DELEGATION OF LEGISLATIVE POWER TO THE LIEUTENANT-GOVERNORS IN COUNCIL

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The subject of the delegation of powers by Parliament and provincial legislatures has been threshed out in numerous cases, of which *Hodge* v. *The Queen*[1] is among the outstanding earlier ones and *Reference as to the Validity of the Regulations in relation to Chemicals*[2] is among the most important of the later. Between these two decisions various courts have wrestled with the problem on several occasions.

Any discussion of the subject at this late date may seem superfluous, yet it is submitted that unwarranted conclusions have been drawn from the leading cases, particularly as those cases apply to the delegation of power by a provincial legislature to the Lieutenant-Governor.

In view of the series of judgments just mentioned, there can be no doubt that a provincial legislature, like the Parliament of Canada, does possess very wide powers of delegation. It seems to be assumed that these powers are unlimited — or practically so. The purpose of this article is to suggest that, wide though the powers of delegation are, they are not as extensive as some may think; and that there is an important difference in this respect between the power of Parliament to delegate to the Governor-General in Council and the power of a provincial legislature to delegate to the Lieutenant-Governor in Council.

Some references to a number of the relevant cases are, perhaps, now in order. Where italics are used, they are those of the writer.

It will be remembered that one of the arguments raised when *Hodge* v. *The Queen* was before the Judicial Committee was that the Provincial Legislature of Ontario had itself no power to enact the regulations made by the Liquor Commissioners but, if it did have such power, it had no right to delegate it. In dealing with this argument the Judicial Committee used words that have become very well known. They are quoted again here for the purpose of emphasizing certain points.

"They [provincial legislatures] are in no sense delegates of or acting under any mandate from the Imperial Parliament". The judgment goes on to say that the Imperial Parliament, in

[1] (1883), 9 App. Cas. 117.
[2] [1943] S.C.R. 1.

enacting the British North America Act, 1867, and in particular section 92,

> conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample *within the limits prescribed by sect. 92* as the Imperial Parliament in the plenitude of its power possessed and could bestow. *Within these limits of subjects and area* the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and *with the object of carrying the enactment into operation and effect.*
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> It is obvious that such an authority *is ancillary to legislation*, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.

We note, then, from *Hodge's* case that there are certain limitations on the generality of the power of delegation by provincial legislatures:

(a) the delegation must be within the powers granted by section 92 of the British North America Act;

(b) the power of delegation confirmed by the Judicial Committee is only in respect of matters ancillary to legislation and for the purpose of carrying it into operation and effect.

The judgment in this case goes no further than to approve a power of delegation to municipal institutions and bodies of the legislature's own creation, but, as will be mentioned, it has now been made clear that some powers may be delegated to the Lieutenant-Governor in Council (with an important limitation, it is submitted).

It will be convenient to pause here to note the exact words of the beginning of section 92 of the B.N.A. Act and of paragraph 1 thereof:

> 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:
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> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, *except as regards the Office of Lieutenant-Governor.*

In re Gray[3] was decided as the result of a controversy that arose from the passing of a military service order in council under the War Measures Act. In considering the implications of the judgment, as they apply to the subject of this article, it is important to remember that the judgment refers to Dominion, not

[3] (1919), 57 S.C.R. 150.

provincial, legislation. The Chief Justice, Sir Charles Fitzpatrick, said in delivering judgment: "Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government". To the objection raised that statutes cannot be amended by regulation, he said, ". . . I do not think this broad proposition can be maintained". He then went on to discuss the War Measures Act, and showed that regulations under that Act can amend a statute.

To quote from the judgment of Anglin J. in this same case:

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is
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> > 'as plenary and as ample . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow'.

What do we learn from this? The powers of delegation possessed by Parliament are very extensive. Parliament, however, cannot *abdicate its functions*. It can delegate powers to the executive government and to other agencies *within reasonable limits*. It can, at least when a state of war exists, delegate power to amend statutory enactments. It is not clear from the judgment whether the right to delegate power of amending statutes would exist in cases not coming under the War Measures Act.

In 1919, the year following the decision of the Supreme Court in *In re Gray*, the Judicial Committee handed down its decision in *In Re The Initiative and Referendum Act*.[4] The judgment in this case (at page 942) recognizes and confirms the fact that a provincial legislature has, within certain limits of area and subject, "such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867".

The judgment also quotes that part of section 92 of the British North America Act stating that "the Legislature may *exclusively* make laws . . ." and proceeds: "The Lieutenant-Governor . . . is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion Statute of 1870. . . ".

