

In the matter of a Reference as to the validity of the Dairy Industry Act, Revised Statutes of Canada, 1927, Chapter 45.

The Canadian Federation of Agriculture - - - - *Appellant*

v.

The Attorney-General of Quebec and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1950

Present at the Hearing

LORD PORTER
LORD SIMONDS
LORD MORTON OF HENRYTON
LORD MACDERMOTT
LORD RADCLIFFE

[Delivered by LORD MORTON OF HENRYTON]

This is an appeal from the Supreme Court of Canada on a Reference by the Governor-General in Council dated the 27th July, 1948. The only question referred to the Supreme Court for hearing and consideration was:—

“ Is Section 5 (a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent? ”

Section 5 (a) of the Dairy Industry Act is in the following terms:—

“ 5. No person shall

(a) manufacture, import into Canada or offer, sell or have in his possession for sale any oleo-margarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.”

The judgment of the Supreme Court (Rinfret, C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Locke, J.J.) was expressed as follows:—

“ (1) The prohibition of importation of the goods mentioned in the section is *intra vires* of Parliament.

Locke J. finds Section 5 (a) of the Dairy Industry Act to be *ultra vires* while expressing no opinion as to the power of Parliament to ban importation by appropriate legislation.

(2) The prohibition of manufacture, offer, sale, or possession for sale of the goods mentioned is *ultra vires* of Parliament, the Chief Justice and Kerwin dissenting.”

The argument in support of the appeal was presented by Mr. Varcoe, K.C. on behalf of the Attorney-General of Canada and by Mr. Milliken, K.C. on behalf of the appellant. They contended that the decision stated in paragraph 2 of the judgment of the Supreme Court should be reversed but no question has been raised before their Lordships' Board, either by the appellant or by any of the respondents, as to the correctness of the decision stated in paragraph 1.

Counsel supporting the appeal contended that the prohibition of the manufacture, offer, sale, or possession for sale of the goods mentioned in Section 5 (a) (hereafter referred to as "the prohibition") was within the powers of Parliament, as defined in the British North America Act, 1867, for reasons which may be briefly summarised as follows:

(1) The prohibition is legislation in relation to the regulation of trade and commerce, and therefore falls within Head 2 of Section 91 of the British North America Act, 1867 (hereafter referred to as "the Act").

(2) It is legislation relating to the criminal law and, therefore, falls within Head 27 of the same section.

(3) It is a law for the peace, order and good government of Canada in relation to a matter not coming within any of the heads of Section 92 of the Act, and is within the "residuary power" conferred by the opening words of Section 91.

(4) It is a law "in relation to agriculture in all or any of the "Provinces" within Section 95 of the Act.

Each of these arguments raises questions of some difficulty, but they can be dealt with quite briefly, as their Lordships find themselves in agreement, on each point, with the conclusions of the majority of the Supreme Court.

It is convenient first to give some account of the earlier history of the legislation which incorporates the prohibition.

In 1886 the Parliament of Canada enacted "An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter", being Chapter 42 of 49 Victoria. This Act was in the following terms:—

"Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance, other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months."

It is to be noted that the "certain" substitutes for butter "heretofore" manufactured, the manufacture and sale of which are prohibited, are those manufactured from any animal substance other than milk. By this language margarine, as distinct from oleomargarine, is not affected as the former is manufactured exclusively from vegetable oils, while oleomargarine has in addition some animal fat.

Cap. 42 of 49 Victoria became cap. 100 of R.S.C. 1886, but the preamble of the original Act was not continued and does not reappear in any later legislation. Subsequently by 3 Edward VII, cap. 6: "The Butter Act, 1903" was passed, Section 5 of which prohibits the manufacture, importation or sale of "any oleomargarine, butterine, or other substitute for butter manufactured wholly or in part from any fat other than that of milk or cream." It is to be observed that importation, as well as manufacture and sale, became prohibited and the prohibition is no longer limited to

substitutes for butter manufactured from animal substances. Accordingly, margarine would appear to have become included in the prohibitions of this legislation.

In 1906, by cap. 85 of the Revised Statutes of that year, the General Inspection Act (cap. 99 of the Revised Statutes of 1886) the Grain Inspection Act (4 Edward VII, cap. 15) and the Butter Act of 1903, became consolidated in the "Inspection and Sale Act," the provisions formerly constituting the Butter Act becoming part VIII of the Act. Section 298 is in the same terms as Section 5 of the 1903 Act, the penalty section being Section 309. Part VIII of the last-mentioned Act was repealed by the "Dairy Industry Act, 1914." This Act was entitled an "Act to regulate the manufacture or sale of butter substitutes." Section 5 (a) is in exactly the same terms as the prohibition now under consideration, margarine being for the first time expressly mentioned.

