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DELEGATED LEGISLATION.

The prairie provinces have upon their statute books enactments designed to protect the public from the vendors of worthless or questionable securities, these enactments being framed largely upon the model of an Act which was passed in Kansas in 1911 and subsequently copied in more than twenty of the other States of the Union. Under this legislation a person desiring to offer stocks or bonds for sale to the public is required to file documents with a Board or Commissioner, giving full information about the company, its constitution, financial condition, proposed plan of doing business and the probability that purchasers of the securities will receive a fair return upon their investments, in which case a certificate is issued entitling the applicant to sell the securities.

Blue sky legislation, as it is called, has not met with universal approval. It was considered by a committee of the Board of Trade in England some years ago and condemned. In reporting upon the subject the Board said:—

> It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses.

The question was again taken up by a committee of the Board of Trade appointed in 1925 and in its report the committee made the following recommendation:—

> We recommend that the offering from house to house of shares, stocks, bonds, debentures or debenture stock or similar securities of any company wherever incorporated, either for subscription or sale, should be made an offence punishable on summary conviction by a heavy fine or, in case of a second or subsequent offence, imprisonment.

The method of dealing with the subject here recommended would meet part of the difficulty but it is evidently a long way from the

kind of legislation we have been considering. Some of the American States rely upon licensing the vendors of securities as a means of protecting the public, and this was the principle adopted in Ontario by The Brokers Registration Act, 1924, which was never, however, brought into effect. Ontario is at present engaged, with the assistance of experienced officials from the State of New York in drafting a new measure to cope with the evil.

The legislation of the prairie provinces was in operation for over a decade with satisfactory results when The Saskatchewan Act came before the Supreme Court of Canada in the case of *Lukey* v. *The Ruthenian Farmers' Elevator Co., Ltd.*,[1] and was declared *ultra vires* of the province in so far as it purported to affect Dominion companies. This was a severe blow to the efficacy of all the provincial Acts and the provinces have since that time made strenuous efforts to induce the authorities at Ottawa to place Dominion companies under the control of provincial legislation.

There has been much discussion over the demands of the provinces and it has been strongly argued that such a delegation of authority as is sought could not be made without an amendment to the British North America Act.

What force is there in this objection? Can the Dominion Parliament delegate to the province power to regulate the sales of shares in Dominion companies? The contrary opinion gets some support from a remark made by Lord Watson during the argument in *C.P.R. Co.* v. *Bonsecours*,[2] as follows:—

> The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.

To which Lord Davey adds:—"or curtail."

Again, in Clement's *Canadian Constitution*, at p. 382, the author denies that "the Dominion Parliament can confer upon a provincial assembly any power of legislation not possessed by such Assembly under the Imperial Statute." Further on, however, he asserts that "the Dominion Parliament has attempted to confer upon a provincial legislature the power to repeal as to the province some of the provisions of The Lord's Day Act." The portions of The Lord's Day Act

[1] [1924] 1 D.L.R. 706; [1924] S.C.R. 56.
[2] [1899] A.C. 367.

referred to by Judge Clement will be found discussed at large in the case *In re the Act to amend The Lord's Day Act.*[3]

Todd, in his *Parliamentary Government in the British Colonies,* published in 1893, expresses himself thus at page 570:—

> In any case where, in the distribution of powers by the British North America Act, certain matters are assigned to the legislative authority of the Dominion Parliament, it is not competent for that body to delegate its functions to the local legislature, so as by an absolute grant of discretionary power to enable the local authority to deal with the matter itself. It is otherwise, however, if the Dominion Parliament merely accepts and ratifies arrangements made or to be made in accordance with its own legislation on the subject. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised either absolutely or conditionally. Legislation on the use of particular powers, or in the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing, and in many circumstances it may be highly convenient. The right of a provincial legislature, in a particular matter, to delegate its own authority to a subordinate body has been admitted, but not without dispute.