It was further stated that the proposed Act seriously affected "the position of the Lieutenant-Governor as an integral part of

[4] [1919] A.C. 935.

the Legislature". If valid the Act would have rendered the Lieutenant-Governor powerless to prevent a bill submitted to a referendum from becoming law if approved by the voters. The judgment goes on:

> Section 92 of the Act of 1867 entrusts the legislative power in a province to its Legislature, *and to that Legislature only.* No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislative in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; *but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.*

The Judicial Committee did not refer in this judgment to the case of *In re Gray* as one might have expected them to do. If the Judicial Committee had thought it applied, is it not likely that it would have been distinguished, since in this same judgment Lord Haldane emphasizes the desirability that appeals to the Sovereign should first come before the Supreme Court of Canada whose judgments, he says, the Privy Council find of "value, in the decision of important points such as those before them", because "of the experience and learning of the judges of that Court"?

Is it not likely that no reference to *In re Gray* was made simply because it dealt with delegation by Parliament, and that the Privy Council considered delegation by a legislature to be in a considerably different category because of the restrictive words respecting the "Office of Lieutenant-Governor" found in paragraph 1 of section 92 of the British North America Act?

When dealing with provincial powers, the Privy Council, in both *Hodge* v. *The Queen* and *In re The Initiative and Referendum Act,* refers to the right of a legislature to delegate to "a body of its own creation" or "subordinate agencies". We should note here that the Lieutenant-Governor, even when "in Council", is certainly not a body of the legislature's creation; nor is the representative of the Sovereign in the province a "subordinate agency". He is an integral part of the legislature. However the Privy Council subsequently decided in *Shannon et al.* v. *Lower Mainland Dairy Products Board* that a legislature can delegate certain powers to the Lieutenant-Governor in Council.[5]

This was the first of the well-known cases to deal explicitly with the authority of a legislature to delegate power to the

[5] [1938] 2 W.W.R. 604.

Lieutenant-Governor in Council. The judgment was handed down by the Privy Council on July 27th, 1938. In this case the Judicial Committee dealt with the objection that a legislature could not delegate to the Lieutenant-Governor in Council, or give him further powers of delegation, and dismissed that objection as subversive of the rights which the legislature enjoys *while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers.* As has been noted, the first among these classes of subjects is the amendment of the constitution of the Province, "except as regards the Office of Lieutenant-Governor".

It is submitted that the *Shannon* case in no way detracts from the proposition that a legislature cannot delegate to the Lieutenant-Governor in Council, or any other body, a power that affects the office of Lieutenant-Governor. As appears from *In Re The Initiative and Referendum Act,* a power that affects a Lieutenant-Governor's right to participate in law-making as an integral part of the legislature, as distinct from a power to regulate as ancillary to legislation, is a power that does affect the "Office of Lieutenant-Governor".

This was the view taken in the case of *Credit Foncier Franco-Canadian* v. *Ross et al. and Attorney-General for Alberta.*[6] This case was decided by the Appellate Division of the Supreme Court of Alberta. It arose out of The Reduction and Settlement of Debts Act passed in Alberta at the Second Session of 1936. By section 2 of this Act a considerable variety of debts were excluded from the operation of the Act, and as well

> (viii) any other kind or description of debt which is declared by the Lieutenant-Governor in Council to be a debt to which this Act does not apply.

Section 12 also provided that the Lieutenant-Governor in Council might declare that any kind or description of debt was a debt to which the Act did not apply. To quote from the judgment:

> There seems no doubt that the intended effect of sec. 12 is to confer *legislative* authority upon a Lieutenant-Governor by which he could by order in council give such a description of debts to be excluded from the operation of the Act under par. (viii) of sec. 2(a) as completely to nullify the Act.

The judgment then refers to *Hodge* v. *The Queen* and continues:

> It is apparent that the authority to make regulations in order to make legislation enacted by the Legislature completely effective is a

[6] [1937] 2 W.W.R. 353.

> quite different thing from authority to make an independent enactment. That is not ancillary to legislation but is legislation itself.

The judgment refers to the decision in *In re Gray* and points out that that case dealt with a measure that:

(a) was Dominion legislation, and

(b) was a war time or emergency measure covered by the residuary powers in section 91 of the British North America Act.