In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as Chapter 45 thereof.

It is to be noted that by Order in Council P.C. 3044 dated 23rd October, 1917, made under the War Measures Act, the operation of Section 5 (a) of the Dairy Industry Act was suspended and by Chapter 24 of the Statutes of Canada 1919 (2nd Session) provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and sale thereof until 1st day of March, 1921. By annual amendments the permissions contained in the Oleomargarine Act were extended to 31st August, 1923, in the case of manufacture and importation, and to 1st March, 1924, in the case of sale. During the period 1st December, 1917, to 30th September, 1923, oleomargarine was manufactured in Canada and imported into Canada on a very large scale.

The summary of legislation just set out shows that the prohibition has been part of the law of Canada for a considerable time, and apparently its validity has never been called in question prior to the present proceedings. This historical fact does not, however, relieve their Lordships of the task of considering whether the prohibition is or is not within the powers of Parliament as laid down in the Act. To quote the judgment of the Board in *Proprietary Articles Trade Association v. A. G. for Canada*, 1931 A.C. 310 at p. 317, "Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*." One other point emerges from the summary. It might have been contended at one time, in reliance upon the preamble to the Act of 1886, that the purpose of the prohibition was to exclude from the Dominion substances which were injurious to health; but no such argument is possible to-day, having regard to the later legislation, in particular the repeal of the earlier legislation by the Dairy Industry Act, 1914, and to the measures taken in 1917 and subsequent years.

It cannot be doubted that the object of the prohibition, as it appears in the Dairy Industry Act now in force, is the protection and encouragement of the dairy industry.

The Dairy Industry Act is very fully analysed in the judgment of the learned Chief Justice. Their Lordships gratefully accept his analysis, without repeating it, and proceed to the consideration of the first argument of counsel supporting the appeal, that the prohibition is legislation in relation to the regulation of trade and commerce. In considering this argument their Lordships are faced yet again with the difficult task of choosing between the conflicting claims of the Dominion Legislature, based on s. 91 head 2 of the Act and of the Provincial legislatures, based on s. 92 head 13. On the one hand it is said that an enactment which seeks to encourage an important industry in the Dominion by prohibiting all citizens of the Dominion from embarking upon another competing industry can accurately be described as an enactment for the regulation of trade and commerce. On the other hand it is said that the prohibition covers the manufacture and sale of the goods in question within, for instance, the Province of Quebec, and that the right of a citizen of that Province to

engage in such manufacture and sale is an important civil right in the Province and comes directly within head 13 of Section 92 ; it is thus one of the classes of subjects assigned by the Act exclusively to the legislatures of the Provinces.

If these conflicting claims had never before been considered by the Board, their Lordships would be faced with a task of great difficulty, but similar conflicts, on different sets of facts, have been resolved over and over again in past years. Their Lordships think that a decision in favour of the validity of this prohibition would be contrary to the current of authority and in particular to certain recent decisions of the Board. They find it unnecessary to pass in review the decisions prior to the year 1936 which bear upon this point. These decisions are summarised with clarity and accuracy in the masterly judgment of Duff C.J. in the *Natural Products* case, 1936 S. C.R. 398. The decision of the Supreme Court in that case was upheld and the judgment of Duff C.J. was approved by the Board (1937 A.C. 377) and their Lordships regard the *Natural Products* case as having a very important bearing upon the present appeal. The Act then under consideration provided for the establishment of a Dominion Marketing Board whose powers included powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, and to determine the manner of the distribution, and the quantity, quality, grade or class of the product that should be marketed by any person at any time. Lord Atkin, in giving the judgment of the Board said:—

“There can be no doubt that 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 is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of s. 91—namely, 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 in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and 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: *The King v. Eastern Terminal Elevator Co.*’

Their Lordships agree with this, and find it unnecessary to add anything.”

As appears from this passage, the regulation of trade and commerce which is assigned to the Dominion legislature by head 2 of s. 91 does not permit the regulation of individual forms of trade and commerce confined to the Province. If such regulation is not permitted, it seems to their Lordships that, *a fortiori*, the prohibition of individual forms of trade and commerce confined to the Province is not permitted. By the prohibition now in question, every citizen of (e.g.) the Province of Quebec is prohibited from manufacturing and selling certain named substances, even if he manufactures only in that Province and sells only in that Province. It is true that the prohibition applies equally to inter-Provincial transactions, but the passage from Duff C.J.’s judgment, set out and approved by the Board in the *Natural Products* case seems fatal to any argument

based upon this fact. So also do the observations of Lord Haldane when delivering the judgment of the Board in the *Dominion Insurance case*, 1916 1 AC 588 at p. 595:—

“ It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.”

