1952

*May 7, 8, 9
*June 30

THE PRINCE EDWARD ISLAND POTATO MARKETING BOARD (Nominal PLAINTIFF) ..... APPELLANT;

AND

H. B. WILLIS INCORPORATED (Nominal DEFENDANT) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA and others ..... INTERVENERS.

ON APPEAL FROM THE SUPREME COURT (IN BANCO) FOR PRINCE EDWARD ISLAND.

Constitutional Law—Regulation of interprovincial and export trade—Competence of Parliament to enact The Agricultural Products Marketing Act (Can.) 1949, 1st Sess. c. 16—Of Governor General in Council to delegate powers to provincially organized Board—Validity of Scheme established under the Agricultural Products Marketing (P.E.I.) Act, 1940, c. 40.

The Agricultural Products Marketing (Prince Edward Island) Act, (S. of P.E.I., 1940, c. 40) as amended, delegated to the Lt. Governor in Council authority to establish schemes for the marketing within the Province of any natural products and to constitute boards to administer such schemes. On Sept. 5, 1950 the Lt. Governor in Council appointed the appellant Board and delegated to it power to regulate the marketing of potatoes within the Province. *The Agricultural Products Marketing Act* (Can.) 1949, 1st Sess., c. 16, authorized the Governor in Council to delegate to marketing boards which had been established under legislation of any province to regulate the marketing therein of agricultural products, like powers in the interprovincial and export trade. On Oct. 25, 1950 the Governor in Council by P.C. 5159 delegated to the appellant Board powers in relation to the interprovincial and export trade in P.E.I. potatoes similar to those it had had conferred upon it with regard to local sales thereof. The Board thereafter issued several orders of which No. 1 imposed an annual licence fee on dealers engaged in marketing potatoes in P.E.I.; No. 2 a levy on dealers for every cwt. shipped from the Island; No. 3 a minimum price below which certain types of potatoes could not be bought from local producers and forbade consignment or export sales; No. 6 imposed a levy on producers in respect of all potatoes marketed by P.E.I. producers and made the dealers agents of the Board for the purpose of collecting the levy. No. 2 was repealed but any existing liability for the levy under No. 2 was continued.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

Held: reversing the judgment of the Supreme Court of Prince Edward Island *in banco*, that the four questions referred to it by the Lieutenant-Governor-in-Council should be answered as follows:

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act*, (1949) 13 George VI., (1st Sess.) c. 16?

Answer: Yes (unanimous).

2. If the answer to question No. 1 is yes, it is within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

Answer: Yes (unanimous).

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: Yes except as to s. 19 (Kerwin, Taschereau, Estey, Cartwright, Fauteux, JJ.); Yes (the Chief Justice); Yes except as to ss. 4 and 19 (Rand J.); No (Kellock and Locke JJ.).

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: Yes except as to Orders numbers 2 and 6 (Kerwin, Taschereau, Rand, Estey, Cartwright, Fauteux JJ.); Yes (the Chief Justice); No (Kellock and Locke JJ.).

APPEAL from a judgment of the Supreme Court of Prince Edward Island *in banco* (1) upon a reference by the Lieutenant Governor in Council of the four questions set out in the preceding head note. By order of the Chief Justice of Prince Edward Island, the Attorney General of Prince Edward Island and the Attorney General of Canada were at the outset granted leave to intervene at any stage of the proceedings. The Attorneys General of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Newfoundland were by order of the Chief Justice of Canada, notified of the Reference on appeal to this Court. The arguments submitted sufficiently appear in the reasons for judgment that follow.

R. H. Milliken Q.C. and *H. F. MacPhee Q.C.* for the appellant.

J. W. de B. Farris Q.C. and *K. M. Martin Q.C.* for the respondent.

F. P. Varcoe Q.C. and *J. T. Gray* for the Attorney General of Canada, Intervenant.

(1) 29 M.P.R. 93; [1952] 4 D.L.R. 146.

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W. E. Darby Q.C. for the Attorney General of Prince Edward Island, Intervenant.

C. J. A. Hughes for the Attorney General of New Brunswick, Intervenant.

L. A. Kelley Q.C. for the Attorney General of British Columbia, Intervenant.

J. R. Dunnet for the Attorney General of Saskatchewan, Intervenant.

THE CHIEF JUSTICE:—In my opinion, the appeal of the Prince Edward Island Potato Marketing Board should be upheld.

The judgment of the Supreme Court of Prince Edward Island *in banco* was delivered on the 31st of January, 1952. The Lieutenant-Governor-in-Council had referred to that Court for hearing and consideration the following questions:

(1) Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) c. 16?

(2) If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

(3) Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular s. 16 thereof?

(4) Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Tweedy J. wrote the main judgment, in which the Chief Justice and MacGuigan J. concurred, the Chief Justice simply adding a few additional reasons.

The main ground of the judgment of Tweedy J. appears to have been that the Supreme Court of Canada in *A.G. of N.S.* v. *A.G. of Can.* (1) which held that the Parliament of Canada and each provincial legislature were not capable of delegating one to the other the powers with which it had been vested, nor of receiving from the other the powers with which the other has been vested. In the opinion of the Supreme Court *in banco* of Prince Edward Island that judgment was really decisive with respect to the first two questions in the reference under appeal.

(1) [1951] S.C.R. 31.

With deference, such is not the effect of the judgment of this Court in the Nova Scotia reference. It was made quite clear in our reasons for judgment that they only applied to the questions as put and which had to deal only with an Act respecting the delegation from the Parliament of Canada to the Legislature of Nova Scotia and *vice versa*. The unanimous opinion of this Court was that each legislature could only exercise the legislative powers respectively given to them by ss. 91 and 92 of the Act, that these sections indicated a settled line of demarcation and it did not belong to the Parliament of Canada or the Legislatures to confer their powers upon the other. At the same time it was pointed out that *In re Gray* (1) and *The Chemical Reference* (2), the delegations there dealt with were delegations to a body subordinate to Parliament and were, therefore, of a character different from the delegation meant by the Bill submitted to the Court in the Nova Scotia reference.

But, on the other hand, the delegations passed upon by this Court *In re Gray* and *The Chemical Reference* were along the same lines as those with which we are concerned in the present appeal. It follows that our judgment in the Nova Scotia reference can be no authority for the decision which we have to give in the present instance. It may be added that at bar counsel did not rely upon that ground in this Court.

The first question submitted to the Supreme Court *in banco* of Prince Edward Island had to do with the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act* (1949), 13 George VI, (1st Session) c. 16. That Act was assented to on the 30th of April, 1949. The preamble, among other things, stated that it was "desirable to co-operate with the provinces and to enact a measure respecting the marketing of agricultural products in interprovincial and export trade". S. (2) of the Act reads as follows:—

2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export

(1) (1918) 57 Can. S.C.R. 150. (2) [1943] S.C.R. 1.

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trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in interprovincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since *Valin* v. *Langlois* (1), when the Privy Council refused leave to appeal from the decision of this Court (2), the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in *Proprietary Articles Trade Association et al* v. *A.G. for Canada et al* (3). The words just quoted are preceded in the judgment of Lord Atkin by these other words:—

> Nor is there any ground for suggesting that the Dominion may not * * * *

It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

In *The Agricultural Products Marketing Act* of 1949 that is precisely what Parliament has done. Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority. Moreover, it may be added, that in doing so Parliament was following the advice of the Judicial Committee in the several judgments which

(1) (1879) 5 App. Cas. 115. (2) (1879) 3 Can. S.C.R. 1.
(3) [1931] A.C. 310.

it rendered on similar Acts and, more particularly, on the Reference concerning the Natural Products Marketing Act, (1) adopted by Parliament in 1934 (S. of C. 24 and 25 George V, c. 57), (1937), that the proper way to carry out legislation of that character in Canada, in view of the distribution of legislative powers under the British North America Act, was for Parliament and the Legislatures to act by co-operation.