We have here an *obiter dictum* of an eminent Judge and the opinions of two text-writers, and they are apparently not very favourable to the view that the Dominion may delegate its powers in the manner suggested above. However, the subject of the delegation of legislative functions has come up for examination and discussion in several decided cases. The first of these that we need mention is *Hodge* v. *The Queen,*[4] where it was held that the legislature of Ontario had power under the B.N.A. Act to entrust to a Board of Police Commissioners authority to make regulations in the nature of police or municipal regulations for the good government of taverns, and thereby to create offences and annex penalties thereto.

This decision was based upon the ground that the Act conferred upon the legislature—

> 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. * * * It was argued at the bar that a legislature committing important regulations

[3] [1923] 3 D.L.R. 495; 33 Man. R. 197; (1923) 2 W.W.R. 520; and (1925) 1 W.W.R. 296.

[4] (1883) 9 A.C. 117.

to agents or delegates effaces itself. This is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

The question again came before the Privy Council in *Powell* v. *Apollo Candle Co.*[5] There the board had to consider the legality of The Customs Regulation Act of 1879, New South Wales, which, by section 133, declared that:—

> Whenever any article possesses, in the opinion of the collector, properties in whole or in part which can be used for a similar purpose as a dutiable article, the governor is authorised to levy a duty upon such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its quantities or uses to such dutiable article.

It was objected to this section that it purported to confer legislative power upon the governor, but Sir Robert Collier answered the objection by saying:—

> The legislature has not parted with its perfect control over the governor and has the power, of course, at any moment of withdrawing or altering the power which they have entrusted to him.

Canadian cases in which the subject has been discussed are *In re Lewis*[6] and *In re Gray*,[7] both of which arose out of The War Measures Act, 1914. Section 6 of that Act conferred power upon the Governor-in-Council:—

> To do and authorise such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

By subsection (2) it was declared that:—

> All orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe.

Subsequently the Military Service Act, 1917, was passed providing for calling out the male inhabitants of the Dominion in classes, but allowing of exemptions under certain conditions.

The Governor-General-in-Council passed an order in council on April 20, 1918, approved by resolutions of the Senate and House of

[5] (1885) 10 A.C. 282.
[6] 41 D.L.R. 1; (1918) 2 W.W.R. 687.
[7] 42 D.L.R. 1; 57 S.C.R. 150.

Commons, providing that the Governor-in-Council might direct orders to report for duty to issue to men in any class under the Act, and that thereupon any exemption theretofore granted to any man so called out should cease. The Appellate division of the Supreme Court of Alberta was of opinion that:—

> Orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment, that is, if they are not merely ancillary, subsidiary and subordinate to such enactment and passed for the purpose of the more convenient and effective operation thereof, or are inconsistent with the direct enactments of the legislature which conferred the delegated power or of any legislative body superior thereto or the principles of the common law.

And accordingly the order in council above referred to was declared invalid.

Judgment was given in this case on June 28, 1918, and one month afterwards the same question was brought before the Supreme Court in the case of in *Re Gray* (*supra*). The Court took quite a different view of the legislation in question from that which prevailed in Alberta. It was held that the Governor-in-Council could repeal or amend an existing statute and even that he could do so while Parliament was sitting. In the course of his judgment Mr. Justice Duff said at pp. 167, 170:—

> The authority conferred by the words quoted is a law-making authority, that is to say an authority (within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking "Interpretation Act," section 9, it is an authority to do so from time to time. The true view of the effect of this type of legislation is that the subordinate body, in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.
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> Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by "The War Measures Act" may usefully be contrasted. The North West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.
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> The statute by which this was authorized, by which the machinery of responsible government, and what in substance was parliamentary government, was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada; and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon Parliament by the Imperial Act of 1871 to make provision

for the administration, peace, order and good government in any territory not for the time being included in any province. It was in a word strictly a grant (within limits) of local self government.

