DOMINION - PROVINCIAL CONFERENCE

Opinions on Constitutional Law

No. 7. Marketing of Natural Products

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C O N T E N T S

		Page
I.	Text of the B. N. A. Act	
II.	Recommendation of Sirois Commission	1
III.	Analysis of Recommendation	5
IV.	The Regulation of Trade in General	6
V.	The Regulation of Marketing	12
VI.	Considerations re Amendment	22
VII.	Draft Amending Section	26

TEXT OF THE B. N. A. ACT

91. . . . it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:-

2. The Regulation of Trade and Commerce.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:-

13. Property and Civil Rights in the Province.

16. Generally all matters of a merely local or private nature in the Province.

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

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

II. RECOMMENDATIONS OF SIROIS COMMISSION

... ...

In the broad meaning of the term, "marketing" might include buying and selling, organization of buyers and sellers, prices, grades and standards, market and other commercial practices, etc. While we are fully aware of these broader implications of the word and of recent developments in Canada and elsewhere of a trend toward fuller commercial regulation, we have, none the less, limited our discussion of marketing to the field of natural products. ... ...

... In more recent years there has been a demand that the state should seek to assure minimum prices to producers by organizing and controlling the production and marketing of natural products, and both the Dominion and the provinces have attempted to do this by legistion. ...

Under the provisions of the British North America Act, which have already been quoted, the provinces had exclusive legislative power over "property and civil rights" and local matters within the province, and, therefore, alone could deal with many phases of marketing which were intra-provincial in their scope. The supply of milk to large cities is an example of this type of marketing regulation. The provinces, however, had no power to legislate concerning interprovincial and foreign trade, but in this trade the need for uniformity of standards and accuracy of grading may be even more essential than in local trade. Various attempts were made by the Dominion to establish standards and grades but with little success except for wheat. The prime difficulty encountered by both Provincial and Dominion legislation arose from the fact that grading of many products to be effective must take place when the individual producer first sells his produce, but that then it is often impossible to say whether the particular articles will remain in local trade or will pass into interprovincial or export trade. A similar constitutional difficulty was encountered in recent legislation designed to aid producers by enabling them to establish marketing boards financed by the imposition of licence fees. Dominion legislation of this type has been held to be valid but it is applicable to commodities whose chief market is local and would probably be inapplicable to commodities entering largely into interprovincial or foreign trade; it might even be possible that provincial legislation which was originally valid would become invalid if the commodity concerned ceased to be merely the subject of local trade and came to be widely sold in foreign markets.

It is unnecessary to examine the lengthy series of legal decisions which have held invalid various attempts to enact marketing legislation. Dominion statutes have, in general, been held invalid because they interfered with local trade; provincial statutes have been invalidated because their provisions purported to interfere with inter-provincial and foreign trade. A number of devices have been employed in an attempt to circumvent these constitutional difficulties. Of these the most important was the device of enabling legislation. The Dominion would pass a statute in general terms and the provinces would pass enabling acts which provided that any provisions of the Dominion act which might be ultra vires were declared to have the force of law in the province. The validity of the device of enabling legislation has not been decided by the Supreme Court of Canada or the Privy Council, but it has been determined in three decisions of provincial appeal courts that the provincial enabling acts did not remedy the defects in the Dominion statute. ... ...

Doubts as to the constitutionality of enabling legislation have led to its virtual abandonment. In its place a new device which might be termed "conjoint legislation" has appeared. The provincial legislation, dealing solely with transactions within the province, provides for the Lieutenant-Governor in Council setting up grades and standards and appointing inspectors to administer the act. In practice the grades and standards adopted conform to those of the Dominion, and the inspectors appointed to administer the provincial statute are Dominion inspectors. Although there has been little or no experience of the working of "conjoint legislation" a number of difficulties would seem likely to arise. ... ...

The present position of marketing legislation was, in our opinion, accurately summarized in one of the briefs presented to the Commission when it was said: "It would appear, therefore, that the position after almost 20 years of legislating and referring the constitutionality of various acts of Parliament and of the legislative assemblies to the Courts, finds us exactly where we began, namely, no one knows how to draft workable legislation dealing with the regulation of grading, packing, storing and marketing of agricultural products, which will come squarely within the respective jurisdictions of the Dominion and the Provinces without the exercise of almost incredible caution."

