THE LICENSING POWERS OF THE PROVINCES

The recent decision of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board*,[1] makes a very important contribution to the settlement of some vexed questions as to the nature and extent of the power of Provincial legislatures to enact licensing provisions for revenue purposes. A legislature may impose upon individuals the necessity of acquiring a licence, and the payment of a fee therefor, either as a method of regulation of their activities or as a method of raising public revenue or as a method of securing both regulation and revenue.

The validity of licensing provisions passed for revenue purposes depends upon their relation to No. 2 or to No. 9 of sec. 92. These heads are as follows:

> No. (2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.
>
> No. (9) Shop, Saloon, Tavern, Auctioneer and other licenses in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

The exact relation of these heads to one another is not quite clear. As matter of language it may be that No. 2 authorizes the raising of revenue *by licences* provided the exaction of the licence fee amounts to the imposition of a *direct tax*. That is revenue may be raised under either No. 2 or No. 9 by a licensing system imposing a *direct* tax.[2] On the other hand if the licence fee amounts to an *indirect* tax it cannot be valid under No. 2. Can a licence fee imposing an indirect tax be valid under No. 9 ?[3]

In addition to this question, as to the nature of the tax which may be levied by way of licences under No. 9, there is the question as to the *nature of the licences* which may be imposed for revenue purposes. No. 9 speaks of "shop, saloon, tavern, auctioneer *and other licences*". What are these "other licences"? Must the phrase "other licenses" be construed *ejusdem generis*

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

[2] See *In re Companies* (1913), 48 S.C.R. at pp. 417 - 8, per Duff J.

[3] To hold that it cannot, is to restrict No. 9 by importing into it the requirement of No. 2 as to "directness" which would be inconsistent with the status of No. 9 as conferring an independent source of taxing power: *Cf. In re Companies, supra; Lawson* v. *Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. at pp. 363 - 4, per Duff J., Rinfret and Lamont JJ. concurring; *Segal* v. *City of Montreal*, [1931] S.C.R. at p. 477. It has been suggested that the reason why No. 9 was enacted was to make it clear that the provinces should be enabled to tax by way of licences even though the tax imposed thereby might be indirect: LEFROY, CONSTITUTIONAL LAW OF CANADA, p. 241, note 273.

and if so what is the common feature enabling a court to determine whether an unenumerated licence is within or without No. 9 ?

It is not proposed here to set out the decisions which have held that the licensing power under No. 9 is confined to licences imposing direct taxes or that, on the contrary, it extends to those imposing indirect taxes, nor to discuss those which have held that the phrase "other licences" must be, or need not be, read *ejusdem generis*. It is enough for present purposes to say that there has been great difference of judicial opinion on these questions. [4]

Related to such questions is the question whether licensing legislation, including the imposition of licence fees, is confined to legislation directed to the raising of revenue by that means or whether such legislation may not be enacted for another purpose, namely, the regulation of some business or activity, and if so whether licence-fee legislation directed to such different purposes must be based on different heads of jurisdiction.

The *Shannon Case*, supra, has a bearing on all the questions above raised. Before discussing that case in detail, however, it may be well to turn to a brief consideration of the relevancy of various heads of Provincial jurisdiction as affected by the fact that the licence-fee legislation has as its primary purpose: (1) the raising of revenue; or (2) something other than the raising of revenue, e.g., the regulation of business or other activity; or (3) revenue and regulation combined. It will be beside the point to say that the provinces by aptly framed legislation have power to accomplish each and all of these purposes; for in each case the power must be derived from some head of jurisdiction and these may vary with the purpose of the enactment as being revenue or regulative.

The power of imposing licence fees for revenue purposes is distinctly given by No. 9 of sec. 92 and it is clear that it may extend even to the length of enabling a Province to require persons duly licensed by the Dominion for the manufacture and sale of commodities to take out provincial licences to sell such commodities in the Province and to pay a licence fee therefor. [5] But like other taxing powers this cannot be used as a merely colourable

[4] The authorities are cited and examined in KENNEDY AND WELLS on THE LAW OF THE TAXING POWER IN CANADA, at pp. 136 - 150; LEFROY, *op. cit.*, pp. 128, 240 - 2; LEFROY, CANADA'S FEDERAL SYSTEM, pp. 433 - 44; CLEMENT'S CANADIAN CONSTITUTION, pp. 664 - 68. See also CANADIAN ABRIDGMENT, Vol. 11 at pp. 304 - 6, 311 - 20.

