in oats and barley (Record, Vol. 3, p. 211). This Instruction to the Trade states it is issued in accordance with a Statement of Policy announced by the Government in Parliament and attaches a summary of the statement of policy. In summary, the Instruction to the Trade announced the following changes to be made effective on and after March 18, 1947, in the regulations relating to oats and barley:—

(*a*) Advance Equalization Payments were to be discontinued;

(*b*) Floor prices on oats and barley were to be increased for No. 1 Feed Oats to 61½ cents and for No. 1 Feed Barley to 90 cents and corresponding prices for other grades;

(*c*) Ceiling prices on oats and barley were to be increased to 65 cents for oats and 93 cents for barley;

(*d*) An adjustment payment of 10 cents per bushel was to be made to producers of barley who had sold it within the crop year before March 17;

(*e*) All western oats and barley in commercial channels was to be sold to the Board at the previous maximum or ceiling prices;

(*f*) Tentative prices for the sale of oats and barley by the Board and a new subsidy on oats and barley for feeding purposes were announced;

Factum of Appellants.

(*g*) Outstanding contracts and export commitments were to be permitted to be carried out by persons who had entered into them at the previous maximum prices ;

(*h*) No oats or barley were to be exported by any person other than the Board.

The outline of Government policy as announced in Parliament forming part of Instruction to the Trade No. 59 explained in some detail the nature of the various steps that were being taken. It clearly appears from this statement that a major change in the control and regulation of the marketing and handling of oats and barley was being made. Included in the statement of the whole policy outlined is the following paragraph :—

" 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 64¾ cents. per bushel for barley and 51½ cents per bushel for oats, all stocks in their possession at midnight tonight, March 17th. 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." (Record, Vol. 3, p. 214.)

36. On March 19, 1947, The Canadian Wheat Board under its powers conferred by the Wartime Prices and Trade Board, issued an Administrators' Order establishing new and higher ceiling prices for oats and barley (Exhibit No. 13, Record, Vol. 3, pp. 220–i). These prices were 65 cents in the case of oats and 93 cents in the case of barley, basis in store Fort William/Port Arthur.

37. On April 3, 1947, Order in Council P.C. 1292 (Record, Vol. 3, p. 228) was passed. The recital to this Order in Council reads :—

" 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

(*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 set out below."

38. The Order in Council revoked Part III of the Western Grain Regulations and substituted a new Part III. The legal effect of the new Part III may be summarized as follows :— Factum of Appellants.

(*a*) All oats and barley in commercial positions in Canada except oats and barley acquired from The Canadian Wheat Board or from producers on or after March 18, 1947, were vested in The Canadian Wheat Board (S. 22, Record, Vol. 3, p. 229, l. 30). The Board was to pay for the oats and barley as follows : If the oats or barley had been acquired at a price not exceeding the previous maximum price the Board was to pay for it at the previous maximum price and if it had been acquired at a price exceeding the previous maximum price the Board was to pay for it at the price at which it was acquired (S. 23, Record, Vol. 3, pp. 229–30). Persons who had sold oats and barley at a price exceeding the previous maximum price were required to pay an amount equal to the difference to the Board (S. 24, Record, Vol. 3, p. 230). Provision was made for the settlement of existing contracts or for rescission of contracts where the property had not passed (Ss. 25 and 26, Record, Vol. 3, pp. 230–31). The Board was required to sell and dispose of the oats and barley vested in it at reasonable prices. Profits were to be paid into the Consolidated Revenue Fund (S. 27, Record, Vol. 3, p. 231).

(*b*) It was provided that no person other than The Canadian Wheat Board should export oats and barley except with the permission of the Board upon payment of a charge or fee. The Board was required to deposit the moneys received in the Equalization Funds (Ss. 28 and 29, Record, Vol. 3, p. 231).

(*c*) The Board was empowered and required to buy oats and barley at a price per bushel that would assure that producers in western Canada would be continuously offered a price per bushel basis in store at Fort William or Port Arthur for No. 1 feed Oats of 61½ cents and for No. 1 Feed Barley of 90 cents and such prices for other grades as were in proper relationship to this price. Profits accruing to the Board were to be paid into the Equalization Funds (Ss. 30, 31 and 32, Record, Vol. 3, p. 232).