There are a number of reasons why complete and exclusive jurisdiction over marketing legislation cannot appropriately be vested in either the Dominion or the provinces. Exclusive provincial jurisdiction to regulate trade in all commodities including articles entering into interprovincial and foreign trade would tend to destroy the uniformity

necessary for foreign trade, and to create barriers to interprovincial trade that would be highly undesirable and contrary to the spirit, if not the letter, of section 121 of the British North America Act. Exclusive Dominion jurisdiction would involve the regulation of local sales of certain commodities, such as milk and vegetables, which it would be highly inconvenient for the Dominion to do. ... ...

Submissions made in our public hearings were almost unanimous in protesting against the present jurisdiction over marketing legislation and in urging that some change was desirable, but they were not unanimous in suggesting the form that this change should take. But in general the submissions urged that the Dominion and the provinces should share the jurisdiction over marketing, either by creating a concurrent jurisdiction analogous to that over agriculture and immigration in section 95 of the British North America Act, or by creating a power for the Dominion and a province to delegate full authority one to the other to legislate concerning certain phases of marketing.

We believe that either method would accomplish the desired result which is to provide for uniformity where the circumstances demand it, allow for local experimentation where it can be carried on without confusion and difficulty, and above all, to provide for certainty, and at the same time flexibility, of jurisdiction. We think it is desirable that the regulation of local marketing, such as the supply of milk for local consumption, should, in practice, be left to the provinces. Bur the marketing of commodities entering largely into interprovincial and foreign trade should be governed by Dominion legislation, which should be valid notwithstanding the fact that it may also regulate intra-provincial trade in there products.

The creation of concurrent jurisdiction over grading and marketing, analogous to that over agriculture and immigration in section 95 of the British North America Act, would provide a solution of most of the difficulties which have been encountered in attempts to regulate the marketing of natural products. In practice the Dominion would probably legislate concerning only those phases of marketing which had importance for interprovincial and foreign trade, and the provinces would regulate marketing in its local aspects. ... ...

We think that the happiest solution might be to provide specifically for concurrent jurisdiction (analogous to that in section 95 of the British North America Act) over the grading and marketing of a list of defined products, and to provide for the provinces adding other products to

the list from time to time. There appears to be no reason why some of the provinces should not add designated products without waiting for the action of all provinces. The designation might be in perpetuity, or a province might be allowed to concede concurrent jurisdiction over the grading and marketing of added products for a defined period. The exact procedure for designating added products should be defined, and we think that the provision need not be restricted to "natural products" but that manufactured or semi-manufactured products might be similarly dealt with by the Dominion and provinces if it should seem desirable to do so. The whole problem of regulation of marketing would, of course, be greatly simplified if our general recommendation, made elsewhere, providing for delegation of power by a province to the Dominion, or vice versa, were implemented.

III. ANALYSIS OF RECOMMENDATION

1. After noting the fact that in general the submission made to it urged that the jurisdiction should be shared either by creating a power of concurrent jurisdiction, or a power to delegate authority over certain phases of marketing, the Commission stated the object of its recommendation as follows:

> "We believe that either method would accomplish the desired result which is to provide for uniformity where the circumstances demand it, allow for local experimentation where it can be carried on without confusion and difficulty and, above all, to provide for certainty, and at the same time flexibility, of jurisdiction. We think it is desirable that the regulation of local marketing, such as the supply of milk for local consumption, should, in practice, be left to the provinces. But the marketing of commodities entering largely into interprovincial and foreign trade should be governed by Dominion legislation, which should be valid notwithstanding the fact that it may also regulate intra-provincial trade in these products."

   It then recommended an amendment providing specifically for (1) concurrent jurisdiction over the grading and marketing of a list of defined products; and for (2) the right of the provinces to add products to that list.

2. The recommendation is confined to the marketing and grading of natural products. Concentrating on "pressing problems" the Commission recognized but refrained from dealing with other aspects of marketing, such as the regulation of prices.