[5] *Brewers and Malsters' Ass.* v. *Attorney-General for Ontario*, [1897] A.C. 231; *Cf. Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. at p. 118.

device for attaining some non-revenue purpose,[6] such as the control of banks and banking in the Province,[7] as opposed to the raising of provincial revenue by means of taxing banks.[8]

It seems abundantly clear as matter of language that the power conferred by No. 9 is a purely fiscal power;[9] for, as Duff J. in the *Lawson Case*[10] said, that head "authorizes licences for the purpose of raising a revenue, and does not contemplate licences which, in their primary function, are instrumentalities for the control of trade, even local or provincial trade".

It is equally clear that under their power to legislate in relation to "property and civil rights in the Province" (sec. 92, No. 13) and in relation to "all matters of a merely local or private nature in the Province" (sec. 92, No. 16) the Provinces have a complete and effective power of *regulation*—a power which it may exercise by the method of imposing the necessity of obtaining, and paying for, licences as a condition of the right to carry on business or other activities in the Province.[11] Accordingly, to take as an illustration the matter of intraprovincial trade, it is undoubtedly true that the provinces may "regulate, by *licensing* persons engaged in the production, the buying and selling, the shipping for sale or storage and offering for sale, in an exclusively local and provincial way of business of any commodity or commodities".[12]

Thus it would seem that provisions requiring licences to be secured, and paid for, are competent to the provinces under No. 9 when directed to the *raising of revenue,* and under Nos. 13 and 16 when directed to *the regulation* of matters of property

[6] *Re Insurance Act of Canada,* [1932] A.C. at pp. 52 - 3, where it was held that even a tax which as a tax was competent to the Dominion would be invalid if linked up with an object not within Dominion competence *i.e.*, the regulation of the business of insurance.

[7] *Re Alberta Legislation,* [1939] A.C. 117, [1938] 4 D.L.R. 433.

[8] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575. Of course to be valid under No. 9 the enactment must impose what is in truth a licence fee rather than impose an indirect tax disguised as such. *Attorney-General of Quebec* v. *Queen Ins. Co.* (1878), 3 App. Cas. 1090, where the statute was held to be a simple Stamp Act and not a licence Act at all. Its validity then turned on No. 2 and not on No. 9.

[9] *Russell* v. *The Queen* (1881), 7 App. Cas. 829 at p. 837.

[10] *Lawson* v. *Interior Tree Fruit and Vegetable Committee,* [1931] S.C.R. at p. 364. Rinfret and Lamont JJ. concurred. This statement is discussed *infra.*

[11] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Sulte* v. *Three Rivers* (1885), 11 S.C.R. 25; *O'Danaher* v. *Peters* (1889), 17 S.C.R. 44; LEFROY'S CONSTITUTIONAL LAW, p. 241, note 275; *Attorney General of Manitoba* v. *Manitoba Licence Holders' Ass.*, [1902] A.C. 73; *Attorney General of Canada* v. *Attorney General of Alberta,* [1916] 1 A.C. 588; *Cherry* v. *The King,* [1938] 1 D.L.R. 156, 161.

[12] Per curiam in *Reference re Natural Products Marketing Act,* [1936] S.C.R. at p. 412, affirmed, [1937] A.C. 377.

and civil rights or other matters of a local or private nature. Indeed it must be conceded that there is a difference in the nature of the power derived from No. 9, enabling licence-fee legislation for revenue purposes, and that derived from other heads of sec. 92 enabling regulation by way of licence-fee legislation.[13]

It is quite consistent with this, however, to recognize that legislation may be *regulative* in substance though it results in an increase of revenue by means of the collection of a licensing fee.[14] For the licence and the fee therefor may be simply "an incident of, or necessary factor in, the regulation and control of natural products in the same way that grading might be provided for as an aid in price regulation"; but in that case their validity depends on heads conferring regulative powers and not on those conferring taxation powers.[15] Conversely, a licensing statute may well be *revenue* legislation in substance though the imposition of the fee does result in some degree of *regulation*.[16]

What then of legislation in the nature of licensing provisions enacted for the double purpose of revenue and of regulation? As to this the answer would seem clear on principle. So far as the purpose is that of raising revenue No. 9 applies to enable the imposition of licence fees; so far as the purpose is essentially regulative and not fiscal No. 9 can have no application; but licensing provisions may of course be enacted as a method of regulation, and fees therefor may be imposed by way of necessary sanctions to secure the observance of the regulative licences.