I would, therefore, answer question (1) in the affirmative.

Question two was not answered by the Supreme Court *in banco* of Prince Edward Island as a result of the fact that it had answered question one in the negative. As my answer to question one is in the affirmative, so will be my answer to question two.

The Governor-in-Council by P.C. 5159, passed on the 25th October, 1950, has done nothing else, nor more, than act in accordance with the powers conferred upon it by s. (2) of *The Agricultural Products Marketing Act* of 1949. Indeed the text of the Order-in-Council is practically and substantially the same as the text of the Act itself. Applying it to the Prince Edward Island Potato Marketing Board, the Order-in-Council refers to the Scheme for the marketing of potatoes, made by the Lieutenant-Governor-in-Council on the 5th September, 1950, and particularly to paras. (*a*), (*b*), (*c*), (*f*), (*g*), (*i*), (*j*), (*o*) and (*p*) of s. 16 of the Scheme. The evident object of that enumeration was for purposes of interprovincial and export trade to limit the exercise of the powers conferred upon The Potato Marketing Board by the Lieutenant-Governor-in-Council of Prince Edward Island to those powers which are exercisable by The Potato Marketing Board under the paragraphs so enumerated. As the Scheme itself, and, in particular s. 16, are the subject of question three, they will be considered by me in my answer to that question.

It will be noted that no question was put in the reference with regard to the validity of the *Agricultural Products Marketing (Prince Edward Island) Act,* 1940, 4 George VI, c. 40. The reference, therefore, assumes that the Act itself is valid; and the question is merely whether the Lieutenant-Governor-in-Council had the required jurisdiction and competence to establish the Scheme and, in particular, s. 16.

(1) [1937] A.C. 377 at 389.

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The purpose and intent of the Provincial Act, as stated in s. 4(1), is "to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part". Ss. (2) of s. 4 is as follows:—

> 4. (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Then s. 5, without limiting the generality of any of the other provisions of the Act, authorizes the Lieutenant-Governor-in-Council to vest in any Provincial board any or all of the additional powers enumerated in sub-paras. (*a*) to (*k*) inclusive.

When s. 6 was first enacted it stated that every provincial board was authorized to co-operate with the Dominion Board to regulate the marketing of any natural product of the Province and to act conjointly with the Dominion Board, and perform such functions and duties and exercise such powers as were prescribed by the Act or the regulations. This was amended in 1950 by striking out the words "Dominion Board" in the second and fourth lines thereof and substituting therefor in each instance the words "Provincial Marketing Boards of other Provinces".

Then s. 7 of the Prince Edward Island Act enacted that every Provincial Board might, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product, to which was added, in 1950, the following:—

> and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

S. (8), which authorizes the Dominion Board to exercise its powers with reference to the marketing of a natural product, was repealed in 1950 and should no longer be considered.

S. (9) of the Provincial Act, as amended in 1950, no longer contained the words "in co-operation with the Dominion Board", and should now be read without those words.

I have referred to these amendments merely to indicate the present state of the Provincial Act, but, I repeat, that its validity is not submitted in the Reference, and the question is only whether the Scheme, adopted on the 5th September, 1950, was within the jurisdiction of the Lieutenant-Governor-in-Council to establish.

In fact, the only doubt suggested with regard to the validity of the Scheme concerns s. (16) thereof. Now, it is obvious that the Provincial Act itself had no other object than to deal with the local marketing within the province, and that intention is emphasized throughout the several sections of the Act.

The same intention appears in s. (16) of the Scheme. The opening words give the Potato Board powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein. The Scheme defines what is meant by the words "regulated area" and that area is thereby limited to the Province of Prince Edward Island. Then these same words are repeated throughout the Scheme and, particularly, in the several paras. of s. (16).

It should be noted that although the Scheme is that of the Prince Edward Island Potato Marketing Board, it has received the approval and, in fact, was made by the Lieutenant-Governor-in-Council, and that question No. (3), therefore, should be considered only in respect of the jurisdiction and competence of the latter.

There could be no ground for suggesting that the Lieutenant-Governor-in-Council could not vest in the Boards constituted by it any powers considered necessary or advisable to enable those Boards effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province. This is especially given to the Lieutenant-Governor-in-Council

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by ss. (2) of s. (4) of the Act. I can see nothing in s. (16) of the Scheme which is not covered by the authorities so conferred upon the Lieutenant-Governor-in-Council, either under s. (4) or under s. (5) of the Act. We must come to that conclusion more particularly in view of the absence in the Reference of any question concerning the authority of the Provincial Act and that, therefore, its validity must be assumed for the purpose of considering the Scheme.

In that connection it is significant that the answers of the Supreme Court *in banco* of Prince Edward Island were that the Scheme in general, and s. (16) in particular, were not within the jurisdiction of the Lieutenant-Governor-in-Council "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". That answer would have been more complete if the Supreme Court *in banco* had stated that it could be and should be so limited. It is sufficient for this Court to say that it must of necessity be limited to transactions within the Province. Far from there being any intention on the part of the Legislature of Prince Edward Island to extend its scope to transactions outside the Province, the Act itself and the Scheme took particular care to limit it to the local trade, and under all canons of construction, including, of course, *The Interpretation Act* (s. 31) they must be so understood.

Question (4) of the Reference submits certain orders made by the Prince Edward Island Potato Marketing Board and asks whether they were within the jurisdiction and competence of that Board and again the answer of the Supreme Court *in banco* was in the negative "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". This, in my view, is practically an answer in the affirmative for none of those orders pretend to affect transactions outside the Province. However, Board orders Nos. 2 and 6(2) are singled out in the answer of the Court below. There is no object in directing our attention to Order No. (2), because, prior to the Reference being submitted to that Court, Order No. 2 was repealed.

The objection to Order 6(2) is stated to be that it might be regarded as indirect taxation, and also that the tax or impost levied under that Order "is clearly far in excess of the valid requirements of the Board for *intra vires* administration expenses, and must be taken to be imposed in contemplation of activities beyond the jurisdiction of the Board". For that reason it was held that "the levy is therefore *ultra vires* and invalid".

The first answer to that objection is that it is based entirely upon a pure question of fact, of which there is not the slightest evidence in the record, and it is not to be assumed that the Board would levy any tax or impost in excess of its requirements. Moreover, the Provincial Act authorizes the Lieutenant-Governor-in-Council to vest in the Board any powers considered necessary or advisable to enable it effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province (s. 4(2) of the Act). The Board is undoubtedly competent to act in accordance with those powers. This Court cannot take judicial notice of facts which may be said to indicate that the levy is beyond the requirements of the Board for the objectives which it is to carry out. No facts of that character appear in the record. It will be time enough to pass upon that question whenever, in some litigation, it is shown that the Board has, in a particular instance, exceeded its requirements.

I have no doubt that the Act itself and the Scheme approved by the Lieutenant-Governor-in-Council were amply sufficient to justify the Orders mentioned in Question (4).

With deference, I am unable to see how the word "regulate" in s. 19 of the Scheme indicates an intention on the part of the Provincial Legislature to extend the scope of this whole enactment beyond the confines of provincial jurisdiction. On the contrary, it seems to me that s. 19 should be "regarded as harmless authority to confer and collaborate informally with representatives of the Nova Scotia Potato Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board", and for those Boards to "act conjointly" with the representatives of the Prince Edward Island Potato Marketing Board. Moreover, it should be pointed

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out that any action of the local potato board is "subject to the approval of the Prince Edward Island Potato Marketing Board".

As to the vague suggestion that the levy provided for in s. 16(*k*) of the Scheme might be looked upon as "a measure of indirect taxation", it has not been made a point for the decision appealed from, but it would seem to have lost its weight—and I do not consider that it ever had any weight —since the adoption of the Board by the Governor-in-Council.