3. The Commission does not deal with the proper scope of Dominion jurisdiction as to "The Regulation of Trade and Commerce", nor suggest any amendment thereto.

4. The Commission does not recommend that either the Dominion or the Provinces should have exclusive jurisdiction to enact marketing legislation.

5. The Commission notes that the whole problem of regulation or marketing would be simplified by enactment of a general power of delegation, as recommended by it in another place. (As to this, see Opinion 2, "The Delegation of Legislative Power by and to the Dominion Parliament")

6. The Commission's solution calls for an amendment providing "specifically for concurrent jurisdiction over the grading and marketing of a list of defined products" and for the addition thereto by the Provinces of other products in perpetuity or for a defined period.

This recommendation goes beyond the other type of concurrent jurisdiction specified in Section 95 in providing for increase from time to time by the Provinces of the subject-matters as to which that jurisdiction is to apply and seems, as to such increase, to import something in the nature of ad hoc provincial delegation. (As to the feasibility or desirability of this blending of the concept of "concurrent" power with that of "delegation", see infra under Section VI.)

IV. THE REGULATION OF TRADE IN GENERAL

This Opinion will confine itself as rigorously as possible to marketing legislation in relation to natural products. Such legislation, however, is but a branch of trade and commerce legislation. Accordingly one would expect to find jurisdiction as to the marketing

of commodities to be vested in the Dominion under its power to legislate concerning "The Regulation of Trade and Commerce" (Section 91, No. 2). This is only partly true, however, for the Provinces also possess jurisdiction to deal with marketing as a matter coming within "Property and Civil Rights" and within "Matters of a merely Local or Private Nature" (Section 92, Nos. 13 and 16). Therefore it seems that proper consideration of a recommendation to confer concurrent powers to legislate as to marketing requires some knowledge of the extent to which, and the manner in which, the Dominion and the Provinces have been held competent to regulate matters of trade under these several heads including, in particular, the matter of the marketing of natural products. This is particularly true as it is not suggested by the Commission that these heads be amended; but rather that the marketing aspect of trade regulation be singled out for special treatment by way of inserting a power of concurrent legislation.

It may be stated at once that the Dominion power under Section 91, No. 2, undoubtedly "does embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers". (Reference re Natural Products Marketing Act (1936) S.C.R. 398 at 410; Lawson v. Interior Committee (1931) S.C.R. at 366.) It has also been said to include "general regulation of trade affecting

the whole Dominion" (Citizens Ins. Co. v. Parsons (1881) 7 App. Cas. 96; John Deere Plow Co. v. Wharton (1915) A.C. 330); but the extent of this aspect of the power is still obscure and has applied so far only in the sense of enabling the Dominion to prescribe the extent to which certain Dominion companies shall be entitled to trade in the Provinces (John Deere Plow Co. v. Wharton, supra). On the other hand, Provincial power, under Section 92, Nos. 13 and 16, extends to the regulation of internal or intra-provincial trade in all possible phases. (Considerable discussion of Section 91, No. 2, is to be found in Opinion No. 4, "The Regulation of Insurance".)

It is clear, however, that neither the Dominion nor a Province can invade the field of the other; and so the Courts have invalidated Dominion legislation because, intentionally or otherwise, it interfered with trade within a Province (Eastern Terminal Elevator Co. v. The King (1925) S.C.R. 434) and Provincial legislation has shared the same fate when held to interfere with inter-provincial or external trade. (Lawson v. Interior Committee (1931) S.C.R. 357; In re Grain Marketing Act (1931) 2. W.W.R. 146.) The course of the decisions emphasizes the fact noted by the Commission (Book I, p.250) "that the power to regulate economic life is divided between the Provinces and the Dominion and that neither one can encroach on the sphere of the other."

The reality of this division of power in the field of trade regulation may be seen by comparing types of Dominion legislation held to be invalid with types of Provincial legislation held to be valid.

