In the Privy Council.

No. 32 of 1951.

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

THE ATTORNEY-GENERAL OF CANADA and THE CANADIAN WHEAT BOARD ... ... APPELLANTS

AND

HALLET AND CAREY LIMITED and JEREMIAH J. NOLAN ... ... RESPONDENTS.

CASE FOR THE RESPONDENT NOLAN

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1.—This is an Appeal by Special Leave from the Supreme Court of Canada (Rinfret, C.J., Kerwin, Taschereau, Rand, Estey, Locke, Cartwright, JJ.), pronounced November 20, 1950, which dismissed Appellants' appeals from a Judgment of the Court of Appeal for Manitoba, pronounced March 10, 1949, affirming a Judgment of the Court of King's Bench pronounced April 19, 1948, in two actions heard together.

2.—Judgments of the trial Judge in favour of Respondent Nolan (hereafter called "Nolan") were sustained by the unanimous decision of five Judges in the Manitoba Court of Appeal and by five of the seven Judges who heard the appeal in the Supreme Court of Canada (Kerwin and Estey JJ. dissenting).

3.—On March 17, 1947, 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 terminal elevators of certain warehousemen. Each of the warehousemen had issued warehouse receipts, for the quantity of barley stored by it. Each warehouse receipt was issued to or assigned and endorsed to Hallet and Carey Limited (hereafter called "Hallet"), which held the documents as agent for Nolan. It had no beneficial interest in them, nor in the barley,

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except it asserted a claim to lien for storage and carrying charges. The barley had been purchased by Hallet 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 possession of the barley from the date of issue of their receipts until its sale.

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

5.—On March 17, 1947, Appellant, The Canadian Wheat Board, hereinafter referred to as the "Board," issued its "Instructions to Vol. 3, p. 211 Trade No. 59" and sent a copy to Hallet as well as to all of the members of the grain trade. In this document the Board as administrator of the Wartime Prices and Trade Board announced a new maximum price on barley and oats, that on barley being 93 cents per bushel. Also it stated that all western oats and barley in commercial channels in Canada as at midnight March 17, 1947, must be sold to the Board the price in the case of all grades of barley being 64¾ cents per bushel. Attached to Instructions to Trade No. 59 was a document entitled "Outline of "Government Policy on Oats and Barley as Announced in Parliament, "March 17, 1947," reading in part as follows:

Vol. 3, p. 214, l. 4

> "4. In order to avoid the fortuitous profits to commercial "holders of oats and barley that would otherwise result from the "action that has been described, handlers and dealers will be "required to sell to the Wheat Board on the basis of existing "ceilings of 64¾ cents per bushel for barley and 51½ cents per "bushel for oats, all stocks in their possession at midnight "tonight, March 17th. Under certain conditions these stocks "will be returned to the holder for resale . . . ."

6.—The effect of the policy announced in Instructions to the Trade 59 was to permit the price of barley to rise from 64¾ cents to 93 cents per bushel effective as of March 18, 1947. This it immediately did for 93 cents per bushel was much less than its actual value. Barley, corresponding to Vol. 3, p. 265 No. 3 C.W. Six Row sold on March 17, 1947, at Minneapolis, U.S.A. for $1.96 to $1.99 and at Chicago, U.S.A. for $1.50 to $1.95.

7.—The Board issued further Instructions to the Trade dealing with Vol. 3, p. 222 this subject in addition to No. 59. No. 64 of March 20, 1947, advised holders of oats and barley taken over by the Board as at midnight March 17, 1947, and unsold as of that time 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 65 cents in the case of all grades "of oats and 93 cents 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 28¼ cents per bushel for the quantity involved in the case " of barley and 13½ cents per bushel for the quantity involved in " the case of oats."

Instructions to the Trade 59 and 64 were issued by the Board without any legal authority whatsoever. At the date of their issue no order-in-council or other enactment purporting to give such authority had been passed.

8.—On April 3, 1947, the Governor General-in-Council passed Order-in-Council P.C. 1292 which was designed to legalize the take-over of the oats and barley. P.C. 1292 states it is made under the powers conferred by the National Emergency Transitional Powers Act (hereinafter called the Transitional Act). The preamble recites that 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, among other things, the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, and in addition for the closing out and termination of any open futures contracts relating to oats or barley outstanding in any futures market in Canada. Section 22 of P.C. 1292 states : Vol. 3, p. 228, *et seq.*

" 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." Vol. 3, p. 229, l. 30

The validity of P.C. 1292 and particularly of Section 22 thereof is the principal question for decision.