Reference must now be made to a case in which the judgment in *Credit Foncier Franco-Canadien* v. *Ross et al.* comes under criticism. This is the judgment of the Court of Appeal of British Columbia in *Reference re Natural Products Marketing (British Columbia) Act.*[7] The purpose of this Act is stated in its section 4 to be "to provide for the control and regulation in any or all respects of the transportation, packing, storage, and marketing of natural products within the Province". To this end power is conferred on the Lieutenant-Governor in Council to "establish, amend, and revoke schemes for the control and regulation within the Province of the transportation, packing, storage, and marketing of any natural products". In particular, powers are conferred, for the furtherance of the purposes of the Act, "to regulate", "to designate", "to determine", "to prohibit", "to require", etc.; and, it is to be noted,

> to exempt *from any determination or order* any person or class of persons engaged in the production, packing, transporting, storing, or marketing of the regulated product or any class, variety or grade thereof.

It must be noted further that the meaning of "natural product" is carefully defined by section 2 of the Act. It is not left to the Lieutenant-Governor in Council to expand or to constrict the scope of the term. Therefore the Lieutenant-Governor in Council cannot widen or narrow the scope of the Act nor apply or cease to apply it to various products, as the Alberta legislation previously mentioned purported to permit in the case of debts. That is to say, the Lieutenant-Governor in Council cannot amend the Act by altering its scope. He can only establish schemes with respect to matters to which the purposes of the Act extend, with the object of putting those purposes into effect. In this fact, it is suggested, lay the real reason why the judgment in the *Credit Foncier* case did not apply in the *Natural Products* case.

[7] [1937] 3 W.W.R. 273.

The court, in the *Natural Products* case, held that the fact that the Act under review confers on the Lieutenant-Governor in Council authority to establish marketing schemes and boards, and to vest in the boards certain powers deemed necessary, does not constitute an illegal delegation of legislative powers or functions. It was held that the Act is not a "skeleton", but discloses a purpose and intent which is not vague and uncertain but definite and concrete. This is important because it must be remembered that all powers conferred on the Lieutenant-Governor in Council by the Act under consideration are in furtherance of this definite "purpose and intent". They are purely regulatory in other words.

Much is said in the judgment about the power "to exempt"; and in this connection the judgment in *Credit Foncier Franco-Canadien* v. *Ross et al.* is criticized. There is, however, a great difference between the statutes dealt with in the two judgments. In the British Columbia Act the power to exempt is a power given to a board to exempt persons *from the board's own orders.* In the Alberta Act the power given was to *exclude from the operation of the Act itself* certain debts, surely a vastly different thing.

In the *Natural Products* case it was also held that the federal or a provincial parliament, when legislating in respect to a subject matter within its competence, has powers of delegation that are not enlarged or restricted by the presence or absence of a state of war or any other emergency. As to this ruling, more will be said later. Martin C.J. B.C. then says that he is unable to take the view of *Gray's* case expressed in the *Credit Foncier* case. It is respectfully submitted that the Appellate Division of Alberta did not take any view of *In re Gray* that was inconsistent with the judgment in the *Natural Products* case. The Appellate Division merely pointed out that *Gray's* case was inapplicable to the circumstances the court was considering in the *Credit Foncier* case. It was mentioned that *Gray's* case arose out of the War Measures Act and that the delegation of power authorized by this Act could be supported as a war measure and was therefore justified under the "residuary powers" in section 91 of the British North America Act.

Even if it were true, as suggested in the judgment in the *Natural Products* case, that the extent of the right of Parliament to delegate powers is not affected by the existence or otherwise of a state of war (and this dictum appears to have been overruled in the *Reference as to the Validity of Regulations in relation to Chemicals*, as will be mentioned), it is also true that the right of

Parliament to legislate at all on the subject will, in some cases, depend on the existence of a state of war — namely, where the powers delegated by Parliament deal with matters normally within provincial jurisdiction. Since the subject dealt with by the legislation under review in *Gray's* case was liability to military service — a subject normally within the jurisdiction of Parliament — the right to legislate did not depend on the existence of a state of war. It is probably true that the existence of a state of war cannot affect the right of a provincial legislature to delegate powers.

The reference, however, to the Act under consideration in *Gray's* case being a war measure is not for our present purpose as important as the observation made by the Appellate Division in Alberta, as previously mentioned, that *Gray's* case was based on Dominion legislation, which of course was not subject to attack on the grounds that proved fatal to the Alberta legislation then under consideration, *i.e.*, that it affected the office of Lieutenant-Governor.