The following Dominion legislation has been held invalid as being in relation to Property and Civil Rights or to matters of a merely local or Private Nature in the Province: legislation for the abolition of the liquor traffic (A.G. Ontario v. A.G. Dominion (1896) A.C. 348); legislation for the regulation of "through traffic" over Provincial and Dominion Railways (Montreal v. Montreal St. Ry. (1912) A.C. 333); legislation prohibiting trade combinations and hoarding and regulating the sale and fixation of prices of commodities (In re Board of Commerce Act (1922) 1 A.C. 191); legislation for the regulation of the grain trade of Canada and of the business of those who deal in grain as warehousemen, vendors or agents, etc. (Eastern Terminal Elevator Co. v. The King (1925) S.C.R. 434; Trimble v. Capling (1927) 1 W.W.R. 188; Sask. Co-op. Wheat Producers v. Zurowski (1926) 3 D.L.R. 810); legislation regulating sales and deliveries of eggs (and their marking and grading) occurring entirely within a province (R. v. Zaslavsky (1935) 3 D.L.R. 788; R. v. Thorsby Traders Ltd. (1935) 3 W.R.R. 475; R v. Brodsky (1936) 1 W.W.R. 177; Cf. R. v. Collins (1926) 59 O.L.R. 453); legislation for the regulation of individual forms of trade within a province such as marketing transactions in natural products having no connection with inter-provincial or external trade (A.G. British Columbia v. A.G. Canada (1937) A.C. 377); legislation for the validation of agreements between persons in an industry as to competition in a trade within a Province (Reference re

Trade and Industry Act (1936) S.C.R. 379; Cf. (1937) A.C. 405); legislation regulating the licensing of fish canneries and the trade processing of fish (A.G. Canada v. A.G. British Columbia (1930) A.C. 111).

The following Provincial legislation has been held competent under Secs. 92, Nos. 13 and 16; legislation for the suppression and regulation of the liquor traffic, the creation of a government monopoly of sale of liquors, and the compulsory licensing of brewers and distillers (Brewers and Maltsters Ass. v. A.G. Ontario (1897) A.C. 231; A.G. Manitoba v. Manitoba License Holders' Asso. (1902) A.C. 71); legislation as to the content and form of contracts of insurance and the regulation of the insurance business generally within a Province (see Opinion No. 4); legislation for the control of production of natural gas in a province (Spooner Oils Ltd. v. Turner Valley Gas Conservation Co. (1933) S.C.R. 629); legislation regulating the sales and price of milk in a province (R. v. Simoneau (1936) 1 D.L.R. 143; R. v. Cherry (1938) 1 W.W.R. 12); and the marketing of natural products generally within a province (Shannon v. Lower Mainland Dairy Board (1938) A.C. 708); legislation prescribing the manner in which any business shall be carried on within the Province even by Dominion companies (Re Insurance Act of Canada (1932) A.C. at 45, 52); legislation creating a monopoly of sale of a commodity within a province (In re Grain Marketing Act (1931) 2 W.W.R.146); legislation regulating the weight at which, and the manner in which, bread

must be marked for sale within a province (R. v. Kay (1909) 30 N.B.R. 278; Re Bread Sales Act (1911) 23 O.L.R. 238; In re Naismith (1883) 2 Ont. Rep. 192; R. v. Chisholm (1907) 14 O.L.R. 178); and finally it appears that the Provinces may "regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities" (Per Curiam in Reference re Natural Products Marketing Act (1936) S.C.R. at 412, affirmed (1937) A.C. 377; Cf. Reference re Fisheries Act (1928) S.C.R. at 471).

In addition to this jurisdiction derived from S. 92, Nos. 13 and 16, the Provinces also possess a measure of power to regulate trade by virtue of their jurisdiction in relation to Direct Taxation and Licensing (Section 92, Nos. 2 and 9); similarly the Dominion has additional power by virtue of its jurisdiction to impose customs duties on goods imported into Canada (Customs Duties Case (1924) A.C. 222).

For a full discussion of the decisions in relation to Trade and Commerce and to Property and Civil Rights see Report by the Parliamentary Counsel of the Senate (W. F. O'Connor, K. C.) on The B. N. A. Act, Annex I, pp. 78 and 109.

V. THE REGULATION OF MARKETING

The division of jurisdiction in the matter of trade regulation as depicted above is reflected in the situation as to jurisdiction in relation to the marketing of natural products. It will be sufficient to note three groups of cases:-

(a) The first group relates to the grain trade.

