13, 1952

Factum of Respondent Nolan

PART I

STATEMENT OF FACTS

On March 17, 1947, Jeremiah J. Nolan, a grain merchant, residing in Chicago, a citizen of the United States, was the owner of 40,000 bushels of No. 3 C.W. Six-Row barley.

This barley was on that date in varying quantities in the terminal elevators at Fort William or Port Arthur of the Manitoba Pool Elevators, Canadian Consolidated Grain Company Limited, United Grain Growers Terminals Limited and Fort William Elevator Company Limited, respectively, hereinafter referred to as the "warehousemen." Each of the warehousemen had issued its warehouse receipt, or receipts, for the quantity of barley stored by it. Each warehouse receipt was issued to or assigned and endorsed to Hallet and Carey Limited, which held these documents at Winnipeg as agent for Nolan. It had no beneficial interest in them, nor in the barley referred to in them, except that it asserted the claim to a lien for storage and carrying charges.

The barley had been purchased by Hallet and Cary Limited in 1943 on instructions of Nolan, and the former held the barley for Nolan's account until it was sold in December, 1948, under court order. The warehousemen had, from the date of issue of their receipts until the sale of the barley, physical possession of the barley, which was specially binned in the quantities indicated by the documents.

Factum of Nolan.

The warehouse receipts are dated either December, 1946, or January, 1947, but represent the actual barley purchased in 1943. The barley was " lent " by Nolan from time to time, a practice in the grain trade, but was returned to him each time, the last time being in December, 1946, and in January, 1947, when the final warehouse receipts came into existence.

On March 17, 1947, the ceiling price for barley pursuant to Order of the Wartime Prices and Trade Board was 64¾c per bushel.

On March 17, 1947, the Canadian Wheat Board, hereinafter referred to as the " Board," a corporation incorporated by the Canadian Wheat Board Act, 1935, being Chapter 53 of the Statutes of Canada 1935, issued its " Instructions to Trade No. 59 " and sent a copy to Hallet and Carey Limited as well as to all of the members of the grain trade.

Exhibit 2, Record, Vol. 3, page 211.

It is in part :—

" THE CANADIAN WHEAT BOARD

INSTRUCTIONS TO TRADE

No. 59

TO ALL COMPANIES AND DEALERS IN OATS AND BARLEY :

Gentlemen :

In accordance with the new Government policy announced in Parliament March 17th, 1947, regarding oats and barley (an outline of which is attached), the Board issues the following instructions effective midnight, March 17th, 1947.

* * * * * *

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, 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.

This requirement includes oats and barley stocks in store and in transit and stocks sold but not delivered whether whole, ground or

otherwise processed, or contained in prepared mixtures. A statement of all stocks on hand as at March 17th, 1947, will be required. (Further details as to the manner in which this information is to be submitted will be furnished as soon as possible.) Factum of Nolan.

* * * * *

Yours very truly,

THE CANADIAN WHEAT BOARD

Approved for the Board by : W. C. McNamara Assistant Chief Commissioner."

Mar. 17, 1947.

Attached to Instructions to Trade No. 59 was a document reading in part as follows :—

"OUTLINE OF GOVERNMENT POLICY ON OATS AND BARLEY AS ANNOUNCED IN PARLIAMENT, MAR. 17, 1947.

1. Effective tomorrow, March 18th, the system of advance equalization payments will be discontinued and The Canadian Wheat Board will stand ready to buy all oats and barley offered to it at new support prices. In the case of barley these prices will be based on 90c for One Feed barley in place of the former support price of 56c in store Fort William/Port Arthur, and other grades at appropriate differentials to be fixed from time to time by the Wheat Board. In the case of oats the new support price will be based on 61½c for One Feed oats in place of the former support price of 40c in store Fort William/Port Arthur, and other grades at appropriate differentials to be fixed from time to time by the Wheat Board. These support prices will remain in effect until July 31st, 1948.

2. At the same time price ceilings for all grades will be raised in the case of barley to 93c and in the case of oats to 65c basis in store Fort William/Port Arthur or Vancouver. The ceiling prices correspond with the support prices for the highest grades of barley and oats.

* * * * *

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 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 charges in terminal positions, special selection premiums, etc., which are considered in the judgment of the Board fair and reasonable.

* * * * *

The effect of the policy announced in Exhibit 2 was to permit the price of barley to rise from 64¾c to 93c per bushel effective as of March 18, 1947.

Factum of Nolan.

This it immediately did for 93c per bushel was much less than its actual value. Barley, corresponding to No. 3 C.W. Six Row, sold on March 17, 1947, at Minneapolis for $1.96 to $1.99 and at Chicago for $1.50 to $1.95.

Exhibit 14, Record, Vol. 3, page 265.

The Board was the administrator of grain prices for the War Time Prices and Trade Board and effective March 18, 1947, the Board issued Administrator's Order A 2303 providing a maximum price for barley of 93c per bushel, basis in store in terminal elevators.

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

On March 19, 1947, the Board issued Instructions to the Trade No. 63.

Exhibit 6, Record, Vol. 3, page 219.

It stated in part as follows :—

> " All concerned are advised that stocks of Registered, Certified or Commercial Seed Oats and/or Barley on hand in commercial channels as at midnight, March 17th, 1947, must be sold t The Canadian Wheat Board.
>
> The Board is prepared to return [*sic*] such stocks to holders immediately upon payment of 13½c per bushel in the case of oats and 28¼c per bushel in the case of barley and the selling price of such oats and/or barley may be increased accordingly."

On March 20, 1947, the Board issued Instructions to the Trade No. 64.

Exhibit 7, Record, Vol. 3, page 222.

It stated in part as follows :—

> " To ALL COMPANIES :
>
> Dear Sirs :
>
> *Re : Oats and Barley taken over by the Board as at midnight, March* 17, 1947.
>
> Holders of oats and/or barley taken over by the Board as at midnight, March 17th, 1947, and unsold as of that time, are advised that the Board will consider applications from such holders to repurchase [*sic*] the oats and/or barley taken over by the Board on the basis of the present ceiling prices of 65c in the case of all grades of oats and 93c in the case of all grades of barley.
>
> Holders desirous of taking advantage of the above offer should communicate with the Board immediately giving particulars, and if confirmed by the Board, will be required to forward details in writing accompanied by a marked cheque for 28¼c per bushel for the quantity involved in the case of barley and 13½c per bushel for the quantity involved in the case of oats."

The Instructions to the Trade hereinbefore referred to were issued by the Board without any legal authority whatsoever.

On April 3, 1947, the Governor General in Council passed Order-in-Council P.C. 1292.

Exhibit 1, Record, Vol. 3, page 228.

It stated in part as follows : Factum of Nolan.

" 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 ;

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Trade and Commerce, and under the powers conferred by the National Emergency Transitional Powers Act, 1945, is pleased for the reasons aforesaid, to order that the Western Grain Regulations (P.C. 3222, of July 31, 1946) be and they are hereby amended by revoking Part III thereof, the said revocation to be deemed to be effective in respect of section twenty-three of the said Part III on and after the eighteenth day of March, nineteen hundred and forty-seven, and by substituting therein the following Regulations as Part III thereof :

* * * * *

21. In this Part, unless the context otherwise requires

(a) " Barley " means barley grown in the designated area and includes barley whether in natural form or cleaned, chopped, ground, mashed or crimped, or otherwise processed or contained in any product ;

* * * * *

(c) " 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, 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 ;

* * * * *

(e) " previous maximum price " means

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

Factum of Nolan.

(ii) with respect to barley, sixty-four and three-quarter cents per bushel,

basis in store Fort William/Port Arthur or Vancouver ;

* * * * *

OATS AND BARLEY VESTED IN BOARD.

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.

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.

24. Any Person

(a) who was the owner of oats or barley in commercial positions at midnight on the seventeenth day of March nineteen hundred and forty-seven, or who, after that day and before the coming into operation of this section, became the owner of oats or barley pursuant to a purchase at a price not exceeding the previous maximum price, and

(b) who before the coming into operation of this section sold the said oats or barley otherwise than to the Board or at a price not exceeding the previous maximum price,

shall pay to the Board an amount in respect of each bushel of the said oats or barley so sold by him equal to the difference between the said

previous maximum price therefor, adjusted as provided in sub-section two of section twenty-three, and the price that is payable by the Board for oats or barley purchased by it under section thirty.

* * * * *

27. (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.

* * * * *

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

(a) direct that any contract or agreement entered into prior to the coming into operation of this section for the sale, purchase, handling, shipment or storage of oats or barley shall be terminated or varied and prescribe terms and conditions on which such termination or variation shall be made ;

(b) require any person to do any act or thing necessary to terminate, close out, clear or cancel by the sale, purchase or delivery of oats or barley any contract or agreement for the sale or purchase of oats or barley negotiated on or through any futures market in Canada ; and

(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.

* * * * *

It is to be noted that P.C. 1292 affected not all oats and barley in Canada, but only that portion " grown in the designated area." This area is defined in the Western Grain Regulations section 2 (1) (j) as comprising the Provinces of Manitoba, Saskatchewan and Alberta and small portions of the Provinces of British Columbia and Ontario.

