1956
*Apr. 24, 25, 26
*Nov. 19, 20
1957
Jan. 22

IN THE MATTER OF A REFERENCE RESPECTING THE FARM PRODUCTS MARKETING ACT, R.S.O. 1950, CHAPTER 131, AS AMENDED.

Constitutional law—Regulation of trade and commerce—Provincial marketing schemes—Validity of The Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended, and regulations and orders thereunder.

The Governor General in council referred to the Court certain questions as to the validity of parts of *The Farm Products Marketing Act* (Ontario) and orders and regulations made under it in relation to "schemes" for the marketing of hogs, peaches and vegetables. By an amendment passed after the order of reference the Legislature declared that the purpose and intent of the Act were "to provide for the control and regulation in any or all respects of the marketing within the Province of farm products including the prohibition of such marketing in whole or in part". The principal attack on the legislation was based upon the contention that it was an infringement of the power of the Parliament of Canada in relation to the regulation of trade and commerce. It was also argued that the licensing provisions involved indirect taxation and that the legislation conflicted with parts of the *Combines Investigation Act*, R.S.C. 1952, c. 31, the *Criminal Code*, 1953-54 (Can.), c. 51, the *Agricultural Products Marketing Act*, R.S.C. 1952, c. 6, and the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167.

The questions were answered by the Court as follows:

1. Section 3(1)(*l*), as re-enacted in 1955, empowers the Farm Products Marketing Board to authorize a marketing agency "to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and [require] any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him".

Per Kerwin C.J. and Rand J.: On the assumption that the Act applies only to intraprovincial transactions as defined in the reasons, this clause is not *ultra vires*.

Per Taschereau, Fauteux and Abbott JJ.: The clause is *intra vires*.

Per Locke and Nolan JJ.: If the pool is limited to products marketed for use within the Province and excludes products marketed or purchased for export either in their natural state or after treatment the clause is *intra vires*.

Per Cartwright J.: The clause is *ultra vires*, since it empowers the Board to authorize a marketing agency to make an equalization of returns to producers, taking from some a part of the price they have received and paying it to others who have obtained a less favourable price.

2. Regulation 104 of C.R.O. 1950, as amended, purports to set up a "scheme" for the marketing of hogs for processing and providing for a local board and a committee in each of seven districts of the Province.

---

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: This regulation is *intra vires*.

Per Cartwright J.: The regulation is invalid because it does not constitute a "scheme" within the meaning of the Act.

3. Regulation 102/1955 provides for compulsory licensing of all processors (*i.e.*, persons who slaughter hogs or have hogs slaughtered for them) and shippers, and for the creation of a marketing agency through which all hogs must be marketed.

Per Kerwin C.J.: Assuming that this regulation deals only with control of the sale of hogs for consumption within the Province, or to packing plants or other processors whose products will be consumed therein, the regulation is *intra vires*.

Per Taschereau, Fauteux and Abbott JJ.: The regulation is *intra vires*.

Per Rand J.: The licences provided for by this regulation are trade regulating licences and not for revenue purposes only, and since there is nothing in the regulation to restrict the ordinary meaning of its language it is in excess of the powers given to the Board by the statute and is therefore *ultra vires*.

Per Locke and Nolan JJ.: The regulation is *ultra vires* except to the extent that it authorizes the control of the marketing of hogs sold for consumption within the Province or to packing plants or other processors purchasing them for the manufacture of pork products within the Province. The provision for licensing is *intra vires* so long as the power is not used to prevent those desiring to purchase hogs or pork products for export.

Per Cartwright J.: The regulation is invalid for the reason given under question 2.

4. An order of the marketing agency prescribes a "service charge" for each hog marketed under the scheme.

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: This order is *intra vires*.

Per Cartwright J.: The order is invalid for the reason given under question 2.

5 and 6. Regulation 145/54, dealing with the marketing of peaches, requires every grower to pay licence fees at a stated rate for each ton or fraction thereof of peaches delivered to a processor and requires the processor to deduct these licence fees and forward them to the local board. Regulation 126/52 contains similar provisions in respect of the marketing of vegetables for processing.

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: These orders are *intra vires*.

Per Cartwright J.: On the material before the Court it is impossible to determine the validity of these orders.

7. A proposed amendment to the Act would empower the Board to authorize a local board "(i) to inquire into and determine the amount of surplus of a regulated product, (ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine, (iii) to market any surplus of a regulated product so purchased or acquired, (iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producer any licence fees payable by the producer to the local board and to remit such licence fees to the local

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

board, (v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product, and (vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product".

Per Kerwin C.J. and Rand J.: This amendment as interpreted in the reasons is not *ultra vires*.

Per Taschereau, Fauteux and Abbott JJ.: Clauses (i) to (iv) are *intra vires* but clause (v), except to the extent that it authorizes the use of licence fees to pay the expenses of the local board, and the whole of clause (vi), are *ultra vires*.

Per Locke and Nolan JJ.: The amendment is *intra vires* except that that part of clause (v) which authorizes the imposition of licence fees to provide moneys to pay for the losses referred to and to set up reserves and for the purposes referred to in clause (vi), is *ultra vires*.

Per Cartwright J.: Clauses (v) and (vi) are *ultra vires* but the other clauses are *intra vires*.

8. *Per curiam:* The Board would not have power under the proposed amendment to authorize a local board to impose licence fees and to use those licence fees to equalize or adjust returns to the producers.

REFERENCE under s. 55 of the *Supreme Court Act*. The terms of the order of reference are set out in the reasons of Locke J., *post*, p. 220.

F. P. Varcoe, Q.C., and *E. R. Olson*, for the Attorney General of Canada.

C. R. Magone, Q.C., for the Attorney-General for Ontario.

M. M. Hoyt, for the Attorney General for New Brunswick.

J. O. C. Campbell, Q.C., for the Attorney-General of Prince Edward Island.

J. R. Dunnet, for the Attorney-General for Saskatchewan.

H. J. Wilson, Q.C., for the Attorney General for Alberta.

R. H. Milliken, Q.C., and *R. A. Milliken*, for Canadian Federation of Agriculture and others.

H. E. Harris, Q.C., for Ontario Federation of Agriculture and others.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, counsel appointed by the Court to represent persons opposed to the legislation.

N. McFarland, Q.C., for Theodore Parker.

After the argument the Court called for further argument and directed that notice be given by the Attorney-General for Ontario to all other parties represented on the original hearing and to the Attorneys-General of Quebec, Manitoba, British Columbia and Newfoundland. The direction of the Court was as follows:

On the assumption that the Act and the three schemes with the regulations applicable to them extend to the marketing of all hogs, peaches and designated vegetables delivered to a processor in the province to be processed, the Court directs the following question to be argued on Monday, November 19, 1956:

Is the regulation of trade so prescribed, controlling production, transportation and sale, including the designation of an exclusive selling agency and fixing the price, to the processor, of these products, within the authority of the Province in respect of such of them as are, in the usual course of production and trade, intended or destined to be or will be exported from the Province in interprovincial or foreign trade? Would the power of the Province extend to the control of the manufacture or processing? For example: liquor may be distilled in a Province solely for export; is the purchase, including the price to be paid therefor, of locally grown grain or other ingredients, within such Provincial regulation? Similarly in the case of wheat grown locally and sold to a miller within the Province whose market is both within and without the Province; of hogs sold to a packer for curing and intended in whole or in part for shipment without the Province; of pulpwood sold to pulp or paper manufacturers for similar disposal; of fish processed by canners for similar disposal; and many other products in the same category of processing and distribution. Can the holding of a licence or the payment of a licence fee by a processor of products for export be made a condition of the processing in the case of (a) a Dominion company, or (b) a Provincial company? Is there a jurisdictional difference between the manufacture of liquor from grain and the processing of hogs into pork, ham or bacon and the similar contrasting treatment of other products, in relation, for example, to the control of marketing and price to the manufacturer or processor? If a distinction is to be made, what is the test or principle to be applied?

F. P. Varcoe, Q.C., and *E. R. Olson,* for the Attorney General of Canada.

C. R. Magone, Q.C., and *H. E. Harris, Q.C.,* for the Attorney-General for Ontario and the Attorney-General of Prince Edward Island.

C. A. Seguin, Q.C., for the Attorney-General of Quebec.

M. M. Hoyt, for the Attorney General of New Brunswick.

W. Burke-Robertson, Q.C., for the Attorney-General for British Columbia.

J. R. Dunnet, for the Attorney-General for Saskatchewan.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

H. J. Wilson, Q.C., for the Attorney General for Alberta.

R. H. Milliken, Q.C., for Canadian Federation of Agriculture and others.

H. E. Harris, Q.C., for Ontario Federation of Agriculture and others.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, counsel appointed by the Court.

THE CHIEF JUSTICE:—This is a reference by His Excellency the Governor General in Council as to the validity of one clause of one section of *The Farm Products Marketing Act* of the Province of Ontario, R.S.O. 1950, c. 131, of certain regulations made thereunder, of an order of The Ontario Hog Producers' Marketing Board, of a proposed amendment to the Act, and of a suggested authorization by the Farm Products Marketing Board if that amendment be held to be *intra vires*. On such a reference one cannot envisage all possible circumstances which might arise and it must also be taken that it is established that it is not to be presumed that a Provincial Legislature intended to exceed its legislative jurisdiction under the *British North America Act*, although the Court may, on what it considers the proper construction of a given enactment, determine that the Legislature has gone beyond its authority.

Subsequent to the date of the order of reference, the Act was amended by c. 20 of the statutes of 1956, which came into force the day it received Royal Assent, s. 1 of which reads as follows:

> 1. *The Farm Products Marketing Act* is amended by adding thereto the following section:
>
> 1*a*. The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the marketing within the Province of farm products including the prohibition of such marketing in whole or in part.

Without entering into a discussion as to what is a declaratory law, since the term may have different connotations depending upon the matter under review, it is arguable that, for present purposes, this amendment should be read as part of *The Farm Products Marketing Act*, but, in any event, the first question submitted to us directs us to assume that that Act as amended down to the date of the reference applies only in the case of "intra-provincial transactions". This term means "existing or occurring within a

province"; see Shorter Oxford English Dictionary, including "intraparochial" as an example under the word "intra". As will appear later, the word "marketing" is defined in the Act, but, in accordance with what has already been stated, I take it as being confined to marketing within the Province.

Question 1 is as follows:

> 1. Assuming that the said Act applies only in the case of intra-provincial transactions, is clause (*l*) of subsection 1 of section 3 of *The Farm Products Marketing Act*, R.S.O. 1950 chapter 131 as amended by Ontario Statutes 1951, chapter 25, 1953, chapter 36, 1954, chapter 29, 1955, chapter 21, *ultra vires* the Ontario Legislature?

Clause (*l*) of subs. (1) of s. 3 referred to, as re-enacted by 1955, c. 21, s. 2, provides:

> 3. (1) The Board may, . . .
>
> (*l*) authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

For a proper understanding of the terms used in this clause and of the provisions of the Act it is necessary to refer to what is proposed by the latter.

The Board is the Farm Products Marketing Board and " 'farm products' includes animals, meats, eggs, poultry, wool, dairy products, grains, seeds, fruit, fruit products, vegetables, vegetable products, maple products, honey, tobacco and such articles of food or drink manufactured or derived in whole or in part from any such product and such other natural products of agriculture as may be designated by the regulations" (s. 1(*b*)). " 'Regulated product' means a farm product in respect of which a scheme is in force" (s. 1(*g*)). Provision is made for the formulation of a scheme for the marketing or regulating of any farm product upon the petition of at least 10 per cent. of all producers engaged in the production of the farm product in Ontario, or in that part thereof to which the proposed scheme is to apply. " 'Marketing' means buying, selling and offering for sale and includes advertising, assembling, financing, packing and shipping for sale or storage and transporting in any manner

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Kerwin C.J.

by any person, and 'market' and 'marketed' have corresponding meanings" (s. 1(*e*), as re-enacted by 1955, c. 21, s. 1). The scheme may provide for a "marketing agency" designated by the Board in its regulations. Once the scheme is approved by the Board the latter's regulations will apply according to the farm products dealt with thereby.

It seems plain that the Province may regulate a transaction of sale and purchase in Ontario between a resident of the Province and one who resides outside its limits; that is, if an individual in Quebec comes to Ontario and there buys a hog, or vegetables, or peaches, the mere fact that he has the intention to take them from Ontario to Quebec does not deprive the Legislature of its power to regulate the transaction, as is evidenced by such enactments as *The Sale of Goods Act,* R.S.O. 1950, c. 345. That is a matter of the regulation of contracts and not of trade as trade and in that respect the intention of the purchaser is immaterial. However, if the hog be sold to a packing plant or the vegetables or peaches to a cannery, the products of those establishments in the course of trade may be dealt with by the Legislature or by Parliament depending, on the one hand, upon whether all the products are sold or intended for sale within the Province or, on the other, whether some of them are sold or intended for sale beyond Provincial limits. It is, I think, impossible to fix any minimum proportion of such last-mentioned sales or intended sales as determining the jurisdiction of Parliament. This applies to the sale by the original owner. Once a statute aims at "regulation of trade in matters of inter-provincial concern" (*The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (1)), it is beyond the competence of a Provincial Legislature. The ambit of head 2 of s. 91 of the *British North America Act,* "The Regulation of Trade and Commerce" has been considerably enlarged by decisions of the Judicial Committee and expressions used in some of its earlier judgments must be read in the light of its later pronouncements, as is pointed out by Sir Lyman Duff in *Re Alberta Statutes* (2). In fact, his judgment in *Re The*

(1) (1881), 7 App. Cas. 96 at 113.

(2) [1938] S.C.R. 100 at 121, [1938] 2 D.L.R. 81, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada et al.,* [1939] A.C. 117, [1939] 4 D.L.R. 433, [1939] 3 W.W.R. 337.