9.—Nolan refused to obey the orders of the Board. He forbade Hallet to deliver to the Board the documents of title to the barley or the barley itself. Vol. 3, pp. 237–8

10.—On May 22, 1947, a Statement of Claim was issued in the Court of King's Bench at Winnipeg by which Nolan sued Hallet for possession of his barley and the documents of title thereto. This is hereinafter referred to as the Nolan Action. Vol. 1, p. 6

11.—Nolan's solicitors offered to permit the Board to take as prominent a part as it desired in his action, but the Board was not satisfied to have the matter come on for determination in the Nolan action. Notwithstanding this offer and the Board's earlier refusal to afford Hallet, who were innocent stake holders, interpleader relief, the Board subjected Hallet to a second action, and on October 8, 1947, commenced its action (hereinafter called Vol. 3, p. 247 Vol. 2, p. 1

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the Board action) against the warehousemen and Hallet claiming possession of the barley and of the documents of title thereto. Hallet did not escape from its unfortunate position until the direction of the Judicial Committee on July 5, 1951.

12.—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 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 of the barley and the documents of title thereto. He found that the Transitional Act was *intra vires* but that the Act did not confer on the Governor-in-Council the power of " appropriation of property " and that Parliament deliberately intended to withhold this power.

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13.—After judgment the Attorney General of Canada was added as a Party Defendant in the Nolan action in order that he might be in a position to appeal the judgment.

14.—On December 7, 1948, it was ordered that the barley be sold and the proceeds be paid into court to the joint credit of both actions.

Vol. 2, p. 45

15.—Appeals in both the Nolan and Board actions were heard together by the Court of Appeal for Manitoba which delivered its judgment on March 10, 1949, and unanimously dismissed the appeal of the Attorney-General in the Nolan action and the appeal of the Board in its action. All five judges supported the finding of the Trial Judge and held *inter alia* that the Transitional Act did not confer on the Governor-in-Council the power to appropriate property.

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16.—Appellants appealed to the Supreme Court of Canada which gave its judgment on November 20, 1950, and by a majority of 5 to 2 (Kerwin and Estey, J.J., dissenting) dismissed both appeals.

17.—The Chief Justice agreed with the reasons delivered by Taschereau, Rand, Locke and Cartwright, J.J.

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18.—Kerwin, J. (dissenting) was of the opinion that looking only at the Transitional Act the powers conferred were sufficient to authorize what was done.

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19.—Taschereau, J., concluded that under the guise of maintaining, controlling and regulating prices, the Governor-in-Council cannot compulsorily appropriate property and arbitrarily fix the compensation to be paid. He considered the exercise of such powers would be beyond the authority conferred by statute and held that to that extent P.C. 1292 was *ultra vires*.

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20.—Rand, J., held that the absolute appropriation of property was not authorized by the Transitional Act and was *ultra vires* of the Governor-in-Council. Vol. 4, pp. 9–12

21.—Estey, J. (dissenting) was of the opinion that in the Transitional Act Parliament had conferred upon the Governor-in-Council the same wide and comprehensive powers for the attainment of the specific purposes mentioned therein as it had conferred upon the Governor-in-Council for the attainment of the more general purposes set out in the War Measures Act, and that P.C. 1292 was therefore *intra vires*. Vol. 4, pp. 12–16

22.—Locke, J., considered that statutes are not to be construed as taking away or authorizing the taking away of the property rights of the subject unless their language makes that intention abundantly clear; and that apart from the fact that the Transitional Act contained no such power either in terms or by plain implication, the omission of the provisions dealing with the subject contained in the War Measures Act from the Transitional Act, is a plain indication that it was not intended that the Governor-in-Council should be vested with any such power. He found P.C. 1292 *ultra vires*. Vol. 4, pp. 16–21

23.—Cartwright, J., considered that the power conferring words in the Transitional Act were subject to the canon of construction that words so general must be construed with caution; also that the War Measures Act and Transitional Act were in *pari materia* and the comparison of their terms is a proper aid in the construction of the latter statute. After making such comparison he found that Parliament did not intend to grant in the Transitional Act wider power than was conferred by the War Measures Act, i.e. power not only to take over property but to fix the compensation to be paid therefor. He found P.C. 1292 was *ultra vires*. Vol. 4, pp. 21–24

24.—Nolan respectfully submits that P.C. 1292 exceeds the authority granted to the Governor-in-Council by the Transitional Act; that the action attempted by P.C. 1292 could not be for the purposes stated in its preamble; and that the essential conditions of jurisdiction were not present and P.C. 1292 is invalid in law. Nolan submits Appellant Board has no legal right to the moneys remaining in Court from the sale of the barley.