Exhibit 1 (2), Record, Vol. 3, page 162.

Of oats and barley " in the designated area " only that portion was affected which was in " commercal positions," i.e., which was not the property of the producer thereof and which was in store in warehouses, elevators, mills, railway cars, vessels or other facilities in Canada for the storage or transportation of grain.

Factum of Nolan.

It is not possible to obtain figures showing the amount of barley and oats in commercial positions on March 17, 1947, but on March 14, 1947, the amount of barley in commercial positions was 19,971,031 and on March 21, 19,696,089 bushels. The amount of oats in such positions on the two days was 29,941,446 bushels and 30,322,322 bushels. There were much larger stocks of barley and oats on prairie farms available for delivery; on March 14, 34,268,846 bushels of barley, 73,414,999 bushels of oats; and on March 21, 1947, 33,331,984 bushels of barley, 71,040,175 bushels of oats.

Exhibit 14, Record, Vol. 3, pages 260–262.

No attempt was made to extend the application of P.C. 1292 to the large quantities of oats and barley on farms.

It is to be noted that the evidence is clear there was no shortage of oats or barley in Canada on March 17, 1947, or subsequently.

Record, Vol. 2, pages 109, lines 18–19, 110 lines 5–8, 112 lines 9–13, 121 lines 27–28, 134 lines 8–11, 135 lines 23–25, Evidence of Beatrice Richardson, pages 140–149 particularly Exhibit 14, Record, Vol. 3, page 260 and Exhibit 15, page 266.

On April 7, 1947, the Board issued Instructions to the Trade No. 74.

Exhibit 1 (5), Record, Vol. 3, page 235.

It stated in part as follows:—

"TO ALL COMPANIES:

Gentlemen:

Pursuant to the powers vested in it by Order in Council P.C. 1929 of April 3rd, 1947:—

1. The Board hereby orders and directs all companies having in their custody, possession or control warehouse receipts or other documents of title covering oats and barley of the categories listed hereunder, as of the close of business, Saturday, April 5th, 1947, to deliver forthwith to the Board the said warehouse receipts or other documents of title. Settlement will be made by the Board for the grain covered by the said warehouse receipts or other documents of title in accordance with the terms of Order in Council P.C. 1292. Deliveries should be accompanied by detailed invoices.

Categories of oats and barley covered by this requirement are as follows:—

(a) Oats and barley in terminal positions in Canada upon which the Company has paid or is obligated to pay special selection and/or diversion premiums, or which have been specially selected or binned for the purpose of obtaining premium prices at time of sale, or otherwise.

(b) Oats and barley in terminal positions in Canada of which the Company has custody, possession or control for the account of non-residents of Canada.

(c) All other oats and barley in terminal positions in Canada which have not previously been adjusted with the Board either by resale to the Company by the Board or otherwise. Factum of Nolan.

* * * * *

This instruction does *not* cover stocks of barley, other than seed, held by or for the account of, Canadian maltsters or manufacturers of pot and pearl barley."

All of the affected owners of barley and oats except Nolan followed the procedure outlined in Instructions No. 64 ; the owners of barley paying to the Board 28¼c per bushel and the owners of oats 13½c per bushel. No oats or barley and no warehouse receipts or documents of title were delivered to the Board. Holders of oats and barley grown in the designated area and which were in commercial positions simply gave their cheques to the Board for the difference in price before and after March 17, 1947, i.e. 28¼c in the case of barley, 13½c in the case of oats.

Record, Vol. 2, pages 105 lines 12-23, 106 lines 29-38, 107 lines 1-8, 112 lines 14-17, 113 lines 20-21, 116 lines 16-21, 117 lines 3-19, 119 lines 9-10, 126 lines 1-5, 132 lines 2-7 and 22-25.

The owners of oats and barley affected continued to be free to dispose of the grain as they saw fit without any direction or supervision by the Board other than the control of export.

Record, Vol. 2, pages 107 line 34, 109 line 23, 113 line 35, 114 line 3, 114 lines 13-26, 120 line 36, 121 line 22, 133 line 31, 134 line 7.

The total amount of money which accrued to the government from the transactions in oats and barley pursuant to P.C. 1292 was $6,596,589.74.

Exhibit 20, Report of Canadian Wheat Board 1946-47, page 24.

P.C. 1292 required that this amount be paid into the Consolidated Revenue Fund of the Dominion of Canada.

Nolan refused to obey the orders of the Board. In a letter to Hallet & Carey Limited dated April 14, 1947, Nolan stated :

" In view of the statements which your Mr. Powell has made to me over long distance telephone, I wish to put my position plainly before you so that you will understand the risks which are involved if you disobey the instructions I have given you.

About March 17th you informed me that The Canadian Wheat Board was taking over my 40,000 bushels of No. 3 C.W. 6 row barley, which I have in store at Fort William and that the Board would pay me a price arbitrarily fixed without consultation with me of 64¾c per bushel, which, as you know, is less than my cost, and would leave me out of pocket approximately $7,500 carrying charges which I have incurred in connection with this grain.

Upon enquiry it was revealed that there was no statutory authority for this attempt by The Canadian Wheat Board to take my property and that they said that they were basing their action upon a statement of Government policy made in the Canadian Parliament on March 17th by the Minister of Agriculture.

Factum of Nolan.

Although my knowledge of Canadian constitutional principle is not extensive, I felt that the Board's action was illegal. It transpires that I was right, but you now inform me that the Board has put forward a new demand upon you for this barley and has directed you to deliver up my documents of title thereto. You say the Board now bases its claim upon a new ground ; namely, an Order-in-Council passed at Ottawa on April 3rd last.

I cannot believe that Canadian law will support this arbitrary totalitarian action of the Wheat Board and it is my view that the Board cannot substantiate illegal demands by subsequent Orders-in-Council, nor do I believe that the Canadian Government approves the confiscation of the property of its citizens or of foreigners trading in Canada who have acquired property in good faith. Such action does violence to principles which I feel are still deeply held and respected in your country as well as mine.

I have other honestly acquired property in Canada and I fear that if a Board can, without discussion, confiscate my grain, then no foreign held assets are safe, and despite the inconvenience and expense to which this matter will put me, I cannot submit to this totalitarian technique without a protest.

I object to the Board's taking my grain at any price. I feel that its action does not reflect considered Canadian Government opinion and is a deplorable step in bureaucratic confiscation which is unprecedented in times of peace. It is my view that this sort of thing can only damage Canada's trading reputation among the few remaining countries which still respect civil liberties.

I challenge the action of The Canadian Wheat Board entirely and I intend to contest in the Canadian courts the constitutionality of the legislative enactments upon which the Board purports to base its actions. I forbid you to deliver to The Canadian Wheat Board my documents of title to the above mentioned barley, which documents you hold as my agents, and I forbid you to deliver to the Board the above mentioned barley. Should you do either of these things, I shall hold you liable in damages."

Exhibit 1 (6) Record, Vol. 3, pages 237-238.

A similar warning was given to Hallet & Carey Limited by Nolan's Winnipeg solicitors in a letter dated April 18, 1947.

Exhibit 1 (7), Record, Vol. 3, page 239.

On April 24 Hallet & Carey Limited served a Notice of Motion returnable before a judge in chambers of the Court of King's Bench in Winnipeg for relief by way of interpleader in respect of the warehouse receipts in its possession for the 40,000 bushels of barley. The Notice of Motion named Nolan and the Board as claimants and called upon them to appear and state the nature of their claims to the property. On the return of the Motion, counsel for the Board opposed the making of the interpleader order on the ground that the Board was an agent or servant of the Crown and as such could not be forced to interplead without its consent. The Board was strongly urged by the presiding judge to give its consent but refused to do so and consequently the judge had no alternative but to dismiss the application for the interpleader order.

On May 22, 1947, a Statement of Claim was issued in the Court of King's Bench at Winnipeg by which Nolan sued Hallet and Carey Limited for possession of his barley and the documents of title thereto. This is hereafter referred to as the Nolan action. Factum of Nolan.

Record, Vol. 1, page 6.

On May 27 the Board served on Hallet and Carey Limited an order by the Board that on or before May 29 it deliver to the Board all stocks of oats and barley in its possession vested in the Board pursuant to P.C. 1292 and all warehouse receipts or documents of title relating thereto, including warehouse receipts and certificates to the 10,000 bushels of barley owned by Nolan.

Exhibit 1 (8), Record, Vol. 3, pages 240–241.

On the same day the Board notified each of the warehousemen by letter of the above Order and that the warehouse receipts for Nolan's barley "should not be honoured unless presented by or through the Canadian Wheat Board."

Exhibit 1 (9), Record, Vol. 3, pages 242–3.