The ingenious argument of Mr. Farris that the Provincial Board had no capacity to receive the delegation of powers from the Federal Government has failed to convince me. As stated above, Parliament could choose its own executive officers for the carrying out of this legislation, and when so chosen the Provincial Board became the agent authorized by the Governor-in-Council with "all or any powers like the powers exercisable by such Board or agent in relation to the marketing of such agricultural product locally within the province". That, of course, must be understood *mutatis mutandis*. The Board did not need the enabling capacity provided for in s. (7) of the Prince Edward Island Act. It became a body, or an entity, and it was not necessary for the Province to give it the power to "perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product"; or, in the words of the amendment of 1950, "to accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act".

Such authority, as contained in s. (7) of the Provincial Act, was not necessary, except perhaps for the province to express its desire that the Provincial Board should not accept any authority from the Governor-in-Council except "with the approval of the Lieutenant-Governor-in-Council". In the present case, the Provincial Board received its powers directly from the Federal Government. But s. (7) can do no harm, since, in the exercise of the powers delegated to the Provincial Board by the Federal Government, the Board becomes the agent of the latter government and gets its powers from such appointment.

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On the whole, I would answer each of the questions in the affirmative.

The judgment of Kerwin and Fauteux JJ. was delivered by:—

KERWIN J.:—In delivering the judgment of the Judicial Committee in *A.G. for British Columbia* v. *A.G. for Canada* (Natural Marketing Act Case) (1), Lord Atkin, at page 389, remarked:—

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But 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.

In *A.G. of N.S.* v. *A.G. of Canada* (2), this Court decided that the method proposed to be adopted by the Legislature of Nova Scotia to meet this test was not authorized. In the present case, in the Court below reliance was placed upon what was there said by the several members of this Court but the opinion of none of the latter justifies the conclusion reached by the Supreme Court of Prince Edward Island *in banco,* or the reasons upon which that conclusion was based. In the Nova Scotia case, it was proposed that the Legislature should enact that the Lieutenant-Governor-in-Council of Nova Scotia might, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter was, by s. 92 of the British North America Act, 1867, exclusively within the legislative jurisdiction of the Legislature and that any laws so made by Parliament should, while such delegation was in force, have the same effect as if enacted by the Legislature. All the members of this Court decided that this could not be done as a contrary conclusion would be obnoxious to the tenor and scheme of the British North America Act. By that Act certain powers were conferred

(1) [1937] A.C. 377. (2) (1951) S.C.R. 31.

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upon the Parliament of Canada and the Legislature of a province, and we held that neither could transfer its authority to the other.

What is here attempted to carry out Lord Atkin's suggestion is an entirely different matter. At the outset, it should be emphasized that no question is submitted as to the validity of the provincial statute *"Agricultural Products Marketing (Prince Edward Island) Act"* (1940, c. 40). In substance, and, as will later appear, in very important respects, that Act is the same as the British Columbia statute which was held to *intra vires* in *Shannon* v. *Lower Mainland Dairy Products Board* (1). Having provided for the constitution by the Lieutenant-Governor-in-Council of a Board to be known as "Prince Edward Island Marketing Board" s. 4 enacts:—

> 4. (1) The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.
>
> (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Provision was then made whereby the Lieutenant-Governor-in-Council might vest in any provincial board, without limiting the generality of any of the other provisions, certain specified powers of regulation, including the registration of all persons engaged in the production, packing, transporting, storing or marketing of the regulated product and to fix and collect licence fees therefrom. S. 7 (as amended in 1950) enacts:—

> 7. Every Provincial board may, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

(1) [1938] A.C. 708.

By the interpretation section, as amended in 1950, "Dominion Act" means "The Agricultural Products Marketing Act" of Canada. This Canadian Act is c. 16 of the Statutes of 1949 (1st Session) and s. 2 thereof provides:—(As to which see p—).

My answer to the first question as to whether this Act is within the jurisdiction and competence of Parliament is in the affirmative. Parliament, legislating with reference to inter-provincial and export trade which it and not any provincial legislature has the power to do, may validly authorize the Governor General in Council to confer upon a provincial board appointed under the Prince Edward Island statute of 1940, the power to regulate such marketing. This Court held in *Valin* v. *Langlois* (1), that Parliament could confer authority and impose a duty upon a provincial Court in connection with contested elections under the Canada Elections Act. In refusing leave to appeal (2), the Judicial Committee indicated its approval of that judgment. Admitting, as counsel for the respondent argued, that the Island Board was not made a corporation and that its members are distinct from the Board as a whole, I reiterate the view expressed in *Labour Relations Board, Sask.* v. *Dominion Fire Brick and Clay Products Ltd.* (3), that such a Board is a legal entity. Having been validly established by the Legislature, it has the capacity to receive and accept the authority authorized by Parliament to be conferred upon it by the Governor-General-in-Council. Counsel for the respondent further submitted that in overruling the judgment of this Court in *Bonanza Creek Gold Mining Co.* v. *The King* (4), the Judicial Committee (5), drew a distinction between powers and rights exercisable within a province and capacity to accept extra-provincial powers. That is quite true but what was in issue there was the extent of the power of the Ontario Legislature under 92(11) of the British North America Act "The Incorporation of Companies with Provincial Objects". While the judgment of the Judicial Committee in that particular case proceeded upon the basis that the Bonanza Creek Gold Mining Company had really been

(1) (1879) 3 Can. S.C.R. 1.
(2) (1879) 5 App. Cas. 115.
(3) [1947] S.C.R. 336 at 339.
(4) (1914) 50 Can. S.C.R. 534.
(5) [1916] A.C. 566.

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incorporated by virtue of the Royal prerogative, there is nothing in the reasons of Chief Justice Fitzpatrick and Duff J., relied upon by the respondent, to indicate that they were dealing with anything more than the limitation of "provincial objects". In fact the latter pointed out that the question whether capacity to enter into a given transaction is compatible with this limitation was one to be determined upon the particular facts, and he held that on the true construction of the Ontario Companies Act the Company only acquired capacity to carry on its business as an Ontario business and that there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

The second question is as to the jurisdiction and competency of the Governor-General-in-Council to pass P.C. 5159. That Order-in-Council granted authority to the Prince Edward Island Products Marketing Board, as established by the Lieutenant-Governor of the Province, to regulate the marketing outside the province in interprovincial and export trade of Island products, and that for such purposes the Board might with reference to persons and property situated within the Island exercise powers like the powers exercisable by it in relation to the marketing of Island products locally within the province under certain paragraphs of s. 16 of the Island's Products Marketing Scheme as amended from time to time. It was not contended that, if the answer to the first question be in the affirmative, the answer to the second should not be the same.

Question 3 is as to the jurisdiction and competency of the Lieutenant-Governor-in-Council to establish the Scheme referred to, and particularly s. 16 thereof. In dealing with this question it is necessary to bear in mind the provisions of the Act under which the Scheme was adopted by the Lieutenant-Governor-in-Council. Subsections 1 and 2 of s. 4 have already been extracted and it is important to note that what is being dealt with is the control and regulation of the transportation, packing, storage and marketing of natural products within the Province. This same wording appeared in the British Columbia statute considered in the *Shannon* case. There, the Privy Council stated that it was apparent that the legislation was

confined to regulating transactions that took place wholly within the province. After pointing out that natural products as defined were not confined to those produced in British Columbia, the judgment proceeded: "It was suggested that 'transportation' would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that 'transportation' is confined to the passage of goods whose transport begins within the Province to a destination also within the Province." Therefore, in view of the similarity of the British Columbia and Prince Edward Island statutes, unless a fair reading of the Scheme as a whole leads one to the opposite conclusion, it should not be held that the Lieutenant-Governor-in-Council exceeded the powers conferred upon him by the statute and attempted something beyond provincial jurisdiction. For that reason, s. 4 of the Scheme, which provides: "This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes of any kind or grade thereof in the regulated area", is in my view valid.