[13] *Re Natural Products Marketing (B.C.) Act*, [1937] 4 D.L.R. 298, at p. 306; *Cherry* v. *The King*, [1938] 1 D.L.R. at p. 161.

[14] Thus in *Attorney General for Canada* v. *Attorney General for British Columbia*, [1928] S.C.R. 457, [1930] A.C. 111, the imposition of licence fees for the operation of fish and salmon canneries could not be supported as a matter of taxation for the real purpose of the legislation was regulation. Such fees could have been supported, however, as ancillary to fisheries regulation under No. 12 of 91. It failed on this ground simply because the power of fisheries regulation did not extend to the regulation of trade processing of fish.

[15] See *Natural Products Marketing (B.C. Act)*, *supra* at p. 336; *Cherry* v. *The King*, *supra*, at p. 161, and see previous footnote. Indeed in a sense the licence fee may not be a revenue measure at all as in the case of a statute designed to regulate the trade in milk and imposing license fees merely as a means of defraying the expenses of the Board charged with its regulation. *Cherry* v. *The King*, *supra*, holding the fees valid as necessary to effective regulation. In the *Shannon Case*, however, the Privy Council regarded such fees as being for the raising of a revenue for provincial or local purposes under s. 92, No. 9.

[16] See *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. at p. 364; *Brewers and Maltsters' Ass.* v. *Attorney-General for Ontario*, [1897] A.C. 231. As in the case of provincial legislation requiring Dominion Companies (in common with others) to pay a licence fee. *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330; *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91; *Cf. Attorney General for Manitoba* v. *Attorney General for Canada*, [1929] A.C. 260.

To come then, at last, to the *Shannon Case*, the statute there in question was the Natural Products Marketing (British Columbia) Act.[17] The purpose of the Act was declared to be "the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province" (section 4 (1)). The method of the statute was that of enabling the Governor in Council to establish "schemes" for such control and regulation as to all or any natural products within the whole province or any area therein, and to constitute boards to administer such schemes, and to vest in them all powers considered necessary or advisable including, in particular, the vesting in any such board of *power to require persons engaged in the production etc. of the regulated product to register and obtain licences from the board, (section 5 (c)) and to fix and collect licence fees from such persons*, etc., and to recover any such licence fees by suit.

The Privy Council held (1) that the Act was valid as being an Act to regulate particular businesses entirely within the province, and (2) that it was not invalid as being an unauthorized delegation of legislative powers. The Privy Council also rejected the contention that the Act was invalid in so far as it authorized the vesting in marketing boards of the power to impose licence fees. Their Lordships did not think it necessary to support the legislation by reference to the provincial power of *direct taxation* under No. 2 of sec. 92; for "without deciding the matter either way they [could] see difficulties in holding this to be direct taxation within the province".

They did support the provision as to licence fees on two alternative grounds. First, that the fees were not taxes at all, but rather "fees for services rendered by the Province or by its authorized instrumentalities under the powers given by sec. 92 (13) and (16)" analogous to fees on land registration and mining and prospecting certificates or "the exaction of market tolls on the establishment of a new market".[18] Secondly as licence fees imposed by way of taxation under No. 9 of sec. 92.

In supporting the legislation on this second ground the Privy Council said:

> If regulation of trade within the Province has to be held valid the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence

[17] R.S.B.C., 1936, c. 165, as amended by c. 41 of the Acts of 1937.

[18] [1938] A.C. at p. 722, 4 D.L.R. at p. 87; followed on this point in *R.* v. *Hoys Crescent Dairy Ltd.*, [1938] 4 D.L.R. 223.

> fee, though usual, does not appear to be essential. But if licences are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes. On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff, J., took a somewhat narrow view of the provincial powers under S. 92(9) in *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, where he says, "On the other hand, the last mentioned head authorizes licences for the purpose of raising revenue, and does not, I think, contemplate licences which in their primary function, are instrumentalities for the control of trade — even local or provincial trade". It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And if licences for the specified trades are valid their Lordships see no reason why the words "other licences" should not be sufficient to support the enactment in question.[19]

Several conclusions may be drawn from the reasons thus given.