(*d*) The Board was required to pay producers a barley adjustment payment of 10 cents for each bushel sold by the producers between August, 1, 1946, and March 18, 1947 (S. 33, Record, Vol. 3, pp. 232–3).

(*e*) Provision was made for the distribution amongst producers of any surplus remaining in the Equalization Funds for the crop year ending July 31, 1947. (Record, Vol. 3, pp. 233–4.)

39. Appropriation Acts, 1947, No. 1 (Ch. 1, 1947) and No. 3 (Ch. 11, 1947) assented to on March 28, 1947, and May 14, 1947, respectively, appropriated interim supply for the carrying on of the Government services. Included in a special Schedule to these Acts was a new Vote entitled " 610. . . . to authorize and provide for payment of subsidies on oats and barley used as feed for livestock under such regulations as may be approved by the Governor in Council . . . $6,000,000.00 ". The effect of including these items in the special Schedule was to make the moneys available

Factum of Appellants.

immediately for expenditure. " Instruction to the Trade No. 59 " of The Canadian Wheat Board issued on government instructions on March 17, 1947, had announced that a subsidy would be payable on oats and barley purchased for feed purposes.

40. The foregoing is a summary of the legislation governing trading in oats and barley during the period of the war and the transitional period up to the enactment of the regulations contained in Order in Council P.C. 1292 of April 3, 1947.

41. The effect and operation of these regulations must be considered in relation to other laws enacted during the same period. These measures were enacted to establish a comprehensive scheme of procurement of supplies and materials and manpower for war purposes and for stabilizing the economy in Canada as a whole by controlling supplies, prices, wages, salaries and so forth. At the beginning of the war these measures applied in respect of specific commodities, services, properties and employments. By 1943, however, the measure taken had been revised and integrated as part of an inter-related legislative scheme. During the years 1943, 1944 and the early part of 1945 these legislative measures as a whole remained substantially unaltered in form and in their application. Commencing in 1945, with the end of the war in sight, the first steps towards repealing or revoking these measures commenced. This has continued since that time until now. The process of " decontrol," i.e. the revocation, repeal or limitation of legislative measures taken to control the economy, was in full swing in the year 1947. A convenient history of the steps taken during the year 1947 is set out in the Report of the Royal Commission appointed to investigate the causes of the sudden rise of prices in Canada by Order in Council P.C. 3109 of July 8, 1948. That Commission, in its Report (Vol. II, p. 74 and following) summarizes the decontrol measures that were taken between the years 1945 and 1948. With respect to the year 1947 it summarizes (p. 80) five main decontrol measures with regard to price control that were taken in the year 1947 as follows :—

> " In the January move, the list of items still controlled was substantially reduced, one of the more important deletions from the point of view of current living expenses being fresh fruits and vegetables with the exception of apples. A further long list of items was decontrolled on April 2, 1947, including wool and wool products, footwear, fuels, motor vehicles, certain durable goods, and plumbing and sanitary supplies. On June 9, ceilings were removed from a further list, dairy products being the most important items of direct interests to the consumer. Copper, lead, zinc and hardwood lumber were also decontrolled at this time and some additional items at the beginning of July.
>
> " A major decontrol move took place on September 15, 1947, when price ceilings were lifted on the majority of goods and services still remaining under control, including flour and bread, cotton, jute and sisal fibres and yarns, all remaining articles of clothing, household furnishings, hides, skins and leather, softwood lumber and farm machinery and equipment. Labour disputes in the packing industry caused the decontrol of meats to be postponed until October 22, on which date feed grains were also decontrolled. By the end of

October 1947, the principal items remaining under control were sugar, molasses, dried raisins, currants and prunes, wheat, the principal oil bearing materials (flaxseed, sunflower seed and rapeseed), the more important oils and fats except corn oil and olive oil, soaps, lard and shortening, primary iron and steel products, tin, and alloys containing more than 95 per cent. tin. Manufacturing processes performed on a custom or commission basis in connection with goods still under price control, and custom or commission packing charges on such goods, were left under control. Dried fruits were released from control on December 31, 1947, and oils and fats, soaps, shortening and lard, on August 1, 1948.