In the same case Anglin, J., at p. 176, expressed himself as follows:—

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 as plenary and as ample * * * as the Imperial Parliament in the plenitude of its powers possessed and could bestow.[8]

"No doubt," he continued, "the amendment of a statute, or the taking away of privileges enjoyed or acquired under the authority of a statute, by order-in-council is an extreme exercise of the power of the Governor-in-Council to make orders and regulations of a legislative character," but he held that such nevertheless was the effect of the statute under review, and he added: "The terms of section 6 of The War Measures Act, 1914, are certainly wide enough to cover orders-in-council made while Parliament is in session as well as when it stands prorogued."

Attention has already been drawn to the language of the Privy Council in *Hodge* v. *The Queen* (*supra*):—

Within these limits of subject and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have under the 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.

The scope which the delegation of legislative functions by the Imperial Parliament has assumed is indicated by a note on page XVIII. of Dicey's Law of the Constitution, eighth edition, where the author says:—

Parliament may itself by Act of Parliament either expressly or impliedly give to some subordinate legislature or other body the power to modify or add to a given Act of Parliament Thus, under the Commonwealth Act, 63 & 64 Vict. c. 12, the Imperial Parliament has given to the Parliament of the Australian Commonwealth power to modify many provisions of The Commonwealth Act, and the Imperial Parliament, under The National Insurance Act, 1911, has given power to the Insurance Commissioners and to the Board of Trade to modify some provisions of The Insurance Act.

[8] *Hodge* v. *Reg.*, 9 A.C. at p. 133. 53 L.J.P.C. 1.

In the case of The Initiative and Referendum Act,[9] Lord Haldane speaking for the Judicial Committee says:—

> Sec. 92 of the (British North America) 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 Legislature 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* (*supra*), 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. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

This observation is in no manner inconsistent with what has already been said and the authorities already cited. The legislature must, of course, preserve its own capacity. It cannot part with its jurisdiction by a general grant of its legislative capacity to another body. There is some limit to the right to delegate.

> The power to make laws, extensive as it is, says Prof. Harrison Moore in the Journal of Comparative Legislation for 1922, was vested in a designated authority and no other. * * * All the Privy Council decisions referred to are at pains to shew that the particular delegation in question was by an Act wherein the Legislature itself had exercised its own discretion over the subject matter dealt with. * * * In all the cases there has been some exercise of judgment and discretion by the legislature itself on the subject matter dealt with, so that it was possible to regard the rule set by the delegate authority as one imposed by the legislature itself. Power to establish rules and regulations incidental to actual legislation to carry out such legislation, to supplement and complete it, to fix the time and place at which it shall come into operation, are all included in the power to make laws.

It seems clear from the above citations that the Dominion Parliament might delegate to the province a limited authority to pass laws upon a subject over which the Dominion has control. If, as under The War Measures Act, it can bestow such a power upon the Governor-in-Council, why may it not do so where the depository of the power is a provincial legislature? There seems no basis of principle upon which any distinction can be supported. If this view be correct, the Dominion Companies Act might be amended by a grant to the provinces of authority to legislate upon the sale of shares in those companies.

[9] [1919] A.C. 935 at p. 945.

It is still more clearly the case that the Dominion might make the right to sell securities of Dominion companies to depend upon permission being obtained from a local authority. A leading case on this point is *The Queen* v. *Burah*.[10] There it was held that a section of the Indian High Courts Act (24 and 25 Vict., c. 104) which conferred upon the Lieutenant Governor of Bengal the power to determine whether the Act, or any part of it, should be applied in a certain district, was conditional legislation and not a delegation of legislative powers. In the course of his judgment Lord Selborne, L.C., said:—

> The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and in many circumstances, it may be highly convenient.

The common practice of bringing a statute into operation on proclamation is another illustration of conditional legislation.

Regina. R. W. SHANNON.

[10] (1878) 3 A.C. 889 at p. 906.