Natural Products Marketing Act, 1934 (1), which is justly considered as the *locus classicus,* must be read in conjunction with and subject to his remarks in the later case. The concept of trade and commerce, the regulation of which is confided to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements. Once an article enters into the flow of interprovincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern. No change has taken place in the theory underlying the construction of the *British North America Act* that what is not within the legislative jurisdiction of Parliament must be within that of the Provincial Legislatures. This, of course, still leaves the question as to how far either may proceed, and, as Lord Atkin pointed out in the *Natural Products Marketing Act* case, *supra,* at p. 389, neither party may leave its own sphere and encroach upon that of another.

Mr. Robinette suggested that there was an inconsistency between the judgment of Mr. Justice Duff in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (2), and his judgment in *The King v. Eastern Terminal Elevator Company* (3). However, all that was decided in the latter case was that Parliament had exceeded its jurisdiction while in the former it was held that the British Columbia statute under review was *ultra vires.*

It was contended by Mr. Pepper that the *Combines Investigation Act,* R.S.C. 1952, c. 314, and ss. 411 and 412 of the *Criminal Code,* 1953-54 (Can.), c. 51, and the *Agricultural Prices Support Act,* R.S.C. 1952, c. 3, are relevant and prevent the Ontario Legislature from enacting clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* and therefore the administrative agencies provided for by that Act, from operating. The point is determined against that contention as to the *Combines Investigation Act* by the decision of this Court in *Ontario Boys' Wear*

(1) [1936] S.C.R. 398, [1936] 3 D.L.R. 622, 66 C.C.C. 180, affirmed *sub nom Attorney-General for British Columbia v. Attorney-General for Canada et al.,* [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

(2) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

(3) [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Kerwin C.J.

Limited et al. v. The Advisory Committee et al. (1). With respect to that Act and also to the sections of the *Criminal Code* referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province. The *Agricultural Prices Support Act* and in fact all Acts of Canada of a similar nature contain merely provisions for the assistance of agriculture. A final argument was advanced to the effect that the legislation conflicted with s. 25 of the *Live Stock and Live Stock Products Act,* R.S.C. 1952, c. 167, which reads:

> 25. Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

This is merely a provision in ease of the other sections of that particular Act.

In view of the wording of question 1, I take clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* as being a successful endeavour on the part of the Ontario Legislature to fulfil its part while still keeping within the ambit of its powers. On the assumption directed to be made and reading the clause so as not to apply to transactions which I have indicated would be of a class beyond the powers of the Legislature, my answer to the first question is "No".

Question 2 asks whether a certain regulation as amended respecting the marketing of hogs is *ultra vires* the Lieutenant-Governor in Council. The order in council was made in pursuance of the statute and, as the wording may be construed as contemplating only local trade, the objection, in view of what has already been stated, is without foundation. Nor can I agree (a) that the scheme does not contain substantive terms and therefore is really not a scheme at all; (b) that it is necessary that there should be prior approval by the producers.

I assume that the regulation of the Farm Products Marketing Board referred to in question 3 deals only with the control of the sale of hogs for consumption within the Prov-

(1) [1944] S.C.R. 349, [1944] 4 D.L.R. 273, 82 C.C.C. 129.

ince, or to packing plants or other processors whose products will be consumed therein. The provision for licensing is not *ultra vires* and a company incorporated by letters patent under the *Companies Act* of Canada, with power to carry on the business of a packing plant throughout the nation, is bound to comply with a general licensing law.

My answer to question 4 is that the order of The Ontario Hog Producers' Marketing Board fixing the service charges to be imposed by the marketing agency is not *ultra vires* the Board, as the matter is covered by the decision of the Privy Council in *Shannon et al. v. Lower Mainland Dairy Products Board* (1). For the same reason, I think similar answers must be given to questions 5 and 6, the first relating to the marketing of peaches for processing and the latter to the marketing of vegetables for processing.

As to questions 7 and 8, I agree with the reasons of my brother Rand.

My answers to the questions are as follows:

Question 1: On the assumption that the Act is restricted to intraprovincial transactions as defined in these reasons, the answer is No.

Question 2: No.

Question 3: Assuming that the Regulation deals only with the control of the sale of hogs for consumption within the Province, or to packing plants or other processors whose products will be consumed therein, the answer is No.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: On the interpretation given to the proposed amendment the answer is No.

Question 8: No.

TASCHEREAU J. agrees in the answers of Fauteux and Abbott JJ.

RAND J.:—This reference raises questions going to the scope of Provincial authority over trade. They arise out of *The Farm Products Marketing Act,* R.S.O. 1950, c. 131, as amended, which deals comprehensively with the matter

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

connoted by its name and out of certain schemes formed under it. Its object is to accord primary producers of farm products the advantages of various degrees of controlled marketing, for which it provides provincial and local machinery.

General jurisdiction over its administration is exercised by the Farm Products Marketing Board; regulation is by way of schemes for the marketing of any product; under a scheme, a local board, district committees and county groups are organized; and the marketing may be carried out exclusively by an agency designated by the Board upon the recommendation of the local board.

The questions put, which assume the Act to be limited in application to local trade, call for answers which make it necessary to examine and define the scope of local trade to the extent of the regulation provided. The enquiry must take into account regulatory power over acts and transactions which while objectively appearing to be consummated within the Province may involve or possess an interest of interprovincial or foreign trade, which for convenience I shall refer to as external trade.

The products embraced include

> animals, meats, eggs, poultry, wool, dairy products, grains, seeds, fruit, fruit products, vegetables, vegetable products . . . and . . . articles of food or drink manufactured or derived in whole or in part from any such product.

"Marketing" means buying, selling, assembling, packing, shipping for sale or storage and transporting in any manner by any person. The marketing board may establish negotiating agencies which may adopt or determine by agreement minimum prices and other features of marketing, and prohibit the marketing of any class, variety, grade or size of a product. It may require a licence to be taken out by every person for producing, marketing or processing a product with fees payable at various times and in different amounts. The Board may authorize an agency to control the times and places for marketing, the quantity, grade, class and price of products to be marketed, and to exercise other powers conferred by the statute on the Board.

Although not specifically mentioned in s. 92 of the *British North America Act,* there is admittedly a field of trade within provincial power, and the head or heads of s. 92 from

which it is to be deduced will be considered later. The power is a subtraction from the scope of the language conferring on the Dominion by head 2 of s. 91 exclusive authority to make laws in relation to the regulation of trade and commerce, and was derived under an interpretation of the Act which was found necessary

> in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess

(*per* Duff J. in *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction* (1)). In examining the legislation for the purpose mentioned we should bear in mind Lord Atkin's admonition in *Attorney-General for British Columbia v. Attorney-General for Canada et al.* (2), that

> the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

The definitive statement of the scope of Dominion and Provincial jurisdiction was made by Duff C.J. in *Re The Natural Products Marketing Act, 1934* (3). The regulation of particular trades confined to the Province lies exclusively with the Legislature subject, it may be, to Dominion general regulation affecting all trade, and to such incidental intrusion by the Dominion as may be necessary to prevent the defeat of Dominion regulation; interprovincial and foreign trade are correspondingly the exclusive concern of Parliament. That statement is to be read with the judgment of this Court in *The King v. Eastern Terminal Elevator Company* (4), approved by the Judicial Committee in *Attorney-General for British Columbia v. Attorney-General for Canada, supra,* at p. 387, to the effect that Dominion regulation cannot embrace local trade merely because in undifferentiated subject-matter the external interest is dominant. But neither the original statement nor its approval furnishes a clear guide to the demarcation of the

(1) [1931] S.C.R. 357 at 366, [1931] 2 D.L.R. 193.
(2) [1937] A.C. 377 at 389, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.
(3) [1936] S.C.R. 398 at 414 *et seq.*, [1936] 3 D.L.R. 622, 66 C.C.C. 180, affirmed *sub nom. Attorney-General for British Columbia v. Attorney-General for Canada et al., supra.*
(4) [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

two classes when we approach as here the origination, the first stages of trade, including certain aspects of manufacture and production.

That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extraprovincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power. This is exemplified in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra,* where the Province purported to regulate the time and quantity of shipment, the shippers, the price and the transportation of fruit and vegetables in both unsegregated and segregated local and interprovincial trade movements.

A producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price, shipping or other trade regulation; and an outside purchaser is entitled with equal freedom to purchase and export. Processing is one of a number of trade services that may be given products in the course of reaching the consumer: milling (as of grain or lumber), sorting, packing, slaughtering, dressing, storing, transporting, etc. The producer or purchaser may desire to process the product either within or beyond the Province and if he engages for that with a local undertaking (using that expression in a non-technical sense), such as a packing plant—and it would apply to any sort of servicing—he takes that service as he finds it but free from such Provincial impositions as are strictly trade regulations such as prices or the specification of standards, which could no more be imposed than Provincial trade marks. Regulation of that nature could directly nullify external trade vital to the economy of the country. Trade arrangements reaching the dimensions of world agreements are now a commonplace; interprovincial trade, in which the Dominion is a single market, is of similar importance, and equally vital to the economic functioning of the country as a whole. The Dominion power implies responsibility for promoting and maintaining the vigour and growth of trade beyond Provincial confines, and the discharge of this duty must remain unembarrassed by local trade impediments. If the processing is restricted to external trade, it becomes an instrumentality of that trade

and its single control as to prices, movements, standards, etc., by the Dominion follows: *Re The Industrial Relations and Disputes Investigation Act* (1). The licensing of processing plants by the Province as a trade regulation is thus limited to their operations in local trade. Likewise the licensing of shippers, whether producers or purchasers, and the fixing of the terms and conditions of shipment, including prices, as trade regulation, where the goods are destined beyond the Province, would be beyond Provincial power.

Local trade has in some cases been classed as a matter of property and civil rights and related to head 13 of s. 92, and the propriety of that allocation was questioned. The production and exchange of goods as an economic activity does not take place by virtue of positive law or civil right; it is assumed as part of the residual free activity of men upon or around which law is imposed. It has an identity of its own recognized by head 2 of s. 91. I cannot agree that its regulation under that head was intended as a species of matter under head 13 from which by the language of s. 91 it has been withdrawn. It happened that in *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (2), assuming insurance to be a trade, the commodity being dealt in was the making of contracts, and their relation to head 13 seemed obvious. But the true conception of trade (in contradistinction to the static nature of rights, civil or property) is that of a dynamic, the creation and flow of goods from production to consumption or utilization, as an individualized activity.

The conclusive answer to the question is furnished by a consideration of s. 94 which provides for the uniformity in Ontario, New Brunswick and Nova Scotia of "all or any of the laws relative to property and civil rights". It is, I think, quite impossible to include within this provision regulation of local trades; that appears to be one feature of the internal economy of each Province in which no such uniformity could ever be expected. What the language is directed to are laws relating to civil status and capacity, contracts, torts and real and personal property in the common law Provinces, jural constructs springing from the

(1) [1955] S.C.R. 529, [1955] 3 D.L.R. 721. (2) (1881), 7 App. Cas. 96.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

same roots, already more or less uniform, and lending themselves to more or less permanence. In some degree uniformity has been achieved by individual Provincial action in such legislation, for instance, as that of contributory negligence.

Head 16 contains what may be called the residuary power of the Province: *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1), and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved. As was recognized in the *Parsons* case, *supra,* this points up the underlying division of the matters of legislation into those which are primarily of national and those of local import. But this is not intended to derogate from regulation as well as taxation of local trade through licence under head 9 of s. 92, nor from its support under head 13.

It is important to keep in mind, as already observed, that the broad language of head 2 of s. 91 has been curtailed not by any express language of the statute but as a necessary implication of the fundamental division of powers effected by it. The interpretation of this head has undergone a transformation. When it was first considered by this Court in *Severn v. The Queen* (2) and *The City of Fredericton v. The Queen* (3), the majority views did not envisage the limitation now established; that was introduced by the judgment in the *Parsons* case, *supra.* The nadir of its scope was reached in what seemed its restriction to a function ancillary to other Dominion powers; but that view has been irretrievably scotched.

The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function

(1) [1896] A.C. 348 at 365. (2) (1878), 2 S.C.R. 70.
(3) (1880), 3 S.C.R. 505.

inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

The reaches of trade may extend to aspects of manufacture. In *Attorney-General for Ontario v. Attorney-General for the Dominion et al., supra,* the Judicial Committee dealt with the question whether the Province could prohibit the manufacture within the Province of intoxicating liquor, to which the answer was given that, in the absence of conflicting legislation of Parliament, there would be jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the Province. This involves a limitation of the power of the Province to interdict, as a trade matter, the manufacture or production of articles destined for external trade. Admittedly, however, local regulation may affect that trade: wages, workmen's compensation, insurance, taxes and other items that furnish what may be called the local conditions underlying economic activity leading to trade.

The federal character of our constitution places limits on legislative acts in relation to matters which as an entirety span, so to speak, the boundary between the two jurisdictions. In *The King v. Eastern Terminal Elevator Company, supra,* for example, there was a common storage of grain destined both to local and external trade. The situation in *City of Montreal v. Montreal Street Railway* (1) was equally striking: there Parliament was held incapable of imposing through rates over a local railway on traffic passing between points on that line and points on a connecting Dominion railway; the only regulation open was declared to be parallel action by Legislature and Parliament, each operating only on its own instrumentality. Although by that means the substantial equivalent of a single administration may be attained, there is a constitutional difference between that co-operating action and action by an overriding jurisdiction.

(1) [1912] A.C. 333, 1 D.L.R. 681, 13 C.R.C. 541.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; this, as in some situations already in effect, may take the form of a single board to administer regulations of both on agreed measures.

On the foregoing interpretation of the scope of Provincial regulation of trade, the questions put to us may now be considered.

Three of them go to the validity of two provisions of the Act, s. 3(1)(*l*), authorizing the marketing of a product by means of a pool, and a proposed amendment, para. (*ss*), to s. 7(1) authorizing the purchase of the surplus of a regulated product and its marketing and the use of licence fees to recoup any loss suffered. The remaining five questions go to regulations made in one case by the Lieutenant-Governor in council, in three cases by the Farm Products Marketing Board, and in one by The Ontario Hog Producers' Marketing Board.

