13, 10 2

Factum of Hallet and Carey Limited.

Factum of the Respondent Hallet and Carey Limited

Part I

STATEMENT OF FACTS

This Respondent is in the unfortunate position of being a stake holder. Shortly after receiving the demand dated 27th May, 1947, from the Appellant The Canadian Wheat Board for the barley (Exhibit 1 (8), Record, Vol. 3, page 240) and the demand from its principal, the Respondent Nolan, dated 14th April, 1947 (Exhibit 1 (6), Record, Vol. 3, page 237) this Respondent applied to the court for an interpleader order. The Canadian Wheat Board opposed the application on the ground that the Board was an agent of the Crown and that the Crown could not be impleaded without its consent. (Record, Vol. 2, page 58). The application for the interpleader order was dismissed and the Respondent had no alternative but to file a defence to the claim of The Canadian Wheat Board and to the claim of the Respondent Nolan. 10

This Respondent takes the position that its principal, the Respondent Nolan, is entitled to the barley and that the judgments in the court below should be upheld.

This Respondent refers to the Statement of facts and adopts the argument submitted in the factum of the Respondent Nolan, but for the purposes of its argument this Respondent directs the attention of the court to some of the facts and documents. 20

" Instructions to the Trade " Nos. 59 to 71, being Exhibits Nos. 2 to 11 both inclusive (Record, Vol. 3, pages 211–227) were issued by the Board before P.C. 1292 (Exhibit No. 1 (4), Record, Vol. 3, page 228) was passed by the Privy Council which was on the 3rd day of April, 1947. A perusal of the order-in-council and the " Instructions to the Trade " indicates that it was not the intention of the Board to take over any oats and barley although such was the declared or ostensible purpose thereof.

In this connection we refer to certain parts of the " Instructions to the Trade " and to the order-in-council. 30

On the 17th day of March, 1947, The Canadian Wheat Board, hereinafter referred to as the Board, issued " Instructions to the Trade " No. 59 (Exhibit No. 2, Record, Vol. 3, page 211).

In and by this pronouncement the Board announced :—

> " 2. Support Prices on Oats and Barley : The Canadian Wheat Board will maintain support prices on Canada Western Barley and Canada Western Oats as follows :—
>
> No. 1 Feed Barley—90c. per bushel basis in store Fort William/Port Arthur. 40
>
> (Prices for other grades to be announced later.)
>
> No. 1 Feed Oats—61½c per bushel basis in store Fort William/Port Arthur.
>
> (Prices for other grades to be announced later.)

Factum of Hallet and Carey Limited.

3. Maximum Prices on Oats and Barley: On behalf of the Wartime Prices and Trade Board the maximum prices on oats and barley grown in Western Canada are announced as follows :—

Barley—93c per bushel, basis in store Fort William/Port Arthur or Vancouver.

Oats—65c per bushel, basis in store Fort William/Port Arthur or Vancouver."

"5. Take-over of Existing Stocks: All Western Oats and Barley in commercial channels in Canada as at midnight, March 17th, 10 1947, must be sold to the Canadian Wheat Board basis 51½c per bushel for all grades of oats and 64¾c per bushel for all grades of barley, in store Fort William/Port Arthur or Vancouver."

"7. Outstanding Contracts and export Commitments.

(a) Oats and Barley taken over by the Board at former ceiling prices will be sold back to the same handlers for domestic consumption at the new support prices, provided that :— "

With "Instructions to the Trade" No. 59 there was delivered a statement entitled "Outline of Government Policy on Oats and Barley as announced in Parliament March 17, 1947." Paragraph 4 thereof reads as 20 follows :—

(Record, Vol. 3, page 214.)

"In order to avoid the *fortuitous profits* to commercial holders of oats and barley that would otherwise result from the action that has been described, handlers and dealers will be required to sell to the Wheat Board on the basis of existing ceilings of 64¾c per bushel for barley and 51½c per bushel for oats, all stocks in their possession at midnight 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 30 charges in terminal positions, special selection premiums, etc. which are considered in the judgment of the Board fair and reasonable."