S. 16 of the Scheme is the one conferring specified powers upon the Potato Board and as it provides that "The Potato Board shall have the following Powers exercisable in Prince Edward Island in relation to the marketing of potatoes *therein*", it also is valid unless some particular clause thereof clearly goes beyond the statutory powers. The only clauses requiring consideration are (*d*), (*e*) and (*k*). I can find no objection to clause (*d*) which merely authorizes the licensing of potato dealers. Clause (*e*) authorizes the Board

> (*e*) to fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing potatoes with power 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;

In substance this is the same as s. 5(*d*) of the Prince Edward Island Act:—

> (*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;

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This s. 5(*d*) is in the same terms as s. 4A(*d*) of the British Columbia statute considered in the *Shannon* case and as to which the Judicial Committee held (page 721):—

> 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.

Clause (*e*) of s. 16 of the Scheme is therefore valid. Clause (*k*) authorizes the Board

> (*k*) to establish a fund in connection with this Scheme to be utilized in such manner as may be deemed necessary or advisable by the Potato Board for the proper administration of the Scheme:

and may stand as it is comparable to section 4A(*j*) of the British Columbia statute:—

> 4A(*j*). To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

which the Judicial Committee also held unobjectionable for the same reasons.

S. 19 of the Scheme reads as follows:—

> 19. The Potato Board may name two representatives to act conjointly with representatives named by the Nova Scotia Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board as a committee to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area, and the Potato Board may, subject to the approval of the Board, delegate to said committee such of its powers as it may deem advisable.

No authority can be found for the kind of sub-delegation therein provided for and, in my opinion, this clause is not within the jurisdiction and competence of the Lieutenant-Governor in Council.

The fourth question is with reference to the jurisdiction and competence of the Board to make certain Orders under the Scheme. Order No. 1 provides that the dealers must take out a licence and pay a fee therefor of five dollars. Order No. 2 provides:—

> (1) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every dealer shall pay to the Board a charge at the rate of One Cent (1c) for every One hundred pounds of potatoes shipped or exported by such dealer from the Province of Prince Edward Island.
>
> (2) Each dealer shall render to the Potato Board on the 6th day of each month a statement of all cars of potatoes shipped during the preceding month which statement shall correctly show the quantity of

potatoes shipped in each car. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph one hereof calculated at the said rate on the volume of potatoes shown by said statement.

Order 6, made February 14, 1951, by para. (1) repealed Order No. 2 "subject to the provision that every dealer shall continue liable to pay to the Potato Board the full amount of the charge or levy which is now due or accruing due and unpaid in respect of potatoes shipped or marketed up to this date." By paragraphs 2, 3, 4 and 5 of Order No. 6:—

(2) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every producer shall pay to the Potato Board a charge or levy at the rate of one cent per hundred pounds of potatoes in respect of all potatoes sold or marketed by such producer.

(3) Every dealer shall be an agent for the Potato Board for the collection of said levy or charge from the producers whose potatoes such dealer ships or exports.

(4) Every dealer when purchasing potatoes in Prince Edward Island shall deduct from the amount payable by him to the Vendor of same the amount of the said levy or charge in respect of the potatoes so purchased by him.

(5) Every dealer shall render to the Potato Board on the 6th day of each month a true and correct statement of all cars of potatoes shipped by such dealer during the preceding month, which statement shall clearly show the quantity of potatoes shipped in each case. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph 2 hereof calculated at the said rate on the volume of potatoes shown by said statement.

These paragraphs are clearly referable to export trade and cannot be supported. While Order No. 2 was repealed before the Order of Reference was made by the Lieutenant-Governor in Council, the revoking Order (No. 6) provides for the continuance of any existing liability for the levy.

I would therefore answer the questions as follows:

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

TASCHEREAU, J.:—The Lieutenant-Governor-in-Council of the Province of Prince Edward Island has referred for advice to the Supreme Court of that Province *in banco*, four questions which are the following: (As to which see p. 394)

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The unanimous opinion of the Court of Appeal was that the questions should be answered as follows:—

1. No.

2. No answer.

3. As to section 19 of the scheme—No. As to the scheme in general, and section 16 in particular,—No, unless and insofar as the scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province.

4. As to Board Order Number 6(2), and the now-repealed Board Order Number 2—No. As to the Board Orders in general—No, subject to the proviso set out in the answer to question 3.

I fully concur with the view that the two first questions should be answered in the affirmative. I have no doubt that the Parliament of Canada has the necessary competence to regulate the marketing of agricultural products *in interprovincial and export trade,* and to co-operate with the provinces which have enacted legislation respecting the marketing of such products *within the province.* (Vide *Lawson* v. *Interior Tree Fruit Committee* (1); (*Marketing Act Reference* (2)) and (3).

It was also I think, within the jurisdiction of the Governor-General to pass P.C. 5159, and to vest in the Board powers which are identical with those authorized to be vested by the statute. (*Shannon* v. *Lower Mainland* (4); (*Chemicals Reference* (5)).

The Supreme Court of Prince Edward Island relied upon *A.G. of Nova Scotia* v. *A.G. of Canada* (6) to answer in the negative, but I do not think that that case supports the view that has been adopted. The judgment merely decided that neither Parliament nor the legislatures can delegate powers to each other so as to change the distribution of powers provided for in ss. 91 and 92 of the British North America Act. Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and

(1) [1931] S.C.R. 357 at 371.
(2) [1936] S.C.R. 398.
(3) [1937] A.C. 377 at 389.
(4) [1938] A.C. 708 at 722.
(5) [1943] S.C.R. 1.
(6) [1951] S.C.R. 31.

export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-Governor-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (*Valin* v. *Langlois* (1)).

As to question No. 3, for the reasons given by my brother Kerwin, whose judgment I had the advantage of reading, it is my opinion that the scheme is valid including s. 16. However, s. 19 is not authorized by the Act. We find in s. 6 of the Act the necessary authority given to the Board to *co-operate* with other Provincial Marketing Boards to regulate the marketing of natural products, but nowhere do we find that the Potato Board is empowered to appoint a committee and *delegate* to it, subject to the approval of the Board, such of its powers, as it may deem advisable.

The charge or levy imposed in Order No. 2 and in Order No. 6 for the purpose of establishing a fund in connection with the Marketing Scheme, seems in either case to be clearly indirect. In the first case it is imposed upon the dealer, and upon the producer in the second, and, therefore, it remains that it is charged upon an article of commerce in course of trade and not against the final purchaser. The effect of this charge or levy necessarily tends to increase the sale price by the amount of the tax. (*Atlantic Smoke Shops* v. *Conlon* (2) and (3)). Order No. 2 was repealed by Order No. 6, but as the revoking Order imposed a liability upon every dealer to pay to the Potato Board the full amount of the charge or levy due or accruing due and unpaid in respect of potatoes shipped or marketed, it follows that both must be held invalid.

I would therefore answer the interrogatories as follows:—

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

(1) (1879) 5 App. Cas. 115. (2) [1941] S.C.R. 670.
(3) [1943] A.C. 550.

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RAND J.:—This appeal arises out of a Reference by the Lieutenant-Governor-in-Council of Prince Edward Island to the Supreme Court of that province of questions relating to both Dominion and Provincial legislation dealing with agricultural products.

Under *The Agricultural Products Marketing (Prince Edward Island) Act* of 1940, authority was conferred on the Lieutenant-Governor-in-Council to establish schemes for the regulation within the province of the marketing of any natural product, to be administered by a principal Board and marketing boards.

By such a scheme a board might be authorized, among other things, to require all persons engaged in a trade within the province to register and obtain licences, to prescribe licence fees therefor, and to fix maximum and minimum prices at which the product might be bought or sold in the province. A board could co-operate with the Marketing Board constituted under The Agricultural Products Marketing Act of the Dominion, and, conjointly, exercise its powers under the local law. With the approval of the Lieutenant-Governor-in-Council, a board could accept and exercise any power conferred upon it pursuant to the Dominion Act in relation to the marketing of a natural product.

