1958

*Feb. 17, 18, 19
**Oct. 7

STEPHEN FRANCIS MURPHY (*Plaintiff*) APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Validity of Canadian Wheat Board Act, R.S.C. 1952, c. 44—Trade and Commerce—Property and Civil Rights—Whether interference with s. 121 of the B.N.A. Act, 1867.

The plaintiff tendered to the defendant railway at Winnipeg one bag each of wheat, oats and barley, to be conveyed to Princeton, British Columbia. The grain had been grown in Manitoba, but there was no suggestion that it was done by the plaintiff or the company of which he was the president and majority shareholder. The defendant refused to transport the grain, and alleged, in defence to the action taken by the plaintiff, that it was prohibited to do so by the provisions of the *Canadian Wheat Board Act,* and more particularly of s. 32. The plaintiff raised the validity of the Act by contending that it interfered with property and civil rights in the province, and further that s. 32 thereof infringed the provisions of s. 121 of the *B.N.A. Act.*

Held: The action should be dismissed. The defendant railway was justified in refusing to transport the grain.

Per Taschereau, Locke, Fauteux and Abbott JJ.: The *Canadian Wheat Board Act,* which controls and regulates not one trade or business but several, including the activities of the producer, the railroads, and the elevators, in so far as its provisions relate to the export of grain from the province for the purpose of sale, is an act in relation to the regulation of trade and commerce within s. 91 of the *B.N.A. Act.* The fact that it interferes with property and civil rights in the province is immaterial.

The question as to whether a producer of grain in Manitoba who is carrying on a business outside the province is prevented by s. 32 from transporting his own grain for his own purposes was not raised by the pleadings or by the evidence. But assuming that the issue had been raised and that such a prohibition is invalid, it would be clearly severable.

The impugned legislation does not contravene the provisions of s. 121 of the *B.N.A. Act.* There is nothing of the nature of a custom duty affecting interprovincial trade authorized by the *Canadian Wheat Board Act.*

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

**The Chief Justice, owing to illness, took no part in the judgment.

Per Rand J.: The scheme of the Act is that generally all grain entering interprovincial and foreign trade is to be purchased and marketed by the Board, and none purchased directly from the farmers can be shipped to another province without a permit from the Board. The Act embodies a policy adopted by Parliament as being in the best interests of the grain producers and the country generally, and that administration is within the competence of Parliament to set up. Assuming that s. 121 of the *B.N.A. Act* is applicable equally to action by Dominion and Province, the charge, related to administrative expenses, exacted as a condition of the shipment is not an impediment to the free passage contemplated by that section, when it is looked at in its true character as an incident in the administration of a comprehensive extra-provincial marketing scheme. The word "free" in s. 121 means without impediment related to the traversing of a provincial boundary.

The tender by a producer of his own grain for transport to his home in another province would be an item in interprovincial trade and would fall within the Act if it was done, as in the present case, for the purposes and in the course of a business.

Per Cartwright J.: Assuming that s. 32 of the Act forbids a producer in one province to transport his own grain into another province to be there used by him for his own purposes, and assuming that prohibition to be invalid as contravening s. 121 of the *B.N.A. Act,* such a prohibition is clearly severable.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Maybank J.[2] Appeal dismissed.

M. J. Finkelstein, Q.C., and *K. G. Houston,* for the plaintiff, appellant.

H. M. Pickard, for the defendant, respondent.

W. R. Jackett, Q.C., H. B. Monk, Q.C., and *J. D. Affleck, Q.C.,* for the intervenant.

The judgment of Taschereau, Locke, Fauteux and Abbott JJ. was delivered by

LOCKE J.:—There are, in my opinion, questions as to the power of Parliament to enact certain of the provisions of the *Canadian Wheat Board Act,* R.S.C. 1952, c. 44, one of which is suggested in the judgment of the learned Chief Justice of Manitoba[1] which need not be considered in dealing with this appeal except to the limited extent hereinafter referred to. It was said in the judgment of

[1] (1956), 4 D.L.R. (2d) 443, 19 W.W.R. 57.
[2] (1956), 1 D.L.R. (2d) 197.