On the 18th March, 1947 by "Instructions to the Trade" No. 61 (Exhibit 4, Record, Vol. 3, page 216) the Board fixed the support price for all grades of oats and barley.

On the 19th March, 1947 W. C. Macnamara, Assistant Chief Commissioner for the Canadian Wheat Board, as administrator of grain prices (Approved, D. Gordon, Chairman, Wartime Prices and Trade Board) issued administrator's order A2303 by which the maximum price of oats was raised to 65c per bushel and barley 93c per bushel, basis in store 40 terminal elevators.

(Exhibit 13, Record, Vol. 3, page 220.)

On the 20th March, 1947 by "Instructions to the Trade" No. 64 (Exhibit 7, Record, Vol. 3, page 222) the Board announced that it would consider applications from holders of oats and barley taken over by the Board to re-purchase the oats or barley taken over by the Board on the basis of the new ceiling price. The holders are requested to forward details in

Factum of Hallet and Carey Limited.

writing accompanied by a marked cheque for 28½c per bushel for the quantity involved in the case of barley, and 13½c per bushel for the quantity involved in the case of oats.

All these instructions were issued without authority and apparently in confident anticipation of P.C. 1292 being passed at an early date.

On 3rd April, 1947 P.C. 1292 was passed amending Western Canada Grain Regulations. (Record, Vol. 3, page 228). The preamble reads in part as follows :

> " 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 and 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," etc. ;

10

By Section 21 (1) (a) " barley " means barley grown in the designated area.

Section 2 (j) of the Western Grain Regulations provides that " designated area " means the area comprised by Manitoba, Saskatchewan, Alberta, Peace River district, etc. (Record, Vol. 3, page 162).

20

By Section 21 (c) of P.C. 1292 " oats and barley in commercial positions " means oats and barley which *are not the property of the producer thereof* and are in store in warehouses, etc.

Generally speaking, therefore, the oats and barley vested in the Board under P.C. 1292 were the oats and barley in warehouses in western Canada which were not the property of the producer.

Section 22 of P.C. 1292 provides for the vesting of oats and barley in commercial positions in the Board on and after the 18th day of March 1947. (Record, Vol. 3, page 229).

Section 23 (Record, Vol. 3, page 229) provides that the Board shall pay to such owners the former ceiling prices.

30

Section 27 (Record, Vol. 3, page 231) provides as follows :

> " (1) The Board shall, from time to time, sell and dispose of all oats or barley vested in it by section twenty-two at such prices as it may consider reasonable."
>
> (2) Net profits arising from the operations of the Board in respect of oats and barley vested in it by section twenty-two, and any monies paid to the Board under section twenty-four, shall be paid into the Consolidated Revenue Fund.
>
> (3) The Board shall be reimbursed in respect of net losses arising from the operations of the Board in respect of oats and barley vested in it by section twenty-two out of monies provided by Parliament."

40

On the 7th April, 1947 the Board issued " Instructions to the Trade " No. 74 (Exhibit 1 (5), Record, Vol. 3, page 235). By these instructions the

Board demanded documents of title to all barley and oats in commercial positions, etc. This demand did not cover stocks of barley (other than seed) held by or for account of maltsters or manufacturers of pot and pearl barley. (Record, Vol. 3, page 236).

Apparently farmers and brewers were considered by the Board to be a privileged class.

There was no shortage in stocks of oats or barley and no emergency in oats or barley. After the 17th March, 1947 oats and barley were dealt with and traded in in the same manner and to the same extent as before that date and no measure of control over these commodities was exercised by the Board.

See the evidence given by officials of three leading grain companies, namely Albert H. Hand (Record, Vol. 3, pages 107, 108, 109 and 110); Charles Kroft (page 121), and Gordon G. Pirt (page 133, lines 31 to 40).

The evidence given by these witnesses shows, and it is not contradicted, that the Board did not take possession of any oats or barley but merely collected the difference between the new ceiling price and the old ceiling price from the owners thereof (other than producers) in commercial positions in the designated area.

PART II

STATEMENT OF POINTS IN ISSUE ON APPEAL AND POSITION OF RESPONDENT IN REGARD THERETO

As all the contentions of this Respondent are dealt with in the factum of the Respondent Nolan, this Respondent will not repeat them but will adopt the arguments submitted on behalf of the Respondent Nolan on the points not covered herein.