In the *Natural Products* case the judgments approved the *Initiative and Referendum* case, but distinguished it on the ground that it dealt with an attempt by the Legislature "to create and endow with its own capacity a new legislative power not created by the Act to which it owes its own creation".

For a provincial legislature to endow another body with the power to extend an act to new fields or to restrict its application to a lesser area is, it is suggested, to grant power to amend the act; that is to say, to legislate and not merely to regulate.

Having in mind that the authority to "exempt" granted in the Natural Products Marketing Act of British Columbia was an authority to the Board to exempt persons from *its own orders*, it is respectfully submitted that Chief Justice Martin criticizes unnecessarily the decision in the *Credit Foncier* case,[8] which, as pointed out, dealt with power to exclude from the operation of a statute certain things otherwise within it.

In the same passage the Chief Justice states that, "In *Hodge's* case, indeed, that very thing — exclusion or exemption from operation, formed a part of the impugned, but confirmed, statute . . . whereby the Licence Commissioners were delegated the power to 'exempt' certain cities and towns 'from the necessity of having all the tavern accomodation required by law' ". (It is to be noted that it was not "certain cities and towns", but certain persons "qualified to have a tavern licence" in the cities

[8] [1937] 3 W.W.R. 273, at p. 286.

and towns, who were so exempted.) Again we find a most important difference between the powers conferred by the Ontario statute under consideration in *Hodge's* case and the statute with which the *Credit Foncier* case deals. In the Ontario statute the Legislature itself specified a definite exemption which the commissioners could merely bring into effect by a resolution. They could not go outside the four walls of the statute and create exemptions at their own discretion. Under the Alberta statute the Lieutenant-Governor in Council could exclude from the Act "any kind or description of debt".

It may be argued that, because the judgments in the *Natural Products* case criticized some of the reasoning in the *Credit Foncier* case and because the result of the *Natural Products* case was approved by the Privy Council in *Shannon et al.* v. *Lower Mainland Dairy Products Board*, therefore the *Credit Foncier* case may be disregarded as an authority. This, however, does not follow. In the *Shannon* case general approval is given, it is true, to the disposal of the subject by Martin C.J. B.C. in the *Natural Products* case; and it is said that there are numerous cases of delegation of "similar powers to those contained in this Act" (*i.e.*, the British Columbia Act). As has been mentioned, however, the delegated authority given in that Act was of a very different character from that given in The Reduction and Settlement of Debts Act of Alberta.

It should also be repeated that the Privy Council in the *Shannon* case said:

> This objection [that it is not within the powers of the provincial legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council or to give him powers of further delegation] appears to their Lordships subversive of the rights which the provincial Legislature enjoys *while dealing with matters falling within the classes of subjects in relation to which the constitution has* granted legislative powers;

and again:

> *Within its appointed sphere* the provincial legislature is as supreme as any other parliament.

The italicized words should be noted particularly.

In any discussion of the validity of delegations of power by Parliament, the *Reference as to the Validity of the Regulations in relation to Chemicals*[9] is one of the most important authorities. Respecting the particular matter discussed in this article — the validity of the delegation of *legislative* authority by a provincial

[9] [1943] S.C.R. 1.

legislature — it is not however of as much assistance as other cases already discussed.

The Supreme Court in this case considered the validity of the exercise by the Governor-General in Council of power, said to be delegated by the War Measures Act, to make certain regulations as a war measure and to delegate certain of such delegated powers to the Controller of Chemicals. It will be necessary here to quote only a paragraph from the headnote to the report:

> The authority vested in the Governor General in Council by the *War Measures Act*, (its constitutional validity having been finally determined in *Re Gray*, 57 S.C.R. 150, and *Fort Frances* case, [1923] A.C. 695), is legislative in its character; and an order in council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, have the effect of an Act of Parliament: *in re Gray, supra.*

It is settled then that power vested in the Governor-General in Council under the War Measures Act is legislative in character (there being nothing in the British North America Act saying that Parliament cannot legislate so as to affect the office of Governor-General).

Although perhaps not pertinent to the main theme of this argument, it is to be noted that the Supreme Court did not agree with the proposition laid down in *Reference re Natural Products Marketing (British Columbia) Act* to the effect that while the existence of a state of war might *confer* on Parliament the right to legislate in some (*e.g.* provincial) fields, nevertheless once that right is acquired Parliament can delegate without restriction, and the state of war does not affect, one way or the other, its right to delegate. Dealing with this question, Duff C.J. says:

> The judgment of the Privy Council in the last mentioned case [*Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695] laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the provinces in relation to a vast field in which the provinces would otherwise have exclusive jurisdiction. It must not, however, be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed by Parliament to the Executive for legislative action in the case of an emergency.