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the Judicial Committee in *Citizens' Insurance Company v. Parsons*[1], and it has been said many times since that in performing the difficult duty of deciding questions arising as to the construction of ss. 91 and 92 of the *British North America Act* it is a wise course to decide each case which arises without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand. For this reason the issues raised by the pleadings and by the admissions made at the trial must be examined.

The appellant is the president and the majority shareholder of a company named Mission Turkey Farms Ltd., incorporated under the laws of British Columbia and which carries on the business of raising turkeys at Mission City and Princeton in that province. On September 29, 1954, the appellant tendered to the respondent at Winnipeg one sack of wheat, one of oats and one of barley, requesting that the grain be conveyed to Princeton and at the time tendered the proper freight charges. It was admitted at the trial that this grain was grown in Manitoba. While the appellant gave evidence, he did not say by whom the grain was owned or how it came into his possession, but it is not suggested that it was grown in Manitoba either by him or by Mission Turkey Farms Ltd. There is no evidence as to the proposed consignee nor any admission as to this. As this does not, in my opinion, affect any issue raised, it may, I think, be assumed that it was proposed to forward the grain to Mission Turkey Farms Ltd.

Other than the allegations as to the tendering of the grain for shipment and the proper freight charges, all of the allegations in the Statement of Claim were denied in the Statement of Defence. As to this, the respondent pleaded that it refused to accept the grain for transport and to accept the money tendered as freight since the appellant was prohibited from causing the grain to be so transported and the respondent was prohibited from transporting it by the provisions of the *Canadian Wheat Board Act* and particularly s. 32 and the regulations made pursuant to that Act.

[1] (1881), 7 App. Cas. 96 at 109, 51 L.J.P.C. 11.

The constitutional issue was raised by the reply by which it was alleged that the *Canadian Wheat Board Act* was *ultra vires* the Parliament of Canada and that the regulations referred to were, therefore, invalid. As to this it was said that in view of the provisions of the *British North America Act* Parliament could not enact or enforce the *Canadian Wheat Board Act*. The reply further asserted that the Act trenched upon the powers of the province as it interfered with property and civil rights in the Province. The reference to the powers of Parliament under s. 91 was further amplified by contending that s. 32 of the Act exceeded the powers of Parliament in that s. 121 of the *British North America Act* provides that all articles of the growth, produce or manufacture of any of the provinces shall be admitted free into each of the other provinces and that the provisions of the impugned Act enabled the Wheat Board to exact a tax on all grain transported from one province to the other.

Maybank J., before whom the trial was held, dismissed the action and that judgment was upheld in a unanimous judgment of the Court of Appeal for Manitoba[1] delivered by the Chief Justice.

The Attorney General for Canada intervened in the proceedings in the Court of Queen's Bench and was represented by counsel in the Court of Appeal and in this Court.

Section 91 vests in Parliament exclusive legislative authority in relation, *inter alia,* to the regulation of trade and commerce, and the concluding sentence of that section declares that any matter coming within any of the classes of subjects enumerated in it shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.

There are two questions to be determined; the first, as to whether s. 32 of the Act, and the Act as a whole, are in relation to the regulation of trade and commerce; the second, as to whether the regulation infringes the provisions of s. 121 of the *British North America Act, 1867.*

[1] (1956), 4 D.L.R. (2d) 443, 19 W.W.R. 57.

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The purpose of the *Canadian Wheat Board Act* is made apparent by an examination of its provisions. The Board constituted by the Act is required to buy all wheat, oats and barley produced in the designated area, that area being substantially the three prairie provinces. Under regulations which the Board is empowered to make, deliveries of grain to elevators or to railway cars may be limited and, except with the permission of the Board, no person may deliver grain to an elevator who is not the actual producer of the grain and in possession of a permit book issued by the Board, or load into a railway car any such grain which has not previously been delivered under a permit book and with the Board's permission. The Board is required to undertake the marketing of all the grain delivered either to elevators or railway cars and the producers receive their proportionate share of the moneys realized from the sale of grain of the grade delivered by them less the expenses of the operation of the Board. It is a matter of common knowledge that much the greatest part of the grain delivered to elevators or to railway cars is exported from the province in which it is grown either to other provinces of Canada or to foreign countries. Grain consumed upon the farms or retained for use as seed is not, of course, affected by the provisions of the statute.