Clause (*l*) of subs. (1) of s. 3 of the statute reads:

> The Board may, . . .
> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

Co-operative disposal may take different forms: it may be that of an exclusive local marketing by an agency, either as owner or agent, by which the products are disposed of and the returns equalized, a form, I should say, within the authority of the Province; or, in the interest of convenience and economy, the producers, as contemplated by the Act here, would make their own sales with all moneys made returnable to the agency, for the recovery of which it may bring suit, and by it equalized and distributed. Since prices can be fixed by the agency, at the point of collecting them the result in both forms becomes the same, and I cannot

see any jurisdictional difference between the equalization in the two cases. The exclusion of such an ordinary device of co-operative marketing from Provincial power would be a curtailment which I cannot think warranted. As it appears elsewhere in these reasons, indirect taxation is not, under a licensing scheme, a disqualifying factor and in co-operative marketing the essential condition of indirect taxation, the general tendency to pass the tax on to another, is excluded.

Question 7 deals with marketing the surplus of a regulated product. I take "surplus", as determined, to be what remains in the hands of producers after the local market is satisfied. Subclauses (i), (ii), (iii) and (v) of the proposed s. 7(1)(*ss*) deal exclusively with a "surplus"; (iv) and (vi) do not expressly mention it, but in the context I am unable to interpret the language as applying to any other subject. Subclause (ii) authorizes purchase by the local board from a voluntary seller; there is no compulsion on either. The clause as a whole sets up a separate feature of regulation which would extend to disposal in external trade. But the producer remains free to enter that trade as he pleases; if he elects to sell to the marketing agency, he does so under the terms of the statute as a matter of agreement; and the provision for a licence fee and its application to the purposes mentioned are valid as contractual compensation for services. Any dealing with the product by the local board or others in external trade would obviously be subject to Dominion regulation.

Question 8 I take to ask this: Could the Farm Products Marketing Board, under the proposed amendment, impose fees on *all producers* of the regulated product destined to the local market to equalize the returns received for the *surplus* with those received for the product generally, that is, can the surplus be gathered in with that marketed locally and the whole equalized in returns? It would be adding the returns from the surplus to the equalization under clause (*l*) dealt with in question 1. That could not be done because the amendment is confined to dealings with the surplus; nor could it be done by an independent provision because, under the machinery of regulation provided, it

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

would be within the decision in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1).

On question 2 it is contended that the hog scheme is defective because only a skeleton of machinery is provided, that it does not contain substantive terms without which it is not a scheme at all. What the vote taken under s. 4 of the statute is intended to decide is whether or not the product shall be brought under a scheme; and the initial creation of its formal structure appears to be the intendment of the statute. Its approval by the Lieutenant-Governor in council and the regulations made by the Farm Products Marketing Board furnish its content, similarly envisaged by the statute. The schedule, by its heading, relates the scheme to the Act; and as the language is capable of being confined to local trade it should, in the context, be so construed.

Question 3 deals with an order of the Farm Products Marketing Board providing by s. 2 that no processor shall commence or continue in the business of processing except under the authority of a licence which the Board may, for any reason deemed by it sufficient, refuse; and by s. 4 prohibiting any person from engaging as a shipper without a licence which a local board may revoke or refuse to renew for failure to observe any order or regulation. This extends to processors or shippers engaged partly or exclusively in external trade. These are trade-regulating licences and not for revenue purposes only; and since there is nothing in the regulation to restrict the ordinary meaning of its language, reaching as it does beyond the limits of the statute itself, it is likewise beyond the power of the Farm Products Marketing Board to make.

Section 6 provides for the appointment of a marketing agency through which "all hogs" shall be marketed. This exceeds the authority given the Board. Paragraphs (*c*) and (*d*) of s. 8 authorize the imposition of "such service charges as may from time to time be fixed by the local board" and their payment to the local board by the marketing agency. The fees are to be applied to the expenses of administration.

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

This was challenged as involving indirect taxation, a point taken on questions 4, 5 and 6 as well, and these objections will now be examined together.

Under the hog producers' scheme, the charges are fixed "at the sum of 24¢ per hog and a pro rating charge in the sum of 20¢ per producer settlement statement". The scheme for marketing peaches fixes a licence fee at 50¢ for each ton or fraction of a ton of peaches delivered to a processor by a grower; and by the vegetable processing scheme at the rate of ½ of 1 per cent. of the total sale-price due a grower for each ton or fraction of a ton of vegetables delivered to a processor.

On these questions two judgments of the Judicial Committee must be noticed: *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited, supra,* and *Shannon et al. v. Lower Mainland Dairy Products Board* (1). In the former the Judicial Committee passed upon legislation of British Columbia which purported to authorize a special exaction from all milk producers in a district proportioned to the quantity of fluid milk sold by them for the purpose of raising a fund to be distributed among the producers whose production was converted into milk products, with a view to equalizing the returns from milk production generally and of bringing about the advantageous distribution of these two classes of commodities. The Committee viewed the issue to be whether the Province, by the means provided, could take money from one group in order to enrich the other, and held the impost invalid as indirect taxation. A similar view was taken of the recovery on the same basis of the expenses of the committee in administering the Act.

The reasons of Lord Thankerton contain no reference to trade regulation: the statute is dealt with as one providing taxation to enable an equalization of price return. The impingement of the tax, related as it was to the volume of products marketed, undoubtedly bore the badge ordinarily held to mark indirect taxation.

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

In contrast to this was the formulation of the issue in *Shannon*. At p. 721 Lord Atkin sums it up:

> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, *i.e.*, by a system of licences, must also be admissible.

There the administering board was empowered, as here, to control generally the marketing of the regulated product, including the time for marketing, the quantities to be offered by any producer, prohibition of the marketing of any grade, quality or class, the fixing of prices, and marketing through a licensed shipper. Finally there was the authority to collect fees:

> 4A(*d*) to fix and collect yearly, half-yearly, quarterly, or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any court of competent jurisdiction. . . .
>
> (*j*) To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

On the contention that this was indirect taxation within s. 92(2), Lord Atkin said at p. 721:

> Without deciding the matter either way, they [their Lordships] can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported.

The other grounds were heads 9, 13 and 16 of s. 92.

Passing to the licence fees he remarked:

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

Duff J. in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra,* had dealt with such licences and at p. 364 had said:

> On the other hand, the last mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade.

On this Lord Atkin commented:

> It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern

licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words "other licences" in s. 92(9) should not be sufficient to support the enactment in question.

It is pertinent to recall that in *Russell v. The Queen* (1), Sir Montague E. Smith answers the argument there made that the legislation challenged came under s. 92(9):

> With regard to the first of these clauses, No. 9, it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes".

The language of Lord Atkin seems to involve the conclusion that fees incidental to Provincial regulation of trade by licence are to be considered without reference to the restriction of s. 92(2); and this appears to have been the opinion of Duff J. in *Lawson* where he says, at p. 364:

> and that accordingly imposts which would be classed under the general description "indirect taxation" are not for that reason alone excluded from those which may be exacted under head 9.

The power to regulate embraces incidental powers necessary to its effective exercise; and the exaction of fees to meet the expenses of such an administration as that of the schemes, regardless of their incidence, is within that necessity.

The fees in *Shannon* were justified on a second ground which supports and supplements the preceding considerations; that they were charges made for services rendered. That is the case here. What the producers receive are the benefits of a control that aims at an orderly marketing. The benefit of the organized apparatus is a service rendered by the scheme; and the fees related to either the quantity or the total return are directly proportioned to it.

Mr. Pepper argued that the regulation was in conflict with the provisions of the *Combines Investigation Act* and s. 411 of the *Criminal Code,* but with that I am unable to agree. The Provincial statute contemplates coercive regulation in which both private and public interests are taken into account. The provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreements by individuals against the public

(1) (1882), 7 App. Cas. 829 at 837.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.

Another conflict was suggested with s. 25 of the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167, which provides:

> 25. Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

This simply enables a farmer or drover to sell at the stockyard notwithstanding the provisions of that Act; it does not purport to give an absolute right as against other enactments, which if it did it might, as an attempt to control local trade, be so far invalid.

On the assumption that the Act is restricted to intra-provincial transactions as defined in these reasons, I therefore answer the questions put as follows:

Question 1: No.

Question 2: No.

Question 3: Yes, as indicated.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: On the interpretation given to the proposed amendment, no.

Question 8: No.

LOCKE J.:—The order of reference made in this matter by His Excellency the Governor General in council, after reciting that questions have arisen respecting the constitutional validity of certain sections of *The Farm Products Marketing Act*, R.S.O. 1950, c. 131, as amended, and the schemes, regulations and orders passed pursuant thereto, and that the Government of the Province of Ontario has requested that certain legislation, schemes, regulations and orders be referred to this Court for hearing and consideration, reads:

> AND WHEREAS the Minister of Agriculture for Ontario advises: that under The Farm Products Marketing Act of Ontario there are at present in operation 14 marketing schemes covering 21 farm products; that the various schemes are financed by the methods indicated in the questions set out hereunder; that the marketing agency referred to in question number 4 is a co-operative corporation incorporated under Part V of The Corporations Act of Ontario 1953, c. 19, and that the by-laws of the marketing agency provide that any surplus of service charges after providing

for reserves shall be allocated, credited or paid to those marketing hogs through the agency computed at a rate in relation to the value of the hogs marketed for such person; that in connection with question number 5 one ton of peaches makes 144 dozen 20 ounce cans of peaches or 1728 cans;

THEREFORE His Excellency the Governor General in Council, under and by virtue of the authority conferred by section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer to the Supreme Court of Canada for hearing and consideration, the following questions:

1. Assuming that the said Act applies only in the case of intra-provincial transactions, is clause (*l*) of subsection 1 of section 3 of The Farm Products Marketing Act, R.S.O. 1950 chapter 131 as amended by Ontario Statutes 1951, chapter 25, 1953, chapter 36, 1954, chapter 29, 1955, chapter 21 *ultra vires* the Ontario Legislature?

2. Is Regulation 104 of Consolidated Regulations of Ontario 1950 as amended by O.Reg.100/55 and O.Reg.104/55 respecting the marketing of hogs, *ultra vires* the Lieutenant Governor in Council either in whole or in part and if so in what particular or particulars and to what extent?

3. Is Ontario Regulation 102/55 respecting the marketing of hogs, *ultra vires* the Farm Products Marketing Board either in whole or in part and if so in what particular or particulars and to what extent?

4. Is the Order dated the 8th day of June, 1955, made by The Ontario Hog Producers Marketing Board fixing the service charges to be imposed by the marketing agency, *ultra vires* the said Board?

5. Is regulation 7 of Ontario Reg.145/54 respecting the marketing of peaches for processing, *ultra vires* the Farm Products Marketing Board?

6. Is regulation 5 of Ontario Reg.126/52 respecting the marketing of vegetables for processing, *ultra vires* the Farm Products Marketing Board?

7. Is the following draft amendment to subsection (1) of Section 7 of The Farm Products Marketing Act, *ultra vires* the Ontario Legislature either in whole or in part and if so in what particular or particulars and to what extent?

"Subsection (1) of Section 7 of The Farm Products Marketing Act as amended by Section 4 of The Farm Products Marketing Amendment Act, 1951, Section 6 of The Farm Products Marketing Amendment Act, 1954 and Section 7 of The Farm Products Marketing Act, 1955 is amended by adding thereto the following paragraph:

(ss) authorizing a local board.

(i) to inquire into and determine the amount of surplus of a regulated product,

(ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine,

(iii) to market any surplus of a regulated product so purchased or acquired,

(iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producers any licence fees payable by the producer to the local board and to remit such licence fees to the local board,

(v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product,

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

(vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product."

8. If the answer to question No. 7 is in the negative, could the Farm Products Marketing Board under the proposed amendment, authorize the local board to impose licence fees on all producers in the Province of the regulated product based upon the volume of the product marketed and to use such licence fees to equalize or adjust returns to the producers?

After the order in council was made, the Legislature of Ontario, by c. 20 of the statutes of 1956, assented to on March 28, 1956, amended the Act in question by the addition of the following:

1*a*. The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the marketing within the Province of farm products, including the prohibition of such marketing in whole or in part.

The case in this matter contains a copy of an order in council made on November 16, 1955, under the provisions of the *Agricultural Products Marketing Act*, R.S.C. 1952, c. 6, whereby certain powers were vested in the Ontario Farm Products Marketing Board, The Ontario Hog Producers' Marketing Board and the Ontario Hog Producers Co-operative, in relation to the marketing of hogs and other products. Since, however, this order is not retrospective in its operation and all of the orders and regulations referred to in questions 2 to 6 inclusive were made prior to its date, they can derive no support from it and must depend for their validity entirely upon the provisions of *The Farm Products Marketing Act* as amended.

It should be said at the outset that no useful answer can be made to questions 1, 3 and 4 in the absence of some further explanation of what is meant by "intra-provincial transactions" other than that which is to be found in the amendment to the statute made in 1956. This merely says that the purpose and intent of the Act is to provide for the control and regulation of the marketing within the Province of farm products, including the prohibition of such marketing in whole or in part.

"Intra" means within but none of the learned counsel supporting the legislation and the regulations contend that the Legislature is competent to prohibit the marketing of live hogs or other farm products for export. An agreement made in Carleton County between a farmer residing there and a buyer for a packing company operating in Hull,

Quebec, is an intraprovincial transaction since it is initiated and completed when the sale is agreed upon and the hog delivered. The farmer is not exporting the hog and it is presumably a matter of indifference to him whether the buyer exports the hog, whether alive or dead, to the Province of Quebec. Yet this transaction would be prohibited if the language of the statute and of the regulation is to be construed literally.

However ineffective the language of the 1956 amendment may be to exclude from the operation of the Act transactions of very great importance and with very wide ramifications which the Province is powerless to regulate (and I think it is quite insufficient), the questions should, in my opinion, be dealt with on the footing that, regardless of the language employed, it was the intention of the Legislature to confine its operation to matters within its own competence. However this procedure may depart from the rules of law applicable to the construction of statutes, this is a reference and, in view of the language of the first question, it is the duty of this Court to endeavour to answer the questions on that basis.