"In all cases, subsidies were removed before the subsidized item was decontrolled. In some instances the removal of the subsidy took place in two or three steps, and appropriate price increase being permitted at each step until final decontrol was reached. In removing price control on goods that had been subsidized, the Wartime Prices and Trade Board tried to limit the extent to which subsidies on goods still held in stock would contribute to inventory profits resulting from higher prices following decontrol. This was done in one of two ways. In some cases the decontrol was staggered, that is, there was a time lag between the reduction of the subsidy and the consequent price increases at another stage. Mr. Taylor quoted the textiles field as an example. When the subsidies on raw cotton were reduced the Board did not allow price increases at the fabric stage until some time later, and increases in the prices of final garments were not permitted until later still. In other cases, generally when the bulk of the goods were still in the hands of that section of the trade which had received the subsidy, the Board took direct steps to recover the subsidy content of the goods in stock."

The foregoing extract is merely a convenient summary of the effect of the legislation in the year 1947 relating to decontrol.

PART II

OBJECTIONS TO JUDGMENT APPEALED FROM

42. The Appellant submits that the learned Judges in the Courts below were in error in not holding that The Canadian Wheat Board was entitled to the documents of title and the barley in issue in these actions and, in particular, they were in error in holding that sections 22 to 26 and 36 of Part III of the Western Grain Regulations as enacted by Order in Council P.C. 1292 of April 3, 1947, were not authorized under the National Emergency Transitional Powers Act, 1945. These provisions were held *ultra vires*—

(*a*) because some of the learned Judges took the view that it was open to them to decide whether in their opinion the enactment of these provisions was necessary by reason of the emergency for the purposes for which regulations are authorized under that Act; and

(*b*) because each of the learned Judges held that these provisions were not authorized by that Act on one or more of the following grounds, namely, that

(i) they did not relate to an existing emergency or at least an existing emergency in barley ;

(ii) they appropriated the property in the barley ;

(iii) the provisions thereof did not come within the words " maintaining, controlling and regulating supplies and . . . prices . . . to ensure economic stability and an orderly transition to conditions of peace " ;

(iv) they purported only to control part of the barley in Canada ;

(v) they purported to establish new and extended controls over barley ;

(vi) they were directed not at the control of barley but at preventing the making by certain persons of fortuitous profits as a result of the increase in the maximum price of barley occurring at the same time ;

(vii) they were discriminatory as they did not appropriate all barley in Canada or all barley grown in the designated area ;

(viii) they took property without just compensation or levied a tax or impost or were in the nature of a penalty ; and

(ix) they were passed by the Governor in Council acting in error pursuant to mistaken advice.

PART III

ARGUMENT

43. The sole issue in these actions is whether The Canadian Wheat Board is entitled to the documents of title and barley that are the subject matter of the actions. By its terms Order in Council P.C. 1292 of April 3, 1947, vested the barley in the Board and entitled the Board to obtain the documents of title. The sole question, therefore, is whether this Order in Council was validly made by the Governor in Council.

44. *The Attorney General of Canada and The Canadian Wheat Board submit that Order in Council P.C.* 1292 *of April* 3, 1947, *was validly made by the Governor in Council under the authority conferred on him by the National Emergency Transitional Powers Act*, 1945 (*Ch.* 25, *Statutes of* 1945).

45. The preamble to the National Emergency Transitional Powers Act, 1945, read as follows :—

> " Whereas the War Measures Act provides that the Governor in Council may do and authorize 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 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 authorized 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 authorized to do and authorize 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."

Factum of Appellants.

46. Sections 2 and 6 (amended by Ch. 60, 1946) of that Act provided as follows:—

"2. (1) The Governor in Council may do and authorize 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—

(*a*) providing for and maintaining the armed forces of Canada during the occupation of enemy territory and demobilization 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, 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.

"(2) All orders and regulations made under this Act or pursuant to authority created under this Act have the force of law while this Act is in force and, together with orders and regulations made under the *War Measures Act* or pursuant thereto, shall, for the purposes of the *Interpretation Act*, be deemed to be regulations.

Factum of Appellants.

"(3) Every order in council made under this Act shall be laid before Parliament within fifteen days after it has been made if Parliament is then sitting, or if Parliament is not then sitting, within fifteen days after the commencement of the next ensuing session thereof and if the Senate and House of Commons within the period of forty days, beginning with the day on which any such order in council is laid before Parliament and excluding any time during which Parliament is dissolved or prorogued or during which both the Senate and House of Commons are adjourned for more than four days, resolve that it be annulled, it shall cease to have effect, but without prejudice to its previous operations or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

"(4) Every order in council made under this Act shall be published forthwith in Statutory Orders and Regulations."