1.—It will be noted that the Privy Council held as valid under No. 9 taxes in the form of licence fees, though it had previously refused to pass upon their validity as *direct* taxation under No. 2 of sec. 92. This can only mean that the validity of licence fees under No. 9 is a question to be decided without reference to their character as imposing direct or indirect taxation. That is, No. 9 empowers the imposition of indirect as well as direct taxes by way of licence fees. [20]

2.—The decision holds that regulation of trade by a licensing system is valid, i.e. licensing may be a method of regulation. [21]

3.—The case holds that if, as part of such regulation, licences are granted, fees may be charged therefor either to defray the cost of administering the local regulation or to increase the general funds of the province or for both purposes, the fee being valid under No. 9 as directed to the raising of revenue.

This can only mean that when the main object is *regulation,* licences may be required by the regulating Province as a method of regulation, [22] the exaction of the fee therefor will fall within

[19] [1938] 4 D.L.R. at pp. 86 - 7, [1939] A.C. at pp. 721 - 2.
[20] See KENNEDY AND WELLS, *op. cit.*, pp. 147 - 50 for previous authorities on this point.
[21] See footnote 11, *supra*.
[22] *Cf. Macdonald* J.A. in *Re Natural Products Marketing (B.C.) Act*, *supra*, at p. 336.

No. 9 as a revenue measure. This seems to leave out of account the fact that the validity of any statute depends on its true legal character, its end, object or primary purpose.[23] For it seems abundantly clear that licence fee to be valid *under No. 9* must be imposed *for revenue* and not for other purposes. It is submitted that Duff J. was exactly correct when he said that No. 9 "does not contemplate *licences which in their primary function* are instruments for the control of trade". It is not an effective criticism of this pronouncement to say that "it cannot. . . be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue". It may be conceded, as their Lordships remark, that it may be difficult in the case of saloon and tavern licences to say that the regulation of the trade is not at least as important as the provision of revenue. With great respect this begs the question as to the application of No. 9. In any such case though the object may be two-fold the power to attain each branch of it must be derived from an appropriate head of jurisdiction. Where, and to the extent that, the object is not revenue No. 9 can have no application. Where "the primary function" of licence fees is the control of trade they cannot be supported under No. 9; for they are not imposed "in order to the raising of a revenue". On the other hand such non-fiscal provisions need not be supported by reference to No. 9 at all; for as licences are a permissible method of *regulation* the charging of fees therefor may well be valid as necessary to effective regulation by the licensing method.

The truth is that a licence fee may be imposed (1) to secure revenue, (2) to regulate trade, etc., and (3) on occasion, to secure both objects. No. 9 has a proper function as enabling *taxing* legislation by way of licences. That function should not be extended in face of its plain terms to cover legislation which, or that part of legislation which, is non-fiscal in character, particularly as the Provinces otherwise possess abundant regulative powers including therein the exaction of licence fees. Nor should it be extended if, as the *Shannon Case* seems to imply, legislation under No. 9 may impose *indirect* taxes.

[23] Thus in *Re Alberta Bills*, [1938] 4 D.L.R. at p. 349, [1939] A.C. at p. 130, the Privy Council after adverting to "the object or purpose of the Act in question" as a matter calling for consideration goes on immediately to say that "the language of S. 92(2), Direct taxation within the Province *in order to the raising of a Revenue* for Provincial Purposes" is sufficient in the present case to establish this proposition". The phrase "*in order to the raising of a Revenue*" (italicized in the judgment) is likewise contained in No. 9 of S. 92 and indicates conclusively what "the object or purpose" of any statute must be if its validity is to be supported by No. 9.

4.—Finally, it is to be recalled that the enactment in question empowering the exaction of licence fees from all persons engaged in the production, marketing etc. of any regulated "natural product", [24] was held to fall within the phrase "and other licences" in No. 9. This would seem to dispose conclusively of the view often expressed [25] that the phrase must be construed restrictively under the *ejusdem generis rule.*

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[24] By definition in sec. 2 this "means any product of agriculture, or of the forest, sea, lake, or river and any article of food or drink wholly or partly manufactured or derived from any such product".

[25] See in KENNEDY AND WELLS, *op. cit.*, pp. 139 - 45; LEFROY, CONSTITUTIONAL LAW, p. 240, notes 271 - 2.