As the purpose is to pool the amounts realized from the sale of these various kinds of grain in each crop year, it has apparently been considered by Parliament to be essential that complete control of exports should be vested in a body such as the Board. Accordingly, s. 32 which is attacked in the reply to the Statement of Defence and which appears in Part IV of the Act under the heading "REGULATION OF INTERPROVINCIAL AND EXPORT TRADE IN WHEAT" provides that, except as permitted by the regulations, no person other than the Board shall export from Canada any such grain owned by a person other than the Board or transport or cause to be transported from one province to another any such products owned by any person other than the Board or sell or agree to sell such grain situated in one province

for delivery in another province or outside of Canada, or buy or agree to buy such grain situated in one province for delivery in another.

It is further provided by s. 32 that any agreement for the sale of such grain in contravention of any provision of the Act or of any regulation or order made under its authority shall be void. As part of the plan to vest the desired control in the Wheat Board, s. 5 declares that all flour mills, feed mills, feed warehouses and seed cleaning mills theretofore or thereafter constructed are works for the general advantage of Canada and a schedule to the Act lists a great number of such establishments in the western provinces which are affected by the section. By s. 174 of the *Canada Grain Act,* R.S.C. 1952, c. 25, all elevators in Canada are declared to be works for the general advantage of Canada.

Dealing with the first question, it appears to me to be too clear for argument that the *Canadian Wheat Board Act* in so far as its provisions relate to the export of grain from the province for the purpose of sale is an Act in relation to the regulation of trade and commerce within the meaning of that expression in s. 91. As pointed out by the learned Chief Justice of Manitoba, it has been long since decided that the provinces cannot regulate or restrict the export of natural products such as grain beyond their borders. That question was most carefully reviewed in the judgment of the Court of Appeal of Saskatchewan in *Re The Grain Marketing Act, 1931*[1], in the judgment delivered by Turgeon J.A. The matter had been considered in earlier cases and in the judgment delivered by Duff J., as he then was, in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*[2], a case which dealt with the marketing of natural products produced in the province of British Columbia, it was said that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2 of s. 91. The matter was recently considered in this Court

[1] [1931] 2 W.W.R. 146.
[2] [1931] S.C.R. 357 at 371, 2 D.L.R. 193.

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in the *Reference respecting the Farm Products Marketing Act, R.S.O. 1950, c. 131*[1], where the statement in *Lawson's* case was followed and the earlier authorities reviewed.

This being so, in my opinion the fact that of necessity it interferes with property and civil rights in the province of the nature referred to in head 13 of s. 92 is immaterial. For reasons which have been stated in a great number of cases decided in the Judicial Committee as well as in this Court, it has been decided that if a given subject-matter falls within any class of subjects enumerated in s. 91 it cannot be treated as covered by any of those in s. 92. The language of Lord Maugham in *Attorney General of Alberta v. Attorney General of Canada*[2], merely repeats what had been decided in many previous cases. It is, of course, obvious that it would be impossible for Parliament to fully exercise the exclusive jurisdiction assigned to it by head 2 and many others of the heads of s. 91 without interfering with property and civil rights in some or all of the provinces. Some of the cases which illustrate this are *Tennant v. Union Bank*[3], *Attorney General of British Columbia v. Canadian Pacific Railway*[4], the street ends case, *Grand Trunk Railway v. Attorney General of Canada*[5], the contracting out case, and the recent judgment of this Court in *Attorney General of Canada v. Canadian Pacific Railway et al*[6].

It is contended for the appellant that the power to regulate trade and commerce under head 2 does not enable Parliament to regulate a particular trade, but this is too broad a statement. The result of the cases in the Judicial Committee dealing with this question appear to me to be most clearly summarized in the judgment of Lord Atkin in *Shannon v. Lower Mainland Dairy Products Board*[7], where it was said:

> It is now well settled that the enumeration in section 91 "The Regulation of Trade and Commerce" as a class or subject over which the Dominion has exclusive legislative powers does not give the powers to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province.