* * * * * * *

"6. (1) Subject as hereinafter provided, this Act shall expire on the thirty-first day of December, one thousand nine hundred and forty-six, if Parliament meets during November or December, one thousand nine hundred and forty-six, but if Parliament does not so meet it shall expire on the sixtieth day after Parliament first meets during the year one thousand nine hundred and forty-seven; provided that, if at any time while this Act is in force, addresses are presented to the Governor General by the Senate and House of Commons respectively, praying that this Act should be continued in force for a further period, not in any case exceeding one year, from the time at which it would otherwise expire and the Governor in Council so orders, this Act shall continue in force for that further period.

"(2) Section nineteen of the *Interpretation Act* shall apply upon the expiry of this Act as if this Act had then been repealed."

47. The Act was in force on April 3, 1947. Order in Council P.C. 1112 of March 25, 1947, made pursuant to section 6 (1) of the Act, continued it in force until May 15, 1947 (Record, Vol. 3, p. 225).

48. Order in Council P.C. 1292 of April 3, 1947, was validly made by the Governor in Council under the authority conferred by section 2 of the National Emergency Transitional Powers Act, 1945. Section 2 conferred subordinate legislative power on the Governor in Council to make such regulations as the Governor in Council deemed necessary :—

(*a*) by reason of the emergency,

(*b*) for a number of purposes, including "for the purpose of . . . maintaining, controlling and regulating supplies and services, prices . . . to ensure economic stability and an orderly transition to conditions of peace; . . . or continuing or discontinuing in an orderly manner as the emergency permits measures adopted during and by reason of the war."

49. There is no doubt that the emergency referred to in section 2 of the National Emergency Transitional Powers Act, 1945, existed at the

time the regulations were made. The emergency referred to is clearly that referred to in the preamble. The emergency is described as " the national emergency arising out of the war against Germany and Japan " and in the preamble it is provided " And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing." The authority of Parliament to enact the National Emergency Transitional Powers Act, 1945, rested on the existence of this emergency. The Act was held to be valid. The emergency has, therefore, been held to have existed. *Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada*, 1947, A.C. 87. Moreover, it is clear that the national emergency arising out of a war is the continuing threat to the security and welfare of the nation as a whole arising from the war and the disturbance and upheaval of the national life arising from war conditions and continues until pre-war conditions of peace are restored or adjustment from war conditions to new conditions of peace is completed. *Fort Frances Pulp and Power Company, Limited*, v. *Manitoba Free Press Company*, 1923, A.C. 695 at 706 ; *reference Re Wartime Leashold Regulations*, unreported. It is clear that on April 3, 1947, the national emergency as so understood had not ceased to exist and the learned Judges in the Court below erred in so holding.

50. Order in Council P.C. 1292 met the requirements of section 2 of the National Emergency Transitional Powers Act, 1945. The Governor in Council deemed the regulations necessary by reason of the emergency for purposes specified in that Act. He expressly stated that he did so. The preamble to the Order in Council (Record, Vol. 3, p. 228) reads :—

> " 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
>
> (*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 set out below."

The necessity of making these regulations is, from its nature, a matter of opinion and the statement by the Governor in Council that " it is necessary " was clearly a statement of his opinion. This is, therefore, an express statement by the Governor in Council that he deemed it necessary to make the regulations by reason of the emergency for one of the specified purposes.

Factum of Appellants.

51. The opinion of the Governor in Council is not open to review from the point of view as to whether or not a court agrees with his opinion that the regulations were necessary by reason of the emergency for the purpose specified. Parliament has conferred subordinate legislative authority on the Governor in Council to make regulations. The regulations that he may make are such as in his opinion are necessary for the purposes specified. The only fact prerequisite to the existence of the authority of the Governor in Council is that he must form this opinion. In inquiring whether the regulations are authorized the court can, therefore, only ask the question—Did the Governor in Council form the opinion ? I.e. Did he deem the regulations necessary by reason of the emergency for one of the specified purposes ? If he did so, then they are within the authority conferred. The authority conferred is not to make such regulations as " are necessary " but such regulations as the Governor in Council " deems necessary." Parliament, to whom the Governor in Council is responsible, has entrusted to the Governor in Council the power to decide as a matter of policy the measures that should be taken to attain the specified objects and the court is excluded from considering whether these measures will attain these objects or not or from inquiring as to the considerations that moved the Governor in Council to form the opinion. The court could only disregard an express statement by the Governor in Council that he deemed a measure necessary within the terms of the statute if it came to the conclusion on the face of the order that he did not deem it necessary. This conclusion cannot be drawn in this case.