On May 28, 1947, the solicitors for Hallet and Carey Limited wrote the Board's solicitors concerning the Board's order of May 27 :—

> "Our clients, Hallet and Carey Limited, have handed us the Notice dated the 27th of May, 1947, served upon them yesterday by The Canadian Wheat Board.
>
> As you know, I represent Hallet and Carey Limited and I should appreciate it if you would deal with me in connection with any matters arising out of the barley in question.
>
> You are aware that my clients have been sued by Nolan for the possession of this barley, and the documents of title thereto. I am preparing a defence to this action in which I will raise your client's claim and the legislation and Order-in-Council upon which it is based. My clients and I are well aware of the Board's claim to the barley and the documents of title. My clients' desire has been and is to divest itself of the property in question and leave the dispute to be settled between the Board and Nolan. In the recent proceedings before Mr. Justice Major only the attitude adopted by the Board prevented Hallet and Carey Limited from achieving this object, and only that attitude is responsible for my clients still being concerned in this matter.
>
> In view of the position taken by the Board in the proceedings before Mr. Justice Major, I do not understand the Board's adding to the inconvenience and embarrassment of my clients by the serving of further notices, which, as I see it, merely repeat a demand already made and of which we are well aware. If there is a new purpose behind the recent notice, I think that in the circumstances you might disclose it to me.
>
> I cannot advise my clients to deliver the barley or the documents of title to the Board any more than I could advise them to

Factum of Nolan.

deliver the same to Nolan. You may consider that my clients would be adequately protected in delivering the barley and documents of title to the Board for the reason that if Nolan succeeds in his action and obtains damages against my clients, the Board would rally to my clients' aid. The attitude of the Board throughout the proceedings before Mr. Justice Major gave no ground for anticipating co-operation from the Board in this matter.

This view is reinforced by the fact that while the Board and you are aware of the action that has been brought against my clients by Nolan, the Board's repeated demand for the barley is not coupled with any offer to co-operate."

Exhibit 1 (10), Record, Vol. 3, pages 244–245.

On June 4, Hallet and Carey Limited filed its defence in the Nolan action, setting up as a defence Instructions to the Trade No. 59 and No. 74, and the order of May 27, 1947, and pleading Order-in-Council P.C. 1292.

Record, Vol. 1, pages 7–13

On July 8 Nolan filed a reply in which he attacked the validity of the Board's proceedings, the National Emergency Transitional Powers Act and certain clauses of P.C. 1292.

Record, Vol. 1, pages 14–17.

On August 1, 1947, the amended Canadian Wheat Board Act (S.C. 1947 Chap. 15) came into effect, and the Western Grain Regulations, in which was embodied the amendment contained in P.C. 1292, under which the marketing of western Canadian grain had previously been regulated, ceased to be of any force and effect.

On September 26, 1947, Nolan's solicitors wrote to the Board's solicitor as follows :—

" *Re : Nolan* vs. *Hallet and Carey Limited, Gen.* 10215.

We have been delaying further proceedings in this action in accordance with your request, but should like to make some progress in it soon. We understand you have in contemplation the bringing of an action by the Board against the defendants in our action and perhaps also the warehousemen who have custody of the grain.

We think it will be agreed that the issues are squarely raised in the current action. Your client has the right to be heard in it and we are satisfied that it can be arranged for it to take as prominent a part as it desires in the current proceedings. If, however, it is thought that by bringing a separate action your client will have a better control of the presentation of its case, we shall accommodate the Board by waiting a further reasonable time.

In the event that an action is commenced on behalf of your client, it does seem to us that by adding the warehousemen the proceedings will be complicated without assisting in the determination of the issues. It is not conceivable that if in the current action the decision is against the Plaintiff, the Board would still have to

take action against the warehousemen. If any doubt is felt on this score, we are prepared to obtain any assurance you might desire to set your client's doubts at rest. Factum of Nolan.

We would appreciate hearing from you."

Exhibit 1 (11), Record, Vol. 3, page 247.

The Board endeavoured to persuade the warehousemen to deliver to it Nolan's barley and to ignore the outstanding warehouse receipts.

Exhibit 1 (13), Record, Vol. 3, pages 250-251.

Each of the warehousemen replied to the Board declining to deliver the barley until the question of its ownership had been determined.

Exhibits 1 (14), 1 (15), 1 (16), Record, Vol. 3, pages 252-254.

On October 1, 1947, notice of trial was given in the Nolan action. Notices under Manitoba King's Bench Act, sec. 72, were served on the Attorney-General of Canada and the Attorney-General of Manitoba. However, as the Board insisted on commencing a separate action, the trial in the Nolan action was adjourned sine die pending completion of the pleadings in the Board action.

Notwithstanding the aforesaid letters written by the solicitors for Nolan and Hallet and Carey Limited to the solicitors for the Board, and the Board's earlier refusal to afford Hallet and Carey Limited, who were innocent stakeholders, interpleader relief, the Board subjected Hallet and Carey Limited to a second action, and on October 8, 1947, commenced its action against the warehousemen and Hallet and Carey Limited claiming possession of the 40,000 bushels of barley and of all the documents of title thereto and special damages for storage and carrying charges. This action is hereinafter referred to as the " Board action." Statements of defence were delivered by the warehousemen and by Hallet and Carey Limited in which they pleaded the Nolan action and attacked the validity of the Board proceedings, the Transitional Act and certain portions of P.C. 1292.

On March 22, 23 and 24, 1948, the Nolan and Board actions were tried together at Winnipeg before Williams, C.J.K.B. Counsel for the Board appeared also for the Attorney-General of Canada. On motion at the trial by counsel for one of the warehousemen, Nolan was added as a party defendant in the Board action.

On April 19, 1948, Williams, C.J.K.B., gave judgment in both actions. He dismissed the Board action with costs. In the Nolan action, he held Nolan entitled to succeed and to have possession in Canada of the barley and the documents of title thereto.

Record, Vol. 3, pages 274-317.

During May, June and July, 1948, new pleadings were completed by all parties in the Board action consequent upon Nolan being added as a party.

On September 24, 1948, the Solicitor for the Attorney-General of Canada served Notice of Motion to be added as a party defendant in the Nolan action.

Factum of Nolan.

The Board, the Crown and the Attorney-General of Canada are for all practical purposes the same interest which has been represented throughout by the one solicitor and counsel.

This interest refused to permit interpleader, insisted on commencing a second, and it is submitted an unnecessary, action in which Nolan was added a defendant. Now we have that same interest applying to be made a defendant in Nolan's action which will make Nolan, Hallet and Carey Limited and that interest all parties in two different actions about the same dispute. How much simpler and more fair it would have been had that interest permitted interpleader at the outset.

The Motion was heard by Williams, C.J.K.B., who, after reserving judgment, gave written reasons for his decision on October 15, 1948. He ordered that the Attorney-General of Canada be added as a party defendant in the Nolan action on the terms, first that he forthwith pay to Hallet and Carey Limited the amount of the costs they would have to pay to Nolan and second, that the Attorney-General of Canada undertake to agree with the other parties that the barley be sold and the proceeds, after payment of all storage and other charges, be paid into court to the credit of both the Nolan and the Board actions to be disposed of by the court on the final termination of the actions.

The term in the order regarding the sale of the barley had been requested by Nolan's solicitors who desired to avoid the accrual of any further storage charges pending the termination of the litigation.

The Board's solicitors on October 21, 1948, wrote Nolan's solicitors as follows :

> " *Re : The Canadian Wheat Board vs. Manitoba Pool Elevators et al.*
>
> As you are aware, we are desirous of entering an appeal from the judgment of Chief Justice Williams herein at the earliest possible date.
>
> We accordingly hereby request that you make arrangements to sign the judgment herein on or before Saturday the 23rd inst.
>
> We have to advise you that if judgment is not signed within this period, we intend to move on Monday, the 25th inst., to sign judgment in this action for the purpose of entering an appeal therefrom."

Nolan's solicitors replied on October 22, 1948, in part as follows :

> " We have your letters of October 21st.
>
> The judgment in the Canadian Wheat Board action should be taken out by Mr. W. P. Fillmore, K.C., who represents the defendant having the leading interest in that action.
>
> However, we feel that that judgment ought not to be taken out before the judgment in *Nolan* v. *Hallett & Carey Ltd.* Both judgments should be entered at the same time. It seems likely that in both actions an order will be required regarding the sale of the grain. The learned trial judge should not become *functus officio* in one action before that order is taken out.

As to your appeal, it is clear from what was said on the recent motion that you desire to appeal both actions at the same time; consequently, there is nothing to be gained by your getting your appeal under way in one action before the other.

* * * * *

Notwithstanding the letter and without further communication, the Board's solicitor on October 25, 1948, interfered in the Board action in which judgment had been given against it and signed judgment.

Record, Vol. 3, page 272,

and on October 28, 1948, filed Notice of Appeal therefrom to the Court of Appeal for Manitoba.

Record, Vol. 2, page 39.

The situation now was that of two actions which involved the same facts, which had been tried together and in which one judgent had been given, one was in the Court of Appeal and the other still in the Court of King's Bench.

The Board endeavoured to proceed with the appeal in its action independently of the Nolan action, but this unreasonable procedure was prevented by the Court of Appeal.