A scheme for the regulation of the marketing of potatoes throughout the province was established by order-in-council of September 5, 1950. A Potato Board was constituted of five members which, besides the general powers already mentioned, was authorized to establish a fund for carrying out the scheme for which it might fix and collect charges in the manner as for licence fees; to borrow money for the objects of the scheme within a maximum aggregate of obligations of $10,000; to distribute among producers proceeds of the sales of potatoes; and generally to do such things as might be ancillary to these objects.

The Governor-in-Council, under the Dominion Marketing Act, by order-in-council of October 25, 1950 granted authority to the Potato Board "to regulate the marketing outside the province of Prince Edward Island in inter-provincial and export trade of Prince Edward Island potatoes produced" in that province and for such purpose "to exercise powers like the powers exercisable by it in relation to the marketing of Prince Edward Island potatoes

locally within the province" under specified paragraphs of s. 16 of the scheme as from time to time amended. Among the paragraphs omitted were (*d*) dealing with the licensing of dealers, (*e*) the collection of licence fees, (*k*) establishing a fund in connection with the scheme, (*l*) borrowing money, (*m*) distributing the proceeds of sales among producers, and (*n*) establishing technical and advisory committees and the employment of experts.

The questions submitted to and the answers given by the court were:—

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) Chapter 16? Answer, No.

2. If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159? No answer.

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: As to section 19 of the Scheme—"No." As to the Scheme in general, and Section 16 in particular—"No, unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province."

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: As to the Board Order Number 6(2), and the now-repealed Board Order Number 2—"No." As to the Board Orders in general—"No, subject to the proviso set out in the answer to Question 3."

From the answers this appeal has been brought.

The validity of the provincial legislation generally was not impugned since its provisions are virtually identical with those of the Act of British Columbia which was approved by the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board* (1). The Committee there construed the Act as a whole to be limited to transactions strictly within the field of local or provincial trade. The administration of the Act so circumscribed, apart from co-operative Dominion legislation, may encounter serious practical difficulties if not insuperable obstacles; but that cannot affect its constitutional validity nor its administration conjointly with Dominion powers.

(1) [1938] A.C. 708.

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The principal point of attack was the efficacy of the Dominion delegation. Mr. Farris argued that the province was incompetent to confer on the Board capacity to accept such powers from the Governor-in-Council. This question was not involved in Shannon, *supra*, as the administration there was provincial only and s. 7 of the Act was not expressly considered. The Potato Board is not, under the statute, a corporation, and the contention is this: the power to create such an entity and to clothe it with jural attributes and capacities is derived from head 13 of s. 92 of the Act of 1867 which deals with property and civil rights within the province; as the incorporation of companies under head 11 has its source in the prerogative, a body so created may have unlimited "capacities"; the prerogative is not drawn on for a body created under any other head than 11; a board created as here can have, then, only a capacity in relation to local law. From this it follows that the purported grant of authority from the Dominion is inoperative.

The central feature of this argument is the notion of the creation of an "entity". That a group of human beings acting jointly in a certain manner, with certain scope and authority and for certain objects, can be conceived as an entirety, different from that of the sum of the individuals and their actions in severalty, is undoubted; and it is the joint action so conceived that is primarily the external counterpart of the mental concept.

But to imagine that total counterpart as an organic creation fashioned after the nature of a human being with faculties called "capacities" and to pursue a development of it logically, can lead us into absurdities. We might just as logically conceive it as a split personality with co-ordinate creators investing it with two orders of capacities. These metaphors and symbolisms are convenient devices to enable us to aggregate incidents or characteristics but carried too far they may threaten common sense.

What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by

appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in *Valin* v. *Langlois* (1). No question of disruption of constitutive provincial features or frustration of provincial powers arises: both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.

The next challenge was to certain provisions of the scheme. In the approach to them it should be assumed that, generally, they are intended only for the regulation of local trade, but several of them are couched in language that must be examined.

By clause 4 the scheme is declared to apply "to all persons who grow, pack, store, buy or sell potatoes of any kind or grade" in the province. I find it difficult to limit this language to local business, but to answer the question finally I take it in its application to the substantive provisions.

These are to be found chiefly in clause 16. para. (*a*) which enables the Potato Board to prescribe the manner of marketing generally; (*b*) to designate the agencies through which potatoes will be marketed; and (*c*) prohibiting the buying, selling, etc. of potatoes which do not conform to quality standards set by the Potato Board. So considered, there is clearly a regulation of external trade which renders clause 4 ultra vires.

The same result follows in the case of para. (*g*) which enables the Board to fix the minimum prices at which potatoes may be bought or sold "for delivery in Prince Edward Island". If the latter were an exclusively ultimate delivery for consumption, there would be no excess: but there may be intermediate deliveries in the course of external trade. Likewise, the application of para. (*m*),

(1) (1879) 5 App. Cas. 115.

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authorizing any agency designated by the Potato Board to distribute among producers the proceeds of the sales of potatoes, carries regulation beyond the provincial field.

Para. (*d*) (1), providing for licensing dealers and fixing fees, construed to apply to all dealers requires a distinction to be made between fees primarily for revenue and primarily for regulation. In *Brewers & Maltsters'* v. *A.G. (Ont.)*, (1), distillers and brewers operating under licenses from the Dominion were held subject to a provincial licence carrying a fee of $100 whether the product was solely for local consumption, for export, or for both. The fee was justified both as direct taxation and under head 9. Lord Herschell emphasized the uniformity of the fee, its relatively small amount, and that it was imposed without regard to the quantity of goods sold.

In *Lawson* v. *Interior Committee* (2), the levy was part of a local regulation of interprovincial and local trade; the tax imposed might vary with the quantity of the product marketed subject to a minimum and maximum amount of charge; and it was held invalid both as indirect taxation and as not being within head 9.

In *Shannon, supra,* the Judicial Committee held that in the regulation of exclusively local business by a system of licences, fees under head 9 were not restricted to direct taxation.

In *Lower Mainland Products* v. *Crystal Dairy Ltd.* (3), there were two local levies; a compulsory transfer of money from one set of dealers to another, and an assessment for expenses; in each case the levy was related to the quantity of product sold. Here, too, external trade was affected. Both were held to be indirect taxation and invalid.

The scheme before us is primarily one of trade regulation. Apart from taxation, so far as it extends to external trade it is invalid. Licence fees for revenue purposes with only an incidental regulation on local and external trade, as in the *Maltsters'* case, can be imposed on the latter if not indirect in their incidence, but if related to sales they become a burden on that trade and, as in *Lawson's* case, are *ultra vires.*

(1) [1897] A.C. 231. (2) [1931] S.C.R. 357.
(3) [1933] A.C. 168.

Clause 19 of the scheme was challenged. This authorizes the Potato Board to name two representatives to act with representatives of the Nova Scotia, New Brunswick and Newfoundland marketing boards as a committee "to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area"; and, "subject to the approval of the (Provincial) Board, to delegate to that committee such of its powers as it may deem advisable." Co-operative action between boards of different provinces having the same administrative objects is quite unobjectionable; but I find nothing in the statute permitting a sub-delegation of powers of this nature.

Finally, order No. 6 of the Potato Board was attacked. It provides that "for the purpose of establishing a fund in connection with the scheme, every dealer shall pay to the Board a charge at the rate of one cent (1c) for every hundred pounds of potatoes shipped from the province." As mentioned, neither para. (*e*) of clause 16, which authorizes licence fees nor (*k*) which permits the establishment of a fund by means of similar fees, was adopted by the Dominion order-in-council, and I cannot take it that that express omission can be supplied by either (*o*) or (*p*) which authorize generally such acts as may be considered necessary to the execution of the scheme. On the contrary view, (*o*) and (*p*) would be sufficient in themselves for the entire administration on behalf of the Dominion; but the order-in-council specifies with particularity only nine paragraphs out of sixteen in clause 16 and adopts no other clause. The assessment is clearly a mode of indirect taxation effecting primarily a regulation of trade: and as the cases examined indicate, its application to trade beyond the province puts it ultra the powers of the Board.