1. This factum will be confined mainly to the contention that the court is entitled to consider the purpose, intent and effect of the Transitional Powers Act and is entitled to be informed by evidence of the real purpose, intent and effect of P.C. 1292 and should declare the same invalid on the ground that this order-in-council was only a colourable device designed to carry out a purpose not authorized by the Transitional Powers Act.

2. This Respondent submits that the "Instructions to the Trade," the evidence adduced at the trial and the order-in-council itself all indicate and demonstrate that P.C. 1292 was passed for the purpose of depriving some of the holders of barley in commercial positions in the designated area of the benefit of the increase in ceiling prices and was not passed in good faith for the purpose of maintaining, controlling and regulating supplies or for effecting an orderly transition to conditions of peace as recited in the preamble to the Transitional Powers Act and was therefore ultra vires and of no force or effect.

3. The Transitional Act did not authorize the confiscation of supplies. It only authorized the maintenance, control or regulation of supplies. The effect of vesting part of the barley in western Canada in the Board followed by immediate re-sale to such owners with no change of possession had no possible relation to the maintenance, control or regulation of supplies of oats and barley.

PART III

ARGUMENT

POINT I

THE COURT IS ENTITLED TO CONSIDER THE PURPOSE, INTENT AND EFFECT OF THE TRANSITIONAL ACT AND IS ENTITLED TO BE INFORMED BY EVIDENCE OF THE REAL PURPOSE, INTENT AND EFFECT OF P.C. 1292 AND TO DECLARE THE SAME INVALID ON THE GROUND THAT THIS ORDER-IN-COUNCIL WAS ONLY A COLOURABLE DEVICE DESIGNED TO CARRY OUT AN OBJECT NOT AUTHORIZED BY THE TRANSITIONAL ACT.

This Respondent relies in particular upon the decision of this court in *Lower Mainland Dairy Products Board et al* v. *Turner's Dairy Limited et al* [1941] S.C.R. 573. In that case the learned trial judge admitted evidence designed to prove that the administrative body in question did not use its powers in good faith for the purposes for which they were given but that the purpose and effect of the impugned orders was to enable the Board, in co-operation with its agent the Clearing House, to equalize prices as between producers who had a market for their milk in the more advantageous fluid milk market but must be sold in the manufacturers market at a lower price ; and to accomplish this by abstracting from the proceeds of the sales of the former class in the fluid milk market a sufficient part of the returns from the sale of their milk to enable the Board, by handing that part over to the other producers, to bring the several rates of return for the two classes into a state of equality. 10 20

Attention is called to the following extract from the judgment of Mr. Justice Taschereau, reported at page 583 :—

> " The appellants have also submitted that some evidence given to show the intent and effect of the orders was improperly admitted. I agree with the majority of the Court of Appeal, that the evidence was admissible and that the objection cannot stand. In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers. The Privy Council took similar views in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1939 A.C. 117) and Lord Maugham delivering judgment for the Judicial Committee said, at page 130 :— 30 40
>
> > ' A closely similar matter may also call for consideration, namely, the object or purpose of the act in question. It is not competent either for the Dominion or a province under the guise or the pretence or in the form of an exercise of its own powers

to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other. Here again matters of which the Court would take judicial notice must be borne in mind and other evidence in a case which calls for it.

Factum of Hallet and Carey Limited.

The next step in a case of difficulty will be to examine the effect of the legislation. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.'

10

I believe that this is the law that should govern this case. It applies to the interpretation of federal and provincial statutes, and I cannot see why the courts should withhold its application to orders of a board which is an emanation of a body subject to this rule."

We refer also to *Proprietary Articles Trade Association et al* v. *Attorney-General for Canada* [1931] A.C. 310. At page 317 Lord Atkin is reported in part as follows :—

" Both the act and the section have a legislative history which is relevant to the discussion."