25.—P.C. 1292 attempted outright expropriation of Nolan's entire property in the barley in return for wholly inadequate consideration determined by the Governor-in-Council without reference to any judicial body. The Transitional Act provided no authority for such action.

26.—The Transitional Act was the direct successor to the War Measures Act, and was enacted to delegate to the Governor-in-Council certain powers which he had previously exercised under the War Measures Act. The preamble to the Transitional Act as well as its subsequent provisions make repeated references to the War Measures Act. The two statutes are in Vol. 4, App. p.

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pari materia. As indicated in the preamble to the Transitional Act they both deal with different phases of the same continuing emergency arising out of the war against Germany and Japan. Under these circumstances it is the logical and proper course that the corresponding sections of the whole of the two statutes be compared to determine the extent of the power granted in the Transitional Act. The making of such a comparison is in accordance with well established rules of statutory construction.

Vol. 4, App. p. 1

27.—The War Measures Act expressly and explicitly provided that the powers of the Governor-in-Council extend to the "appropriation, "control forfeiture and disposition of property and of the use thereof," and also provided a procedure for the fixing by a Court or Judge of compensation for any property so appropriated. Despite the general grant of power in the opening words of Section 3 of the War Measures Act, Parliament thought it necessary to confer by specific words the power to appropriate property. The War Measures Act has been a Canadian statute since 1914. It was the source of the Dominion's legislative power during the first and second World Wars. It has been interpreted on several occasions by the Courts, and its meaning is well established and well understood. The departure by Parliament in the Transitional Act from the wording of the War Measures Act must be given meaning and Parliament must be taken to have intended a result distinct and different from that which would have followed from a repetition of the pattern of the War Measures Act.

28.—The Transitional Act contained no specific power of appropriation and no provision for fixing compensation of property appropriated. Nolan submits the omission of these provisions indicates clearly that the Transitional Act does not include the right to appropriate. If Parliament had intended to grant the power to appropriate property it would have said so as it did in the War Measures Act.

29.—This conclusion is supported by the legislative history of the Transitional Act. In the Manitoba Courts Appellants asserted that the draftsman of the Transitional Act had purposely omitted as non-essential reference to appropriation or compensation. This is simply not correct. The fact is the draftsman of the Transitional Act had included in the Bill specific powers of appropriation and a compensation clause in the identical terms of Section 7 of the War Measures Act. This Bill was drastically amended by Parliament. The reference to appropriation and the compensation clause were deleted. It was a matter of "common knowledge "possessed by every man on the street of which courts of justice cannot "divest themselves" (*In re Price Brothers*, 60 S.C.R. 265, at page 279), that the final form of the Transitional Act resulted from strong opposition to the Bill in Parliament and throughout Canada. It is recognized that Courts do not look at Bills in order to interpret Acts. However, it is submitted that Courts can look at a Bill to test the accuracy of a submission which is itself a purported statement of the history of an Act.

30.—The conclusion that Parliament did not intend to and did not grant in the Transitional Act the power to appropriate property is further strengthened by noting the emphasis placed in the Transitional Act on the discontinuance of emergency measures.

The Trial Judge stated, Vol. 3, p. 304, l. 19

> " As I read this preamble with its emphasis on continuance
> " and discontinuance there is compelling force in the argument
> " that it was not the intention of Parliament to authorize the
> " imposition of new controls or entirely new measures unless those
> " new measures looked to the discontinuance of the controls."

Rand, J. stated, Vol. 4, p. 10, ll. 9–11

> " Parliament, therefore, passed the Act of 1945 as a truncated
> " War Measures Act in which the jurisdiction enjoyed by the
> " executive under the former Act was reduced."