On November 24, 1948, Williams, C.J. K.B., settled the order made by him on October 15, 1948 in the Nolan action.

Record, Vol. 1, pages 20–21,

and on December 3, 1948, the Attorney-General for Canada appealed from the order to the Court of Appeal for Manitoba.

Record, Vol. 1, page 29.

On December 7, 1948, by an order made in both actions (by the Court of Appeal in the Board action and by the Chief Justice of Manitoba as an *ex officio* judge of the Court of King's Bench in the Nolan action which was still in the Court of King's Bench) it was ordered that the barley be sold and the proceeds be paid into the Court of King's Bench to the joint credit of both actions.

Record, Vol. 2, page 45.

The amount of $48,175 was paid into court as the proceeds of the sale of the barley.

Thereafter orderly progress was made. On December 13, 1948, the Attorney-General of Canada discontinued his appeal from the order of Williams, C.J. K.B., in the Nolan action.

Record, Vol. 1, page 32,

and on December 22, 1948, judgment was signed in the Court of King's Bench in the Nolan action.

Record, Vol. 1, page 45.

Factum of Nolan.

On January 3, 1949, Notice of Appeal was filed by the Attorney-General for Canada against the judgment in the Nolan action.

Record, Vol. 1, page 37.

The appeals in both the Nolan and Board actions were heard together by the Court of Appeal for Manitoba on January 25, 26, 27, 28 and 31 and February 1, 1949. During the hearing of the appeals, at the request of counsel for the warehousemen, the court made an order on February 1, which was consented to by all the parties, that the warehousemen be paid their accumulated storage charges out of the monies in court resulting from the sale of the barley ; that without prejudice to the rights of the other parties to the said actions as against one another and to the balance of the proceeds, the warehousemen henceforth cease to be parties to the Board action and that the matter of the warehousemen's costs throughout be reserved to be dealt with on the disposition of the Board action by the Court of Appeal.

Record, Vol. 2, page 48.

The storage charges totalling $9,720.30 in respect of the said barley, were duly paid to the warehousemen out of the monies in court.

The Court of Appeal delivered its judgment on March 10, 1949. The court unanimously dismissed the appeal of the Attorney-General in the Nolan action and the appeal of the Board in its action. The reasons for judgment of Chief Justice McPherson are found in

Record, Vol. 3, pages 321–323.

The reasons for judgment of Mr. Justice Adamson were concurred in by Mr. Justice Richards.

The reasons for judgment of Mr. Justice Dysart are found in

Record, Vol. 3, pages 324–331.

The reasons for judgment of Mr. Justice Adamson are found in

Record, Vol. 3, pages 332–341.

The reasons for judgment of Mr. Justice Coyne are found in

Record, Vol. 3, pages 342–345.

During the settling of the Minutes of Judgment of the Court of Appeal in the Board action considerable difference of opinion arose between counsel for the Board and all other counsel in respect of the provision in the order of February 1, 1949, that the matter of the warehousemen's costs throughout should be reserved to be dealt with on the disposition of the Board action in the Court of Appeal. All counsel except counsel for the Board took the position that it was intended the decision of the Court of Appeal in the matter of the warehousemen's costs was to be final and that since the Court had ordered the Board to pay these costs the Board should make such payment at once. Counsel for the Board took the position that the matter of the warehousemen's costs was part of the judgment of the Court of Appeal from the whole of which the Board proposed appealing to the Supreme Court of Canada, and that it did not propose making any such payment until ordered to do so by the court of last resort.

Application was made to the Registrar to settle the minutes, and he referred the matter to the Court of Appeal which settled the Minutes of Judgment in the form in which they appear in Factum of Nolan.

Record, Vol. 3, pages 318–320.

The costs of the warehousemen have not yet been paid.

On the application of the Board to the Court of Appeal for an order allowing its appeal, notices of which application were served on the warehousemen, the warehousemen contended that they ceased to be parties to the action by virtue of the Order of February 1, 1949, and further contended that since the only matter in controversy between them and the Board was the matter of their costs, they should not be parties to any further appeal in the action.

The order allowing the appeal was made without prejudice to any right of the warehousemen to advance their contentions.

Record, Vol. 2, pages 53–54.

PART II.

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

The Respondent Nolan submits that P.C. 1292 is *ultra vires ;* that the essential conditions of jurisdiction for emergency legislation were not present in respect of the enactment of P.C. 1292 ; that it exceeds the authority granted to the Governor-in-Council by the Transitional Act (The National Emergency Transitional Powers Act, 1945) ; and that it cannot be upheld on any other ground. The Respondent Nolan submits that consequently the Canadian Wheat Board has no legal right to the monies paid into court being the proceeds of the sale of the 40,000 bushels of barley.

PART III.

ARGUMENT.

Summary

I. The pith and substance of P.C. 1292 is not as stated in its preamble. The real purpose and effect of P.C. 1292 was to prevent a profit to or to take money from a certain limited group of holders of oats and barley.

II. The courts may test the validity of P.C. 1292, and make use of extrinsic evidence in doing so.

III. P.C. 1292 is invalid, since testing and examination show that the essential conditions of jurisdiction are not present.

IV. P.C. 1292 exceeds the jurisdiction of and does not fall within the ambit of the powers conferred by Section 2 (1) (*c*) of the Transitional Act.

V. The expropriation of property is not authorized by the Transitional Act.

Factum of Nolan.

VI. P.C. 1292 cannot be supported and upheld as a mode or system of taxation.

VII. P.C. 1292 is not validated by reason of the Western Grain Regulations receiving statutory recognition in the amendment to the Canadian Wheat Board Act, Statutes of Canada 1947, Chapter 15, Section 6.

I. *The pith and substance of P.C. 1292 is not as stated in its preamble. The real purpose and effect of P.C. 1292 was to prevent a profit to or to take money from a certain limited group of holders of oats and barley.*

1. The necessity for and the purpose of P.C. 1292 are not as stated in its preamble, i.e.—

> " 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 . . ."
>
> Record, Vol. 3, page 228.

It was not made necessary by reason of the alleged continued existence of the national emergency arising out of the war against Germany and Japan (even if such emergency continued to exist). Its purpose was not the maintaining, controlling and regulating supplies and prices to ensure economic stability and an orderly transition to conditions of peace.

2. The real purpose is stated in Ex. 2, Outline of Government Policy on Oats and Barley, which is part of Instructions to the Trade No. 59, i.e., " to avoid the fortuitous profits to commercial holders of oats and barley " Exhibit 2, Record, Vol. 3, page 214, lines 4–5, which would otherwise have resulted from the raising of price ceilings.

That this was the real purpose is evidenced by the content of Instructions to the Trade No. 64, Exhibit 7, Record, Vol. 3, page 222, which advises holders of oats and/or barley taken over by the Board that the Board will consider applications from such holders to repurchase [*sic*] the oats and/or barley, and which requests holders desiring to take advantage of this offer to communicate with the Board and to forward a marked cheque for 28¼c per bushel in the case of barley and 13½c per bushel in the case of oats, being the differences between the previous and the new ceiling prices.

Also Instructions to the Trade No. 63 provided :—

> " All concerned are advised that stocks of Registered, Certified, or Commercial Seed Oats and/or Barley on hand in commercial channels as at midnight, March 17th, 1947, must be sold to The Canadian Wheat Board.
>
> " The Board is prepared to return [*sic*] such stocks to holders immediately upon payment of 13½c per bushel in the case of oats and 28¼c per bushel in the case of barley and selling price of such oats and/or barley may be increased accordingly."
>
> Exhibit 6, Record, Vol. 3, page 219.

3. No indication is given in P.C. 1292 as to why the alleged continuing emergency arising out of war against Germany and Japan made necessary the vesting of oats and barley in the Canadian Wheat Board. Factum of Nolan.

4. There was no emergency in oats and barley.

(*a*) The evidence is clear that there was no shortage of oats or barley in Canada on March 17, 1947, or subsequently.

Record, Vol. 2, page 109 lines 18–23, page 110 lines 3–8, page 112 lines 9–13, page 121 lines 27–28, page 134 lines 8–11, page 135 lines 23–25, Evidence of Beatrice Richardson, Record, Vol. 2, pages 140–149 particularly Exhibit 14, Record, Vol. 3, page 260 and Exhibit 15, page 266.

(*b*) Had there been an emergency, all oats and barley in Canada would have been taken over. Only oats and barley grown in the " designated area " were affected.

" Section 2 (1) (*j*) ' Designated area ' means that area comprised by the Province of Manitoba, the Province of Saskatchewan, the Province of Alberta, and those parts of the Province of British Columbia known as the Peace River district and the Creston-Wynndel areas, and such other parts of the Province of British Columbia and such parts of the Province of Ontario lying in the Western Division, as the Board may from time to time designate."

(Western Grain Regs. P.C. 3222.)

Exhibit 1 (2), Record, Vol. 3, page 162, line 24.

Of oats and barley in the " designated area," only that portion was affected which was in " commercial positions."

" ' 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, 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." (P.C. 1292.)

Record, Vol. 3, page 229, lines 10–14.