While it is my conclusion that what *The Farm Products Marketing Act* authorizes and what the various boards constituted under its provisions have attempted to do include matters wholly within the jurisdiction of Parliament, all of the necessary powers may be vested in these boards by separate action taken in unison under Dominion and Provincial powers and, in answering the questions, I propose to express my opinion as to the respective limits of the jurisdiction of these legislative bodies in matters of this kind, so far as they may be relevant to the matters for consideration.

The main question that has arisen for determination in these matters has been as to the jurisdiction of Parliament under head 2 of s. 91 and that of the Provinces under heads 13 and 16 of s. 92 of the *British North America Act*. A succession of attempts has been made by various Provincial Legislatures and one by Parliament to regulate and control the sale of natural products and, before attempting to answer the questions, it is of some assistance to consider the principal cases in which the respective powers of the legislative bodies under these heads have been considered.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), the *Produce Marketing Act* of British Columbia, being c. 54 of the statutes of 1926-27, was considered by this Court. The proceedings were initiated by an action and evidence was given as to the activities of the committee of direction constituted under the statute, which showed that the committee interpreted its powers as enabling it, *inter alia,* to control the marketing and sale of fruit and vegetable products sold by growers and purchased by others for export from the Province or exported by the growers direct. The principal judgment delivered in this Court was written by Duff J. (as he then was).

Section 10 of the British Columbia Act purported to vest in the Committee power, "so far as the legislative authority of the Province extends", of controlling and regulating the marketing and shipment of natural products and the fixing of prices, very similar to, though not identical with, those authorized to be exercised by a marketing agency by s. 7 of the Ontario Act. The following passage from the reasons for judgment is to be considered (pp. 364-5):

> As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so—to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of, as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these prod-

(1) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

ucts. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus *ad quem*, the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

It may be noted further that the Act thus found to be invalid assumed to control products in their natural state, as shown by the definition in s. 2 of the Act. The Ontario legislation under consideration goes further in that it assumes to control not only a great variety of farm products but also "such articles of food or drink manufactured or derived in whole or in part from any such product".

The reasons delivered by Duff J. were concurred in by Rinfret and Lamont JJ. Newcombe J. agreed that the legislation was in reference to the regulation of trade and commerce, while reserving his opinion on other matters discussed. Cannon J., who concurred in the result, assigned other reasons for his conclusion that the legislation was invalid.

The remarks of Lord Atkin in *Shannon et al. v. Lower Mainland Dairy Products Board* (1), as to what had been said upon the subject of the licences authorized by the statute considered in *Lawson's Case,* do not affect this consideration.

In *Attorney-General for British Columbia v. Attorney-General for Canada et al.* (2), the *Natural Products Marketing Act, 1934,* of the Parliament of Canada, was held beyond the powers of Parliament by the Judicial Committee. The Dominion legislation was designed to regulate the sales of similar products to those referred to in the British Columbia Act. Lord Atkin by whom the judgment was delivered said (p. 386) that there could be no doubt that the provisions of the Act covered "transactions in any natural product which are completed within the Province, and have no connection with inter-provincial or export trade".

(1) [1938] A.C. 708 at 721, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.
(2) [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

The matter had been considered in this Court and a passage from the judgment of the Court delivered by Duff C.J. (1) was approved which read:

> The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.

This appears to assist in explaining what Lord Atkin intended by the expression "transactions which are completed within the Province" in the earlier passage.

As in the case of the British Columbia legislation considered in *Lawson's Case,* s. 26 of the Act provided that if it should be found that any part of the Act was *ultra vires,* effect should be given to such parts as should be held to be within the powers of Parliament. It was held, however, that the whole texture of the Act was inextricably interwoven and that, as the main portion of the legislation was invalid as being in pith and in substance an encroachment upon provincial rights, the sections which were within the Dominion powers must fall as being in part merely ancillary to it.

In *Shannon v. Lower Mainland Dairy Products Board, supra,* the *Natural Products Marketing (British Columbia) Act, 1936,* as amended by c. 41 of the statutes of British Columbia in 1937, was held to be within Provincial powers.

The judgment of the Judicial Committee was again delivered by Lord Atkin. The definition of "marketing" did not differ materially from that in the statute considered in *Lawson's Case,* and the statute contained in subs. (1) of s. 4 a declaration to the same effect as that contained in the 1956 amendment to the Ontario Act. By the amendment of 1937 it was declared that the purpose and intent of the Legislature was to confine the provisions of the Act within the competence of the Legislature and that all the provisions thereof should be construed so as to give effect to this purpose and intent. The amendment further provided in some detail that should any part of the Act be held *ultra*

(1) [1936] S.C.R. 398 at 412, [1936] 3 D.L.R. 622, 66 C.C.C. 180 (*sub nom. Re Natural Products Marketing Act, 1934*).

vires this should not affect those portions which were within the powers of the Legislature, the intention being to give separate and independent effect to the extent of its powers to every provision of the Act.

The matter came before the Courts by way of reference by the Lieutenant-Governor in council. The trial judge had found the Act *ultra vires* but this was reversed in the Court of Appeal and the appeal was taken direct to the Judicial Committee. The report of the argument shows that it had been admitted on the part of the appellant that the purpose of the Act was to regulate the marketing of natural products only to the extent the jurisdiction of the Province extended. Dealing with the argument that the legislation encroached upon the power of Parliament under s. 91(2), Lord Atkin said that it was sufficient to say that:

> . . . it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province.

Later, he said that it was plain that the transportation which was controlled was "confined to the passage of goods whose transport begins within the Province to a destination also within the Province" and that the appellant did not dispute that it was the intention of the Legislature to confine itself to its own sphere and had not established that there had been any encroachment. Concluding his consideration of this aspect of the matter, he said:

> The pith and substance of this Act is that it is an Act to regulate particular businesses *entirely within the Province* and is, therefore, *intra vires* of the Province.

(The italics are mine.)

In my view, the Judicial Committee did not intend by the language above quoted to depart from what Lord Atkin had said in the Dominion *Marketing Act* case and its approval of the language of Duff C.J. in that case above quoted.

Some assistance may be found in the earlier cases upon the point. In *Hodge v. The Queen* (1), where the *Liquor License Act* of 1877 of Ontario was upheld, the power to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns was held not to interfere with the general regula-

(1) (1883), 9 App. Cas. 117.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

tion of trade and commerce vested in the Dominion. The Act was held to be "entirely local" in its character and operation.

In *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1), where the validity of the *Canada Temperance Act,* 1886, was considered, Lord Watson said (p. 365), referring to the powers of the Provincial Legislature, that it was practically conceded that it must have power to deal with the restriction of the liquor traffic *from a local and provincial point of view.* As to the argument that s. 18 of the existing Ontario Act conflicted with the provisions of the Dominion Act, he said (p. 368):

> . . . the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario.

I do not find any other material assistance in the decided cases as to the extent of the powers of the Legislature to regulate trade other than that which is to be obtained from the cases in which the extent of the powers of Parliament under s. 91(2) has been declared.

In *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (2), Sir Montague E. Smith, delivering the judgment of the Judicial Committee, after pointing out (p. 112) that the words "regulation of trade and commerce" in their unlimited sense were sufficiently wide to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, down to minute rules for regulating particular trades, and that a consideration of the Act showed that the word was not used in this unlimited sense, said that their Lordships did not attempt to define the limits of the authority. He said that the words would include political arrangements in regard to trade requiring the sanction of Parliament, *regulation of trade in matters of interprovincial concern,* and perhaps general regulation of trade affecting the whole Dominion.

While in *Bank of Toronto v. Lambe* (3), reference was made to the passage above referred to from *Parsons' Case,* Lord Hobhouse merely said that it had been there suggested

(1) [1896] A.C. 348. (2) (1881), 7 App. Cas. 96.
(3) (1887), 12 App. Cas. 575 at 586.

that the power of regulation given to the Parliament meant some general or interprovincial regulations, but no further attempt to define the subject need be made.

While the extent of the power was considered in two early cases in this Court: *Severn v. The Queen* (1) and *The City of Fredericton v. The Queen* (2), no attempt was there made to define the limits of the power.

What has been at times considered as a limitation of the power appears to have resulted from a passage in the judgment in *Parsons' Case* (p. 113) which says that the authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular trade or business such as the business of fire insurance in a single Province.

In *Attorney-General for Canada v. Attorney-General for Alberta et al.* (3), Viscount Haldane said that the power did not extend to legislate for "the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces".

In *In re The Board of Commerce Act, 1919,* and *The Combines and Fair Prices Act, 1919* (4), it appears to be stated somewhat more broadly (p. 198). There it is said that the authority of Parliament did not enable interference with particular trades in which Canadians would, apart from any right of interference conferred by the heading, be free to engage in the Provinces.

The result of the cases in the Judicial Committee appears to me to be most clearly summarized in the judgment of Lord Atkin in *Shannon's Case, supra,* where it is said (p. 719):

> It is now well settled that the enumeration in s. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province.

The Farm Products Marketing Act continues in existence the Farm Products Marketing Board, a body corporate theretofore constituted, the members of which are

(1) (1878), 2 S.C.R. 70. (2) (1880), 3 S.C.R. 505.

(3) [1916] 1 A.C. 588 at 596, 26 D.L.R. 288, 10 W.W.R. 405, 25 Que. K.B. 187.

(4) [1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

appointed by the Lieutenant-Governor in council. Reference has been above made to the various farm products which the Board is given power to control. The extensive powers vested in the Board include power to establish negotiating agencies which may adopt or determine by agreement minimum prices for the regulated product, terms of purchase and sale, and conditions and forms of contract for the purchase and sale of such product; and, except where a marketing agency has been designated for the marketing of a regulated product to "prohibit the marketing of any class, variety, grade or size of any regulated product" and to authorize a marketing agency to conduct a pool of the nature referred to in the first question submitted.

The Board is, in addition, given power to make regulations with respect to any regulated product, including the prohibiting of persons from engaging in marketing or processing any such product except under the authority of a licence issued by the Board (s. 7(1)(*b*)), and "providing for the refusal to grant a licence for any reason which the Board or the local board may deem sufficient" (s. 7(1)(*c*)).

Other than in the manner in which this is attempted in the amendment made in 1956 above referred to, the statute does not limit the exercise of the powers which may be vested in the Board under its provisions to natural products marketed for consumption in the Province, but includes in its sweeping terms such products which might be sold for export or exported by a producer or one purchasing from him from the Province.

The first question is directed to clause (*l*) of subs. (1) of s. 3 of the Act. This authorizes the Board to

> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

Construing the reference to intraprovincial transactions in the question and the words "control and regulation in any or all respects of the marketing within the Province of

farm products including the prohibition of such marketing in whole or in part" in the 1956 amendment, as referring to purchases and sales of the controlled product, whether hogs, fruit or vegetables in their natural form, for consumption in the Province, and sales to processors, manufacturers or dealers proposing to sell such products, either in their natural form or after they have been processed by canning, preserving or otherwise treating them, for consumption within the Province, I consider the clause to be within the powers of the Province.

Such transactions are, in my opinion, matters of a merely local or private nature in the Province within head 16 of s. 92, and such regulation is in relation to property and civil rights in the Province within head 13.

The pools authorized by clause (*l*) appear to be designed to obtain the most favourable prices for the producers as a whole by selling the regulated product through the medium of a marketing agency, a procedure which, it is apparently hoped, will result in better prices being realized for the crop as a whole than would otherwise be possible. I do not consider that the decision of the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1) supports a contention that the authority to authorize the proposed pools is beyond Provincial powers. In my view, the fact that some of the producers might under such regulations receive less for their product than they would if they were at liberty to sell when the opportunity offers and that others might receive more than they would otherwise receive does not mean that a tax is imposed upon one producer for the benefit of others. The design is apparently to realize what will be over the years better prices for all producers and this, in my opinion, is within the powers given by heads 13 and 16.

In answering this question I exclude sales of produce where the producer himself ships his product to other Provinces or countries for sale by any means of transport, or sells his product to a person who purchases the same for export. To illustrate, I exclude a shipment by a hog producer of his hogs, alive or dead, to the Province of Quebec

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

and transactions between such producer and a buyer for a packing plant carrying on business in Hull who purchases the hog intending to ship it to Hull, either alive or dead, and transactions between a hog producer and a packing plant operating in Ontario purchasing the hog for the purpose of producing pork products from it and exporting them from the Province to the extent that the carcass is so used.

The passage from the judgment in *Lawson's Case* which is above quoted makes it clear that to attempt to control the manner in which traders in other Provinces will carry out their transactions within the Province, or to prohibit them from purchasing natural products for export, is not a matter of merely Provincial concern but also directly and substantially the concern of the other Provinces. I cannot think that from a constitutional standpoint the fact that the buyer for the packing house elects to have the hog killed before it is exported or cut up and, after treatment, exported as hams, bacon or other pork products, can affect the matter.

The order in council referred to in the second question approved the scheme under the powers conferred by s. 4(2) of the Act. The objections to the validity of this order are that the scheme is not confined to marketing in Ontario and envisages marketing extraprovincially and, further, that the Lieutenant-Governor has no power to create a local board. As to the first, the scheme itself, while defining the farm product to which it applies, does not deal with the manner in which the marketing is to be carried on, but merely provides the agencies which are to carry on the proposed activities. It is by the regulations passed subsequently by the Board that the manner of operation is defined and the first objection is really directed against them. As to the power of the Lieutenant-Governor to appoint the Board, the section referred to expressly authorizes the approval of a scheme and part of the scheme is the establishment of such a board. Section 1(*d*) of the Act defines the expression "local board" as meaning a board constituted under a scheme, and power to approve the scheme carries with it, of necessity, in my opinion, the power to approve the constitution of the board.

Ontario Regulation 102/55, referred to in the third question, contains the regulations made by the Board under the powers vested in it by s. 7 of the Act. The regulation in question was made prior to the amendment of 1956 but, in order that the answers made should be of assistance, it is my opinion that the matter should be treated as if this had been made under the statute as amended.