In Reference *re* Persons of Japanese race (1946 S.C.R. 248) Estey, J. stated (p. 313) in reference to the Transitional Act,

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

31.—The preamble to the Transitional Act states that it is essential there continue to be exercisable " certain transitional powers." " Certain " does not mean " all." Clearly Parliament intended that some of the powers granted in the War Measures Act should not be continued under the Transitional Act. One of the powers not continued was that of appropriation of property. Vol. 4, App. p. 2

32.—The Court may take judicial notice of the fact that in other spheres of the Canadian economy the period was one of decontrol.

33.—In *In re Gray* (1918, 57 S.C.R. 150) in which the Supreme Court considered and upheld the validity of the War Measures Act, Duff, J. (as he then was) in referring to the enumerated items following the " for greater certainty " provision in Section 3 of the War Measures Act described them as (p. 168),

> " groups of subjects which it appears to have been thought might
> " possibly be regarded as ' marginal instances ' as to which there
> " might conceivably arise some controversy whether or not they
> " fell within the first branch of the section."

One of these enumerated items was " appropriation, control forfeiture and " disposition of property and of the use thereof." It was recognized by Duff, J., that this item in the War Measures Act was a marginal instance the omission of specific reference to which might even during actual war lead to controversy whether it was included in the wide general wording of Section 3 of the War Measures Act. The actual omission of this item in time of peace from the Transitional Act, whose general wording was for

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much more restricted purposes alone justifies the conclusion that the right of appropriation was intentionally withheld by Parliament from the powers it conferred on the Governor-in-Council. The added omission of the compensation clause makes the conclusion irresistible.

34.—The above quotation from Duff, J., also clearly contradicts Appellants' contention that decisions on the War Measures Act recognize that the enumerated matters in Section 3 of the statute are unnecessary surplusage. Duff, J., shows these enumerated items were necessarily specified to eliminate possible controversy in marginal instances.

35.—Appellants' contention that the Transitiomal Act contained the power to appropriate property despite its changed pattern and the absence of a provision for the fixing of compensation forces Appellants to take the position that the Transitional Act conferred on the Governor-in-Council powers greater than he had under the War Measures Act, and powers he never had before, namely, to take property and to pay only such price as he might choose to give ; without reference to any judicial body to fix compensation. Such a position is quite untenable. It is clear from the preamble with its emphasis on discontinuance of emergency measures that Parliament did not intend to grant wider powers than had been granted under the War Measures Act.

Vol. 4, App. p. 2

36.—The power of appropriation in the War Measures Act could only be exercised during a state of war. The Transitional Act provided that on

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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. In view of the wording of the preamble to the Transitional Act Parliament could not have intended to grant in peace time wider powers in respect of property than it granted during the war.

Vol. 4, p. 19, ll. 38–40

37.—Nolan advances and relies upon the reasons and authorities referred to by Locke, J., in the Supreme Court that statutes are not to be construed as taking away or authorizing the taking away of the property rights of the subject, unless their language makes that intention abundantly clear ; and that the Transitional Act contains no such clear and distinct power of appropriation. The statements of Adamson, J., in the Manitoba Court of Appeal are pertinent,

Vol. 3, p. 340, l. 15

" Expropriation of private property by the State, without " provision for an adjudicated or arbitrated compensation, is so " alien to Canadians that it almost raises a presumption that neither " Parliament nor the Governor-in-Council intended what is " attempted by this Order-in-Council. Counsel for the Attorney " General was unable to cite any other instance in which such a " thing was done by any Canadian Government.

* * * *

Vol. 3, p. 341, l. 5

" Parliament is not to be understood as having intended to levy " a special tax or assessment upon a small class, or to have taken

" any man's property without just compensation, except upon the " clearest and most unequivocal language. Such an act would be " in the nature of a penalty. I do not think that, upon any " interpretation, the vesting attempt by the Order-in-Council " comes within the purview of the Act."

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38.—In the absence of a specific grant of the power of appropriation in the Transitional Act, that power cannot be implied. Rand, J., emphasizes this principle.

". . . . it would be inconsistent with the declared purpose of " Parliament to imply in the continued authority what was express " in the original enactment."

Vol. 4, p. 10, ll. 24–26

39.—As stated by Cartwright, J., it is a settled canon of construction that words so general as these in Section 2 (1) of the Transitional Act must be construed with caution, and that all words if they be general and not express and precise are to be restricted to the fitness of the matter.

Vol. 4, p. 22, l. 4

Further, " delegated authority . . . . must be exercised " strictly in accordance with the power creating it and in the " spirit of the enabling statute." (31 Halsbury, 467, 2nd edition.)