This order purported to repeal order No. 2 which provided for a similar assessment and which for the same reasons was invalid; and the purported preservation in order No. 6 of unpaid levies under No. 2 likewise fails.

I would, therefore, answer the questions as follows:—

1. Yes.
2. Yes.
3. Except as to sections Nos. 4 and 19, Yes.
4. Except as to orders Nos. 2 and 6, Yes.

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The judgment of Kellock and Locke, JJ. was delivered by:—

KELLOCK, J.:—The central question in this appeal is as to the respective jurisdictions of Parliament and the provincial legislature with respect to regulation of the marketing of a natural product. It is now settled that neither jurisdiction is competent without the other to cover the entire field of local as well as interprovincial and international marketing. The limitation upon the legislative jurisdiction of Parliament was settled by the decisions in *The King* v. *Eastern Terminal Elevator Co.* (1), and *A.G. for B.C.* v. *A.G. for Canada* (2), (Natural Products Marketing Act Reference). While on the other hand, the limitation under which the legislature of a province labours is illustrated by the decision in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee* (3). It was pointed out by Lord Atkin in the *Natural Products Reference supra,* at 389, that satisfactory results cannot be achieved by either legislature leaving its own sphere and encroaching upon that of the other.

The scheme here in question was established by a provincial Order-in-Council under the provisions of the *Agricultural Products Marketing (P.E.I.) Act* (1940) 4 Geo. VI c. 40, as amended in 1950 by 14 Geo. VI c. 18. The purpose and intent of the statute is stated in s. 4, ss. 1, to be

> to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products *within the province,* including the prohibition of such transportation, packing, storage and marketing in whole or in part.

By ss. 2, the Lieutenant-Governor-in-Council is authorized to establish, amend and revoke schemes for the control and regulation *within the province* of the transportation, packing, storage and marketing of any natural products, to constitute marketing boards to administer such schemes, and to vest in such boards any powers considered necessary or advisable for the purpose.

(1) [1925] S.C.R. 434. (2) [1937] A.C. 377.
(3) [1931] S.C.R. 357.

This statute, with some minor differences, is essentially in the form of the statute of British Columbia, in question in *Shannon* v. *Lower Mainland Dairy Products Board* (1), which was held to be *intra vires* of the provincial legislature. In that case, after pointing out that it is now well settled that s. 91(2) of the British North America Act does not give the Dominion the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province, Lord Atkin said at p. 719:—

> And it follows that to the extent that the Dominion is forbidden to regulate within the province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

At p. 720 he added:

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

None of the questions on the present reference relates to the competency of the provincial statute here in question, no doubt because of the decision in *Shannon's* case.

The grounds of attack upon the scheme in the case at bar are that (*a*) its whole purpose and result is to control extra provincial trade; (*b*) the legislative powers of Parliament cannot be delegated to a provincial legislature or any agency thereof; and (*c*) the taxes imposed by rules Nos. 2 and 6 of the Potato Board are not authorized by the statute and in any event are indirect.

The provincial Order-in-Council was made on September 5, 1950, subsequent to the Dominion Act which had been assented to on April 30, 1949, but before P.C. 5159 was made thereunder on October 25, 1950. With respect to the second ground of attack, with which I shall deal first, there is in fact no question here of any delegation of legislative authority by Parliament either to the provincial legislature or to the Lieutenant-Governor-in-Council. Neither the Dominion statute nor P.C. 5159 purports to empower either to do anything. Mr. Farris contends that the Canadian Act is incompetent to confer any authority on the provincial board for the reason that the board, although not a corporation, is an entity apart from its

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members, and the provincial legislature is without legislative competence to endow it with capacity to accept powers from Parliament exercisable with respect to international and interprovincial trade. He referred to the judgment of Farwell J. in *Taff Vale Ry. Co.* v. *Amalgamated Society of Ry. Servants* (1).

In my opinion, the provincial board "is but a name for the individuals that compose it," to adopt the language of Atkin L.J., as he then was in *Mackenzie-Kennedy* v. *Air Council* (2). Under the legislation there in question, the Air Council was given attributes more closely resembling those of a corporation than in the case of the provincial board. But, like the board, the Council was not expressly created a corporation. It was held by all the members of the court that the Council was not a corporation. Atkin L.J., in the course of his judgment, pointed out that there were in existence prior to the Act of 1917, by which the Air Council was constituted, other statutes expressly constituting department of state, corporations. At p. 534, after referring to the language of Littledale J. in *Tone River Conservators* v. *Ash* (3), namely, that "To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident," the learned Lord Justice said:

> If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances, he found himself unable to find, in the language employed by the Legislature, "the manifest intention to incorporate" which Littledale J. thought essential.

In the case at bar there is, in my opinion, a clear indication to be found in the legislation that it was not the intention of the provincial Legislature to incorporate. The statute of 1940 followed and repealed the earlier P.E.I. Natural Products Marketing Act (1934) 24 Geo. V c. 17. By s. 3 of that statute the Lieutenant-Governor-in-Council

(1) [1901] A.C. 426. (2) [1927] 2 K.B. 517.
(3) (1829) 10 B. & C. 349 at 384.

was authorized to establish a board for the purposes of the statute, and the board, by ss. 6, was expressly made a body corporate, but when the Act of 1940 was passed, ss. 6 of the earlier legislation was dropped. A further indication of the legislative intention may be gathered from s. 7 of the Act to amend the statute law, c. 1 of the statute of 1951, which adds a new section to the Act of 1940, as follows:

> 16. No action shall be brought against any person who since the fifth day of September, 1950, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of this Act for anything done by him in good faith in the performance or intended performance of his duties under this Act.

I therefore think that there is no question of incorporation in the case of the provincial board, and that the principle to which Mr. Farris called our attention does not apply. There is, accordingly, no lack of capacity on the part of the individuals, from time to time, who make up the potato board to receive authority from Parliament.

Coming to the scheme itself, it must depend for its validity upon the provincial statute alone, as the Lieutenant-Governor-in-Council derives his authority to establish the scheme from that statute and from that statute alone. Para. 4 of the scheme provides that it shall apply to "all" persons who grow, pick, store, buy or sell potatoes of any kind or grade thereof in the regulated area. Para. 16 provides that the Potato Board shall have certain powers exercisable "in Prince Edward Island" in relation to the marketing of potatoes "therein", including the power (*a*) to prescribe the manner in which potatoes shall be marketed, (*b*) to designate the agency through which potatoes shall be marketed, (*c*) to prohibit the buying, selling, packing, storing or transporting of potatoes which do not conform to quality standards, (*d*) to license potato dealers and determine the amount of licence fees and the terms and conditions upon which dealers may buy, sell, transport and otherwise handle potatoes, (*e*) to fix and collect licence fees from all or any persons so engaged, (*f*) to exempt any person or class from the scheme, (*g*) to fix the minimum price or prices at which potatoes may be bought or sold "in Prince Edward Island for delivery in Prince Edward Island," (*h*) to require production of records, (*i*) to regulate

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the shipment and marketing of potatoes in such manner as the board may deem advisable, (*j*) to establish a fund in connection with the scheme and to fix and collect charges in a similar manner to the collection of licence fees from *all* or any persons producing, packing, transporting, storing or marketing potatoes. Para. 18 provides that *every* person who buys, sells, transports, or otherwise handles potatoes shall have a licence issued by the board, and *no* person may buy, sell, offer for sale, or otherwise deal in potatoes produced in the regulated area unless he is in possession of a licence.

On November 6, 1950, the board issued its Order No. 1 providing that *no* dealer should engage in the marketing of potatoes without a dealer's licence obtained from the board. On December 18, 1950, by Order No. 3 the board fixed certain minimum prices at which potatoes might be bought from producers delivered at "Prince Edward Island shipping points." Sub-para. 3 provided that from and after midnight of December 20, 1950, *no dealer or other person* should sell or market potatoes on consignment or ship potatoes "from" Prince Edward Island for sale on consignment.