[1] [1957] S.C.R. 198, 7 D.L.R. (2d) 257.
[2] [1939] A.C. 117 at 130, [1938] 3 W.W.R. 337, 4 D.L.R. 433.
[3] [1894] A.C. 31.
[4] [1906] A.C. 204 at 210.
[5] [1907] A.C. 65.
[6] [1958] S.C.R. 285, 12 D.L.R. (2d) 625.
[7] [1938] A.C. 708 at 719, 4 D.L.R. 81, 2 W.W.R. 604.

The *Canadian Wheat Board Act* controls and regulates not one trade or business but several, including the activities of the producer, the railroads, the elevators and flour and feed mills and, except to a very minor extent, these activities are directed to the export of grain or grain products from the province, activities which the province itself is powerless to control.

In the able argument addressed to us by Mr. Finkelstein he has pointed out that, as s. 32 of the Act reads, a producer of grain in Manitoba who is carrying on outside the province an activity such as that of Mission Turkey Farms Ltd. in British Columbia is prevented from transporting, either by rail or otherwise, his own grain for his own purposes. This appears to be the case as the section declares by subs. (*b*) that no person other than the Board may transport or cause to be transported from one province to another province wheat or wheat products owned by a person other than the Board.

This question, however, is not raised either by the issues defined by the pleadings or by the facts given in the evidence. It is not contended that the appellant produced the grain which he sought to ship by the railway or that the company to whom I have presumed it was consigned was the producer of the grain in Manitoba. It was alleged in the Statement of Claim but not proven that the appellant was a poultry farmer. All that was proved was that he was the president of a company engaged in that business. The only possible inference to be drawn from the evidence is that the appellant bought the grain from some producer in Manitoba, either on his own behalf or on behalf of the British Columbia company, for the purpose of exporting it from the province in defiance of the Act and of the regulations.

If, however, contrary to my view, the question as to the validity of the prohibition of such a movement of a grower's own grain should be considered as having been raised and if it be assumed for the purpose of argument that such prohibition is invalid as being for any reason beyond the powers of Parliament, such prohibition would be clearly severable. It would affect only a minute portion of the western grain crop and it is impossible to sustain an

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argument that Parliament would not have passed the Act as a whole if it were known that in this respect s. 32 exceeded its powers.

There remains the question as to whether the legislation contravenes the provisions of s. 121 of the *British North America Act*. That section has been construed in the judgments delivered in this Court in *Gold Seal Limited v. The Attorney General of Alberta*[1], where Duff J., as he then was, said (p. 456):

> . . . that the real object of the clause was to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.

and Anglin J., as he then was, agreed (p. 466). This interpretation was accepted by the Judicial Committee in *Atlantic Smoke Shops Limited v. Conlon*[2]. There is nothing of this nature authorized by the *Canadian Wheat Board Act*.

In my opinion, this appeal fails and should be dismissed with costs. There should be no order as to costs for or against the intervenant.

RAND J.:—This appeal impugns the validity of prohibitory and compulsory features of *The Canadian Wheat Board Act, 1935,* as amended. The appellant is a poultry farmer in British Columbia and the president and majority shareholder of a company organized to engage in the business of raising and marketing poultry. Sufficient quantities of feed in wheat, oats and barley to meet the requirements of business of that class are not available from local production and it has become necessary to import from the prairie provinces; and it is out of an attempted shipment by the appellant from Manitoba to British Columbia that the dispute arises.