40.—The Judges in the Supreme Court did not, as has been suggested by Appellants, confuse the general grant of power with the enumerated purposes in the Transitional Act. For example the judgment of Cartwright, J., recognizes clearly that the power was contained in the general wording at the commencement of Section 2 (1). Nevertheless he found that the vesting provisions of P.C. 1292 were not authorized by the Transitional Act and were *ultra vires* of the Governor-in-Council.

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41.—Nolan further submits that the pith and substance of P.C. 1292 is not as stated in its preamble. The action attempted by P.C. 1292 was not " necessary by reason of the continued existence of the National " Emergency arising out of the war against Germany and Japan for the purposes of maintaining, controlling and regulating supplies and prices to " ensure economic stability and an orderly transition to conditions of " peace."

42.—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 barley was sold to or repurchased from the Board. Holders of oats and barley grown in the designated area (comprising the Provinces of Manitoba, Saskatchewan and Alberta and small portions of the Provinces of British Columbia and Ontario) and which were in commercial positions, i.e. which were not the property of the producer thereof and which were in store in warehouses, elevators or mills, railway cars, vessels or other facilities in Canada for the storage or

Vol. 2, p. 105, ll. 12–23; p. 106, ll. 29–38; p. 107, ll. 1–8; p. 112, ll. 14–17; p. 113, ll. 20–21; p. 116, ll. 16–21; p. 117, ll. 3–19; p. 119, ll. 9–10; p. 126, ll. 1–5; p. 132, ll. 2–7; p. 132, ll. 22–25; Vol. 3, p. 229, l. 10

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transportation of grain, simply gave their cheques to the Board for the difference in price before and after March 17, 1947, i.e. 28¼ cents in the case of barley.

Vol. 2,
p. 107, l. 34
p. 109, l. 23
p. 113, l. 36
p. 114, l. 3
p. 114, ll. 13–26
p. 120, l. 36
p. 121, l. 22
p. 133, l. 31
p. 134, l. 7

B. The holders of oats and barley affected continued to be free to hold or dispose of the grain as they saw fit.

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C. P.C. 1292 had no effect on price. War Time Prices and Trade Board Administrator's Order 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 65 cents and for the best grade of barley was 93 cents. Prices for oats and barley regardless of grade 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. 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. 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 in the open market, increased substantially.

Vol. 3, p. 265

Vol. 2,
p. 109, ll. 18–23
p. 110, ll. 3–8
p. 112, ll. 9–13
p. 121, ll. 27–28
p. 134, ll. 8–11
p. 135, ll. 23–25

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

Vol. 3, p. 162, l. 24

E. Had there been an emergency, all oats and barley in Canada would have been taken over. Actually only oats and barley grown in the designated area were affected. Of oats and barley in the "designated area," only that portion was affected which was in commercial positions.

Vol. 3, p. 236, ll. 6–8

F. 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.

Vol 3, p. 336, l. 29.

G. Appellants admitted at trial and on the appeal there was no national emergency in oats or barley.

Vol. 3, p. 300, l. 17

H. Trial Judge found no emergency existed in Canada with regard to oats and barley.

43.—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.

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44.—Nolan submits that the action outlined above was not and could not be for the purpose of " maintaining, controlling and regulating supplies and prices." These words do not imply a purpose wide enough to include the appropriation of property.

45.—The proposition that Courts ought not to question the wisdom or propriety of a particular policy adopted by the Governor-in-Council in exercising a discretion under emergency legislation does not extend to say that Courts cannot find that the action of the Governor-in-Council is not in fact limited to a particular purpose, nor are Courts prevented from saying that the activity of the Governor-in-Council cannot in fact be for a particular purpose. The Governor-in-Council may mistake the purpose and the Court may find that the activity cannot be for the stated purpose because the activity cannot effect the purpose which the Governor-in-Council might think it could.

46.—In *Cooperative Committee on Japanese Canadians' Attorney-General of Canada*, 1947, A.C. 87, at page 108, Lord Wright stated :

> " Their Lordships do not doubt the proposition that an " exercise of the power for an unauthorized purpose would be " invalid, and the only question is whether there is apparent any " matter which justifies the Judiciary in coming to the conclusion " that the power was in fact exercised for an unauthorized " purpose."