52. The foregoing interpretation of the statute is not only correct as a matter of applying the language of the statute, but it has been so established by authorities on similar legislation. In the *Chemicals Reference*, 1943 S.C.R. 1, the validity of regulations made under the War Measures Act was in question before this Court. Duff C.J. reviewed section 3 of the War Measures Act, which empowered the Governor in Council to make " such regulations as he deems necessary by reason of the war for the security, defence, peace, order and welfare of Canada." He pointed out that this power would, of course, be subject to the existence of a war, the terms of that Act itself and to any overriding provisions of the British North America Act. With reference to the power conferred on the Governor in Council he then continued at p. 12 :—

> " The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute : the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

"True, it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in council would be invalid as showing on its face that the essential conditions of jurisdiction were not present (*Rex.* v. *Comptroller General of Patents*); but such theoretical speculations cannot affect the question we have to decide."

Rinfret J. (as he then was) after reviewing the authorities states at pp. 17–18 :—

"There follows from the principles so enunciated these consequences :

"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 (Lord Selborne in *The Queen* v. *Burah*). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

"The conditions for the exercise of that power are: The existence of a state of war, or of apprehended war, and that the orders or regulations are deemed advisable or necessary by the Governor in Council by reason of such state of war, or apprehended war."

and at p. 19 :—

"That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated. For a court to review the enactment would be to assume the roll of legislator."

53. In the *Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada*, 1947 A.C., p. 87, the authority of the Governor in Council to make regulations providing for the deportation of persons of the Japanese race and an additional provision for the deportation of the wives and children of persons ordered to be deported in certain cases was referred to the Courts. The recitals in the Order in Council did not refer

Factum of Appellants.

to the deportation of the wives and children and the validity of this provision of the order was specifically questioned. The Privy Council held the recital to be unnecessary so long as there was nothing " apparent " to show that the order was not for an authorized purpose and held it was valid so long as it " might " be for these purposes. Lord Wright states at pp. 107–8 :—

> " The next matter arises on sub-s. (4) of s. 2 of P.C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of sixteen years) of persons with respect to whom an order for deportation has been made. The case sought to be made runs as follows : The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-ss. 1, 2 and 3 of s. 2 of the order. In the case of the classes of persons referred to in sub-ss. 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary ; a request was considered by the Governor in Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-s. 4, and the only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order, therefore, not only does not show that by reason of the existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might, indeed, be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration. The incompleteness of the recital is, in their Lordships' view, of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorized purpose would be invalid, and the only question is whether there is apparent any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorized purpose. In their Lordships' opinion there is not. The first three sub-sections of s. 2 no doubt deal with the matter which primarily engaged the attention of the Governor in Council, but it is not in their Lordships' view a proper inference from the terms of those subsections that the Governor in Council did not also deem it necessary or advisable for the security, defence, peace, order and welfare of Canada that the wives and children under sixteen of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go."

54. In *Rex* v. *Comptroller General of Patents*, (1941) 2 K.B. 306 (C.A.), the authority of His Majesty under the Emergency Powers (Defence) Act,

1939, of the United Kingdom to make regulations taking over rights under patents was questioned. The authority of His Majesty under this Act was " to make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community." Scott L.J. states at pp. 311–12 :— Factum of Appellants.

" Be that as it may, in my opinion, the effect of the words ' as appear to him to be necessary or expedient ' is to give to His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the courts. In my view, the sub-section clearly conferred on His Majesty in Council that ultimate discretion."

Clauson L.J. (later Lord Clauson) states at pp. 314–15 :—

" The applicants have attacked reg. 60E on the ground that His Majesty was not authorized by the Act of 1939 to make it. It was argued that the regulation was not necessary or expedient for securing the public safety, or any of the other purposes mentioned in the Act, but it appears to me, as a matter of construction of the Act, to be quite clear that the criterion whether or not His Majesty has power to make a particular regulation is not whether that regulation is necessary or expedient for the purposes named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the regulation. As I construe the Act, Parliament has plainly placed it within the power of His Majesty to make any regulation which appears to him to be necessary or expedient for the purposes named.