20

This Respondent also relies upon *In Re Price Brothers & Company and Board of Commerce of Canada*, 60 S.C.R. 265, and to the well-known passage from the judgment of Mr. Justice Anglin at page 279 which reads in part as follows :—

" The common knowledge possessed by every man on the street, of which courts of justice cannot divest themselves, makes it impossible to believe that the Governor-in-Council on the 29th of January, 1920, deemed it necessary or advisable for the security, defence, peace, order, or welfare of Canada—by reason of the existence of real or apprehended war, invasion or insurrection, to confer on the Paper Controller such powers as the Board has purported to exercise by its order now in appeal. Advisability or necessity, however great, arising out of post-war conditions is not the same thing as, and should not be confounded with advisability or necessity by reason of the existence of real or apprehended war."

30

The admission in evidence of extraneous material is discussed in *Home Oil Distributors Limited* v. *Attorney-General for British Columbia* [1940] S.C.R. 444. At page 453 Mr. Justice Davis is reported as follows :—

" A rule somewhat wider than the general rule may well be necessary in considering the constitutionality of legislation under a federal system where legislative authority is divided between the central and the local legislative bodies."

40

At this point we also point out a difference in the wording of the War Measures Act and the Transitional Powers Act of 1945. Section 3 of the War Measures Act reads as follows :

" 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, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; *and for greater certainty, but not so as to restrict the generality of the foregoing terms*, it is hereby declared that the powers of the Governor-in-Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:" The corresponding section in the Transitional Powers Act reads 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*,"

It is to be observed therefore that Section 3 of the War Measures Act is not limited in its terms whereas under Section 2 (1) of the Transitional Powers Act the Governor-in-Council can only do and authorize such acts and things as he may . . . deem necessary or advisable *for the purposes* therein specified.

It must also be borne in mind that there is a distinction between an Order-in-Council and an Act of Parliament. See *The King* v. *Singer*, 1941, S.C.R. 111. At page 115 Chief Justice Rinfret (then Mr. Justice Rinfret) is reported as follows:

"A regulation made under an Act, and in particular a regulation under the War Measures Act, is not an enactment passed by Parliament; it is an enactment made by the Government.

An Act of Parliament, in order to become law and to form part of the statutes of Canada, must be adopted by the House of Commons, the Senate and receive the Royal Assent. It is debated publicly, to the knowledge of the public, and it comes into force on the day of its sanction by Royal Assent, which is given publicly.

The regulation takes the form of an Order-in-Council, debated secretly by the Privy Council and, generally speaking, will come into force as soon as it is signed by the Governor-General, without there being any essential requirement for its publication.

These circumstances show the great difference between the Act of Parliament and the Order-in-Council, in so far as the people is concerned; and the difference takes even more importance when it is applied to Section 164 of the Criminal Code, which requires for the guilt of an accused that he should have been doing or omitting any act 'wilfully' and 'without lawful excuse.'"

In this connection we quote from the judgment of Duff, C.J. in the case commonly referred to as the *Chemicals Reference*, 1943 S.C.R. 1, at page 13:

"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 (1)); but such theoretical speculations cannot affect the question we have to decide.

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor-General-in-Council are not, by the War Measures Act, outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are
10 given, although here again, as regards the present Reference, that rule has only a theoretical interest."

In view of the limited powers conferred by the Transitional Powers Act and in view of the fact that the court is here asked to pass upon an order-in-council and not upon a statute, it is submitted that the court should not only consider the plain terms of the order-in-council itself but the extraneous evidence submitted at the trial.

In the court below the Appellants relied upon the case commonly referred to as the *Japanese Race case*, reported 1946 S.C.R. 248, affirmed 1947 A.C. 87. The following is a quotation from the opinion of Lord Wright
20 at page 101:

"The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge. Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the Provinces comes into play. *But very clear evidence that an emergency has not arisen, or that*
30 *the emergency no longer exists*, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation."

It is submitted that there is here very clear evidence that no emergency had arisen in oats or barley. If there had been an emergency in oats or barley P.C. 1292 was not intended or designed to deal with such an emer-
40 gency. The instructions issued by the Board and the actions of the Board show that it did not consider or even pretend that there was an emergency in these commodities.