Section 6 of *The Interpretation Act,* R.S.O. 1950, c. 184, provides that where an Act confers power to make orders or regulations, unless the contrary intention appears, expressions used in them shall have the same meaning as in the Act conferring the power. Accordingly, where the word "marketing" is used in the regulation, it is to be given the meaning attributed to the word in s. 1(*e*) of the Act which defines it as meaning, *inter alia,* buying, selling and offering for sale, packing and shipping for sale and transporting in any manner, and assigns to the words "market" and "marketed" corresponding meanings.

The regulation applies to all hogs produced in Ontario, with certain defined exceptions. "Producer" is defined as one engaged in the production of hogs. "Processing" is defined as meaning the slaughtering of hogs and "processor" as one who slaughters hogs or has hogs slaughtered for him.

The regulation provides for the appointment of the Ontario Hog Producers' Co-operative as the marketing agency through which all hogs shall be marketed and declares that no person shall market hogs except through that agency, and authorizes the marketing agency, *inter alia,* to direct and control the marketing of hogs, including the times and places at which they may be marketed, to fix the prices to be paid to producers, to require the price to be paid to be forwarded to the marketing agency and to collect from any person by suit the price or prices of hogs owing to the producer.

On the face of it, the regulation assumes to control the marketing of hogs which the producer might wish to export from the Province on his own account, prohibits him, by way of illustration, from selling his hogs to the representative of a packing company in Quebec who proposes to export them from the Province, prohibits the Quebec packing house from buying the hogs from him and packing com-

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

panies operating in Ontario from purchasing hogs from him for the purpose of manufacturing pork products and exporting them, and from purchasing hogs from any person in Ontario other than the marketing agency and except at prices which may be fixed by the marketing agency and at times determined by them. This, as I have said, is, in my opinion, assuming to regulate trade and commerce in matters which are not merely of concern to the people of Ontario but are directly and substantially the concern of the people of other Provinces and thus beyond the powers which may be vested by the Province in such a board.

To the extent, however, that the regulation assumes to control in this manner hogs sold for consumption within the Province or to packing plants or other processors purchasing the animals for the manufacture of pork products to be consumed within the Province, the regulation is, in my opinion, *intra vires* as dealing with matters which are merely of a local or private nature in the Province.

The regulation also provides for the licensing of persons shipping or transporting hogs or slaughtering them and, so long as this power is exercised under the licensing power given by head 9 of s. 92 and is not used to prevent those desiring to purchase hogs or pork products for export and thus to regulate interprovincial trade, I consider it to be within Provincial powers. This appears to me to be settled by *Brewers' and Maltsters' Association of Ontario v. The Attorney-General for Ontario* (1). It will be noted that the Board, by s. 3 of the regulation, may refuse to grant a licence as a processor "for any reason which the Board may deem sufficient". As every packing company in Ontario must, of necessity, be a processor within the definition contained in the regulation, and since many of the large packing companies are presumably incorporated by letters patent under the *Dominion Companies Act* and have been granted power to carry on their business in all of the Provinces of Canada, the decisions of the Judicial Committee in *John Deere Plow Company, Limited v. Wharton* (2) and in *Great West Saddlery Company, Limited v. The King* (3), would in the case of such companies be obstacles in the way

(1) [1897] A.C. 231.
(2) [1915] A.C. 330, 18 D.L.R. 353, 7 W.W.R. 706.
(3) [1921] 2 A.C. 91, 58 D.L.R. 1, [1921] 1 W.W.R. 1034.

of the exercise of such a power. The judgments delivered in the Court of Appeal for Saskatchewan in *In re The Grain Marketing Act 1931* (1) contain a valuable review of authorities on the question as to the right of the Province to interfere with export by a producer of grain. I refer particularly to the judgments of Turgeon J.A. at p. 155 (W.W.R.), McKay J.A. at p. 167 and Martin J.A. at p. 182.

The fourth question relates to an order made by The Ontario Hog Producers' Marketing Board on June 8, 1955, which reads:

> THAT the service charges to be imposed by the Ontario Hog Producers Co-operative for the marketing of hogs under the said scheme be and the same are hereby fixed at until further order of the Board the sum of 24¢ per hog and a pro rating charge in the sum of 20¢ per producer settlement statement.

Section 8(*c*) of the regulations authorizes the Board to empower the marketing agency to impose service charges on the marketing of hogs and, by para. (*d*), to pay to the local board from the charges so imposed its expenses in carrying out the purposes of the scheme. It is the local board that fixes the amount of these charges under s. 9. I do not know what the expression "pro rating charge" means and answer this question on the footing that the charge of 20¢ is for preparing and rendering the statement referred to in s. 10(2).

Assuming that the charges are made in respect of hogs sold for consumption in Ontario as mentioned in the answer to question 3, in the absence of any evidence to the contrary, it is, in my opinion, to be assumed that these are fair charges for services to be rendered by the marketing agency and the local board. On this footing, I consider the regulation to be a proper exercise of the powers given by heads 13 and 16 of s. 92 and *intra vires*: *Shannon et al. v. Lower Mainland Dairy Products Board, supra,* at p. 722.

Question 5 relates to s. 7 of Ontario Regulation 145/54 dealing with the marketing of peaches for processing which reads:

> (1) Every grower shall pay to the local board licence fees at the rate of 50 cents for each ton or fraction thereof of peaches delivered to a processor.

(1) 25 Sask. L.R. 273, [1931] 2 W.W.R. 146.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

(2) The processor shall deduct the licence fees payable by a grower from the sum of money due to the person from whom the peaches were received.

(3) The processor shall forward to the local board the licence fees deducted not later than the 1st of December in any year.

The scheme to which the regulation in question applies constitutes a local board to be known as "The Ontario Peach Growers' Marketing Board" and, in addition, a committee in each of the defined districts in Ontario to be known as "The District Peach Growers' Committee".

Regulation 145/54 defines "peaches" as meaning those produced in Ontario which are subsequently used for processing, and the latter word is defined as including canning, dehydrating, drying, freezing or processing. "Processor" includes every person carrying on in the Province the business of processing peaches. Section 2 requires persons engaged in the business of growing peaches, so defined, to have a licence to be issued by the Board, and every grower is deemed to be the holder of such a licence. Processors and dealers in such peaches are also required to obtain licences. The term "dealer", as defined, would include persons representing purchasers outside of the Province who propose to export the fruit to be processed elsewhere than in Ontario.

The power vested in the Province to legislate in relation to licences in order to the raising of a revenue for provincial, local or municipal purposes under head 9 of s. 92, in my opinion, authorizes this section, even though their imposition in an amount which varies with the quantity sold may tend to increase the sale-price. It must, I think, be taken as decided by the judgment of the Judicial Committee in *Shannon's Case* that it is not a valid objection to a licence, plus a fee, that it is directed both to the regulation of trade and to the provision of revenue. While the functions of the marketing board and the growers' committee are not defined in the material, it is proper to assume, in my opinion, that these licence fees are to defray the expenses of these bodies in discharging their duties under the scheme. The fact that the licence fee may be charged in respect of peaches processed for export does not, in my opinion, invalidate the section.

Question 6 relates to Ontario Regulation 126/52 referring to the marketing of vegetables for processing.

The licence fee payable by a grower is at the rate of one-half of 1 per cent. of the total sale-price due to him for each ton or fraction thereof of peaches delivered to a processor and processed by the latter. In other respects, the provisions are similar to those of O.Reg. 145/54 referred to in the last question.

For the same reasons, I consider the imposition of these licence fees to be *intra vires* the marketing board.

Question 7 relates to a proposed amendment to s. 7 of *The Farm Products Marketing Act* which reads:

> Subsection (1) of Section 7 of The Farm Products Marketing Act as amended by Section 4 of The Farm Products Marketing Amendment Act, 1951, Section 6 of The Farm Products Marketing Amendment Act, 1954 and Section 7 of The Farm Products Marketing Act, 1955 is amended by adding thereto the following paragraph:
>
> (ss) authorizing a local board
>
> (i) to inquire into and determine the amount of surplus of a regulated product,
>
> (ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine,
>
> (iii) to market any surplus of a regulated product so purchased or acquired,
>
> (iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producers any licence fees payable by the producer to the local board and to remit such licence fees to the local board,
>
> (v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product,
>
> (vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product.

Clauses (i), (ii) and (iii) appear to require no comment since there is no compulsion on the part of the producer to sell to the local board.

Clause (iv) appears to me to be unrelated to the previous clauses since if the local board buys from the producer the latter would presumably have nothing to do with the processors. Processors who have purchased the regulated product from producers may be required, in my opinion, to deduct any licence fees lawfully payable by the producer from the purchase-money and remit the amounts to the local board.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

Clauses (v) and (vi), to the extent that they authorize the use of moneys realized from licence fees to pay the operating expenses of the local board, are, in my opinion, *intra vires*. The proposed amendment is to be construed in the same manner as the section of the Act referred to in the first question and so applying to products marketed or purchased for consumption within the Province. On the assumption that the producer sells his own product on the market, a licence designed to raise moneys not merely for the expenses of the Board but to cover losses incurred by it in its market operations or to equalize or adjust returns received by all the producers would, in my opinion, be *ultra vires*. So-called licence fees or charges imposed for this purpose would, in my opinion, be taxes the nature of which could not be distinguished from the adjustment levies referred to in the *Crystal Dairy* case above referred to.

It will be seen from the report of that case that, on behalf of the respondent, it was contended not merely that the levies were bad as constituting indirect taxation but also that imposing them was an attempt to regulate trade which was, at least partly, interprovincial. The Judicial Committee, finding that the levies, being in the nature of indirect taxes, could not be supported, did not consider the argument based upon head 2 of s. 91. From the fact that the point was argued, however, and the further fact that the fluid milk market referred to was obviously within the Province, it is proper to conclude, in my opinion, that, though this substantial part of the product was sold for local consumption, the objection that the method adopted to equalize the returns of the producers was beyond Provincial powers must be given effect to. This aspect of the matter appears to me to be concluded by the judgment in that case.

I would not construe clauses (v) and (vi) as contemplating that the imposition and use of such licence fees for the last-mentioned purposes would be a matter of agreement between the local board and the producers. To do so would be to render the question itself pointless.

What I have said as to clauses (v) and (vi) of the proposed amendment referred to in question 7 applies to question 8.

In my opinion, neither the provisions of the *Combines Investigation Act*, R.S.C. 1952, c. 314, nor of s. 411 of the *Criminal Code*, 1953-54 (Can.), c. 51, are objections to the schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the *British North America Act*. It cannot be said, in my opinion, that within the terms of para. (*a*)(vi) of s. 2 of the *Combines Investigation Act* the scheme "is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Rather is it a scheme the carrying out of which is deemed to be in the public interest. Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state.

The same reasoning applies, in my opinion, to s. 411 of the *Criminal Code*. I consider that the section has no application to a scheme authorized by a Legislature under its powers conferred by the same statute which, by s. 91, gave to Parliament the power to pass laws in relation to the criminal law. If, indeed, the section could be construed as applying to such an act, I think it would be impossible to say that a scheme deemed by the Legislature to be in the public interest could be held to unduly limit or prevent competition within the meaning of the section.

I have not dealt with the sufficiency of the Hog Producers' Marketing Scheme or any question of severability as it might affect either the statute or the regulation as, in view of the form of the questions, to do so would, in my opinion, serve no useful purpose.

My answers to the various questions are as follows:

Question 1: If the pool for the distribution of moneys received from the sale of the regulated product is limited to such products marketed for use within the Province and excludes such products marketed or purchased for export in their natural state or after treatment, clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* is not *ultra vires* of the Legislature.

Question 2: No.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

Question 3: Yes, except to the extent that the regulation authorizes the control of the marketing of hogs sold for consumption within the Province or to packing-plants or other processors purchasing the animals for the manufacture of pork products for use within the Province. The provision for licensing is *intra vires,* subject to what is said as to the refusal of such a licence.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: That part of clause (v) which authorizes the imposition of licences for the purpose of providing moneys to pay for the losses referred to, to set up reserves, and for the purposes referred to in clause (vi) is *ultra vires.*

Question 8: No.

CARTWRIGHT J.:—The questions referred to the Court by His Excellency the Governor General in council and a summary of the provisions of *The Farm Products Marketing Act* of Ontario, hereinafter referred to as "the Act" are set out in the reasons of other members of the Court.

Clause (*l*) of subs. (1) of s. 3 of the Act to which the first question refers is as follows:

> The Board may, . . .
>
> (*l*) authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

The main argument urged by Mr. Robinette against the validity of this clause is that it does not contemplate a pooling and sale of the regulated product by a marketing agency but rather purports to empower the Board to authorize the agency to take from the sellers of a regulated product a portion of the price for which they have sold the product and to pay such portion over to other sellers of the product who have obtained a less favourable price; and that such legislation is beyond the powers of the Provincial Legislature for the reasons given by the Judicial Committee in *Lower*

Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited (1). Whether the clause does purport to authorize such compulsory equalization is a question of the construction of the words used by the Legislature read with due regard to the other related provisions of the Act. The argument against the construction for which Mr. Robinette contends is put as follows in the factum of the Attorney General of Canada:

> The interpretation to be adopted must, of course, be based on the assumption that there was a *bona fide* intention by the province to confine itself to its own sphere. It is submitted that the paragraph in question is open to the interpretation that it does not contemplate any "equalization", and, consequently, does not fall within the criticism adopted in the *Crystal Dairy* case. The pooling of the product and the provision for the distribution of the sum realized should be interpreted as meaning that each producer will receive his *aliquot* share according to the amount, variety, size, grade and class of the product delivered by him. Upon this interpretation, it is submitted that the provision is valid.

and as follows in the factum of the Attorney-General for Ontario:

> It is submitted that the above clause (*l*) of subsection (1) of Section 3 merely authorizes the mixing or pooling of the regulated product received by the marketing agency from various producers and selling the product in bulk instead of selling each individual producer's commodity separately, and the distribution of the proceeds after deducting all necessary and proper disbursements and expenses.