The truth is that the present case is typical of the many cases in which the Board has felt bound to put some limit upon the scope of the wide words used in head 2 of s. 91 “ in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the Provinces were intended to possess ”—see per Duff, J. in *Lawson v. Interior Tree Fruit & Vegetable Committee* 1931 S.C.R. 357 at 366. The necessity for putting such a limit leads to the rejection of counsel’s first argument.

In putting forward their second argument, counsel relied strongly upon the cases of *A.G. for Ontario v. Hamilton Street Railway* 1903 A.C. 524, *The Proprietary Articles Trade Association v. A.G. for Canada* 1931 A.C. 310 and *A.G. for British Columbia v. A.G. for Canada (the Criminal Code case)* 1937 A.C. 368. They pointed out that s. 10 of the Dairy Industry Act makes any violation of any provision of ss. 5 to 7 an offence, punishable upon summary conviction with the penalties set out in s. 10; and that, apart altogether from s. 10, any breach of the prohibition in s. 5 (a) would be punishable under s. 164 of the Criminal Code. They submitted that in these circumstances s. 5 (a) was such a law as is described in head 27 of s. 91 of the Act.

Their Lordships are unable to accept this submission. It is necessary in each case to consider what is the “ pith and substance ” of the Legislation in question, and this was recognised by the Board in the *Criminal Code* case at p. 376 *med.* In the present case, the prohibition in s. 5 (a) is in pith and substance a law for the protection and encouragement of the dairy industry in Canada. Incidentally, penalties are provided for any breach of the prohibition, but their Lordships are quite unable to regard this fact as sufficient *per se* to make the prohibition a law “ for the peace, order and good government of Canada in relation to the criminal law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters ” within the meaning of head 27 of s. 91. The contrary view would enable the Parliament of Canada to “ assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.” See *A.G. for Ontario v. Reciprocal Insurers* 1924 A.C. 328 at p. 340. Their Lordships’ views on this branch of the case may be happily stated by a quotation from the judgments of the majority in the Supreme Court. Rand, J. said: “ That object (i.e., the object of the prohibition) as I must find it, is economic, and the legislative purpose is to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular

trade within the provinces : *Shannon v. Lower Mainland Dairy Board* [1938] A.C. 708. The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject-matter and follows the latter in its allocation to the one or other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of inter-provincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction. This conclusion is not in conflict with *Attorney-General of British Columbia v. Attorney-General of Canada* [1937] A.C. 368. (Section 498A of the Criminal Code.) There, the essential nature of the legislation was not the equalisation of civil rights between competitors or promoting the interest of one trade as against another; it was the safeguarding of the public against the evil consequences of certain fetters upon free and equal competition. There is no like purpose here; there is nothing of a general or injurious nature to be abolished or removed; it is a matter of preferring certain local trade to others."

With these observations their Lordships entirely agree, and they are fatal to counsel's second argument in support of the appeal. That argument would have had more weight if it had been possible to contend that the object of the prohibition was to exclude from Canada substances injurious to health.

In support of their third argument, counsel relied principally on the case of *Russell v. The Queen* 7 App. Cas. 829 and the recent case of *A.G. for Ontario v. Canada Temperance Federation & others* [1946] A.C. 193, in which *Russell's* case, not for the first time, was considered and commented upon. In the latter case Viscount Simon, in delivering the judgment of the Board, said, at p. 205:—

"In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances: so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province."

This passage must, however, be considered in conjunction with the words used by Lord Atkin when delivering the judgment of the Board in the *Labour Conventions Case* [1937] A.C. 326 at pp. 352-3:—

"But the validity of the legislation under the general words of s. 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have attained 'such dimensions as to affect the body politic,' and to have 'ceased to be merely local or provincial,' and to have 'become matter of national concern.' It is interesting to notice how often the words used by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion* have unsuccessfully been used in attempts to support encroachments on the Provincial

legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this, they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, 'abnormal circumstances,' 'exceptional conditions,' 'standard of necessity' (*Board of Commerce case*), 'some extraordinary peril to the national life of Canada,' 'highly exceptional,' 'epidemic of pestilence' (*Snider's case*), to show how far the present case is from the conditions which may override the normal distribution of powers in ss. 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on this point, and preclude further disputes."

Their Lordships think it sufficient to say, in answer to this third argument, that the prohibition now under consideration relates to civil rights within each of the provinces and that neither the facts set out in the Order of Reference, nor any other facts of which their Lordships could take judicial notice, lead to the conclusion that there exist in the present case the conditions which may override the normal distribution of powers in Sections 91 and 92.