Nolan submits that in P.C. 1292 the Governor-in-Council if he had the power, which is challenged under the first part of this case, attempted to exercise it for an unauthorized purpose, and that there are apparent substantial grounds justifying the Judiciary in coming to this conclusion and that accordingly for the reasons stated by Lord Wright, P.C. 1292 is invalid.

47.—The submission that the actual purpose of P.C. 1292 was not as stated in its preamble is not to impute bad faith, to the Governor-in-Council. The Governor-in-Council, which is the Cabinet, did not give its mind to more than a fraction of the thousands of orders-in-council that were passed under the Transitional Act. These are the activity of civil servants. Insofar as the Governor-in-Council gave sanction to the preamble to P.C. 1292 the situation simply was that he was wrongly advised ; that he misconceived his power and failed to see that his activity could not achieve the purpose alleged.

48.—Adamson, J. stated in the Manitoba Court of Appeal, Vol. 3, p. 340

> " To make this finding is not to impute bad faith to the " Governor-in-Council, but merely to hold that a mistake was " made. The Canada Gazette shows that in 1947 more than " 5,000 Orders-in-Council were enacted. Many of such Orders-" in-Council were technical, complicated and involved. It is safe

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" to say that frequently the Governor-in-Council was dependent " for the correctness of the recitals in Orders-in-Council, and for " the facts required to decide the necessity of the measures taken " under such Order-in-Council, upon an official or controller in " some department. Indeed, the sequence of events indicates " that the Canadian Wheat Board had acted, and that this Order- " in-Council was an attempt to legalize what had already been " done."

49.—Respondents' contention that the pith and substance of P.C. 1292 was not as stated in its preamble is proved by evidence and deduction. It finds additional support in Appellants' own conduct. At trial and in the Manitoba Court of Appeal Appellants asserted that the actual purpose of the Order-in-Council was stated in its preamble and sought to exclude evidence of the real purpose. At trial Petitioners actually succeeded in excluding the " Outline of Government Policy " which accompanied Instructions to the Trade No. 59 and which completely exposed the true purpose of P.C. 1292, which was " to avoid the fortuitous profits to com- " mercial holders of oats and barley " which would otherwise have resulted from the raising of price ceilings. By right-about-face in the Supreme Court Appellants referred to the " outline " and actually quoted it in their Petition for Special Leave to Appeal to the Judicial Committee.

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50.—As submitted previously, the Transitional Act contains no power of appropriation of property, but even if it did, such power could be used only for the purposes stated in the preamble to P.C. 1292, namely, " main- " taining, controlling and regulating supplies and prices to ensure economic " stability and an orderly transition to conditions of peace." As shown in paragraph 42 the appropriation attempted did not maintain, control or regulate prices. Even if the appropriation had been relevant to the subject of price control the appropriation attempted by P.C. 1292 was not limited to that purpose. Section 22 of P.C. 1292 purported to vest in the Board absolutely the oats and barley held in commercial positions. Even if it were (which is not admitted) a legitimate measure of price control to appropriate the difference in price between the old ceiling for barley of $64\frac{3}{4}$ cents per bushel and the new ceiling of 93 cents per bushel, this is quite a different matter to the appropriation of the barley absolutely. Such absolute appropriation could not be for the purpose of maintaining, controlling and regulating prices. Such appropriation went beyond what was necessary to carry out that purpose, and accordingly is *ultra vires*.

51.—Nolan further submits that the essential conditions of jurisdiction were not present for the enactment of P.C. 1292 since it did not promote the safety of and was not the concern of the Dominion as a whole and accordingly P.C. 1292 is invalid in law.

52.—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. The claim that the Governor-in-Council has unlimited power for limited purposes and an uncontrollable right to say what is necessary or advisable for the limited purposes is a claim to absolute power which Parliament certainly did not intend to convey in the Transitional Act.

53.—Nolan submits that the courts may test the validity of P.C. 1292 and may make use of extrinsic evidence in doing so. 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 recognize 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. The effect of the authorities is summarized by the Judicial Committee in the Japanese case (1947, A.C. 87, 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."

54.—Regarding the first requirement stated in the Japanese case, P.C. 1292 does not fall within the ambit of the powers duly conferred by the Act on the Governor-in-Council because as previously submitted the Transitional Act does not confer on the Governor-in-Council the power to appropriate property.