The judgment of the Chief Justice of Manitoba is largely directed to this point and the Respondent suggests that the reasons given are sound and should be confirmed. As pointed out by the learned Chief Justice no attempt was made by the Appellants to show there was an emergency in oats or barley or to show why the vesting of a portion thereof assisted in the discontinuance of the control of same in an orderly manner.

Factum of Hallet and Carey Limited.

This Respondent submits that P.C. 1292 is contrary to the letter and spirit of the powers conferred on the Governor-in-Council by the Transitional Act.

At page 102 of the *Japanese* case Lord Wright states :—

> " For the validity of the orders it is necessary first, that on the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor-in-Council, second, that, assuming the orders were within the terms of the War Measures Act, *they were not for some reason in law invalid.*"

and again at page 107 :— 10

> " 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.*"

and again at page 108 :—

> " The preamble to the Transitional Act states clearly the view of the Parliament of the Dominion as to the necessity of imposing 20 the powers which were exercised. The argument under consideration invites their Lordships, *on speculative grounds alone*, to overrule either the considered opinion of Parliament to confer the powers or the decision of the Governor-in-Council to exercise them. So to do would be contrary to the principles laid down in *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co.* and accepted by their Lordships earlier in this opinion."

The Respondents are not inviting the Court on speculative grounds alone to overrule the decision of the Governor-in-Council to exercise powers conferred on the Governor-in-Council by an Act of Parliament. The 30 Respondents are asking the Court to find that the Governor-in-Council did not exercise the powers conferred by the Transitional Act but acted contrary to such powers and are asking the courts to find that in view of the evidence and the terms of P.C. 1292 it is apparent that the Governor-in-Council did not and could not have considered it necessary or advisable for any authorized purpose to vest part of the oats and part of the barley in commercial positions in one part of the country in The Canadian Wheat Board.

If no extraneous matters can be considered by the Court then there would be no limit to government by order-in-council. If an order-in- 40 council is unassailable merely because it purports to be an exercise of the powers conferred by statute, and if the order-in-council must be accepted at its face value and if the Court cannot for any purpose look behind the " iron curtain " the Governor-General in Council would become a legislative body able at all times to override provincial rights under the constitution.

Since this factum was drafted counsel for the Respondent has had an opportunity of reading the judgments handed down by the Chief Justice

Factum of Hallet and Carey Limited.

and other members of this Court "IN THE MATTER OF a reference to determine the validity of the Wartime Leasehold Regulations." There are many passages in these judgments which tend to support and justify the arguments advanced by this Respondent and which confirm the views expressed by Mr. Justice Taschereau in the case of *Lower Mainland Dairy Products Board et al* v. *Turner's Dairy Limited et al* [1941] S.C.R. 573, which is above referred to, and in particular his opinion that extraneous evidence is admissible in order to disclose to the court the true purposes and effect of legislation, and that colourable devices cannot be used by legislative
10 bodies to deal with matters beyond their powers.

POINT 2

THE INSTRUCTIONS TO THE TRADE, ALL RELEVANT DOCUMENTS, AND THE EVIDENCE ADDUCED AT THE TRIAL INDICATE AND DEMONSTRATE THAT P.C. 1292 WAS PASSED FOR THE PURPOSE OF DEPRIVING THE HOLDERS OF BARLEY IN COMMERCIAL POSITIONS IN THE DESIGNATED AREA OF THE BENEFIT OF THE INCREASE IN CEILING PRICES AND WAS NOT PASSED IN GOOD FAITH FOR THE PURPOSE OF MAINTAINING, CONTROLLING AND REGULATING SUPPLIES OR FOR ANY OF THE PURPOSES RECITED IN THE PREAMBLE TO THE TRANSITIONAL ACT AS SPECIFIED THEREIN.

20 This Respondent again points out that at the trial the Appellant Board was not, and in the Court of Appeal neither the Appellant Board nor the Attorney-General for Canada were able to suggest or explain how the vesting in the Board of a portion of the oats and barley in one part of the country could be regarded as in any way connected with maintaining, regulating or controlling supplies.