It will be observed that the clause makes no reference to pooling the product or to conducting a pool for the sale of the product; what is to go into the pool is all the money received from the sale of a regulated product. The operation of the clause appears to be confined to cases in which a marketing agency has been appointed under cl. (*m*) of s. 7 (1) of the Act which, as re-enacted by 1955, c. 21, s. 7, reads:

> 7 (1) The Board may make regulations generally or with respect to any regulated product, . . .
>
> (*m*) upon the recommendation of the local board, designating a marketing agency through which a regulated product shall be marketed and requiring the regulated product to be marketed through the marketing agency.

Clause (*o*) of the same subsection is as follows:

> (*o*) where a marketing agency is designated for a regulated product, authorizing the marketing agency,
>
> (i) to direct and control, by order or direction, the marketing of the regulated product including the times and places at which the regulated product may be marketed,

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Cartwright J.

(ii) to determine the quantity, grade and class of the regulated product that shall be marketed by each producer,

(iii) to prohibit the marketing of any class, variety, grade or size of the regulated product,

(iv) to fix from time to time the price or prices that shall be paid to producers for the regulated product or any class, variety, grade or size of the regulated product and to fix different prices for different parts of Ontario,

(v) to impose such service charges as may from time to time be fixed by the local board for the marketing of the regulated product,

(vi) to pay to the local board from service charges imposed under subclause v its expenses in carrying out the purposes of the scheme,

(vii) to require the price or prices to be paid to the producer for the regulated product to be forwarded to the marketing agency,

(viii) to collect from any person by suit in any court of competent jurisdiction the price or prices of the regulated product owing to the producer.

It would appear from the provisions of clause (*o*), and particularly subclauses (vii) and (viii) thereof, that the Act envisages situations in which while the regulated product is to be marketed through the designated marketing agency it is the producer and not the agency who becomes the vendor with whom the contract of sale is made and to whom the purchaser becomes indebted for the price. It also appears, particularly from subclause (iv), that the price received during the operation of a scheme by one producer, "A", for a quantity of the regulated product of a certain variety, size, grade and class may vary from time to time and from place to place from the price received by another producer, "B", for an equal quantity of the product of the same variety, size, grade and class. In such a situation the plain words of cl. (*l*) appear to me to empower the Board to authorize the marketing agency to distribute the total moneys received by it from the purchasers from "A" and "B" between "A" and "B" not having regard to the prices contracted to be paid to each of them but having regard only to the amount of the regulated product sold by each of them, in other words to make an equalization as was sought to be done by the legislation found to be invalid in the *Crystal Dairy* case.

I am not unmindful of the rule that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the legislature the

intention of limiting the operation of its enactments to matters within its allotted sphere; but this rule does not permit the adoption of a forced construction at variance with the plain meaning of the words employed.

Using the example I have given above, the clause in question appears to me to empower the Board to authorize a marketing agency to deduct from the moneys received from the purchasers of the product of producer "A" not only "all necessary and proper disbursements and expenses" but also such amount as it may be necessary to add to the moneys received from the purchasers of the product of producer "B" to equalize the price received by "A" and "B" for products of like variety, size, grade and class. The fact that the amount required to make the equalization will be deducted from moneys received by the marketing agency on behalf of the producers instead of being collected from them as an "adjustment levy" does not appear to me to enable us to distinguish the clause in question from the legislation declared to be invalid in the *Crystal Dairy* case.

In my opinion, question 1 should be answered in the affirmative.

Questions 2, 3 and 4 may conveniently be dealt with together, as Mr. Robinette and Mr. McFarlane have raised a fundamental objection to the validity of these orders which, in my opinion, must prevail. This is that the so-called scheme set out in sched. 1 to Regulation 104 of C.R.O. 1950 as amended and which is approved and declared to be in force by the Lieutenant-Governor in council is not a scheme within the meaning of the Act.

It is common ground that, if it exists, the authority of the Lieutenant-Governor in council to make Regulation 104 is derived from s. 4(2) of the Act, as amended by 1955, c. 21, s. 3, reading in part as follows:

> The Lieutenant-Governor in Council may,
>
> (*a*) approve any scheme or any part thereof with such variations as he may deem proper and declare it to be in force in Ontario or any part thereof; and
>
> (*b*) notwithstanding subsection 1*d*, amend any approved scheme as he may deem proper.

By s. 1 (*i*) of the Act it is provided:

> In this Act, . . .
>
> (*i*) "scheme" means any scheme for the marketing or regulating of any farm product which is in force under this Act.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Cartwright J.

Some of the meanings of the word "scheme" given in the Concise Oxford Dictionary and the Shorter Oxford English Dictionary are "systematic arrangement proposed or in operation", "plan for doing something", "a plan of action devised in order to attain some end". To come within the definition given in the Act the "scheme" must at least set out a plan for the marketing or for the regulating of some farm product. The name of the so-called scheme suggests that it is a plan for the marketing of hogs but it contains no plan for marketing at all. It simply purports to set up a local board and seven committees and while it prescribes in some detail the manner in which the members of these bodies are to be chosen, nothing is said as to their powers, purposes or duties; the scheme contains no word as to how the marketing is to be carried out; no plan is formulated. In my opinion it cannot be said to be a scheme.

The form of question 2 suggests that the regulation referred to was a consolidation or re-enactment in 1950 of an earlier regulation and was amended twice in 1955 but the material before the Court does not indicate the form of the "scheme" before such consolidation and amendments. However, its previous form does not appear to be material as the regulation in its present form, as printed in the case, is a complete enactment and it was not suggested that there is any scheme in force in Ontario for the marketing or regulating of hogs other than that set out in sched. 1 to the Regulation 104 which is before us.

If I am right in my conclusion that sched. 1 does not contain a scheme within the meaning of that term as used in the Act, it follows that the Lieutenant-Governor in council was not empowered to approve it or to declare it to be in force.

It must also follow that hogs are not a "regulated product" as cl. (*g*) of s. 1 of the Act provides that that expression means "a farm product in respect of which a scheme is in force". It results from this that the Farm Products Marketing Board had no authority to make O.Reg. 102/55 referred to in question 3. This regulation purports to be made in exercise of the powers given to the Board in s. 7 of the Act and all of these which are apt to

enable the Board to make the regulation in question are predicated on the existence of a scheme and a regulated product.

The order dated June 8, 1955 made by The Ontario Hog Producers' Marketing Board referred to in question 4 purports to be made in exercise of the powers granted to it by s. 9 of O.Reg. 102/55 and that regulation being, in my opinion, invalid it follows that The Ontario Hog Producers' Marketing Board had no authority to make the order in question.

In dealing with questions 5 and 6 there is this preliminary difficulty, that neither the order of reference nor the material in the case contains any information as to the terms of the schemes for the marketing of the products dealt with or as to how they are in fact carried out. During the argument, the Court was furnished with printed copies of:

(i) Regulation 109 of C.S.O. 1950 as amended by O.Reg. 144/54 purporting to approve "The Ontario Peach Growers' Marketing-for-Processing Scheme".

(ii) Ontario Regulations 146/54 dealing with marketing of peaches for processing, setting up "The Negotiating Committee for Peaches for Processing" and "The Negotiating Committee for Selling and Transporting Peaches for Processing" and providing for the constitution of a negotiating board in the event of the committees or either of them failing to arrive at an agreement on or before July 28 in any year. The purposes of the negotiating committees are set out in s. 3(1) and (2) as follows:

3. (1) The Negotiating Committee for Peaches for Processing may adopt or determine by agreement

(*a*) minimum prices for peaches or for any class, variety, grade or size of peaches,

(*b*) terms of purchase and sale for peaches,

(*c*) storage charges for peaches or for any class, variety, grade or size of peaches, and

(*d*) conditions and form of contracts for the purchase and sale of peaches.

(2) The Negotiating Committee for Selling and Transporting of Peaches for Processing may adopt or determine by agreement handling, transporting or selling charges by dealers for peaches which the dealers handle, transport or sell.

(iii) Ontario Regulations 125/52, purporting to approve "The Ontario Vegetable Growers' Marketing-for-Processing Scheme".

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Cartwright J.

(iv) Ontario Regulations 131/52, as amended by O.Reg. 119/53 and O.Reg. 43/54, setting up a "Negotiating Committee" having objects similar to those of the two committees referred to in O.Reg. 146/54, above, and a negotiating board.

The introduction of this material appears to me to place the Court in a dilemma. If the material is regarded as being before us as a basis for answers to the questions referred to us then for the reasons I have given above in answering questions 2, 3 and 4, "The Ontario Peach Growers' Marketing-for-Processing Scheme" and "The Ontario Vegetable Growers' Marketing-for-Processing Scheme" would both appear to be invalid and the regulations referred to in questions 5 and 6 would fall with the schemes. If on the other hand the material is regarded as not being before us we have no sufficient basis on which to form an opinion as to whether the regulations referred to in questions 5 and 6 can be upheld, as was argued, as the imposition of fees for services rendered by the authorized instrumentalities of the Province: *vide Shannon et al. v. Lower Mainland Dairy Products Board* (1). I am of opinion that there is not sufficient material before the Court to enable us to answer either question 5 or question 6.

As to question 7, cls. (i), (ii), and (iii) of the proposed para. (*ss*) do not appear to be open to objection.

In dealing with cl. (iv) it must, I think, be assumed that the words "any licence fees payable by the producer" contemplate true licence fees such as the Legislature has power to impose or authorize and on this assumption the clause merely provides a method of collection of such fees and is unobjectionable.

Clause (v) purports to authorize the local board to use moneys compulsorily collected from producers of a product to make up the losses sustained by the board in purchasing the surplus of such product from other producers and reselling the same. In effect the board would be using such moneys to bring about an equalization, or a partial equalization, of the very sort which the Judicial Committee, in the *Crystal Dairy* case, held to be beyond the powers of the Legislature. The circumstance that the loss for which

(1) [1938] A.C. 708 at 722, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

equalization is to be brought about is sustained by the local board in purchasing from the less fortunate producers and then reselling rather than by such producers themselves does not enable the nature of the legislation to be differentiated from that considered in the *Crystal Dairy* case; nor does giving to the moneys which the producers are required to pay for this purpose the name of licence fees afford a sufficient ground of distinction. In my view clause (v) is *ultra vires* of the Legislature; and for similar reasons I am of the same opinion as to cl. (vi).

From the wording of the opening clause of question 8, it would seem that, in view of my answer to question 7, it is not necessary for me to answer question 8, but it follows from the reasons I have given in answering question 7 that, in my opinion, the answer to question 8 would clearly be in the negative.

The answers which I would make to the questions submitted depend on the construction which I put upon the words of the statute, particularly s. 3(1)(*l*) and the word "scheme", and upon the para. (*ss*) proposed to be added by amendment to s. 7(1). As the other members of the Court do not share my views on these matters of construction I desire to add that if I were able to construe the statute as my brother Rand does, I would, for the reasons which he has given, answer all the questions as he has done.

My answers to the questions referred to the Court are as follows:

Question 1: Yes.

Question 2: Yes, in whole.

Question 3: Yes, in whole.

Question 4: Yes.

Questions 5 and 6: On the material before the Court I find it impossible to answer either of these questions.

Question 7: Clauses (v) and (vi) of the proposed para. (*ss*) are *ultra vires* of the Ontario Legislature.

Question 8: No.

FAUTEUX J.:—By an order of His Excellency the Governor General in council (P.C. 1955-1865), dated December 14, 1955, eight questions, with respect to the validity (i) of *The Farm Products Marketing Act,* R.S.O. 1950, c. 131,

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

as up to then amended, (ii) of certain regulations and orders purported to be passed thereunder, and (iii) of a proposed amendment thereto, have been referred to this Court for consideration and answer. Subsequent to the date of this order of reference and prior to the hearing thereof, the Legislature of Ontario, by an amendment sanctioned on March 28, 1956 (1956, c. 20, s. 1), added to the Act s. 1*a* declaring that:

> The purpose and intent of the Act is to provide for the control and regulation, in any or all respects, of the marketing *within the Province* of farm products, including the prohibition of such marketing in whole or in part.

(The italics are mine.)

It is as thus amended that the validity of the Act is now being considered.

The scheme of the Act may be summarily described as follows: Ten per cent. of the producers engaged, within a given area, in the production of a farm product, may propose the adoption of a compulsory scheme for marketing or regulating the farm product. If the scheme is approved by a certain majority of producers, the Farm Products Marketing Board, whose members are appointed by the Lieutenant-Governor in council, may recommend its adoption to the latter who may approve it with such variations as deemed proper and declare it in force. Marketing operations under the scheme are conducted by a local board in accordance with the terms of the scheme but the Board may also designate marketing agencies. The scheme may include a system of licensing of persons engaged in producing, marketing or processing the regulated product. This licensing is done under the regulations made by the Board which may prohibit persons from engaging in such operations, except under the authority of a licence. Licence fees, to be used by the local board for the purpose of carrying out and enforcing the Act, the regulations and the scheme, may be authorized by the Board. The actual direction of the marketing is done by either the Board, a local board or a marketing agency which, appointed by and acting pursuant to the regulations of the Board, directs and controls the marketing of the product. The marketing agency may be authorized to conduct a pool for the distribution of all moneys received from sales of the product and having

deducted its necessary and proper disbursements and expenses, to distribute the proceeds of sales in such a manner that each person receives a share in relation to the amount, variety, size, grade and class of the regulated product delivered by him. Violators of any provisions of the Act, of the regulations, of the schemes declared to be in force, or of any order or direction of the Board, local board or marketing agency, shall be guilty of an offence and liable to monetary penalties.

There are at present in operation 14 marketing schemes covering 21 farm products. Three of these schemes, relating to hogs, peaches and vegetables respectively, have been referred to this Court.

Certain general principles, related to the validity of marketing legislation, may expediently be stated before entering into the individual consideration of each of the questions.

The regulation of the marketing of farm products within the Province exclusively is within the legislative competence of the Provincial Legislature and not of Parliament. In *Attorney-General of British Columbia v. Attorney-General of Canada et al.* (1), the *Natural Products Marketing Act, 1934,* enacted by Parliament, was held to be *ultra vires* substantially for the reason that it covered transactions completed within the Province and having no connection with interprovincial or export trade. Later, in *Shannon et al. v. Lower Mainland Dairy Products Board* (2), the *Natural Products Marketing (British Columbia) Act,* 1936, providing for the regulation of marketing within the Province, was held *intra vires.* Such valid regulatory scheme may be carried out and enforced through the means of a licence scheme provided for by a Provincial Legislature for, as stated by Lord Atkin in the *Shannon* case, *supra,* at p. 721:

> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, *i.e.,* by a system of licences, must also be admissible.