55.—Regarding the second requirement, P.C. 1292 is invalid in law because the essential conditions of jurisdiction are not present. This is apparent from an examination of the evidence. 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. The authorities in this respect are recorded in Nolan's factum in the Supreme Court. Vol. 4, Nolan's Factum, pp. 23–30

56.—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 then it cannot be validly enacted by the Governor-in-Council. The Dominion cannot use the device of delegated authority to avoid the scrutiny of the courts and by this means solve Canada's

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constitutional difficulties, or draw to itself a field of jurisdiction the courts have hitherto denied it. This is what the Judicial Committee means by its second requirement in the Japanese case that orders must not be " by some reason in law invalid."

57.—Where Dominion legislation trenches, as does P.C. 1292, upon property and civil rights in the provinces, it can 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 (1932 A.C. 695) where Viscount Haldane said, at p. 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 p. 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 (1946, 2 W.W.R. 1), where Viscount Simon said, at p. 6 :

> " 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 p. 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."

58.—The question whether the action is related to an emergency is of unique importance because if Parliament can say there is an emergency and then that the relation of the action to the emergency cannot be reviewed the provisions of the B.N.A. Act could be overridden.

59.—Appellants' 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 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, and a matter in respect of which it had no right to legislate.

In *In re Price Brothers*, 1920, 60 S.C.R. 265, Duff, J. (as he then was) stated (p. 272):

> " 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."

60.—An examination of P.C. 1292 on its face and tested for its pith and substance by the evidence which is summarized above, shows that the appropriation does not meet these basic requirements of jurisdiction because it did not promote the safety of the Dominion as a whole ; and 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. Since these essential conditions of jurisdiction are lacking, P.C. 1292 is invalid in law.

61.—In considering the effect of the English authorities as to the extent of the authority conferred in enactments stating that His Majesty in Council may do such things as he deems necessary or advisable for specified purposes, it is to be noted that the British parliament has unlimited legislative power and its delegatee can create any legislation it could itself create. The Canadian Parliament does not have unlimited legislative power. Legislation by it and its delegatee is limited to Section 91 of the B.N.A. Act.

62.—In the later stages of this litigation and in the Petition for Leave Appellants, going entirely outside the record have made reference to " profiteering " and have said the policy of preventing profiteering from de-control has been followed in Canada throughout the whole period of de-control, and has been applied in respect of other commodities than

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barley. The use of the approbrious epithet " profiteering " is as incorrect as it is an unfair attempt to prejudice Nolan and ill-fits petitioners attempt to take Nolan's barley at less than its market value and further without compensation for the sum of $7,700.00 incurred by Nolan for storage and carrying charges. In respect of no other commodity has the procedure set forth in P.C. 1292 been used, i.e., in no other instance was there an attempt under the Transitional Act to appropriate the entire title to any property or commodity in order to prevent the accrual of profits. Nolan acted at all times strictly in accordance with his legal rights. He acquired the barley legally on the open market at 69¾ cents a bushel and subsequently held it in storage as he was legally entitled to do. There is no evidence of, nor was there, profiteering in oats and barley. If Government had not wanted people to purchase oats and barley it would not have allowed as it did an open market in these grains. Appellants who sought to make a profit at Nolan's expense ought not to use the expression " profiteer " in respect of him.

63.—Nolan respectfully submits that the Judgments of all the Canadian Courts are right and should be affirmed, and that this appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the appropriation of property is not authorized by the Transitional Act.

2. BECAUSE the pith and substance of P.C. 1292 is not as stated in its preamble and since the action attempted could not be for the purpose stated.

3. BECAUSE the essential conditions of jurisdiction were not present since P.C. 1292 did not promote the safety of and was not the concern of the Dominion as a whole.

4. BECAUSE of the reasons given in the respective Judgments of the five majority Judges in the Supreme Court of Canada.

5. BECAUSE of the reasons given in the unanimous decision of the Court of Appeal for Manitoba.

6. BECAUSE of the reasons given by the Trial Judge.

JOHN A. MACAULAY.
G. E. TRITSCHLER.

In the Privy Council.

No. 32 of 1951.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE ATTORNEY GENERAL OF CANADA and THE CANADIAN WHEAT BOARD ... APPELLANTS

AND

HALLET AND CAREY LIMITED and JEREMIAH J. NOLAN RESPONDENTS.

CASE FOR THE RESPONDENT NOLAN

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