" Accordingly, the validity of reg. 60E, or any other regulation made under s. 1, sub-s. 1, of the Act, can be investigated only by inquiring whether or not His Majesty considered it necessary or expedient, for the purposes named, to make the regulation and this application for prohibition can succeed only if it is within the power of this court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the Order in Council, that this regulation appeared to him to be necessary or expedient for the named purpose. In my view, this court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty and this court has no control over it. I know of no authority which would justify the court in questioning the decision which His Majesty must be taken to have stated that

Factum of Appellants.

he has come to, namely, that this regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled.

" This being my view on the construction and effect of the Act, it is clearly wholly irrelevant to discuss whether reg. 60E was in fact necessary or expedient for securing the public safety, or for any of the other purposes set out in the subsection. It is a wholly irrelevant matter, and we have nothing to do with it. His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the regulation, and, so far as this court is concerned, there is an end of the matter."

and at p. 316 :—

" It has been said that there might be a case where, on the face of it, a regulation was bad. If that means that if, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I agree that, on the face of the order, it would be inoperative. If that is all that is meant by the expression that an order might be bad on the face of it, I do not differ."

Goddard L.J. (later Lord Goddard) states at p. 316 :—

" I agree with all which has been said and with the result which has followed."

55. In *Point of Ayr Collieries, Ltd.* v. *Lloyd George* (1943), 2 A.E.R. 546, regulation 55 (4) of the Defence (General) Regulations of the United Kingdom was considered by the Court. That regulation provided : " If it appears to a competent authority that in the interests of the public safety the defence of the realm or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking . . ." the competent authority might do so and might appoint a comptroller. An order of the Minister of Fuel and Power was attacked. Lord Greene M.R. states at pp. 547–8:—

" . . . the appellants' case is that there were no adequate grounds upon which the Minister could find as he says he found, namely, that it appeared to him that it was necessary to take control.

" If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or

not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this Court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister.

" In the present case let me assume that every statement in the appellants' evidence is correct, and that there is nothing to be said on the other side, in other words, that there are no additional facts outside those set out in the appellants' evidence. In my opinion, the appellants' evidence does not establish any circumstances which gives this court power to interfere with what is admittedly the *bona fide* decision of the Minister. We cannot investigate the adequacy of his reasons. We cannot investigate the rapidity or the lack of investigation, if it existed, with which he acted. We cannot investigate any of those things because Parliament in its decision has withdrawn those matters from the courts and has entrusted them to the Ministers concerned, the constitutional safeguard being, as I have said, the supervision of Ministers exercised by Parliament. That being so, that is an end of the case. The Minister put in no evidence. He was not bound to put in any evidence, because his case rested on the basis that, even accepting the evidence put in by the appellants, there was no case for him to answer. In my opinion, that view was perfectly correct. He was, therefore, not under any obligation to put in any evidence at all. That being so, this court, of course, has heard only one side of the case. We do not know what facts there may have been which actuated the Minister in what he did. There was no necessity for him to disclose them because he had a perfectly unanswerable case even on the appellants' own evidence."

Goddard L.J. and Du Parcq L.J. (later Lord Du Parcq) both agreed.

56. In *Carltona, Ltd.* v. *Commissioners of Works*, (1943) 2 A.E.R. 560, an order of the Commissioners of Works under a regulation similar to that in question in the *Point of Ayr Collieries, Ltd. case* was attacked. Lord Greene M.R. stated at pp. 563–4 :—

" The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith—and I may say that there is no such allegation here—is not open in this court. It has been decided as clearly as anything

can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

Goddard and du Parcq L.JJ. agreed.

57. The following authorities also support this view: *Liversidge* v. *Anderson*, 1942 A.C. 206 (H.L.) and *Greene* v. *Home Secretary*, 1942 A.C. 284 (H.L.).