Under its licensing power, derived from heads 9, 13 and 16 of s. 92 of the *British North America Act,* a Provincial Legislature may raise money to defray the costs of opera-

(1) [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

(2) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

tion of such valid regulatory scheme. Lord Atkin, immediately following the passage quoted above from his reasons in the *Shannon* case, says:

> . . . if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes.

Again, in the same case, at p. 722, the learned lord continues:

> The impugned provisions can also . . . be supported on the grounds accepted by Martin C.J. in his judgment on the reference—namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92(13) and (16) . . . On these grounds, the attack based on the powers to exact licence fees must be held to fail.

Under the authority of the *Shannon* case, *supra,* this Court in *Ontario Boys' Wear Limited et al. v. The Advisory Committee et al.* (1), dealing with a compulsory levy to help to defray the expenses of administering codes of working conditions under *The Industrial Standards Act,* R.S.O. 1937, c. 191, stated at p. 359:

> If the assessment be a tax, it is a direct tax within the meaning of the decisions of the Judicial Committee and of this Court; and, in any event, it may be justified as a fee for services rendered by the Province or by its authorized instrumentalities under the powers given provincial legislatures by section 92(13) and (16) of the *British North America Act.*

Finally, and as such licence-fees need not meet the test of direct taxation, the variable character of the amount of the payment is not objectionable. This was affirmed by the Ontario Court of Appeal and the correctness of this affirmation was not questioned by the Privy Council in *Brewers' and Maltsters' Association of Ontario v. The Attorney-General for Ontario* (2).

Dealing now with the submissions made at hearing with respect to each of the questions referred:

The first and the only question bearing on the Act itself is directed to cl. (*l*) of subs. (1) of s. 3, enabling the Farm Products Marketing Board to

> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a

(1) [1944] S.C.R. 349, [1944] 4 D.L.R. 273, 82 C.C.C. 129.
(2) [1897] A.C. 231.

share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

As formulated, the submission of invalidity as to this clause is that the deduction of all necessary and proper disbursements and expenses involves taxation of each producer and that there being allegedly a tendency for the tax to be passed on, the taxation is indirect and therefore the clause is *ultra vires* the Legislature. Compulsory equalization of payment and compulsory deduction, it is said, amount to indirect taxation. To support these views, reliance is placed on the decisions (i) of the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1), and of this Court in (ii) *Lower Mainland Dairy Products Board et al. v. Turner's Dairy Limited et al.* (2) and (iii) in *The Prince Edward Island Potato Marketing Board v. H. B. Willis Incorporated* (3).

The factual situation which the Legislature of British Columbia intended to correct, as well as the remedial laws it passed for that purpose and which were impugned in the *Crystal Dairy* and the *Turner's Dairy* cases, have no relevant similarity to the factual and legal situations here involved. It being more profitable to dairy farmers to sell milk in a fluid form than to sell products manufactured from it, the market for fluid milk became glutted. To remedy this situation, the Legislature compelled traders in fluid milk to transfer a portion of the returns obtained by them in the fluid milk market to the traders in the manufactured products market. These contributions of the fluid milk traders, called "adjustment levies", as well as the collection of moneys for the operation of the scheme, designated as "expense levies", were held to be *ultra vires*: the adjustment levies, because they amounted to indirect taxation, and the expense levies, being ancillary thereto, were held to share the same jural nature. In both the *Crystal Dairy* and *Turner's Dairy* cases, though achieved by different methods, there was compulsory equalization of returns, traders of processed milk products receiving more, at the expense of traders in the fluid milk products. Under the

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.
(2) [1941] S.C.R. 573, [1941] 4 D.L.R. 209.
(3) [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

Act here considered, there is no pooling of returns but a pooling of products aiming at more advantageous marketing and, hence, returns: each producer remaining entitled to receive out of the total returns—all necessary and proper disbursements and expenses being deducted—his share according to the amount, variety, size, grade and class of the product he pooled with the other producers. The object of the compulsory equalization and compulsory deduction is not here the same as in the *Crystal Dairy* and *Turner's Dairy* cases, *supra*. In its normal operation, and this under the authorities is the test, the Act, in pith and substance, does not contemplate that one producer or one class of producers should contribute part of his or its returns to another producer or class of producers.

In the *Prince Edward Island* case, *supra*, order no. 6, related to order no. 2, of the Potato Board, was held *ultra vires* because the impugned provisions thereof were found by some members of the Court to be referable to interprovincial or export trade and, by others, to involve indirect taxation; there being in both cases no proper federal legislative provisions enabling the Board to so provide. This decision is here only invoked in support of the contention that cl. (*l*) involves indirect taxation. Assuming that the deduction authorized under this clause would amount to taxation, the opinions expressed in the *Prince Edward Island* case cannot, in my view, support the proposition that it amounts to indirect taxation for there is no similarity in the operation of the two schemes with respect to the charge. Under the normal operation of cl. (*l*), the total return received by the agency from the sale of the pooled regulated product, as well as the total amount of the necessary and proper disbursements and expenses incurred by the agency for its marketing are both unknown until after completion of the marketing operation. The portion of the total expenses which is subsequently determined and charged against the return to which each producer is entitled on the basis of the quantity and quality of the product he pooled with other producers cannot be compared to the charge considered in the *Prince Edward Island* case and, of its nature and character, cannot acquire a tendency to enter as such into the price of the commodity.

These deductible expenses are expenses actually incurred for the operation of a marketing scheme designed to bring to each producer a benefit ultimately measured by the amount, variety, size, grade and class of the regulated product pooled for more effective marketing and hence better returns; they are meant to be in lieu of the expenses which, in the absence of the scheme, each producer would have to incur to market, under comparable conditions, his own product. They do not involve taxation but are tantamount to a service charge and as such it is quite immaterial, under the authority of the *Shannon* case, *supra,* whether or not the charge has a tendency to enter into the price of the commodity. This test has been formulated simply to distinguish direct from indirect taxation. We were also referred to *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), but it must be noted that the views therein expressed must now be read in the light of those stated by the Judicial Committee in the *Shannon* case.

The next three questions—questions 2, 3 and 4 of the reference—are related to the hog scheme. The original provisions with respect to this scheme appear in O.Reg. 52/46, subsequently amended and then replaced by O.Reg. 93/49 and O.Reg. 94/49, both of which, with some modifications intervening, were consolidated in 1950 to become C.R.O. 1950, nos. 104 and 105 respectively. Summarily, the scheme provides for: the establishment of a local board; the regulating of the marketing by regulations made by the Provincial Board; the licensing by the boards of processors and shippers, but not producers; the setting up of an agency through which exclusively hogs have to be marketed; the authority of the agency to direct marketing, to fix from time to time prices to be paid to producers and to impose service charges; the reception by the agency of the sales-price and its remittance to producers less service charges; and the imposition by the agency of a service charge fixed, by order of the local board, at 24¢ per hog and a pro rating charge of 20¢ per settlement account.

(1) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Fauteux J.

The first question related to this scheme is whether Regulation 104 of C.R.O. 1950, as amended by O.Reg. 100/55 and O.Reg. 104/55, is *ultra vires* the Lieutenant-Governor in council, either in whole or in part, and if so, in what particular or particulars and to what extent.

The main submission is that the scheme is applicable to the sale of hogs generally, for import and export as well, and as such regulates trade within the meaning of head 2 of s. 91 of the *British North America Act* and therefore is *ultra vires*. In support of this submission, reference was made to ss. 1*a* and 1*b* of sched. 1, reading:

INTERPRETATION

1*a*. In this scheme

(*a*) "hogs" means hogs produced in Ontario except that part thereof comprising the territorial districts and the Provisional County of Haliburton;

(*b*) "processing" means the slaughtering of hogs; and

(*c*) "producer" means a producer engaged in production of hogs.

APPLICATION OF SCHEME

1*b*. This scheme applies to hogs marketed either directly or indirectly for processing but does not apply to

(*a*) hogs sold by a producer
  (i) to a producer, or
  (ii) to a consumer, or
  (iii) to a retail butcher, and

(*b*) hogs resold by a processor who bought the hogs under this scheme.

With respect to importation: It is clear from the above provisions that hogs produced elsewhere than in Ontario are not covered by the scheme. It is equally clear from s. 1*a*(*c*) read with the provisions of s. 4 of the scheme, which for the whole purpose thereof provides for the grouping of hog producers by districts within the Province, that producers beyond its boundaries are not affected either. In the result, anyone in Ontario is free to import therein and anyone beyond its boundaries to export thereto the regulated product.

With respect to exportation: Were the words "within the Province", expressed or held to be implied after each of the words "marketed" and "processing" appearing in the opening provision of s. 1*b*, the submission that an Ontario producer is barred from marketing the regulated product elsewhere than in the Province would fail; and in my view it must be so held for the following reasons.

Reference has already been made to the declaratory provision, added to the Act by the Legislature in 1956, and formally stating that: "The purpose and intent of the Act is to provide for the control and regulation, in any or all respects, of the marketing *within the Province* of farm products, including the prohibition of such marketing in whole or in part." This provision imports an all-embracing rule of construction with respect to the Act and also with respect to the legislative provisions authorized to be made thereunder, for expressions used in orders in council, orders, schemes and regulations are to be given "the same meaning as in the Act conferring the power" to make them: *The Interpretation Act,* R.S.O. 1950, c. 184, s. 6. Thus, the word "marketing" defined in s. 1(*e*) of the Act means "marketing within the Province" and a similar meaning attends the word "marketed" appearing in the opening provisions of s. 1*b* of Reg. 104. As clearly appears in the latter provision, the operation, to which the scheme applies, is not that of marketing or that of processing, both *simpliciter,* but that of "marketing for processing", *i.e.,* a form of marketing operation, which cannot here be interpreted as one carried beyond the Province without disregarding the formal statement of the 1956 amendment. The amendment is subsequent to the impugned regulation, but the presumption against construing statutes retrospectively, which was invoked, is inapplicable to an Act which, like the amending Act of 1956, is declaratory in its nature; such Acts, unless providing the contrary, have relation back to the time when the prior Act was passed: *Attorney-General v. Theobald* (1); see also Craies on Statute Law, 5th ed. 1952, p. 364. The marketing in Ontario of hogs produced in Ontario for processing, *i.e.,* slaughtering, in Ontario, is the sole transaction or particular business controlled and regulated under the scheme.

Other considerations also attend such interpretation. There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature. These presumptions are not displaced by the language

(1) (1890), 24 Q.B.D. 557.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

used in the relevant legislative provisions applicable to this scheme when read as a whole. Indeed such provisions consistently imply the intention of the Legislature to restrict the application of the scheme to intraprovincial transactions. Section 2(1) of Reg. 102/55 prohibiting processors from commencing or continuing in the business of processing except under the authority of a licence surely cannot be said to be applicable to processors beyond the limits of the Province of Ontario.

Having reached the view that the transaction covered by the scheme is intraprovincial, I do not find it necessary or expedient to define in general terms what constitutes an intraprovincial transaction. The suggestion that to be intraprovincial a transaction must be completed within the Province, in the sense that the product, object of the transaction, must be ultimately and exclusively consumed or be sold for delivery therein for such consumption, is one which would, if carried to its logical conclusion, strip from a Province its recognized power to provide for the regulation of marketing within such Province in disregard of the decisions of the Judicial Committee in *Attorney-General for British Columbia v. Attorney-General for Canada et al., supra,* and in *Shannon v. Lower Mainland Dairy Products Board, supra.*

That joint action of Parliament and of the Legislature may better solve the difficulties arising in particular cases is well known to those entrusted with the government of the nation and the Provinces but provides no answer to the questions here referred for consideration.

The invalidity of the regulation is also contended for on the basis that: (i) It does not constitute a scheme under the Act but merely provides for the establishment of a local board; (ii) it is *ultra vires* the Lieutenant-Governor in council to create a local board and to adopt this scheme, constituting an entirely new scheme, without prior approval of producers. As already indicated, the original hog scheme was set up by O.Reg. 52/46, the reading of which shows compliance with statutory prerequisites for its adoption by the Lieutenant-Governor in council. Ever since the adoption of O.Reg. 52/46, the scheme related to hogs was maintained, though the original legislative provisions related

thereto were amended, replaced, and consolidated to become ultimately, in form and substance, what they now are. None of the arguments advanced substantiates these objections and, on further consideration, nothing was found to support the proposition that the wide powers given, under the Act, to the Lieutenant-Governor in council, particularly under s. 4(2)(*b*), have been exceeded.

The second question related to the hog scheme, question 3 of the reference, is whether O.Reg. 102/55 respecting the marketing of hogs is *ultra vires* the Farm Products Marketing Board either in whole or in part and, if so, in what particular or particulars and to what extent. This regulation of the Board, approved by the Lieutenant-Governor in council, replaced C.R.O. 1950, No. 105, consolidating O.Reg. 94/49, O.Reg. 99/50 and O.Reg. 215/50.

Here again it was submitted that there is nothing in the regulations to confine the marketing to marketing within the Province. This point has already been considered and disposed of.

The next attack is related to s. 6 of the regulations providing that all hogs shall be marketed, and that no person shall market hogs except, through the marketing agency therein designated. The argument is that s. 6 is repugnant to s. 25 of the *Live Stock and Live Stock Products Act,* R.S.C. 1952, c. 167, enacting that:

> Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

Section 25 appears in Part I of the Act referred to, which part deals with the internal operation of stockyards. In its very terms, the section is not attributive but protective of the right farmers or drovers may otherwise have to sell their own livestock at a stockyard on their own account. The fact that, on proper provincial marketing legislation, this right is to be exercised through the instrumentality of a marketing agency is entirely a different matter. The provisions of s. 6 are not, in my view, repugnant to those of s. 25; but, were they held to be so, the question of the validity of those of s. 25 would then immediately arise, for under undisputed principles, regulating the marketing of farm products within a Province is within the exclusive legislative competence of the Legislature and not of Parliament.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

The next attack is directed to s. 8 of the regulations which, it is said, involves delegation unauthorized by s. 7(1)(*o*) of the Act. The latter section enumerates a number of functions which the Board may, by regulation, authorize a designated marketing agency to perform. Pursuant to that power, the Board, by s. 8, allotted to the marketing agency therein designated certain functions, all being referable to, and couched in similar language as in, s. 7(1)(*o*). This is not a delegation to legislate but an authority to perform administrative duties. The case of *The Attorney General of Canada v. Brent* (1), quoted in support of this objection, has no relevancy.