The nature and fate of an early attempt by the Dominion to regulate this trade is revealed in the headnote to Eastern Terminal Elevator Co. v. The King (1925) A.C. 396, which is as follows:

> "The Canada Grain Act was passed in 1912 to control and regulate, through The Board of Grain Commissioners, the trade in grain. It provides that all owners and operators of elevators, warehouses and mills and certain traders in grain, shall be licensed; for supervision of the handling and storage of grain in and out of elevators, etc.; and prohibits persons operating or interested in a terminal elevator from buying or selling grain. It contains also provisions for inspection and grading. This Act was amended in 1919 by adding to Sec.95, subsec. 7 which provides that if at the end of any crop year in any terminal elevator 'the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year' such surplus shall be sold for the benefit of the Board.
>
> Held, that this subsection is only a part of the scheme of the Act to control and regulate the business, local and otherwise, of terminal elevators which it is not within the competence of Parliament to enact.
>
> Held, per Duff and Rinfret JJ., that the legislation is not warranted by the fact that three-fourths of the trade in grain is export out of Canada. If Parliament can provide for control of the local business under that condition it must have power to do so whatever may be the extent of the export trade."

The point of this case is that an attempt by the Dominion to secure national control of the trade in grain, which is very largely export trade, failed because a key provision was held ultra vires as being part of a scheme to control and regulate the business, local and export, of terminal elevators and the occupations of those who operated them. It is to be noted that the undoubted Dominion power to control the grain trade in its external and interprovincial aspects did not avail, because the attempt infringed on local trade and the rights of persons engaged therein.

A measure of control of this trade has since been secured by the device of declaring grain elevators to be "works for the general advantage" and thereby bringing them under Dominion jurisdiction by virtue of S.92 (10)(c) -- an exercise of the declaratory power which the writer regards as of dubious validity.

Conversely, a Provincial attempt to control the grain trade also failed.

In re Grain Marketing Act (1931) 2 W.W.R. 146), the Saskatchewan Court of Appeal held the (provincial) Grain Marketing Act, 1931 (providing for the compulsory pooling of wheat for the marketing within or without the Province of all grain grown in the Province), to be ultra vires, because enacted with the object of controlling the export of grain from Saskatchewan to other Provinces and foreign countries, and because the right of a resident of a province to export therefrom and sell elsewhere grain grown therein is not a matter of "Property and Civil Rights within the Province" nor a "Matter of merely Local or Private Nature in the Province".

(b) The second group of cases relates to the marketing of natural products.

In Lawson v. Interior, Tree, Fruit and Vegetable Committee (1931) S.C.R. 357, the Supreme Court of Canada held ultra vires as regulating trade in matters of interprovincial concern the Produce Marketing Act of British Columbia, which enabled a Provincial Committee, inter alia, to "control the manner in which traders in other provinces shall carry out their interprovincial transactions . . . and to dictate the routes of shipment, the places to which shipment is to be made . . . and to fix license fees to be paid by shippers" etc.

In Shannon v. Lower Mainland Dairy Products Board (1938) A.C. 708, another British Columbia marketing Act was held intra vires as being "confined to regulating transactions that take place wholly within the Province" and as being "an Act to regulate particular businesses entirely within the Province". The scheme of the Act, thus upheld, enabled the Governor in Council to set up a central Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural product, to constitute marketing boards to administer such schemes and to vest in them any powers considered necessary, including the power to fix and collect license fees from persons engaged in such activities.

Somewhat analogous provincial legislation for the regulation within a province of the sales and prices of milk has been held valid as relating to "Property and Civil Rights" and "Matters of a Private and Local Nature". (R. v. Simoneau (1936) 1 D.L.R. 143; R. v. Cherry (1938) 1 W.W.R. 12.)

The Dairy Products Sales Adjustment Act 1929 of British Columbia, which sought to adjust the proceeds of the sales of milk as between various classes of producers, was held ultra virew as indirect taxation. (Lower Mainland Dairy v. Crystal Dairy (1933) A.C. ,68.)