On March 14, 1947, there were 29,941,446 bushels of oats and 19,971,031 bushels of barley in commercial positions, but 73,414,999 bushels of oats and 34,268,846 bushels of barley on prairie farms available for delivery.

Exhibit 14, Record, Vol. 3, pages 260–262.

No attempt was made to extend the application of P.C. 1292 to the large quantities of oats and barley on farms, nor to vest in the Board the largest proportions of oats and barley in Canada on March 17, 1947.

(*c*) Stocks of barley held by or for the account of Canadian maltsters or manufacturers of pot and pearl barley were specifically exempted from the taking over (Instructions to the Trade No. 74).

Exhibit 1 (5), Record, Vol. 3, page 236, lines 6–8.

Factum of Nolan.

(*d*) Appellant admitted at trial and on the appeal there was no national emergency in oats or barley.

(*e*) Trial judge found no emergency existed in Canada with regard to oats and barley.

Record, Vol. 3, page 300, lines 16–18.

5. P.C. 1292 did not maintain, control or regulate supplies or prices.

(*a*) No oats or barley and no warehouse receipts or documents of title were delivered to the Board. No oats or barley were sold to or repurchased from the Board.

Holders of oats and barley grown in the designated area and which were in commercial positions simply gave their cheques to the Board for the difference in price before and after March 17, 1947, i.e., 13½c per bushel in the case of oats, and 28¼c in the case of barley.

Record, Vol. 2, pages 105 lines 12–23, page 106 lines 29–38, page 107 lines 1–8, page 112 lines 14–17, page 113 lines 20–21, page 116 lines 16–21, page 117 lines 3–19, page 119 lines 9–10, page 126 lines 1–5, page 132 lines 2–7 and 22–25.

(*b*) The holders of oats and barley affected continued to be free to dispose of the grain as they saw fit.

Record, Vol. 2, pages 107 line 34, page 109 line 23, page 113 line 36, page 114 line 3, page 114 lines 13–26, page 120 line 36, page 121 line 22, page 133 line 31, page 134 line 7.

(*c*) P.C. 1292 had no effect on price.

War Time Prices and Trade Board Administrator's Order A. 2303 (Exhibit 13, Record, Vol. 3, pages 220–221), raised the maximum price ceiling and permitted oats and barley to sell for amounts nearer but still much less than their real value.

The new ceiling for the *best* grade of oats was 65c and for the *best* grade of barley was 93c. Prices for *all* grades of oats and barley immediately rose to the new ceilings.

This result was inevitable, because oats and barley were selling in Chicago and Minneapolis for prices substantially in excess of the new ceilings. Grades of barley corresponding to 3 C.W. 6 Row Barley, the grade involved in this action, sold on March 17, 1947, at Minneapolis for $1.96 to $1.99 and at Chicago for $1.50 to $1.95.

Exhibit 14, Record, Vol. 3, page 265.

The new support prices contained in P.C. 1292 under which the Board was authorized to buy oats and barley at less than the new ceilings was a quite unnecessary and idle gesture, and merely a device to lend colour to the legislation.

Record, Vol. 2, pages 104 lines 17–19 and 25–28, page 107 lines 15–33, page 110 lines 34–36, page 114 lines 31–2, page 115

lines 6–10, page 119 line 29, page 120 line 3, page 127 lines 13–26, page 128 lines 27–34, page 132 line 36, page 133 line 16, page 133 lines 23–27.

Because of the prevailing higher prices on the Chicago and Minneapolis markets the Board could not possibly lose money at the new support prices. The actual effect of these higher prices was shown in October, 1947, when price ceilings in Canada on oats and barley were removed, whereupon the price of these grains on the open market increased substantially.

6. P.C. 1292 was discriminatory violation of ownership of property and sanctity of contract, which promotes economic instability and uncertainty and does not ensure an orderly transition to conditions of peace.

7. This was a colourable attempt to pass off under a guise legislation which was beyond Dominion power. If the Governor-in-Council had expressed the real purpose and effect of P.C. 1292, the language used would have indicated in effect that the ceiling price of oats was 51½c and of barley was 64¾c; that by reason of the pressure caused by considerably higher prices prevailing outside of Canada it was necessary, in order to satisfy popular demand, to raise the ceiling price of oats to 65c and of barley to 93c; that by such action the holders of oats and barley on farms and in commercial positions would have a profit of 13½c on oats and 28¼c on barley; that the holders of oats and barley on farms and maltsters and manufacturers of pot and pearl barley were considered worthy to retain such a profit, but that the holders of oats and barley in commercial positions were not; that accordingly, the holders of oats and barley in commercial positions must send in their cheques to the Wheat Board for 13½c per bushel on oats and for 28¼c per bushel on barley which they held; and that if they did so, they could continue to deal with the oats and barley as they pleased.

II. The courts may test the validity of P.C. 1292 and may make use of extrinsic evidence in doing so.

1. In the courts below Appellant took the position that if the Transitional Act is *intra vires* the courts may not enquire if the Order-in-Council is valid, as the Governor-in-Council has declared that it is necessary and advisable to enact the provisions therein contained; in other words such a declaration puts it beyond the power of the courts to enquire into the validity of P.C. 1292.

2. The whole of Canadian constitutional jurisprudence is a demonstration of the proposition that it is the function of the courts, continually exercised, to examine and test legislation, whether by Parliament or its delegatee, the Governor-in-Council.

In addition to the cases elsewhere in this factum referred to, Respondent relies upon:—

Russell v. *The Queen* (15).

In re Gray (16).

In re The Board of Commerce Act and The Combines and Fair Prices Act 1919 (17).

Toronto Electric Commissioners v. *Snider* (18).

Reference re The Dominion Trade and Industry Commission Act 1935 (19).

Reference re The Natural Products Marketing Act 1934 (20).

Reference re Section 498-*A of the Criminal Code* (21).

Reference re Farmers' Creditors Arrangement Act (22).

Reference re The Unemployment and Social Insurance Act 1935 (23).

Reference as to Sec. 5 (*A*) *of the Dairy Products Act* (24).

Wartime Leasehold Regulations Reference (25).

3. That P.C. 1292 purports to have been enacted by the Governor-in-Council pursuant to the authority delegated by the Transitional Act does not exclude the court from testing and examining its validity. The authorities recognise that such delegated authority confers on the Governor-in-Council wide discretionary powers, but they show also that the exercise of such authority is subject to review by the courts.

4. In all the Canadian constitutional cases, the courts did examine and did find either good or bad the legislation under examination. There is no case in constitutional history in which the courts expressed or acted upon the principle contended for by the Appellant in the courts below, that the Governor-in-Council could legislate upon absolutely any matter, and in a completely uncontrollable manner, so long as he said he deemed it necessary to do so. Upon Appellant's theory, Parliament can terminate its jurisdictional limitations at will. It need only declare an emergency in time of war or peace, delegate power to the Governor-in-Council to deal with that emergency as he sees fit, and then whatever the Governor-in-Council does, whether or not it relates to an emergency, real or imagined, is valid Dominion legislation. For example the Governor-in-Council might say he deemed it necessary to re-enact legislation which the Privy Council had held to be *ultra vires* of the Dominion, such as the "New Deal" legislation of the Bennett government in the 1930's or the various Dominion insurance statutes. Appellant's theory poses an absurdity, makes nonsense of the B.N.A. Act, and is fallacious.

5. Appellant's said proposition is opposed by all the authorities.

(*a*) In *Rex* v. *Controller of Patents* (1), consideration was given to powers conferred on His Majesty by the Emergency Powers (Defence) Act, 1939. Clauson, L.J., said, 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."

In considering these remarks of Clauson, L.J., it will be borne in mind that the British Parliament has unlimited legislative power

and its delegatee can create any legislation it could itself create. This is not so in Canada. Legislation by Canada's Parliament and its delegatee is limited to the jurisdiction set out in Sec. 91 of the B.N.A. Act. Factum of Nolan.

(*b*) *In re Price Brothers and Company* v. *The Board of Commerce of Canada* (1A), Duff, J. (as he then was), said : (p. 272) :—

" In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that orders-in-council made by the Governor-General-in-Council professedly under the authority of section 6 of that Act (War Measures Act, 1914) are not judicially revisable. I think such orders are reviewable, in the sense that when in a proper proceeding the validity of them is called into question, it is the duty of a court of justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order.

" One of the conditions of jurisdiction is, in my judgment, that the Governor-in-Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war—(I leave the case of insurrection out of view as having no relevancy) or as having some relation to the prosecution of the war or the objects of it."

(*c*) The principle of *Rex* v. *Controller of Patents* (1) was accepted by Duff, C.J., in the *Chemicals Reference* case (2). At p. 13, he says :—

" 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."

The court in this case (much relied on by Appellant) did exercise the power of review and held paragraph 4 of the Order-in-Council there in question *ultra vires*. The situation which Duff, C.J., thought " theoretically conceivable " became real in the case at bar when the evidence at the trial showed, and Appellant conceded, that there was no emergency in oats or barley, and it was demonstrated that the Governor-in-Council had not deemed P.C. 1292 to be necessary or advisable for the purposes stated.