This case, then, confirms the right of Parliament to delegate power to the Governor-General in Council and, where the statute by which that right is exercised so provides, the right of the

Governor-General in Council to delegate further the powers so delegated by Parliament.

From the cases discussed we can draw these conclusions, therefore, *in so far as provincial legislatures are concerned:*

(a) delegation by a legislature of its powers must be within the limits fixed by section 92 of the British North America Act and therefore must not affect the office of Lieutenant-Governor;

(b) delegated powers should be ancillary to legislation.

In other words a provincial legislature can delegate power to regulate but not to legislate.

It may sometimes be very difficult to draw the line between legislation and regulation. Where a statute leaves details to be dealt with by regulation respecting matters purely ancillary to the operative parts of the statute, it is fatally easy for the draftsmen of the regulations to cross that line and frame their provisions so that, while they are perhaps within the general purpose and intent of the act, they are nevertheless not ancillary to existing provisions of it, but are in themselves new substantive provisions.

It is perhaps easier to detect, as being really legislative in character, regulations that extend or limit the sphere of an act, the kind of regulations for which provision was made in The Reduction and Settlement of Debts Act of Alberta. This is a provision frequently found in statutes, a provision that, it is maintained, is improper.

It is not difficult to find examples of statutes which contain a schedule setting forth a list of things, occupations, etc., and which authorize the Lieutenant-Governor in Council to amend that schedule from time to time. Furthermore, acts of several provinces adopting, as a wartime measure, the labour and industrial disputes legislation contained in the Dominion Order in Council P.C. 1003 provided that amendments made by the Governor-General in Council to that order in council could be adopted as amendments to the provincial legislation by order of the Lieutenant-Governor in Council. The subject therefore is of great importance. If the view here expressed is correct, a number of important provincial enactments are open to challenge.

In order to avoid the necessity of perhaps frequent amendments, a device was adopted in The Apprenticeship Act of Manitoba,[10] which follows, to some extent, that used in the

[10] Chapter 1 of the Statutes of 1944.

Ontario statute considered in *Hodge* v. *The Queen*, wherein the Legislature specifically provided or described an exemption that the Liquor Commissioners could bring into being. In The Apprenticeship Act there is a schedule of trades that is quite extensive. The Act does not immediately apply to these trades but only to such of them as the Lieutenant-Governor in Council from time to time designates by order in council. The Lieutenant-Governor in Council cannot therefore go outside the four walls of the Act. The Legislature had an opportunity to pass on the schedule and knew that such and such a trade might at any time be brought under the Act. In effect, what happens is something like what occurs when a statute is brought into force on proclamation. In the case of The Apprenticeship Act, the legislation is simply brought into force by proclamation as regards a trade *named in the Act.* No change is made in the wording of the Act by the action of the Lieutenant-Governor in Council. If it should ever be desired to apply the Act to a trade not listed, the schedule will have to be amended by the Legislature.

It is the purpose of the present writer to maintain that delegated power *to alter the scope or other terms of a statute* is power to legislate; and that such a power, although it may be possessed by Parliament, does conflict with section 92 of the British North America Act by affecting the office of Lieutenant-Governor, and that it is therefore not "within the classes of subjects in relation to which the constitution has granted legislative powers" to provincial legislatures. It is not within their "appointed sphere". With this view doubtless many will disagree.

THE SUMMING-UP IN BARDELL v. PICKWICK

Mr. Justice Stareleigh summed up in the old-established and most approved form. He read as much of his notes to the jury as he could decipher on so short a notice, and made running comments on the evidence as he went along. If Mrs. Bardell were right, it was perfectly clear Mr. Pickwick was wrong, and if they thought the evidence of Mrs. Cluppins worthy of credence they would believe it, and, if they didn't, why they wouldn't. If they were satisfied that a breach of promise of marriage had been committed, they would find for the plaintiff with such damages as they thought proper; and if, on the other hand, it appeared to them that no promise of marriage had ever been given, they would find for the defendant with no damages at all. The jury then retired to their private room to talk the matter over, and the judge retired to *his* private room to refresh himself with a mutton chop and a glass of sherry. (Charles Dickens: The Posthumous Papers of the Pickwick Club)