58. If it is suggested that the decisions in the Courts in the United Kingdom set out above are not applicable to the National Emergency Transitional Powers Act, 1945, because of the limitations on the power of Parliament under the British North America Act, this suggestion is not correct. The National Emergency Transitional Powers Act, 1945, has been held to be within the authority of Parliament. *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (above). The effect of this decision and the decisions holding the War Measures Act to be within the authority of Parliament is to establish that in relation to an emergency Parliament may confer on the Governor in Council plenary legislative authority of the same kind as is conferred under the statutes of the United Kingdom considered in the authorities mentioned above. As Duff C.J. said, the discretion is plenary except only that no regulation may be made that is directly repugnant to a provision in the British North America Act or a provision in the statute itself. Subject to this one qualification the same principles apply. There are no such provisions to which P.C. 1292 was repugnant.

59. It is clear from the foregoing cases that where action is taken under an authority conferred in the terms used in the National Emergency Transitional Powers Act, 1945, and the person taking the action states expressly that he has formed the opinion required by the statute, the action can only be held to be unauthorized if it appears on the face of the order that he did not do so or if it is not possible that the order " might " have been deemed necessary so that the action was taken in bad faith. This is not the present case.

60. *The Attorney General of Canada and The Canadian Wheat Board submit that the learned Judges in the Courts below erred in holding sections* 22 *to* 26 *and section* 36 *enacted by Order in Council P.C.* 1292 *of April* 3, 1947, *to be ultra vires the Governor in Council on the grounds stated by them in their reasons for judgment and set out in Part II of this Factum.*

61. In order to support the finding that these regulations were *ultra vires* on the grounds referred to by the learned Judges these grounds must have effect in one of either two ways. They must show either that

(*a*) the regulations fell outside the authority conferred on the Governor in Council so that the Governor in Council could not make them even if he deemed them necessary by reason of the emergency for the purposes specified ; or

(*b*) notwithstanding his express statement, on the face of the order it appears that the Governor in Council did not deem the regulations necessary by reason of the emergency for the purposes specified and thus acted in bad faith in making the statement.

62. In accordance with the authorities mentioned above, the only limitations on the authority of the Governor in Council to make such regulations as he deems necessary by reason of the emergency for the purposes specified are such specific limitations as are imposed by

(*a*) other provisions of the National Emergency Transitional Powers Act, 1945, itself, or

(*b*) any repugnant provision of the British North America Act.

63. There are no provisions in the National Emergency Transitional Powers Act, 1945, that restrict the authority of the Governor in Council to make the regulations set out in P.C. 1292 of April 3, 1947.

64. There are no provisions in the British North America Act that restrict the authority of the Governor in Council to make these regulations or to which their provisions are repugnant. If it is suggested that the regulations impose a tax or impost and for this reason are repugnant to sections 53 and 54 of the British North America Act this suggestion is unsound. Sections 53 and 54 of the British North America Act relate to Bills in the House of Commons. These sections do not prohibit Parliament from authorizing by a Bill properly passed the imposition of taxation by a subordinate legislative authority. *Powell* v. *Appollo Candle Limited*, (1885) 10 A.C. 282. Parliament may, therefore, notwithstanding these sections, pass a statute authorizing the Governor in Council to impose a tax or impost. Sections 53 and 54 would, of course, apply to the statute conferring the authority. There is nothing in this case to show that these sections have not been complied with in the enactment of the National Emergency Transitional Powers Act, 1945. The Attorney General of Canada states that in fact these provisions were complied with. In any event, the issue in these actions is whether the property in the barley and the right to the documents of title were vested in the Canadian Wheat Board. This is not taxation. *Eastern Terminal Elevator Company Ltd.* v. *The King* 1925 S.C.R. 434 at 447. It follows that Order in Council P.C. 1292 of April 3, 1947, was not repugnant to sections 53 and 54 of the British North America Act. There are no other provisions of the British North America Act to which it can be argued that it was repugnant.

65. The learned Trial Judge found that the Governor in Council did not have authority under the National Emergency Transitional Powers Act, 1945, to appropriate property. By this it is understood

Factum of Appellants.