(*d*) Appellant's proposition is completely met in the *Japanese case* (Privy Council) (3), at p. 102 :

" 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."

(*e*) The recent judgment of the Supreme Court of Canada in the *Wartime Leasehold Regulations Reference* (16) shows conclusively the fallacy of Appellant's proposition and that the courts do not recognize any such limits upon their powers and duties as was contended for by the Appellant in the courts below.

Tashereau, J., says in his Judgment :

Page 10 :—

" Of course, these statements are not conclusive and do not close the door to all judicial investigations, . . ."

Page 13 :—

" It follows that if there is unmistakable evidence to make it clear that there is no emergency, the courts are duty bound to intervene. Otherwise, we would reach a conclusion that is not justified by the B.N.A. Act. Under the guise of ' Peace, Order and good Government,' it would be possible for the Parliament of Canada to enact colourable legislation, and wrongly assume powers that belong to the provincial legislatures. Confederation has been erected on more solid foundations."

Locke, J., says in his Judgment, page 5 :—

" We are to inquire into and determine what is the true nature and character of this legislation and it is, of course, true that in considering this question the matter is not determined by the language used in the preamble or elsewhere in the statute."

6. The Transitional Act depends on Sec. 91 of the B.N.A. Act, which provides that the Dominion may :—

" make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces."

In repeated attempts to justify Dominion legislation under this general power, the courts have closely tested and examined the real purpose and effect of the legislation to determine whether it was in truth legislation for the peace, order and good government of Canada, or whether it was colourable legislation masked to conceal its real character and encroaching on a sphere denied the Dominion.

An Order-in-Council under the Transitional Act passed by Parliament's delegatee, the Governor-in-Council, has no greater validity than legislation passed directly by Parliament. If this enactment could not have been validly passed by Parliament under its general power to make laws for the peace, order and good government of Canada, then it cannot be validly enacted by the Governor-in-Council. The Dominion cannot use the devise of delegated authority to avoid the scrutiny of the courts and by this means solve Canada's constitutional difficulties, or draw to itself a field of jurisdiction the courts have hitherto denied it. This is what the Privy Council means by its second test in the *Japanese case* that orders must not be " by some reason in law invalid."

7. The courts have increasingly adopted the practice of looking outside the legislation for evidence of an ulterior motive or a colourable effect; i.e., an attempt by the enacting body to frame an enactment in such form as to conceal its true character as an encroachment on a sphere denied to it. Factum of Nolan.

(*a*) The authorities are gathered in the article, " Constitutional Interpretation and Extrinsic Evidence," 17 Canadian Bar Review, p. 86.

(*b*) In the *Alberta Legislation case* (Supreme Court) (4) Duff, J., says at p. 81 :

" In order to test the validity of the legislation, we must, we think, envisage the plan in practice as the statute contemplates it "

and at p. 102 :

" The judgment of Judicial Committee in *Union Colliery Co. of B.C. Ltd.* v. *Bryden* (1899) A.C. 580, is sufficient authority for the proposition that the answer to this question is to be found by ascertaining the effect of the legislation in the known circumstances to which it is to be applied "

and at p. 125 :

" In the factum of the Attorney-General of Canada appears a great mass of material, some of which was referred to on the argument. The admissibility and relevancy of a great part of it was objected to, but the court heard what counsel desired to say upon the subject without determining the issues raised. None of it was relied upon by counsel for the Provincial Attorney-General. Some of this material is of such a character that it is clearly relevant and admissible, while other parts are just as clearly irrelevant and inadmissible. However, it is unnecessary to determine the exact line that separates the one class from the other, since, after a detailed examination of the provisions of the Bill itself, I have arrived at the conclusion that the Bill in toto is *ultra vires* of the Provincial legislature."

In the same case (Privy Council) (5), Lord Maugham stated :

" 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 (p. 438) . . . matters of which the court would take judicial notice must be borne in mind, and other evidence in a case which calls for it " (p. 439),

(*c*) The courts may make use of the common knowledge possessed by every man in the street. (*Price Bros. Board of Commerce case* (6).)

(*d*) In the *Chemicals Reference case* (2), Davis, J., shows, at p. 23, that the court, even after the conclusion of argument,

Factum of Nolan.

accepted evidence in the form of information furnished to it on behalf of the Attorney-General. Here is an excellent example, in a case much relied upon by Appellant, of how the courts do test legislation and do accept extrinsic evidence.

(*e*) In *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ltd.* (7), Taschereau, J., at p. 583, said :

" 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."

(*f*) In the *Margarine case* (24) Estey, J., says at page 81 :

" That legislation so enacted may affect matters assigned exclusively to the provinces does not constitute a valid objection unless it be *determined* that such is " colourable," as that word has been so often used."

Rand, J., says at page 49 :

" The Court in its enquiry is not bound by the *ex facie* form of the statute ; "

Locke, J., says at page 84 :

" The fact that Parliament has declared that the manufacture, importation and sale of a healthful, nutritious food is a crime, does not relieve us of the necessity of inquiring into the real nature of this legislation. The determination of that question does not turn on the language used by Parliament but on the provisions of the Imperial Statute of 1867 (*Union Colliery Company* v. *Bryden*, 1899 A.C. 580, *Attorney-General for Manitoba* v. *Attorney-General for Canada*, 1925 A.C. 561). It may be observed that if it is within the power of the Dominion to prohibit the manufacture and sale of this valuable and harmless article of food in the provinces of Canada by the simple expedient of declaring these acts to be criminal offences, Parliament might with equal force prohibit the production and sale of milk or the keeping of cattle or the growing of wheat or the manufacture of flour. In my opinion, this is not in pith and substance criminal legislation and if it cannot be supported on other grounds, to sustain it as such would be to permit the Dominion to invoke heading 27 of Section 91 in aid of a clear encroachment upon the Provincial field."

(*g*) In the *Rentals case* (25) Rinfret, C.J., says :

" No doubt anybody attacking parliament's legislation as colourable would have to introduce evidence of certain facts to

support the contention, for it can hardly be expected that the Order of Reference would contain material of a nature to induce the Court to conclude to the colourability of the legislation. It may be that it would be so apparent that the Court could come to that conclusion without extraneous evidence . . . " Factum of Nolan.

Kerwin, J., says :

" It is apparent from the documents of which we are entitled to take judicial knowledge that the leasehold regulations were originally part only of various controls of enterprise and services, etc., . . . "

Rand, J., says :

" With those declarations and the matters of general public knowledge, at least not inconsistent with them, before us, and with nothing seriously challenging them, it would be quite impossible for this Court to find that war conditions had in fact entirely disappeared, that the declarations of Parliament were not made in good faith, and that its legislation, for some purpose other than that of an orderly accommodation of the regulations to the last stages of the economic derangement, was a colourable device for dealing with matters beyond its jurisdiction."

Kellock, J., says :

" If clear evidence had been adduced of the disappearance of any conditions justifying the continued operation of the federal legislation, it would, of course, be not only within the power but the duty of the court to declare the legislation invalid, but in the present case there is nothing of the kind."

(*h*) In the present proceedings, counsel for the Board, following the trial, submitted to the learned trial judge a copy of a report of the Canadian Wheat Board for the crop year 1946 and 1947. On the appeal he admitted this was done to affect the judgment of the learned trial judge. Counsel for Nolan approved of this action as being in accordance with the courts' increasing practice of looking outside the legislation itself at extraneous evidence. Subsequently, on appeal, the report was marked as Exhibit 20.

(i) Any available extrinsic evidence as to the real purpose and effect of P.C. 1292 should be considered. Evidence at trial and particularly the following Instructions to the Trade are pertinent and relevant :—

Number 59 Exhibit 2, Record, Vol. 3, pages 211–214.
Number 60 Exhibit 3, Record, Vol. 3, page 215.
Number 61 Exhibit 4, Record, Vol. 3, page 216.
Number 62 Exhibit 5, Record, Vol. 3, pages 217–218.
Number 63 Exhibit 6, Record, Vol. 3, page 219.
Number 64 Exhibit 7, Record, Vol. 3, page 222.
Number 66 Exhibit 10, Record, Vol. 3, page 224.

Factum of Nolan.

Instructions to the Trade are, by the definition of " order " in the Western Grain Regulations (P.C. 3222) (Exhibit 1 (2), Record, Vol. 3, pages 161–185), considered to be orders of the Board and therefore have to be recognized by the Board.

As to the Outline of Government Policy on oats and barley which is part of Instructions to the Trade No. 59 (Ex. 2), this is not within the rule that parliamentary debates are inadmissible for the purpose of construing a statute. We are not here concerned with anything said in debate. Ex. 2 was created by Appellant (an agent of His Majesty) and sent by it to all the parties to these actions and to the trade generally, and was acted upon by them. It is admissible against Appellant, who ought not to be permitted to say that this policy, before being disclosed by it, was also stated by someone in Parliament and therefore cannot be referred to. You cannot make something irrelevant by saying it in Parliament.