At the trial the defendant Nolan submitted facts and figures through witnesses and Exhibits 14 (Record, Vol. 3, pages 260 to 265 inc.) and 15 (Record, Vol. 3, pages 266 and 267) for the purpose of proving, and which did demonstrate that P.C. 1292 covered only a part of the oats and barley
30 in western Canada and that there was no emergency in oats or barley and that in view of world prices the Board took no risk in advancing new support prices to 65c a bushel for oats and 93c a bushel for barley.

Exhibit 14 (Record, Vol. 3, pages 263 and 264) shows that as at 31st March, 1947 total stocks of oats in commercial positions was 29,030,103; on farms 154,935,000; and that as at 31st March, 1947 total stocks of barley in commercial positions was 18,874,617 and on farms 57,960,000.

If it was necessary or advisable to vest oats and barley in commercial positions in the Board, why were oats and barley in commercial positions owned by the producers thereof not vested in the Board?

40 No explanation was given or suggested as to why the Board went through the form of re-selling the oats and barley so vested in it to the holders thereof.

It was obviously impossible to explain or justify P.C.1292 as a measure designed to bring about orderly decontrol.

The Board did not take delivery of any oats or barley. In all cases (except from Nolan who refused to pay) it accepted the difference between

the old and the new ceiling price. Thereafter the holders of all oats and barley in commercial positions fulfilled their existing contracts for barley, accepted new contracts from other customers and in all respects went about their business as if P.C. 1292 had not been passed. See evidence of A. H. Hand, Charles Kroft and Gordon G. Pirt, hereinbefore referred to at the end of the statement of facts.

The remarkable thing is that on the 17th of March the Board announced that it was going to take over barley in commercial positions in the designated area at the current price as at midnight on the 17th of March, 1947, which was two days before the Wartime Prices and Trade Board announced the new ceiling price. (Exhibit 13, Record, Vol. 3, page 220.)

It is worthy of note that this order is signed by the Commissioner of the Canadian Wheat Board, who was also the administrative officer of the Wartime Prices and Trade Board who promulgated the new ceiling prices for barley and oats.

It is still more remarkable that " Instructions to the Trade " Nos. 59 to 66 both inclusive were issued prior to the 3rd day of April, 1947, when P.C. 1292 was passed. All these " Instructions to the Trade " were absolutely unauthorized and were illegal acts.

It should also be pointed out that on the 7th of April, 1947, the Board issued " Instructions to the Trade " No. 74 by which the Board demanded the documents of title to oats and barley affected by P.C. 1292. One can only speculate as to why this demand did not cover stocks of barley held by or for the account of maltsters or manufacturers of pot and pearl barley.

One of the most significant provisions in P.C. 1292 is Section 24. This provides in effect that if a person owned oats or barley in commercial positions on the 17th of March or who after that date and before the 3rd of April became the owner of oats or barley at a price not exceeding the previous ceiling price, and who before the 3rd of April sold the oats or barley otherwise than to the Board or at a price not exceeding the previous maximum price, he is required to pay the Board the difference between the previous maximum price and the new maximum price.

Section 24, although obscurely worded, is designed to collect the same tax of 28½c a bushel from any person who bought and sold barley which was in commercial positions between the 17th of March and the 3rd of April.

It is impossible to imagine how this could have been a measure designed to maintain, regulate or control supplies. It does clearly indicate however that the sole intent and purpose of P.C. 1292 was to make a levy on holders of barley and oats in commercial positions in the designated area.

P.C. 1292 is by way of amendment to the Western Grain Regulations. It is most complicated in its terms and any member of the Privy Council not familiar with the Western Grain Regulations or the grain trade may not have grasped the significance of the order-in-council or become seized of the fact that only a portion of the oats and barley in western Canada was to be vested in the Board. He might not have known that the ceiling price

had been raised on the 19th of March, whereas Section 22 of the order-in-council provides that the price is to be adjusted as of the 17th of March.

Under subsection 2 of section 27 the net profits arising from the operations of the Board in respect to oats and barley vested in it are to be paid into the Consolidated Revenue Fund.