Speaking generally, the scheme of the Act is that primarily all grain entering interprovincial and foreign trade is to be purchased and marketed by the Board, and none purchased directly from the farmers on the prairies can be shipped to another province without the production of a license from the Board. This means that, regardless of the price paid to the producer, for the purpose of a private interprovincial movement, the grain is dealt with

[1] (1921), 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710.
[2] [1943] A.C. 550 at 569, 4 D.L.R. 81, 3 W.W.R. 113.

as if, by the shipper, it had been sold to and thereupon repurchased at the established price from the Board. Sales by the Board for a crop season are pooled and the gross returns less administration expenses equalized among the producers. When the grain is delivered an initial payment is made to the producer with a participation certificate entitling him to share in the ultimate net return. A certificate is likewise given to the individual shipper. In the result the latter is required to pay to the Board the difference between the initial payment and the then selling price. Since the certificate enables him to share in any further return realized, he is treated as a producer selling to the Board and is obliged to share in the administration expenses.

To bring the matter to a test, the appellant in Manitoba bought three sacks of grain, one of wheat, one of oats and one of barley, all grown in that province, and tendered them to the respondent Railway Company for carriage to British Columbia. The license not being forthcoming, the Railway declined to accept them and this action was brought. In justification of its refusal, the respondent pleaded the Act and the regulations made under it and the sufficiency in law of that plea is before us.

The Act consists of six Parts. Part I establishes the Board as a body corporate and an agent of Her Majesty in right of Canada for the object of "marketing" in interprovincial and export trade wheat grown in Canada. Appropriate powers are conferred and the marketing is to be by means of buying from producers, selling and pooling the proceeds.

Part II is a code of provisions dealing with elevators and dominion railways. By the *Canada Grain Act* all elevators in the prairie provinces are declared to be works for the general benefit of Canada under s. 91(29) of the *British North America Act*. Section 16 of the *Wheat Act* prohibits, except with the permission of the Board, the delivery or acceptance of grain to or by an elevator unless the person delivering (*a*) is the actual producer of or entitled as a producer to the grain; (*b*) at the time of delivery produces a permit-book under which he is entitled to deliver the grain in the current crop year; and (omitting two requirements not material here) (*e*) that the quantity

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delivered does not exceed the quota estimate by the Board for the particular delivery point. Section 17 forbids, without similar permission, the loading of grain into a railway car that is not delivered under a permit-book. Even that permission requires the terms of s. 16, unless expressly excepted, to be complied with as in delivery to an elevator. The permit-book, by s. 18, authorizes delivery of grain produced on the land of the producer. Various powers in relation to elevators and railways are vested in the Board by s. 20, including the making of regulations for the delivery to or the receipt of grain into elevators, the delivery out of elevators to railway cars or lake vessels, and the allocation generally of cars on railways to elevators, loading points or persons. By s. 21 the Board is authorized to prescribe terms for delivery and acceptance of grain at elevators or railways by persons other than producers.

Part III deals with voluntary marketing. The Board is bound to buy all wheat offered by a producer; a selling pool is provided, and the returns equalized between producers according to the quantity and grade of wheat delivered by them.

The title to Part IV is in these words: "REGULATION OF INTERPROVINCIAL AND EXPORT TRADE IN WHEAT." By s. 32, except as permitted by regulation, no person other than the Board may (*a*) export from or import into Canada wheat or wheat products owned by a person other than the Board; (*b*) transport or cause to be transported from one province to another the same commodities so owned; (*c*) sell or agree to sell those commodities situated in one province for delivery in another or outside of Canada; and (*d*) the converse of (*c*), buy or agree to buy such commodities from one province for delivery in another or outside of Canada. Section 33 provides for the issue by the Board of licences to ship where that is otherwise forbidden.

In Part V, s. 35 authorizes the Governor in Council by regulation to extend the application of Parts III or IV, or both, to oats and barley and thereupon the provisions of those Parts shall be deemed to be re-enacted in Part V including the appropriate expansion of definitions. That

was done prior to the tender of the grain for shipment here and the Act was then operative on all three commodities.

In Part VI, s. 45 makes the following declaration:

> 45. For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada, and, without limiting the generality of the foregoing, each and every mill or warehouse mentioned or described in the Schedule is a work for the general advantage of Canada.

The provisions of the Act embody a policy adopted by Parliament as being in the best interests of the grain producers and the country generally; and the question is whether that administration is within the competence of Parliament to set up, which, in turn, is to be decided on the validity of the substantive enactments of Parts III and IV.