The Outline was made relevant by the reference to it in the defence set up in the Nolan action.

Record, Vol. 1, page 7.

It is significant that in the *Wartime Leasehold Regulations Reference* (25) there was " included in the order (of reference) an announcement made in the House of Commons by the Minister of Finance . . ." (from Judgment of Locke, J.)

III. *P.C. 1292 is invalid, since testing and examination show that the essential conditions of jurisdiction are not present.*

1. The essential conditions of jurisdiction of Dominion legislation are the same, whether that legislation takes the form of a statute or an Order-in-Council passed pursuant to a statute.

2. Where such legislation trenches, as it does in P.C. 1292, upon property and civil rights in the provinces, it must be justified upon what, for convenience, has come to be called the emergency doctrine. The true test of legislation depending upon this doctrine is enunciated in the *Fort Frances case* (8), where Viscount Haldane said, at page 704 :—

> " The general control of property and civil rights for normal purposes remains with the provincial legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole."

and at page 705 :—

> " Their Lordships therefore entertain no doubt that however the wording of ss. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion parliament is to be excluded from trenching on property and civil rights in the provinces of Canada, yet in a sufficiently great emergency such as that arising out of war there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole."

and in the *Temperance Case* (9), where Viscount Simon said, at page 6 :— Factum of Nolan.

> " In their Lordships' opinion, the true test must be found in the real subject matter of the legislation. If it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, . . . then it will fall within the competence of the Dominion parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the provincial legislatures."

and at page 7 :—

> " True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself and not the existence of emergency that must determine whether it is valid or not."

3. Appellant's contention that the existence of a general national emergency entitles Parliament or the Governor-in-Council to legislate in respect to matters within provincial jurisdiction in which there is no local emergent situation, or which are unrelated in any way to the national emergency cannot be supported. Legislation enacted by virtue of the emergency doctrine must be related to that emergency. The true test is not whether a general national emergency exists but rather the test is whether the real subject matter of the legislation from its inherent nature is the concern of the Dominion as a whole. Otherwise Parliament by declaring, for example, the existence of an emergency consequent upon an outbreak of smallpox in Newfoundland might claim by virtue of that declared emergency the right to expropriate house property on Vancouver Island, a matter entirely unrelated to the situation leading to the emergency declaration.

4. An examination of P.C. 1292 on its face and tested by the evidence for its pith and substance shows that it does not meet these basic requirements of jurisdiction because :—

(*a*) Its real purpose is disclosed in the " Outline " attached to instructions to the Trade No. 59 ;

Exhibit 2, Record, Vol. 3, pages 211–214.

(*b*) If the high-sounding purpose of P.C. 1292 were true, all oats and barley in Canada would have been affected ;

(*c*) Only a fraction of the oats and barley in Canada were affected by it, namely those grown in a designated area ;

(*d*) Of such oats and barley, only that part was affected which was not in maltsters' and producers' hands ;

(*e*) In October, 1947, when the price ceilings on oats and barley were removed entirely, no attempt was made to repeat the legislative novelty of March, 1947 ;

Evidence, Record, Vol. 2, page 107, lines 29–33.

(*f*) When price ceilings were removed from other commodities such as sugar, live stock, butter, etc., before and after March, 1947,

Factum of Nolan.

the legislative novelty of P.C. 1292 was not attempted. The courts can take judicial notice of these matters ;

(*g*) It was local and discriminatory class legislation ;

(*h*) There was no relationship between such discriminatory class legislation and any emergency which might exist by reason of the war with Germany and Japan (which by that time had been successfully concluded nearly two years before) ;

(*i*) Even if the Board had taken or had intended to take the actual ownership of the oats and barley and resold them to the former owners, this did not further any policy of bringing about greater production or other objective of national interest ;

(*j*) There was no reason in March, 1947, to prevent one small group taking a profit ;

(*k*) In the *Fort Frances case* (8), the Privy Council had in mind the relation between public safety and the supply of newsprint (p. 706). There is no possible connection between public safety and preventing profits to one group in the community, so that the reasoning of the *Fort Frances case* is not applicable ;

(*l*) The Governor-in-Council could not have deemed it necessary or advisable by reason of any emergency to prevent the making of fortuitous profits ;

(*m*) It did not promote the safety of the Dominion as a whole (*Fort Frances case* (8)) ;

(*n*) It did not go beyond local or provincial concern or interests and was not, from its inherent nature, the concern of the Dominion as a whole (*Temperance case* (9)).

IV. *P.C. 1292 exceeds the jurisdiction of and does not fall within the ambit of the powers conferred by Section 2 (1) (c) of the Transitional Act.*

1. P.C. 1292 is intended to derive its authority from Section 2 (1) (*c*) of the Transitional Act, which provides :—

> " 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
>
> * * * * *
>
> (*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."

2. The wording of the Act is exceeded by the terms of P.C. 1292 for the following reasons :—

(*a*) Sec. 2 (1) (*c*) does not support or justify the extensive interference with rights of property contained in P.C. 1292 ;

(*b*) Sec. 2 (1) (*c*) is limited to " maintaining, controlling and regulating " and there is no authority for action beyond that provided by those words which are cumulative and not alternative. Webster's New International Dictionary, 2nd edn., defines these words as follows :— Factum of Nolan.

" Maintain	..	To hold or keep in any particular state or condition, especially in a state of efficiency or validity ; to support, sustain or uphold ; to keep up ; not to suffer to fail or decline.
Control	..	To exercise restraining or directing influence over ; to dominate ; regulate ; hence to hold from action ; to curb.
Regulate	..	To govern or direct according to rule, as laws which regulate the succession of the seasons ; more narrowly, to bring under the control of law or constituted authority ; to make regulations for or concerning, as, to regulate the industries of a country or the production of wheat."

None of these words is in meaning or scope wide enough to authorize the compulsory transfer of property or cancellation of contracts. On the contrary, each implies the preservation or conservation of the thing which is to be made the subject of the " maintaining, controlling and regulating."

In *A.G. for Ontario* v. *A.G. for Dominion* (10), it is stated :

> " 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 " (p. 363).

(*c*) The " maintaining, controlling and regulating " must be done to ensure economic stability and an orderly transition to conditions of peace. The compulsory transfer of ownership and cancellation of contracts promotes the opposite of economic stability. P.C. 1292 introduces doubt and uncertainty into business and commerce. No contract can be made with the assurance that it can be free of similar interference. P.C. 1292 involves violation of ownership and sanctity of contract.

(*d*) The preamble of the Transitional Act contemplates " the discontinuance in an orderly manner as the emergency permits of measures adopted during and by reason of the emergency."

The Court is entitled to use the preamble because " The preamble of every Act shall be deemed a part thereof intended to assist in explaining the purport and object of the Act " (Section 14 Interpretation Act R.S.C. 1927 c. 1).

Sec. 2 (1) (*e*) speaks of " continuing or discontinuing in an orderly manner as the emergency permits measures adopted during and by reason of the war."

Factum of Nolan.

The plain intent of the Act is to lessen and discontinue controls, restrictions and interference, and it is contrary to the purposes of the Act to increase interference.

P.C. 1292 is a very definite increase in government interference in economic affairs, an entirely new policy.

The Court may take judicial notice of the fact that in other spheres of the Canadian economy the period was one of de-control. By April 3, 1947, wartime wage and salary control had been eliminated, most commodities had been released from wartime price control and wartime foreign exchange control regulations had been replaced by a statute.

3. P.C. 1292 being contrary to the plain intent of the Transitional Act and exceeding the jurisdiction conferred by that Act, is invalid.

> " Delegated authority . . . must be exercised strictly in accordance with the power creating it and in the spirit of the enabling statute."
>
> (31 Halsbury 467, Second Edition, as applied in *The King* v. *National Fish case* (11)).

In the *Lower Mainland Dairy case* (7), Duff, C.J., said, at p. 577 :

> " Such an administrative body as the Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down ; it is under a strict duty to use its powers in good faith for the purposes for which they are given."

V. The expropriation of property is not authorized by the Transitional Act.

1. Section 3 of the War Measures Act provides :—

> " 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 :—
>
> * * * * *
>
> (*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof."

2. The powers in 3 (*f*) above are not to be found in the Transitional Act. Subsection (*c*) of Section 2 (1) of the Transitional Act contains the words " use and occupation of property." There is no reference to ownership of property.

3. There is no jurisdiction under the Transitional Act to appropriate or forfeit property.

Factum of Nolan.

Both Acts are linked together, as will be seen from the recitals in the Transitional Act. If Parliament had intended appropriation and forfeiture to be exercised under the Transitional Act, these powers would have been specially provided for, as in the War Measures Act, and there would have been provisions for compensation, as found in Sec. 7 of the War Measures Act and all statutes authorizing expropriation. The payment of 64¾c per bushel as of March 17, 1947, for barley, which two days later was worth 93c in Canada and which on March 17 was worth $1.50 in Minneapolis and $1.96 in Chicago, cannot be considered as appropriate compensation.