Lack of jurisdiction is apparent on the face of P.C. 1292 in that a consideration of its essential features indicates that its purpose and object was not to maintain control or regulate supplies of oats and barley but
10 rather to deprive a certain class of the owners of these commodities of the benefit of the advance in price. P.C. 1292 cannot be justified as an order designed to effect an " *orderly transition to conditions of peace.*"

POINT 3

THE TRANSITIONAL ACT DID NOT AUTHORIZE THE CONFISCATION OF SUPPLIES, IT ONLY AUTHORIZED THE MAINTENANCE, CONTROL OR REGULATION OF SUPPLIES. THE EFFECT OF VESTING PART OF THE BARLEY IN WESTERN CANADA IN THE BOARD WAS TO THAT EXTENT TO TAKE IT OUT OF THE HANDS OF THE OWNERS THEREOF AND THUS PREVENT THE MAINTENANCE, CONTROL OR REGULATION OF SUPPLIES OF OATS AND
20 BARLEY.

The power to regulate a trade does not include power to prohibit. *Municipal Corporation of the City of Toronto* v. *Virgo*, 1896 A.C. 89. The headnote reads as follows :

" A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner :—

So held, where, under c. 184 of Revised Statutes of Ontario, 1887, s. 495, a municipal by-law was passed prohibiting hawkers
30 from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised."

The judgment of their Lordships was delivered by Lord Davey. At page 93 he is reported as follows :

" No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a
40 trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for its shews that when the Legislature intended to give power to prevent or prohibit it did so by express words."

See *Attorney-General for Ontario* v. *Attorney-General for the Dominion* and *The Distillers and Brewers' Association of Ontario*, 1896 A.C. 348.

Factum of Hallet and Carey Limited.

In this case the judgment of their Lordships was delivered by Lord Watson. At page 363 he is reported as follows :

> " A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation."

He then quotes with approval the opinion of Lord Davey above referred to.

This Respondent also refers to the case of *Canada National Fire Insurance Company* v. *Hutchings et al*, 1918 A.C. 451. It was held that although the Companies Act (Canada) gave the company power to pass by-laws regulating the transfer of stock that the company could not pass a by-law which virtually prohibited the transfer of shares. 10

In this connection this Respondent calls attention to and relies upon the judgement of Dysart, J.A., and refers to the following passages: (Record, Vol. 3, page 329).

> " The ' orders and regulations ' which are authorized by the Transitional Act are, so far as relevant to the case at bar, confined to such as the Governor-in-Council ' may, by reason of the continued . . . emergency, deem necessary or advisable for the purpose of . . . maintaining, controlling and regulating supplies ' of barley. The threefold ' purpose ' sets the outside limit of the power to make regulations. In this respect the Transitional Act differs fundamentally from the War Measures Act, where the general purposes are expressly declared to be unrestricted by the particular purposes. Judicial decisions interpreting this latter Act are, therefore, of little assistance in the interpretation of the Transitional Act. The power inferred by this Act is the measure by which the regulations must be tested for validity. That power authorizes regulations (a) for ' maintaining . . . supplies ' — that is, for keeping those supplies in being, for preserving them unimpaired ; (b) for ' controlling . . . supplies ' — that is, for exercising restraint and protection over the actions of other persons respecting those supplies ; and (c) for ' regulating . . . supplies ' — that is, for governing, guiding and directing them by some rule. 20 30
>
> Those limited purposes clearly do not authorize the vesting regulation (No. 22). The power to vest is not expressed, and it cannot be implied. Least of all is there power to vest retroactively to March 17, 1947. Nor is there any power expressly given to compel sales of barley to the board. Compulsory sales are not impliedly contained in ' maintaining, controlling and regulating supplies ' — certainly not at the pre-existing low-scale prices. 40
>
> Moreover, the ' supplies ' of barley which the Transitional Act sought to maintain and control were surely those of the whole of Canada ; the Act does not suggest that only a small and selected portion of those supplies are to be affected. Yet P.C. 1292 confines the vesting or compulsory sales to only a part of the western supplies.

13, 1952

The limitation on the amount of barley intended by that regulation to be thus controlled indicates that the real purpose of the order was not the carrying out of any of the designated purposes under the Transitional Act."

CONCLUSION

This Respondent therefore respectfully submits that these appeals should be dismissed with costs.

W. P. FILLMORE,

Of Counsel for the Respondent
HALLET & CAREY LIMITED.

10