As a preliminary skirmish, it was stressed by Mr. Finkelstein that the prohibition was equivalent to forbidding a producer in Manitoba from having his own property for his own purposes carried to his home in another province and this was assumed to be an outrageous thing. That the shipment offered, if carried, would have been an item in interprovincial trade is, I think, beyond question. Whether or not the statute would gather in every conceivable mode of moving goods across a provincial boundary, such as a person transfering his home and belongings from one province to another, including an ordinary supply of grain for domestic use, or where the farm straddles the border line of two provinces, the gathering of crops on one side and storing them in the owner's barns on the other, it is unnecessary to consider. In the situation before us, the intended shipment was to be one of transportation across a provincial line for the purposes and in the course of a business. It makes no difference whether business is connected or associated with the owner's production of raw material in another province or with that of strangers; in either case the merchandise and the transportation serve exactly the

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same purpose, and ownership is irrelevant. The merchandise was to move between interprovincial points in the flow of goods of an economic and business character and that is sufficient.

The main contention was that the legislation and regulations infringed s. 121 of the Act of 1867 that

> All articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the Provinces.

Assuming this section to be applicable equally to action by Dominion and province, is the charge exacted as a condition of the shipment an impediment to that free passage for which the section provides? Viewing it in isolation, as a hindrance to interprovincial trade detached from all other aspects, the demand bears the appearance of a violation. Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.

But when the exaction is looked at in its true character, as an incident in the administration of a comprehensive extra-provincial marketing scheme, with its necessity of realizing its object in the returns to producers for all production except for local purposes, interference with the free current of trade across provincial lines disappears. The subjects of trade by their nature embody an accumulation of economic values within legislative jurisdiction, wages, taxes, insurance, licence fees, transportation and others, all going directly or indirectly to make up or bear upon the economic character of those subjects; and the charge here is within that category as one item in a scheme that regulates their distribution.

"Free", in s. 121, means without impediment related to the traversing of a provincial boundary. If, for example, Parliament attempted to equalize the competitive position of a local grower of grain in British Columbia with that of one in Saskatchewan by imposing a charge on the shipment from the latter representing the difference in production costs, its validity would call for critical examination. That result would seem also to follow if

Parliament, for the same purpose, purported to fix the price at which grain grown in Saskatchewan could be sold in or for delivery in British Columbia. But burdens for equalizing competition in that manner differ basically from charges for services rendered in an administration of commodity distribution. The latter are items in selling costs and can be challenged only if the scheme itself is challengeable.

Section 121 has been considered in two cases, *Gold Seal Limited v. Attorney General of Alberta*[1] and *Atlantic Smoke Shop Limited v. Conlon*[2]. In the former a majority of this Court, Duff J., Anglin J. and Mignault J., held that prohibition by Parliament of the importation of intoxicating liquor manufactured in a province into another where its sale for consumption was illegal did not infringe the section; Duff J. at p. 456 said:

> The phraseology adopted, when the context is considered in which this section is found, shows, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union;

A similar view was expressed by Anglin J. at p. 466, and by Mignault J. at p. 470 who added to customs duties "other charges of a like nature". In *Atlantic Smoke Shop,* at p. 569, Viscount Simon remarked in part on the *Gold Seal* judgment:

> The meaning of section 121 cannot vary according as it is applied to dominion or to provincial legislation, and their Lordships agree with the interpretation put on the section in the *Gold Seal* case.

What was being considered there was a provincial tax to be paid by a person purchasing tobacco at retail for consumption by himself or others. Included in the confirmation was s. 5 which required of residents payment of the tax on tobacco brought in for their personal consumption from other provinces. Infringement of s. 121 in that case would have been by a tax as distinguished from *Gold Seal,* by prohibition in support of valid provincial law; in neither was it necessary to explore s. 121 beyond those limits.

[1] (1921), 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710.
[2] [1943] A.C. 550, 4 D.L.R. 81, 3 W.W.R. 113.