4. The War Measures Act gave general power to pass regulations deemed necessary or advisable "for the security, defence, peace, order and welfare of Canada," and then continues "for greater certainty, but not so as to restrict the generality of the foregoing terms," to declare that the powers of the Governor-in-Council shall extend to certain matters specifically enumerated, among these the appropriation and forfeiture of property. Despite the generality of the terms of the War Measures Act, parliament thought it necessary to deal specifically with appropriation and forfeiture of property.

There is no general power contained in the Transitional Act, and no "for greater certainty," and no power of appropriation or forfeiture.

5. The authority for P.C. 1292 must be found in Sec. 2 (1) (*c*) of the Transitional Act. This does not authorize appropriation. Certainly "maintaining, controlling and regulating" does not.

6. The power of forfeiture in the War Measures Act could only be exercised during a state of war. The Transitional Act provided that on and after January 1, 1946, the war against Germany and Japan should, for the purposes of the War Measures Act, be deemed no longer to exist.

7. In the *Japanese case* (3A) Estey, J., in the Supreme Court, at p. 313 stated, in reference to the Transitional Act :—

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

8. Counsel for the Appellant before the Court of Appeal of Manitoba made another "startling" argument. He contended that the enumerated clauses (*a*) to (*e*) of Section 2, subsection 1, of the Transitional Act contained purposes only and in effect were immaterial because the general words at the beginning of Section 2 contained a grant of power as wide as that contained in the first part of Section 3 of the War Measures Act itself. He contended that the general words at the beginning of Section 2 of the Transitional Act contained the power of appropriation, and then asserted that by reason of the decisions interpreting the War Measures Act it was not essential to enumerate specific powers, and that the draftsman of the Transitional Act had followed these decisions and had purposely omitted enumerating specific powers and in particular had purposely omitted the power of appropriation and any reference to compensation.

Factum of Nolan.

An examination of the general words of section 2 of the Transitional Act shows they have no meaning apart from the purposes enumerated in clauses (*a*) to (*e*).

As to Appellant's assertion that the draftsman of the Transitional Act had deliberately omitted as non-essential the powers of appropriation and provision for compensation, that is simply not correct.

The fact is that the draftsman of the Transitional Act had such powers of appropriation and provision for compensation in the Bill (House of Commons Bill 15 Fall Session 1945), but Parliament struck them out.

It is recognized that the Courts are not entitled to look at Bills in order to interpret Acts. *Herron* v. *Rathmines* (14) at p. 501.

However, it is submitted that the Court can look at a Bill to test the accuracy of a submission which is itself a purported statement of the history of an Act.

Bill 15 contained in Section 3, subsection 1, exactly the same arrangement of powers as Section 3, subsection 1 of the War Measures Act, i.e., a general power to make orders for the security, defence, peace, order and welfare of Canada, and also " for greater certainty " specific enumerated powers including " appropriation, control, forfeiture and disposition of property and of the use thereof . . ." It contained a compensation clause in almost exactly the same words as Section 7 of the War Measures Act. Bill 15 makes it clear that the draftsman did not consider that by reason of the decisions interpreting the War Measures Act it was not essential to enumerate specific powers.

The Transitional Act as passed did not contain either the general power or the specific enumerated powers, nor the provision for compensation, i.e., the wide grant of power proposed by Bill 15 corresponding to that in the War Measures Act was replaced by a very limited authority to make orders for certain specific purposes only. It is a matter of " common knowledge possessed by every man on the street " that this limitation of power in the Transitional Act resulted from strong opposition to Bill 15 in Parliament and throughout Canada.

VI. *P.C. 1292 cannot be supported and upheld as a mode or system of taxation.*

1. It is not within the power of the Governor-in-Council to originate taxation. This power is exclusively in parliament.

(*a*) Sections 53 and 54 of the B.N.A. Act provide :—

" 53. Bills for appropriating any part of the public revenue or for imposing any tax or impost shall originate in the House of Commons.

" 54. It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose that has not been first recommended to that House by message of the Governor-General, in the session in which such vote, resolution, address or bill is proposed."

(*b*) These sections are more than directory or procedural— they are designed to protect and to preserve a basic principle of constitutional practice, that there shall be no taxation without the consent of parliament to the particular charges. The B.N.A. Act is an Imperial statute and its provisions cannot be overridden or disregarded by parliament. Factum of Nolan.

(*c*) In *The King* v. *National Fish Company, Ltd.* (11) at page 81 it is stated :—

" The Regulation cannot of its own inherent power control or originate matters of taxation. Such an extreme step would be contrary to the whole scheme and spirit of the B.N.A. Act."

and at page 82 :—

" The regulations must be so construed as to reserve to parliament the initial power of taxation."

and at page 83 :—

" The Governor-in-Council has no power—*proprio vigore*— to impose taxes unless under authority specifically delegated to it by statute. The power of taxation is exclusively in parliament."

(*d*) In the *Chemicals Reference case* (2), Duff, C.J., states, at page 10 :—

" It is not necessary for the purposes of the present reference to consider whether it is within the power of parliament, even in an emergency, to give authority to the Governor-General in Council to exercise legislative powers in relation to such matters as, for example, those within the scope of Sections 53 and 54 of The British North America Act. It is in the highest degree unlikely that any such question will ever arise touching such matters. But it ought to be observed that, apart from the conditions expressed in the War Measures Act, the validity of any Order or Regulation made under the authority of Sec. 3 is affected by a two-fold condition ; that it could be enacted as a statute by parliament in execution of its emergency powers or otherwise ; and furthermore, that parliament is not precluded by the British North America Act or by any later lawful enactment concerning its legislative powers from committing the subject matter of it to the Executive Government for legislative action."

(*e*) In the case of *Attorney-General* v. *S. Wilts United Dairy, Ltd.* (13), it was held in both the Court of Appeal and the House of Lords that a charge on each unit of milk authorized by Order-in-Council under the Defence of the Realm Act as part of a general scheme of milk regulation was not within the power conferred by the Act.

The judgment of the Court of Appeal states in part (page 884) :—

" If an officer of the executive seeks to justify a charge upon a subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show in clear terms that parliament has authorized the particular charges. The

intention of the legislature is to be inferred from the language used and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon a subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purpose of the levy, the circumstances would be remarkable indeed which would induce the Court to believe that the legislature had sacrificed all the well-known checks and precautions, and not in express words but merely by implication had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon a subject for purposes connected with his department."

2. P.C. 1292 was not enacted pursuant to Sections 53 and 54 of the B.N.A. Act and therefore cannot be supported or upheld as a mode or system of taxation.

VII. *P.C. 1292 is not validated by reason of the Western Grain Regulations receiving statutory recognition in the amendment to the Canadian Wheat Board Act, Statutes of Canada 1947, Chapter 15, Section 6.*

1. The 1947 Amendment to the Canadian Wheat Board Act which was introduced in Parliament on February 20, 1947, and which was assented to on May 14, 1947, as Chapter 15, Statutes of Canada 1947, contained in Section 6 the following subsection which came into force on the day of assent:—

> "The Western Grain Regulations and the Eastern Grain Regulations made by the orders of the Governor-in-Council of the 30th day of July, 1946, shall continue in full force and effect until the coming into force of the provisions of this Act other than this sub-section, and shall then for the purpose of Section 19 of the Interpretation Act be deemed to have been revoked."

No alteration was made in Section 6 from its introduction on February 20, 1947, until its enactment on May 14, 1947.

The Western Grain Regulations were amended under date of April 3, 1947, by P.C. 1292, which substituted a new Part III thereof.

It is apparent Parliament could have had no intention of validating P.C. 1292 when on May 14, 1947, it assented to Chapter 15 of the 1947 Statutes in the form in which it was introduced on February 20, 1947.

2. The controversy between Nolan and the Board arising out of P.C. 1292 was before the Court on April 24, 1947, on which day Hallet and Carey gave notice of its application for an interpleader order. At that time Chapter 15 had not been passed.

3. There could be only one vesting of the oats and barley by P.C. 1292. That vesting was attempted on April 3, 1947, and was legally either good or bad at that time. Section 6 of Chapter 15, as passed on May 14, 1947, did not and could not re-enact the vesting section. It is apparent

Parliament did not give its mind to the matter at all as no reference whatever is made in Chapter 15 to the vesting of oats and barley. Factum of Nolan.

4. Even if Parliament had used apt words to indicate its intention to re-enact in Chapter 15 on May 14, 1947, the vesting of oats and barley as provided by P.C. 1292, such action by Parliament would not be valid. Chapter 15 was not enacted as emergency legislation and consequently it depended for its validity on the normal peacetime powers of the Dominion under Section 91 of the B.N.A. Act. Such powers do not authorize the extensive interference with property and civil rights in the province by way of expropriation of property, etc., which was attempted by P.C. 1292.

Dated at Winnipeg this 6th day of April 1950.

Respectfully submitted,

JOHN A. MACAULAY.

G. E. TRITSCHLER.

of Counsel for JEREMIAH J. NOLAN,

(*Defendant*) Respondent.

(*Plaintiff*) Respondent.

INDEX OF CASES