On November 6, 1950, Order No. 2 had been passed levying a charge of one cent for every one hundred pounds of potatoes "shipped or exported" by dealers "from" the province, but by Order No. 6 of February 14, 1951, Order No. 2 was repealed, but the liability of dealers for amounts then due was preserved. Order No. 6 goes on to provide that *every* producer shall pay a levy of one cent per one hundred pounds of potatoes in respect of "all potatoes sold or marketed by such producer." *Every* dealer is to be an agent of the board for the purpose of collection of this levy.

By para. 19 the board is authorized to name two representatives to act conjointly with representatives named under the authority of legislation of Nova Scotia and Newfoundland to "regulate and co-ordinate the marketing of potatoes produced in the said provinces" and in Prince Edward Island, and to delegate to such committee the powers of the board.

In my view, the powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered, as was admitted at the bar, that the business of marketing potatoes in the province is preponderantly an export business.

The order of the Lieutenant-Governor-in-Council would appear to have been passed on the theory that in so far as it went beyond the matter of regulation of purely local trade, the powers of the board could be supplemented by an Order-in-Council under the Dominion statute. That this is so was quite frankly admitted by the Attorney-General for Prince Edward Island in his argument before this court. The provincial Order-in-Council is to be judged, however, on the basis of that which was authorized by the provincial statute alone, as the competency of the Lieutenant-Governor-in-Council could not be increased by anything which might be done by the Governor-General-in-Council under the Dominion Act; *A.G. for N.S.* v. *A.G. for Canada* (1). I see no basis upon which the good may be severed from the bad. I therefore conclude that the scheme is invalid. While the Dominion Order-in-Council is valid to clothe the designated individuals with authority to regulate interprovincial and international trade, it is clear, in my view, that the orders made by the board apply and were intended to apply indiscriminately over the whole field, local, interprovincial and international, and are therefore incapable of being supported in the restricted field.

In the result, while it is clearly within the competence of Parliament and a provincial legislature to authorize an agency such as the agency contemplated by the legislation here in question so as to bring about regulation of the whole field of trade in a natural product, it is necessary that the Dominion and provincial legislation respectively be confined to the legislative jurisdiction of each legislature.

(1) [1951] S.C.R. 1.

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While in the Reference re the *Minimum Wage Act of Saskatchewan* (1), it was found possible to construe the legislation there under consideration as applicable only to persons subject to provincial jurisdiction, I do not think it practicable so to construe the provincial Order-in-Council here in question, having regard not only to the form of its enactment but also to its subject matter. The legislative intention, as expressly disclosed by para. 4, extends over the whole field of trade, and even if that paragraph could be written out of the scheme, the same intent is expressed in sub-paras. (*a*), (*b*), (*f*) and (*i*) of para. 16. In my view, to strike out any one or more of these provisions, leaving the rest standing, would be to rewrite the Order-in-Council, which I do not think it is open to the court to do.

I would therefore answer questions 1 and 2 in the affirmative, and questions 3 and 4 in the negative.

The judgment of Estey and Cartwright, JJ. was delivered by:—

ESTEY, J.:—This reference is concerned with the validity of a plan for co-operation between the Parliament of Canada and the provincial legislatures in the marketing of natural products.

The legislature of Prince Edward Island enacted in 1940 the *Agricultural Products Marketing (Prince Edward Island) Act* (S. of P.E.I. 1940, c. 40) which authorized the Lieutenant Governor in Council to set up a scheme for the marketing of natural products. The language of this statute anticipated co-operation with the Parliament of Canada.

The Parliament of Canada in 1949 enacted *The Agricultural Products Marketing Act* (S. of C. 1949 (1st Sess.), c. 16) designed particularly to make possible co-operation with the provinces in the marketing of natural products.

The legislature of Prince Edward Island in 1950 amended (S. of P.E.I. 1950, c. 18) its statute of 1940 in order to make it more in accord with that of the Parliament of Canada.

(1) [1948] S.C.R. 248.

In this reference the validity of the provincial act is not questioned, no doubt because its provisions are, in all material particulars, to the same effect as those of the act of British Columbia declared to be within the competence of the provincial legislature in *Shannon* v. *Lower Mainland Dairy Products Board* (1).

On September 5, 1950, as authorized by the provisions of the above-mentioned provincial statute, the Lieutenant-Governor-in-Council, by Order-in-Council, established a scheme "for the control and regulation within the Province of the transportation, packing, storage and marketing" of potatoes. The Order-in-Council also provides for a board of five members designated as the Prince Edward Island Potato Marketing Board (hereinafter referred to as the Potato Board) to carry out the provisions of the scheme. The board elects its own chairman and may appoint a secretary-treasurer and such other officers and employees as the members may deem expedient. In para. 16 in the Order-in-Council its powers are particularly set out.

The Governor General in Council, under the authority of s. 2 of *The Agricultural Products Marketing Act,* passed P.C. 5159, October 25, 1950, granting to the Potato Board "powers like the powers exercisable by" that board "in relation to the marketing of Prince Edward Island potatoes locally within the province" as set out in nine of the sub-paras. of para. 16 of the scheme under the provincial Order-in-Council.

The Government of Prince Edward Island referred to the Supreme Court of that province the following four questions: (As to which see p. 394).

This is an appeal from the answers given to the questions by the Supreme Court of Prince Edward Island.

The *Agricultural Products Marketing Act* is restricted to the interprovincial and export trade and neither purports to nor does it interfere with provincial trade as did earlier legislation declared to be *ultra vires. Re The Natural*

(1) [1938] A.C. 708; Plax. 379.

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Products Marketing Act 1934, as amended, 1935, (1) and (2). It is, however, contended that the statute is *ultra vires* in so far as it provides for the delegation of power by the Governor in Council as set forth in s. 2:

> 2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.
>
> (2) The Governor in Council may by order revoke any authority granted under subsection one.

The Supreme Court of Prince Edward Island concluded that the Parliament of Canada, in the foregoing s. 2, had provided for a delegation of a type this Court held to be *ultra vires* in *A.G. of N.S.* v. *A.G. of Canada* (3). It was there held the delegation of legislative powers by the Parliament of Canada to a provincial legislature, or by a provincial legislature to the Parliament of Canada, of their respective legislative powers was beyond the competence of these bodies. The problem here presented is quite different in that it is the delegation by the Governor General in Council to the Potato Board, an agency created by the Legislature of the province.

The constitution of this Potato Board is similar to that of the Labour Relations Board of Saskatchewan in respect of which Mr. Justice Kerwin, with whom my Lord the Chief Justice concurred, stated: "* * * the Board is a legal entity, and * * * 'has a right to be heard in Court' " *Labour Relations Board, Sask.* v. *Dominion Fire Brick and Clay Products Limited* (4).

It is, however, contended that the Parliament of Canada cannot confer upon this Potato Board the powers the Governor General in Council sought to do by Order-in-Council P.C. 5159. Our attention was directed to the

(1) [1936] S.C.R. 398.
(2) [1937] A.C. 377; Plax. 327.
(3) [1951] S.C.R. 31.
(4) [1947] S.C.R. 336.

distinction between capacity and powers as expressed by Viscount Haldane in *The Bonanza Creek Gold Mining Co.* v. *Rex* (1), where he stated:

> But actual powers and rights are one thing and capacity to accept extraprovincial powers and rights is quite another * * * In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies.

That the legislature appreciated the foregoing distinction between capacity and powers is evidenced both by the history of the legislation and the language adopted in the enactment itself. The legislature, in passing The Agricultural Products Marketing Act in 1940, repealed (s. 14) The Natural Products Marketing Act 1934 (S. of P.E.I. 1934, c. 17), which provided that the Lieutenant Governor in Council might establish a board to be known as the Provincial Marketing Board and, under s. 3(6) thereof, it was expressly created "a body corporate." In the 1940 act the Lieutenant Governor in Council was again authorized to constitute a board to be known as the "Prince Edward Island Marketing Board" and to "constitute marketing boards," but it does not contain a provision making either a body corporate.