In The Natural Products Marketing Act Case (1937) A.C. 377, the Privy Council held ultra vires Dominion legislation providing (inter alia) for the establishment of a Dominion Marketing Board with power to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, to determine the manner of distribution, and the quantity, or class of the product, etc., that should be marketed by any person at any time, and to prohibit the marketing of any such regulated products, and providing for the control by the Governor in Council of the export from, and the importation into, Canada of such products.

In holding this not to be competent under the Trade and Commerce Clause, the Privy Council (at pp. 386-7) said:

> "The provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade . . . It was sought to bring the Act within The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-Provincial and export trade. But the

> regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province. In his judgment the Chief Justice says: 'The enactments in question, therefore, inso far as they relate to matters which are in substance local and provincial, are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-Provincial trade and committing the regulation of external and inter-Provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority'. Their Lordships agree with this; and find it unnecessary to add anything."

Their Lordships, after rejecting the contention that the Act was valid under the Residuary Clause of Section 91, reached the conclusion that "in the result there is no answer to the contention that the Act in substance invades the Provincial field and is invalid."

This case also falls within the third group and will be mentioned in relation thereto.

(c) The third group of cases in the field of marketing relates to co-operative attempts by the Dominion and the Provinces to deal with topics partly within the jurisdiction of each but requiring unified administration in order to be effective.

The Privy Council in several cases had enumerated the "co-operation" theory, viz., that as to given topics where jurisdiction was divided so that neither the Dominion nor the Provinces could effect a desired object, they might by co-operative action

attain that object by each legislating in such a way as together to cover the topic in the way desired. (See Montreal Street Railway Case (1912) A.C. 333, where it was suggested that through-traffic on Dominion and Provincial railways could be controlled in this way.)

This judicial cue has been seized on as a way out of the evils of divided jurisdiction. Two devices have been used. First, there was the device of enabling Provincial legislation, designed to cure the infirmities of Dominion jurisdiction by making particular Dominion legislation applicable to any matter within the jurisdiction of the Provinces, or by providing that provisions of a Dominion enactment which were ultra vires the Dominion should have the force of law in the Province.

One useful illustration of this device is to be found in the attempts by the Provinces to continue the application to industrial disputes in a Province of the Industrial Disputes Investigation Act, which had been held ultra vires in the Snider Case in 1925. The Dominion Act was amended to make it applicable "to any dispute which is within the exclusive legislative jurisdiction of any Province and which by the legislation of the Province is made subject to the provisions of this Act." The Provinces co-operated with this invitation by individually declaring that the Dominion Act should "apply to a dispute which is within or subject to the exclusive legislative jurisdiction of the Province"; although some of the Provinces later repealed such enabling legislation and enacted their own measures for dealing with industrial disputes.

This device was also used with relation to the provisions of the Dominion Live Stock and Live Stock Products Act, which dealt with the inspection, marking and grading of eggs etc., and which were held ultra vires in R. v. Collins (1926) 59 O.L.R. 453. Certain of the Provinces purported to validate these provisions as applicable thereto. This device was held ultra vires in three provinces as attempts by one legislative body to delegate jurisdiction to another. The net effect of these decisions was that, as the provisions of the Dominion Act were ultra vires as relating to the control of sales and purchases within a Province, they could not be made valid by such provincial legislation. (Rex v. Zaslavsky (1935) 3 D.L.R. 788; Rex v. Thorsby Traders (1936) 1 D.L.R. 592; Rex v. Brodsky (1936) 1 D.L.R. 578.)

The second device was that of"dove-tailing" or "conjoint" or "complementary" legislation by the Dominion and the Provinces, which is sometimes, and inexactly, called "concurrent" legislation.

The Dominion legislation which was held ultra vires in The Natural Products Marketing Act Case, supra, was designed to co-operate with provincial Acts in relation to marketing, e.g., it provided for the exercise by the Dominion Board of any powers conferred thereon by provincial legislation. Moreover, every Province had co-operated with the Dominion in setting up marketing boards and had enacted special legislation to provide fot this co-operation and to dove-tail in with the Dominion Act. Nevertheless, the result

was that because the Dominion Act, in addition to dealing with foreign and inter-Provincial trade, also covered, in terms not severable, transactions completed in a Province, it was ultra vires as a whole.