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The case of *James v. Commonwealth of Australia*[1] was strongly urged upon us by Mr. Finkelstein. There the Commonwealth had passed an Act bringing interstate commerce in dried fruits under regulation. Its effect was to prohibit interstate trade to unlicensed shippers and to restrict it quantitatively when under licence. The latter was the result of a requirement that a determined percentage of the total production by a grower must be exported from Australia or destroyed and that only the balance could be sold either in the grower's own state or in any other state of the Commonwealth. Section 92 of the constitutional Act, 63-64 Vict., c. 12, declared:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The issues were whether the section bound the Commonwealth, and if so, whether the legislation infringed it. The Judicial Committee found the regulation to be *ultra vires* of the Commonwealth to enact.

Even if the constitutional considerations in that issue were the same as those to be taken into account in this, the difference in character of the restrictions would be a sufficient distinction between them. But those considerations are not the same. The Australian constitution is a federal scheme in the general acceptation of that expression; it is one in which autonomous states confer on their collective organization segments of their own legislative, executive and judicial powers, retaining their original endowment so far as it is not transferred and not otherwise withdrawn from them. In that of Canada a converse formulation was effected: in constitutional theory, a new and paramount Dominion was created to which was attributed power to legislate for its peace, order and good government generally. This was subject to certain local and private powers exclusively vested in provinces then created; but those powers in turn were made subordinate to paramount and exclusive authority specifically defined and reserved to the Dominion. The organization was brought into existence as of an original creation. Expressly and by implication the existing structures, their laws, institutions and constitutional status, so far as compatible

[1] [1936] A.C. 578.

with the new order, were carried forward; but in the words of Viscount Haldane in *Attorney General, Commonwealth of Australia v. The Colonial Sugar Refining Company Limited*[1],

> . . . although it (the Canadian constitution) was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.

By the Australian Act, the regulation of Trade and Commerce committed by s. 51(1) to the Commonwealth was "subject to this constitution", which drew in s. 92, and was not exclusive; and so far as their legislation did not conflict with that of the Commonwealth, the States could likewise regulate interstate trade.

This diversity in structure and the scope and character of power over interstate trade and commerce, although illuminating in its disclosure of variant constitutional arrangements, suffices to require an independent approach to and appraisal of the question before us. Section 91(2) of the Act of 1867 confides to Parliament, "Notwithstanding anything in this Act," the exclusive legislative authority to make laws in relation to "The Regulation of Trade and Commerce". By what has been considered the necessary corollary of the scheme of the Act as a whole, apart from general regulations applicable equally to all trade, and from incidental requirements, this authority has been curtailed so far but only so far as necesary to avoid the infringement, if not "the virtual extinction", of provincial jurisdiction over local and private matters including intra-provincial trade; but the paramount authority of Parliament is trenched upon expressly only as it may be affected by s. 121. Pertinent to this is the ruling in *Attorney General of British Columbia v. Attorney General of Canada*[2], affirmed[3], in which it was held that customs duties imposed on the import of liquor by British Columbia under s. 91(2) did not violate s. 125 exempting all property of the province from taxation.

[1] [1914] A.C. 237 at 253.
[2] (1922), 64 S.C.R. 377, 38 C.C.C. 283, [1923] 1 W.W.R. 241, 1 D.L.R 223.
[3] [1924] A.C. 222, 42 C.C.C. 398, [1923] 3 W.W.R. 1249, 4 D.L.R. 669.

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I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.

The scheme of the *Wheat Act* is primarily to benefit producers of wheat in areas to which that product can now be said to be indigenous. Its effect is not to reduce the quantity of either foreign or interprovincial trade; whatever the demands of the provinces for these goods, the Board, under its duty to market the production of the "regulated areas", is bound to supply those requirements. But it is concerned also to spread the furnishing of that supply equitably among the producers. The individual with grain on hand may, because of quota, be unable to sell at the particular moment to a buyer in another province but his neighbour can do so. If the demands, export and interprovincial, are sufficient, all production will move into trade; what may be delayed is the particular disposal by the individual of his excess over the initial quota, not the movement of grain. The Act operates on the individual by keeping him in effect in a queue but the orderly flow of products proceeds unbated.