Following the line of argument adopted with respect to questions 1 or 2 of the reference, similar points were raised with respect to O.Reg. 102/55. Thus it was said that ss. 9 and 10 involve indirect taxation, that in making these regulations, the authority of the Board was exceeded, mainly for the reason that a new scheme, unapproved by the producers, is set up. As to these points, reference is made to what has already been said.

It was also argued that these marketing legislative provisions conflict with certain federal laws, namely, (i) the *Combines Investigation Act,* R.S.C. 1952, c. 314, and the provisions of the *Criminal Code* relating to combines; and (ii) the *Agricultural Prices Support Act,* R.S.C. 1952, c. 3. As to (i): A like submission was unsuccessfully made in *Rex v. Cherry* (2) and *Ontario Boys' Wear Limited et al. v. The Advisory Committee et al., supra.* The object of Parliament in legislating with respect to private agreements involving monopolies is to protect the public interest in free competition. The adoption by Parliament of an "Act to assist and encourage co-operative marketing of agricultural products", 3 Geo. VI, c. 28, now R.S.C. 1952, c. 5, does not suggest that marketing schemes devised by Parliament or a Legislature within their respective fields, are *prima facie* to be held to come within the scope of the anti-monopoly legislation. As to (ii): Under the *Agricultural Prices Support Act,* a Board constituted of members appointed by the Governor General in council is,

(1) [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296.

(2) [1938] 1 W.W.R. 12, [1938] 1 D.L.R. 156, 69 C.C.C. 219 (*sub nom. Cherry v. The King ex rel. Wood*).

under certain conditions, given authority to fix the prices at which it may itself either purchase agricultural products or pay to the producers thereof the difference between such fixed price and the average market-price, thus, as the title of the Act suggests, supporting the price of such products. The intent and purpose of both Acts alleged to be in conflict are quite different. Both are intended to assist producers. One, however, *i.e.*, the Act here considered, aims at procuring maximum returns by means of orderly marketing, while the other aims at assuring minimum returns, under certain circumstances and conditions. The Ontario Legislature cannot be presumed to have intended its legislation to be operative beyond the limits of its own sphere and contrary to any federal legislation validly adopted.

The last question related to the hog scheme, the fourth in the reference, is whether the order dated June 8, 1955, made by The Ontario Hog Producers' Marketing Board, fixing the service charges to be imposed by the marketing agency, is *ultra vires* the said board. This order, made by the local board, *i.e.*, The Ontario Hog Producers' Marketing Board, under s. 9 of O.Reg. 102/55, fixed the service charges to be imposed by the marketing agency, *i.e.*, the Ontario Hog Producers Co-operative, at "the sum of 24¢ per hog and a pro rating charge of 20¢ per producer settlement statement". On the statement of facts appearing in the order of reference, the said marketing agency is a co-operative corporation incorporated under Part V of *The Corporations Act*, 1953 (Ont.), c. 19, and its by-laws provide that any surplus of service charges, after providing for reserves, shall be allocated, credited or paid to those marketing hogs through the agency, and computed at a rate in relation to the value of hogs marketed by such person. It is said that the order is invalid for the reason that neither the Act nor the regulation contemplates a service charge of that nature and that, in any event, indirect taxation is involved. The contention that the service charges, authorized under the Act and the regulation, involve any form of taxation has already been considered and found to be unsupported; and nothing that was said substantiates the proposition that the service charges fixed by order of the local board are of a different nature than those authorized under the Act and the regulation. The argument for the

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

contrary view stems from the fact that the by-laws of the marketing agency provide for setting up reserves before a distribution of surplus service charges, if any, is made. As stated in the *Shannon* case, *supra,* fees for services rendered by the Province or by its authorized instrumentalities may validly be charged, under the powers given in s. 92(13) and (16) of the *British North America Act.* Such service charges are not invalid merely because they may exceed the actual expenses of the recipient. The nature of the use thereafter made of such surplus might, in certain cases, indicate a colourable attempt to tax or do indirectly what could not validly be done directly, but nothing that was submitted to us supports the contention that any such use is here contemplated.

By questions 5 and 6 in the order of reference, we are asked to consider the validity of s. 7 of O.Reg. 145/54 and s. 5 of O.Reg. 126/52, both sections imposing "licence fees" to be paid to the local board by every grower engaged in the production for processing of peaches and vegetables respectively. Invalidity of these two sections is contended for on the basis that they are a colourable attempt to raise money under the guise of a licence and that their true effect is to raise money by taxation. The marketing of peaches and vegetables for processing is controlled by regulations of the Provincial Board which prohibit any person from engaging in the business of a grower, processor or dealer, in the case of peaches, and of processor, in the case of vegetables, unless he is or is deemed to be, under the regulations, the holder of a licence from the Board, for which no specific charge is made to the grower. Under the regulations, each grower of peaches or vegetables for processing is "deemed to be the holder of a licence in form I". The "licence fees" imposed upon the grower of peaches are at the rate of 50¢ for each ton or fraction thereof of peaches delivered to a processor; under the scheme related to vegetables, the "licence fees" imposed upon every grower are at the rate of one-half of 1 per cent. of the total sale-price due him for each ton or fraction thereof of vegetables delivered to and processed by, the processor. These "licence fees" are collected by the processor by deducting them from the sum of money due to the person from whom peaches or vegetables were received, and are remitted to the local board. What

functions are performed by The Ontario Peach Growers' Marketing Board and The Ontario Vegetable Growers' Marketing Board, being, respectively, the local boards appointed under these schemes, is not clear from the material submitted; however, we were given, at the hearing, the unchallenged information that the local boards negotiate the price to be paid for these products and that the fees charged to growers were meant to defray expenses thus incurred for the operation of the schemes. On the facts stated in the order of reference, one ton of peaches makes 144 dozen 20-ounce cans of peaches or 1,728 cans. For reasons already given, these "licence fees" are, in my view, tantamount to a service charge which can validly be imposed under the authority of the Province. Furthermore, there is no evidence as to the extent of the expenses incurred by these local boards for the operation of the schemes; and the amount of fees which each grower has to pay, when related to his returns, does not suggest that taxation is involved in the service charge.

The last two questions, questions 7 and 8 of the reference, are related to the proposed amendment of the Act adding to subs. (1) of s. 7 para. (*ss*), conferring upon a local board the additional powers described in subparagraphs numbered from (i) to (vi) inclusively. Under subparas. (v) and (vi), one of the purposes for which the use of licence fees is authorized, is to make some form of equalization payment. To that extent the provisions of these subparagraphs cannot be validly adopted by the Province, in view of the decisions of the Judicial Committee and of this Court in the *Crystal Dairy* and the *Turner's Dairy* cases respectively.

My answers to the questions referred to the Court are therefore as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No.

Questions 5 and 6: No.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

Question 7: Subparagraph (v) except to the extent that it authorizes the use of licence fees to pay expenses of the local board, and the whole of subpara. (vi), of the proposed para. (*ss*), are *ultra vires* the Ontario Legislature.

Question 8: No.

ABBOTT J.:—I have had an opportunity of considering the able and exhaustive reasons prepared by my brother Fauteux and I am in agreement with the views which he has expressed. I desire only to add a few brief observations.

The Farm Products Marketing Act, R.S.O. 1950, c. 131, is in the usual form of marketing legislation in Canada. With the inclusion of s. 1*a*, added in March 1956, the Act contains, in substance, the same provisions as the *Natural Products Marketing (British Columbia) Act,* R.S.B.C. 1936, c. 165, which was before the Judicial Committee in *Shannon et al. v. Lower Mainland Dairy Products Board* (1), and the *Agricultural Products Marketing (Prince Edward Island) Act,* 1940 (P.E.I.), c. 40, which was before this Court in *The Prince Edward Island Potato Marketing Board v. H. B. Willis Incorporated* (2).

It might be noted, perhaps, that the British Columbia Act covered "any product of agriculture, or of the forest, sea, lake, or river". The Ontario Act is somewhat more limited in its application and relates only to farm products.

In its essential features, the Ontario Act is, in my opinion, indistinguishable from the British Columbia Act, which was held by the Judicial Committee in *Shannon's Case* to be an Act to regulate particular businesses entirely within the Province and therefore *intra vires* of the Province. Presumably because of the decision in *Shannon's Case* no question as to the validity of the Prince Edward Island Act was raised on the reference to this Court and it was assumed to be *intra vires* for the purposes of that reference. Each marketing scheme adopted under an Act such as the one under consideration, and the regulations applicable to such scheme, must, of course, be looked at to see whether they come within the authority conferred by the Act, but, as I have stated, I share the view expressed by my brother

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.
(2) [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

Fauteux that *The Farm Products Marketing Act* of Ontario, including cl. (*l*) of subs. (1) of s. 3, is *intra vires* the Ontario Legislature.

Turning now to the three schemes which are the subject-matter of the present reference, the hog scheme applies only to hogs produced in Ontario and marketed, *i.e.*, sold, for processing in Ontario. The compulsory features of the scheme are (1) licensing requirements and the imposition of licence fees and service charges and (2) prohibition of the sale of live hogs produced in Ontario to a processor in Ontario except through a designated marketing agency. *The hog scheme regulates only the sale of live hogs produced in Ontario to a processor in Ontario for slaughtering in that Province.* It does not purport to interfere with either (a) the sale of live or dressed hogs to anyone in Ontario other than a processor in Ontario, or (b) the importation or exportation of live or dressed hogs by anyone in Ontario. In the scheme "processing" is defined as meaning the slaughtering of hogs.

The peach scheme and the vegetable scheme are primarily licensing schemes, with powers given to what is described as a negotiating committee, to negotiate minimum prices, to establish contract conditions and the like. The only compulsory provisions appear to be the licence requirements and the imposition of licence fees. There are no compulsory marketing provisions as in the case of the hog scheme. What is regulated under all three schemes is the sale of locally-produced hogs, peaches and vegetables, to a processor for processing in the Province. All three schemes contemplate the regulation of dealings in particular commodities in a particular way, not of trade in such commodities as a whole.

It has long been settled that rights arising out of or in connection with contracts, such as a contract of sale made in a Province between a producer and a processor, are civil rights within the meaning of head 13 of s. 92 of the *British North America Act* and as such within the legislative power of a Province: *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (1).

(1) (1881), 7 App. Cas. 96.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Abbott J.

In *John Deere Plow Company, Limited v. Wharton* (1), Viscount Haldane L.C., referring to the words "civil rights", said:

> An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases.

In my opinion it would be equally impracticable and undesirable to attempt an abstract logical definition of what constitutes interprovincial or export trade. Each transaction must be looked at, in order to ascertain whether or not, in fact, it involves such trade. It is also dangerous, I think, on a reference such as this to go beyond the terms of the reference and to attempt to decide, by analogy, questions which are not submitted for the opinion of the Court.

Aside from the attack made on the licence fees imposed under the three schemes, as being indirect taxation, which has been fully dealt with by my brother Fauteux, the principal attack made on the validity of these schemes was that they purport to regulate extraprovincial trade.

It is hard to conceive of any important article of commerce, produced in any Province, which would not, to some extent at least, enter into interprovincial or export trade. Certainly milk, which was the product regulated in *Shannon's Case,* in its processed form at any rate, must be exported from British Columbia. Similarly it is common knowledge that potatoes in substantial quantities are shipped out of Prince Edward Island.

The power to regulate the sale within a Province of specific products, is not, in my opinion, affected by reason of the fact that some, or all, of such products may subsequently, in the same or in an altered form, be exported from that Province, unless it be shown, of course, that such regulation is merely a colourable device for assuming control of extraprovincial trade. Similarly, the power to regulate the wages of those engaged in processing such products within a Province, is not affected by the fact that the resulting product may be exported, although it is obvious that the scale of such wages would have a significant effect upon the export price. It is the immediate effect, object or purpose, not possible consequential effects, that are rele-

(1) [1915] A.C. 330 at 339, 18 D.L.R. 353, 7 W.W.R. 706.

vant, in determining whether *The Farm Products Marketing Act* of Ontario and the three schemes adopted under it, which are the subject of the present reference, are laws in relation to a matter falling within Provincial legislative competence. As Viscount Simon said in *Attorney-General for Saskatchewan v. Attorney-General for Canada et al.* (1):

> Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters.

What is regulated under these schemes is not the farm product itself but certain transactions involving that product, and the transaction which is regulated is completed before the product is consumed either in its original or in some processed form. Processing may take many forms and the original product may be changed out of all recognition. The place where the resulting product may be consumed, therefore, is not in my opinion conclusive, as a test to determine by what legislative authority a particular transaction involving such farm product may validly be regulated.

As I have stated, the fact that some, or all, of the resulting product, after processing, may subsequently enter into extraprovincial or export trade does not, in my view, alter the fact that the three schemes submitted in this reference, regulate particular businesses carried on entirely within Provincial legislative jurisdiction, and are therefore *intra vires*.

My answers to the questions referred to the Court are therefore as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No.

Question 5: No.

Question 6: No.

(1) [1949] A.C. 110 at 123, [1949] 2 D.L.R. 145, [1949] 1 W.W.R. 742.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Abbott J.

Question 7: Subparagraph (v), except to the extent that it authorizes the use of licence fees to pay expenses of the local board, and the whole of subpara. (vi) of the proposed para. (*ss*) are *ultra vires* the Ontario Legislature.

Question 8: No.

NOLAN J. agrees in the reasons and answers of LOCKE J.