Counsel for British Columbia had argued "that there are really practical reasons why this legislation (the Dominion Act) should be supported: it was obviously designed to fit in along with Provincial Acts in relation to marketing . . . ; experience in British Columbia had shown that the two Acts were working in complete accord; the same Board could function in two capacities - both as a Federal and as a Provincial Board."

Their Lordships discussed this contention and said the last word on the theory of conjoint legislation as follows:

> "The Board were given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation; and their attention was called to the existence of provincial legislation setting up provincial schemes for various provincial products. 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 the present case their Lordships are unable to support the Dominion Legislation as it stands."

In the result, so far as effective marketing legislation requires the subject to be covered by legislation dealing with it in its three-fold aspects as foreign, inter-provincial and local trade regulation, it is legally possible to do so by "properly-framed" legislation of a "conjoint" or "complementary" character, but close to being practically impossible. The following passage indicates this situation in striking, and reasonably accurate, terms:

> "To have effective marketing legislation in Canada it becomes necessary to devise Dominion legislation which does not by so much as a hair's breadth invade the provincial field, and to supplement this by concurrent provincial legislation, enacted by all the provinces, which would deal with the matter in so far as it was in the provincial field. Each must deal with its own; neither can deal with both or with the other. But to be effective both would have to be pieced together so as to leave no gap between them. While to be effective the legislation must nearly occupy the whole field, it may not overlap, for following the cases it now seems that the mere possibility of an overlap will infect the whole enactment." (Gouin and Claxton - Appendix 8 to Sirois Report at p. 47.)

The regulation of marketing in its local aspects is legally possible (Shannon Case, supra); but even if all Provinces deal with the marketing of a commodity in the same sense or in the same terms, the result would not be effective control in a national sense for Dominion legislation would be required to deal with the subject in its inter-provincial and external aspects. This, however, encounters the difficulty that such Dominion marketing legislation even in these aspects must almost inevitably impinge on the property

and transactions of persons within a province and so be held ultra vires. Provincial legislation may be effective as to commodities locally produced and locally consumed, e.g., milk. It can hardly be effective as to commodities which may well be destined for sale in other Provinces or in other countries. For example, as the Commission says: "the grading of natural products, in order to serve its purpose, should be done when the product passes from the producer to the dealer, but it is frequently impossible at that stage to tell whether the particular lot of produce is designed for intra-provincial or for inter-provincial or export trade and, therefore, impossible to say whether provincial or federal regulations should be applied . . . the only alternative where comprehensive regulation seems desirable is a scheme of joint Dominion and provincial legislation and administration." (Book I, page 251.)

Generally as to the difficulties of divided jurisdiction in relation to marketing, see J. A. Corry, Appendix 7 to Sirois Report, Chapter II, and see Sirois Report, Book I, p. 250.

VI. CONSIDERATIONS RE AMENDMENT

1. The great desideratum is to enable comprehensiveness of legislative treatment of the marketing of natural products combined with power of adaptation.

2. The Commission does not recommend that either the Dominion or the Provinces should have exclusive jurisdiction.

3. Though noting that improvement might come through an amendment enabling delegation of power, the Commission's remedy is one of concurrent jurisdiction.

4. Concurrent jurisdiction, however stated, implies the ultimate right of the Dominion to deal with marketing in a Province so long as it so deals with it as essential to its regulation of inter-provincial or external trade. Thus the main purpose of the amendment is to remove the present infirmity of Dominion power by reason of which any Dominion attempt to deal with marketing in its national aspects is likely to fail because of the practical necessity of doing what is legally impossible, viz., deal with matters which touch on commodity transactions occurring in a Province and the rights of those who produce and sell such commodities therein. This Dominion-enabling power must somehow protect a Province from unnecessary interference with intra-provincial marketing transactions. A nice dilemma!

5. The Commission recommends: (1) that the subject-matter of the concurrent power should be "a list of defined natural products"; and (2) that this list be capable of being added to by an individual province "without waiting for the action of all Provinces."