that he meant that even if the Governor in Council deemed it necessary by reason of the emergency for one of the specified purposes to appropriate property it was not within his authority to do so. The Trial Judge based his decision in this respect on a comparison with the corresponding provisions in the War Measures Act where the power to appropriate property was specifically enumerated. In accordance with the authorities already cited his finding is incorrect. There is no doubt that under the War Measures Act the Governor in Council would have had authority to appropriate property even if this topic had not been specifically enumerated in section 3 of the Act. It has been held by this Court (*Re* Gray (1917) 57 S.C.R. 150) and by the Privy Council (*Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada* (above) p. 105) that the authority of the Governor in Council under the opening words of section 3 of the War Measures Act extended to all matters that he deemed necessary by reason of the war for the security, defence, peace, order and welfare of Canada whether or not the matter fell within the enumeration or outside the enumeration. The authority conferred is a plenary discretion. The National Emergency Transitional Powers Act, 1945, authorized the Governor in Council to make such orders and regulations as he deemed necessary by reason of the emergency for the specified purposes. There is no enumeration but the authority of the Governor in Council is as plenary in relation to matters that he deems necessary by reason of the emergency for the specified purposes as was his authority under the War Measures Act for matters he deemed necessary by reason of the war for the security, defence, peace, order and welfare of Canada.

66. The second basis on which the grounds set out by the learned Judges in the Courts below might show that Order in Council P.C. 1292 was *ultra vires* must be that they show that the Governor in Council could not have deemed the regulations to be necessary for the specified purposes and, in effect, acted in bad faith. Where the Governor in Council has, as he did in this case, expressly stated that he holds the requisite opinion a court cannot override this statement unless the court concludes that it appears on the face of the Order that he did not reach and could not honestly have reached such an opinion. The grounds set out by the learned Judges do not support this conclusion and the learned Judges erred in holding the regulations *ultra vires*.

67. Moreover, it is clear that the regulations were for the purpose of the control and regulation of prices and supplies for the maintenance of economic stability and an orderly transition to conditions of peace. The legislative history of the regulations relating to " oats and barley " in the Western Grain Regulations and of the whole body of laws enacted during the war of which these regulations form a part, establish clearly that the regulations enacted by this Order in Council were an integral part of a scheme for orderly decontrol. The prices and the export and domestic marketing of oats and barley had been subject to control during the period 1942 until 1947. The successive amendment and repeal of the laws enacted during wartime for stabilization of the economy commenced in 1945 and continued until virtually the present time. The enactment of Order in Council P.C. 1292 in April 1947, when this process was in full swing, to have effect coincidentally with an increase in the ceiling price of barley

under the Wartime Prices and Trade Board Regulations and the commencement of payment of a subsidy on oats and barley shows that the Order in Council was a part of the legislation for the withdrawal of economic controls. Further the Governor in Council is expressly authorized by the statute to make such regulations as he deems necessary to effect the removal of the controls " in an orderly manner." A programme of decontrol, i.e. the amendment or repeal of laws fixing ceiling prices or restricting the export of a commodity from Canada to markets having other prices or regulating internal marketing in Canada, necessarily involved a consideration of the interests of many persons. These may be persons who produced the commodity, who deal or trade in the commodity, and who consumed the commodity, in the case of barley, those who feed barley to livestock. An increase in the ceiling price brought about as a part of the general scheme of decontrol specifically affects the interests of all these groups of persons. The producers had been denied export markets and higher prices when they sold their barley prior to the change. The feeders required subsidies to enable them to continue to purchase barley after the change until their products—meat—were released from price control. The dealers who had bought while the lower ceiling price was in effect with the expectation of a normal trading profit would, in the absence of some such provision as was made, have obtained a large additional profit resulting solely from the programme of decontrol. The simultaneous increase in the " floor prices " as part of the stabilization programme and part of orderly withdrawal of controls, in fact guaranteed this fortuitous profit and, if necessary, the guarantee would have had to have been met out of public funds. The vesting of the barley in The Canadian Wheat Board, with full compensation at the previous maximum price—the previous ceiling price—avoided this additional profit to dealers without causing any loss of their normal trading profits and avoided the discrimination against other persons which otherwise would have resulted. It was a matter that the Governor in Council clearly deemed, in good faith, as he stated, necessary for the purpose of orderly decontrol and discontinuance in an orderly manner of measures adopted for economic stability.

68. *For the foregoing reasons, the Attorney-General of Canada and The Canadian Wheat Board submit that the learned Judges in the Court below erred in holding Order in Council P.C. 1292 of April 3, 1947, to be ultra vires the Governor in Council and in holding that The Canadian Wheat Board was not entitled to delivery of the documents of title and to the barley in issue in these actions.*

F. P. VARCOE

H. B. MONK

D. W. MUNDELL