Section 121 does not extend to each producer in a province an individual right to ship freely regardless of his place in that order. Its object, as the opening language indicates, is to prohibit restraints on the movement of products. With no restriction on that movement, a scheme concerned with internal relations of producers, which, while benefiting them, maintains a price level burdened with no other than production and marketing charges, does not clash with the section. If it were so, what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. As the provinces are incompetent to deal with such a matter, the two jurisdic-

tions could not complement each other by co-operative action: nothing of that nature by a province directed toward its own inhabitants could impose trade restrictions on their purchases from or sales of goods to other provinces. It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself; and I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged.

Objection was taken to s. 33(*c*) which contemplates a situation where permission is given an individual to export wheat and a charge exacted of such sum as

> . . . in the opinion of the Board represents the pecuniary benefit enuring to the applicant pursuant to the granting of the license, arising solely by reason of the prohibition of imports or exports of wheat and wheat products without a license and the then existing differences between prices of wheat and wheat products inside and outside of Canada.

The subsection, as is seen, is limited to export and is clearly severable; and, being inapplicable to interprovincial trade, its validity is not in question here.

Finally, the contention is made that the purported declarations under the *Canada Grain Act* as well as the *Canadian Wheat Board Act* that all elevators, mills and feed warehouses in the three prairie provinces are works for the general advantage of Canada under s. 91(29) of the Act of 1867 are invalid, that declarations under that power must specify the individual work in respect of which considerations for and against have been weighed by Parliament; but we are not called upon to examine this contention. The prohibition of shipment in the case before us is contained in s. 32 of Part IV of the Act and it was in compliance with para. (*b*) of that section that acceptance of the shipment by the Pacific Railway was refused. The declarations mentioned are pertinent to the application of certain provisions of Part II governing delivery and acceptance of grain at elevators and railways but these are subsidiary to the prohibitions and regulations of carriage under Part IV. It is not suggested that, assuming s. 32 to be valid, the Pacific Railway is not bound by its terms to refuse the shipment as it did, and no elevator is involved. I should add that I am not to be taken as implying that restrictions on local elevators and mills, in

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relation, among other things, to delivery to carriers of grain for interprovincial transportation could not validly be imposed by Parliament.

I would, therefore, dismiss the appeal with costs.

CARTWRIGHT J.:—I am in general agreement with the reasons of my brother Rand and those of my brother Locke and would dispose of the appeal as they propose. I wish, however, to add a few words as to one of the submissions made by Mr. Finkelstein in the course of his full and able argument.

It was urged that s. 32 of the *Canadian Wheat Board Act* forbids a person who produces grain in one province to transport the grain so produced into another province to be there used by himself for his own purposes, that this prohibition is invalid, that it cannot be severed from the other provisions of the section and that consequently the whole section falls. The facts in the case at bar do not fall within the supposed case on which Mr. Finkelstein bases this argument but this circumstance does not affect the relevance of his submission to the issue of constitutional validity.

It seems clear that the enactment of such a prohibition would be beyond the powers of any provincial legislature and so would appear *prima facie* to fall within the powers of Parliament under the opening words of s. 91 of the *British North America Act* and to be valid, unless it contravenes s. 121 of that Act.

It may be that if, on its true construction, s. 32 would have the effect of prohibiting the supposed transportation it would be in conflict with s. 121 as being a prohibition which, to borrow the words of my brother Rand, "in its essence and purpose is related to a provincial boundary" and not being a regulation of trade or commerce (since there are difficulties in regarding a person as engaged in trade or commerce with himself) or a necesary incident of such regulation. If this be so it would furnish a strong reason for construing s. 32 as excluding from its operation the transportation in the case supposed, but I do not find it necesary to reach a final conclusion on the point as, in my opinion, the supposed prohibition if invalid is clearly severable.

I agree that the appeal should be dismissed with costs and that no order as to costs should be made for or against the intervenant the Attorney General of Canada.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Finkelstein, Finkelstein & Houston, Winnipeg.

Solicitor for the defendant, respondent: H. M. Pickard, Winnipeg.

Solicitors for the intervenant: Monk, Goodwin & Higenbottam, Winnipeg.