The language of the 1940 statute is equally indicative of the intention of the legislature where, in relation to the marketing boards, it authorizes only the vesting of powers therein. S. 4(2), under which the Potato Board was created, provides that the Lieutenant-Governor-in-Council "may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers" and again in s. 5 the Provincial Board (which includes the Potato Board) may be vested with "additional powers." Then the Lieutenant-Governor-in-Council, in constituting the board, provided in the opening words of para. 16 that it "shall have the following powers." Whatever the precise nature and character of such a statutory

(1) [1916] 1 A.C. 566; 2 Cam. 75 at 89.

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unincorporated body, as ultimately determined, may be, it is sufficient here to observe that the legislature, in constituting this board as it did, without making it a corporate body, intended that the board should exercise the capacities of natural persons, but restricted the exercise thereof to the powers vested in them as a board. As stated by Farwell J., whose language was approved by the House of Lords, when speaking in reference to an unincorporated body, "The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature." *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1).

It is conceded that the Governor-General-in-Council might appoint the five individual members of the Potato Board and vest them with the same powers as set out in P.C. 5159. When, however, it is appreciated that this Potato Board is an unincorporated legal entity with the capacity of a natural person, there appears to be nothing in principle or authority to prevent the Governor-General-in-Council designating and authorizing it to discharge such duties and responsibilities as may be deemed desirable within the legislative competency of the Parliament of Canada.

The province, under s. 7 of the provincial act, retains control over its board. The Governor-General-in-Council may, of course, from time to time, change, alter or withdraw any authority it has conferred upon the board under P.C. 5159. The scheme here created is, throughout, a co-operative effort on the part of the respective governing bodies in which each maintains its own respective legislative fields. The board, under the scheme, is responsible to the respective governments in the discharge of those powers which each has competently conferred upon it.

The principle of the delegation and imposition of duties by the Parliament of Canada upon bodies created under provincial legislation was recognized in *Valin* v. *Langlois* (2). With the greatest possible respect to the learned

(1) [1901] A.C. 426 at 429. (2) (1879) 3 Can. S.C.R. 1.

judges in the Appellate Court who held a contrary opinion, I think question No. 1 should be answered in the affirmative.

The Governor General's Order-in-Council P.C. 5159 appears to be within the provisions of the *Agricultural Products Marketing Act* as enacted by the Parliament of Canada in 1949 and, therefore, the answer to question No. 2 should be in the affirmative.

Under question No. 3, if the Lieutenant-Governor-in-Council has established the scheme within the limits of the act of 1940, the competence of which is here not questioned, it is valid. It is suggested, however, that the Lieutenant-Governor-in-Council, in passing para. 4 of the scheme, has exceeded the limits of the power authorized by the provincial act. Para. 4:

> 4. This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes * * * *

The respective provisions of the scheme must be read and construed together. The general language setting forth the scope and application of the scheme in para. 4 must be read with the provisions of para. 16 granting to the board its powers. This para. 16 at the outset expressly states:

> The Potato Board shall have the following powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein.

The several powers enumerated in subparas. (*a*) to (*k*) are in accord with the opening words. When, therefore, the general language of para. 4 is read in relation to the powers as vested in the board under para. 16, it becomes clear that it was intended para. 4 should be construed and ought to be construed to apply only within the field of competent provincial jurisdiction.

In so far as the Lieutenant-Governor-in-Council, in para. 16(*d*) and (*e*), authorized the Potato Board to require licences and to impose fees therefor, the act was within the competence of the province. *Shannon* v. *Lower Mainland Dairy Products Board supra* at p. 391:

> 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

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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.

It was also contended that subpara. 16(*k*) is invalid. It provides for the establishment of a fund "for the proper administration of the scheme" and contemplates that it shall be fixed and collected in the manner provided by subpara. 16(*e*). Such an imposition would appear to be within the competence of the Province, so long as it is not made in a manner and an amount that would cause it to enter into the price of the commodity and, therefore, to be in reality an indirect tax. Lord Herschell, in relation to the imposition of a uniform licence fee of $100, when considering it as a matter of direct or indirect taxation, stated:

> They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. *Brewers and Maltsters' Association of Ont.* v. *A.G. for Ont.* (1).

The language of para. 16(*k*) so read and construed does not appear to be objectionable.

Para. 19 of the scheme provides for an interprovincial committee "to regulate and co-ordinate the marketing of potatoes produced" in the provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and provides that, subject to the approval of the Prince Edward Island Marketing Board, the Potato Board may delegate to that committee "such of its powers as it may deem advisable." This provision contemplates the provinces dealing with interprovincial and export trade and is beyond the competence of the province to enact. I would, therefore, answer question No. 3 yes, except para. 19.

(1) [1897] A.C. 231; 1 Cam. 529 at 534.

The scheme, as constituted by the Lieutenant-Governor-in-Council, may be valid, and yet the board, in adopting orders and regulations, may exceed its authority and it is suggested in question No. 4 that the board has done so. The board has made seven orders, an examination of which would indicate that all but Orders Nos. 2 and 6 are within the authority of the board. Under Order No. 2 the board imposed, for the purpose of establishing a fund in connection with the scheme, upon every dealer a charge or levy at the rate of one cent for every 100 pounds of potatoes shipped or exported by such dealer. This Order was repealed by Order No. 6, but it was provided that any amount due or accruing due and unpaid under Order No. 2 remained an outstanding liability. Order No. 6 then proceeded to impose a similar charge or levy of one cent per 100 pounds of potatoes upon every producer in respect of all potatoes sold or marketed by such producer. It might be sufficient to say that neither the act nor the scheme authorizes the Potato Board to make a levy of the sort contemplated by these Orders, but there is a further objection to their validity. This charge or levy is in relation to a sale of potatoes and its nature and character is such that it would be passed on by the dealer as part of, and, therefore, would enter into, the price of the commodity. It is, therefore, in substance an indirect tax and cannot be competently enacted by the province or any agency thereof. Question No. 4 should be answered yes, except as to Orders Nos. 2 and 6.

The questions submitted should be answered: Question No. 1, yes; Question No. 2, yes; Question No. 3, yes, except as to para. 19; Question No. 4, yes, except as to Orders Nos. 2 and 6.

Appeal allowed.

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REPORTER'S NOTE: Following the Reference by the Lieutenant-Governor-in-Council to the Supreme Court of Prince Edward Island *in banco,* by order of Campbell C.J. the appellant as a representative of the class interested in maintaining the affirmative of the questions put, and the respondent as representative of the class interested in maintaining the negative, were named nominal plaintiff and defendant respectively. On the fyling of pleadings it appeared to the Court *in banco* that questions were raised as to the validity of Acts of the Parliament of Canada and the Legislature of Prince Edward Island, and the Attorney General thereof and the Attorney General of Canada having been granted leave to intervene at any stage of the proceedings and the Attorney General of Prince Edward Island having intervened, and it appearing to the Court *in banco* that a conclusive determination of the said questions by the Court of highest resort was desired by the parties and that such determination could be more expeditiously obtained by removing the case to the Supreme Court of Canada, it was ordered by the Court *in banco* that the Reference be so removed. Pursuant to this Court's direction argument as to its jurisdiction was heard on Oct. 25, 1951. H. F. McPhee K.C. appeared for the appellant and K. M. Martin K.C. for the respondent. Judgment was reserved and on Nov. 2, 1951, Cartwright J. delivered the unanimous judgment of the Court holding that under s. 37 of the *Supreme Court Act* an appeal lies only from the opinion of the highest court of final resort in the province in any matter referred to it by the Lieutenant-Governor-in-Council and no such opinion having been pronounced the appeal should be quashed but with no order as to costs.