As to suggestion (1), it is to be noted that everywhere in the B. N. A. Act the subject-matter of legislative power is stated in generic terms, or "classes of subject", e.g., "Trade and Commerce", "Banks and Banking", "Property and Civil Rights" in Sections 91 and 92. Even in dealing with concurrent powers in Section 95 the subject-matter is described generically as "Agriculture and Immigration." It is submitted that this practice should be followed for two reasons: (a) because it is consistent with the whole spirit and text of the Act; and (b) because it is always dangerous to be too specific in a Constitution which must operate in conditions often uncontemplated by its framers. Moreover, what is wrong with the Trade and Commerce power is not any doubt as to its generic coverage, but the fact that undue weight has been given by the Courts to the provincial aspects of the subjects covered.

Accordingly it is submitted that concurrent jurisdiction as to marketing should not take the form of a list of defined products but should be stated ganerically; e.g., "natural products of agriculture, of the forest and of the waters."

As to suggestion (2), providing for the addition of defined products to the list stated in the amendment, it is submitted that such a method is entirely inconsistent with the philosophy of the Constitution - and decisions thereon - which imply the unalterability of the terms of jurisdiction (except by formal amendment) of what is an Act of Parliament constituting a federal union upon stated terms.

The degree of flexibility which lies in the device of concurrent powers inheres in the fact that a Province may legislate as it desires, subject to the potential and ultimate right of the Dominion to over-ride such legislation; and also in the fact that the legislation of the Dominion is not to be curtailed by reason of the fact that it impinges on the field of provincial jurisdiction or runs counter to existing provincial legislation. But in either case the legislative power is of the same character as that conferred specifically by Sections 91 and 92, in that it flows from heads of jurisdiction stated in permanent terms. If a greater degree of flexibility is desired - if it is desired to vary the content of legislative power from time to time as necessities require - then the proper device is that of ad hoc delegation of powers under an amendment authorizing such delegation.

Moreover the suggestion involves the transfer of jurisdiction by the method of an individual Province adding a product to the list of products specified as being within Dominion jurisdiction. This is nothing more than ad hoc delegation and should be dealt with on that basis, i.e., under the general power of delegation recommended by the Commission and discussed in Opinion II. Otherwise concurrent legislation may result in uneven coverage of particular products, whereas marketing legislation should possess as much uniformity of coverage as possible, particularly as related to export trade.

Accordingly it is submitted that the amendment as to jurisdiction over the marketing of natural products by way of concurrent powers should not take the form suggested by the Commission, i.e., of a list of defined products within Dominion jurisdiction subject to addition by provincial action; but on the contrary, the jurisdiction of both Dominion and Provinces should be stated in appropriate generic terms.

6. It is desirable that the section conferring concurrent powers in this regard should follow as closely as possible the language of Section 95.

7. Since the Commission expressly dealt only with certain phases of "marketing", e.g., grading, and did not encompass the whole field of commercial organization and practices, it is desirable to define the sense in which the word is used.

8. In addition to using the general expression "natural products" it might be useful to insert a definition of what is included therein. This would make it possible to include other products, natural or otherwise, from time to time by amendment of the definition without disturbing the main provisions and any jurisprudence which may grow up around them.

VII. DRAFT AMENDING SECTION

The British North America Act, 1867, is amended by adding thereto the following section:

"95C. (1) In each Province the Legislature may make Laws in relation to the Marketing within the Province of the Natural Products of Agriculture, and of the Forests and Waters, of the Province; and it is hereby declared that the Parliament of Canada may from time to time make Laws in relation to the Marketing of such Natural Products in two or more of the Provinces or in a foreign country; and any Law of the Legislature of a Province relative to the Marketing of such Natural Products therein shall thereupon have effect in and for the Province as long and as far only as it is not repugnant to any such Law of the Parliament of Canada made applicable to that Province; but no Law of the Parliament of Canada passed hereunder shall apply to govern the Marketing of such Natural Products within the Province

of their origin.

(2) For the purposes of this section the expression "Marketing" includes grading, marking, selling, buying, shipping for sale, storage, and offering for sale; and the expression "Natural Products" includes animals, meats, eggs, wool, dairy products, grain, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber and any other natural products of agriculture and of the forest, sea, lake or river, and any article of food or drink wholly or partly manufactured or derived from any such product."

August, 1944.

Vincent C. MacDonald.