As to Counsel's fourth and last argument, their Lordships have already recognised that the object of the prohibition was to protect and encourage the dairy industry in Canada. For this reason, Counsel contend that it is a law in relation to agriculture within Section 95 of the Act, although in form it is merely a prohibition relating to certain manufactured substances. In their Lordships' view, however, the authorities show that this contention is unsound. In the case of *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited*, 1933, A.C. 168, the Board had to consider the validity of the Dairy Products Sales Adjustment Act, 1929, which authorised the appointment of an Adjustment Committee in any district in which the dairy farmers petitioned for one. The object of the Act was to relieve congestion in the fluid milk market caused by a shortage of demand, and, as Lord Thankerton put it in delivering the judgment of the Board: "Broadly stated, this object is attained by the Committee fixing monthly the standard prices for fluid milk and manufactured products respectively and the weight and quantity of each sold or disposed of by all the farmers in the district, based on returns compulsorily obtained from them, and thereafter apportioning the difference between the total value of the sales of each, calculated at the respective standard prices, over the whole body of farmers, in proportion to the weight of fluid milk sold or disposed of by each farmer. Each farmer is then bound to contribute his share of the apportionment to the Committee, who apportion and pay the total amount so received to the farmers who have sold or disposed of the manufactured products."

At page 174 *ad fin.* Lord Thankerton said: "The contention of the Appellants that the Act of 1929 is a law relating to agriculture under Section 95 of the Act of 1867 may be disposed of as untenable, for the Act of 1929 does not appear in any way to interfere with the agricultural operations of the farmers, and Section 21 of the Act expressly prohibits the Committee from fixing prices at which milk or manufactured products may be sold, and from directing in what quantity, to whom, or when milk or manufactured products may be sold or disposed of by a dairy farmer."

This passage bears strongly against the argument for the Appellant, for it might well be thought that the Act which the Board was then considering could more easily be described as an Act in relation to agriculture than can the prohibition now under consideration.

It is significant that in the *Natural Products* case, already cited, it was not even argued that the Act in question, The Natural Products Marketing Act, 1934, came within Section 95 of the Act. No mention appears to have been made of Section 95 of the Act, either before the Board or in the Supreme Court of Canada. In their Lordships' view the Act of 1934 was more closely related to agriculture than the prohibition now under consideration; it may be that Counsel considered an argument based on Section 95 to be hopeless, in view of the observation of Lord Thankerton already quoted.

If, however, there were any doubt as to the principles to be applied in construing Section 95, it is removed, in their Lordships' view, by a passage in the judgment of the Board, delivered by Viscount Simon, in *A.G. for Saskatchewan v. A.G. for Canada and Others*, 1949, A.C. 110, at pp. 122-3. The Act then under consideration was the Farm Security Act, 1944, of Saskatchewan and the main object of that Act was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of there being in any year a crop failure as defined in the Act. A portion of the Act relating to a reduction of interest was attacked as being *ultra vires* the provincial legislature, and the portion attacked was sought to be upheld on the ground that its pith and substance was "agriculture in the Province" within the meaning of Section 95 of the Act, and that it was not repugnant to any Act of the Parliament of Canada. In dealing with this contention, which had been supported by the dissenting judgment of Taschereau, J., in the Supreme Court, Viscount Simon said: "It is convenient to deal first with this last contention, which provided a chief ground on which the dissenting judgment of Taschereau, J., was based. There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand, J., points out, there is a distinction between legislation 'in relation to' agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is 'the true nature and character of the legislation'—not its ultimate economic results—that matters (*Russell v. The Queen*). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase 'agriculture in the Province' may be construed, and whatever advantages to farmers the re-shaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture."

Although the prohibition now under consideration relates to a different subject-matter, the passage just quoted would seem to apply with much force to the present case. The prohibition might well "produce a favourable effect on the strength and stability" of the dairy industry; but the passage just quoted shows that this fact alone is not sufficient to make it legislation "in relation to agriculture" within Section 95; and there is no other ground on which it can be brought within Section 95. To sum up, the connection between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition within the terms of Section 95, and for this reason Counsel's fourth and last argument fails.

Their Lordships are of opinion that the Supreme Court of Canada rightly answered that "the prohibition of manufacture, offer, sale, or possession

for sale of the goods mentioned is *ultra vires* of Parliament." This was the only question raised in this appeal and their Lordships will humbly advise His Majesty that the appeal should be dismissed.

In the Privy Council

THE CANADIAN FEDERATION OF
AGRICULTURE

v.

THE ATTORNEY-GENERAL OF QUEBEC
AND OTHERS

[DELIVERED BY
LORD MORTON OF HENRYTON]

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