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THE IDEAL COMPANY LAW FOR CANADA.

The existence of the rival jurisdictions for the creation of companies and the consequent conflicts, the varying methods of bringing them into existence and the results to their members, directors and to the public, and the rights of the provinces to taxation and control, have been the subject of much litigation and of many articles from disputants or reformers. Mr. H. A. Robson, K.C., in *Canadian Law Times*, 1916, page 861, says that "there is no subject in which there is so conspicuous a need for the removal of the divergencies between the laws of the different provinces as that of Company Law," and Mr. Thomas Mulvey, K.C., in the same publication, in 1920, points out the impossibility of giving an exact opinion in respect of the capacity of either Dominion or provincial companies or the authority of directors. There is no need to dwell upon the necessity for the reform, but I desire to express my disagreement with the manner of bringing it about which has been heretofore suggested—a uniformity of provincial and Dominion acts—and to urge the granting to parliament the exclusive authority in respect of a subject which has now become of such Dominion-wide interest and importance.

A system of uniform provincial acts is objectionable in that:

1. It is impossible to make the uniformity permanent, for the provinces would still retain their right of repeal or amendment, and, as we in British Columbia know too well, capital considers fixed conditions in respect of laws and taxation as a condition precedent to investment.

2. Amendments in unison would be as difficult as the consummation of the original arrangement,—and amendments are inevitable and desirable to keep abreast of commercial development, to remove ambiguities or cure defects.

3. The offensive and unjust condition of requiring heavy regis-

tration fees in every province where it is desired to carry on business would continue. The industrial world considers it an imposition, and its tendency is to hamper that freedom of commercial intercourse which is desired and desirable between the monied interests of the several provinces.

Although the uniformity plan does not result in permanency yet the idea is involved, and the consenting provinces really intend that, and also that they shall part with their freedom of legislating on the subject. There would be a tacit understanding that no amendment would be made without the consent of all. In other words, the same result would be intended, if not actually consummated, as would ensue from an amendment of the B. N. A. Act, taking the right from the provinces and giving it to parliament.

Assuming that the matter of fees can be arranged, why should the provinces not resign their right to legislate on this subject? It is not one of peculiarly provincial concern. Beyond the revenue to be secured provinces as such have no interest in laws governing companies. If it be suggested that provinces have an interest in securing the filing of information in a provincial registry, I would answer that it is not because of some provincial purpose, but because it is desirable that the information should be available to the people more readily than it would be at Ottawa. Surely that is a matter of interest to every Canadian alike, and should and would be the subject of suitable provisions in the Canadian Act, under which it is intended that there would be a registry for every province. The people of the provinces do want the law simplified and an end put to the uncertainty as to capacity and powers, rights and obligations of members and directors beyond the possibility of resurrection, and neither our own citizens nor foreign investors or industrialists will consider the work complete unless there be but one Act and one law-making authority to alter it.

In the negotiations leading to Confederation, provincial rights and interests were naturally anxiously guarded, and in those days the provincial boundary was to many the horizon of their interests and loyalty. Now, with most commercial or industrial operations, the vision and aspirations extend to the oceans, and I believe that had the "fathers" the present-day outlook they would have thought the reservation to the provinces of that limited and ambiguously expressed power was too inconsequential to deserve special treatment, and would have dealt with the subject as one of general interest. It has so been dealt with in the Act creating the Australian Commonwealth. It is as much of nation-wide mercantile interest as Bills of Exchange are. What was possibly thought quite an unimportant

and harmless provision has developed a serious state of confusion and perplexity.

Then as to distribution of fees: By apportioning the receipts in the ratio of the past earnings from this source of the Dominion and the several provinces, justice would be done, and each would receive approximately what it does to-day, save in cases of re-registration, which, as I have said, is an insupportable condition in the opinion of the interests affected. Certainly it was never intended by those who framed section 92, and it is doubtful if Lord Haldane in his dictum in the *Great West Saddlery*[1] case, meant to approve of such registration fees as we have in British Columbia, by way of taxation, and that what he intended was that extra-provincial companies should only pay such taxes as were levied as such against home companies after incorporation. It should be kept in mind that he was considering a Saskatchewan company, where the charge is an annual licence fee, and therefore resembling the ordinary methods of taxation.

In each plan there would probably be the same work of bringing the legislatures and parliament into harmony as to the form of the Act (although this is not a necessary condition precedent to conferring jurisdiction on parliament), but in carrying out the one Act plan there would be in the first place the delay, not involving any uncertainty, of having the Imperial parliament amend the B. N. A. Act. Afterward, however, we should not find ourselves in the position of the United States. We should not create a law of the Medes and Persians, nor emulate the condition existing when the Court of Chancery had its origin.

Then as to details: The very instructive and interesting series of Articles by our provincial Registrar, Mr. H. G. Garrett, is concluded at page 592, vol. 42 of the *Canadian Law Times* by certain proposals in detail on the same subject which it will be advantageous to follow. Mr. Garrett asks, "Is it not possible?—

(1) "To have a single act like the United Kingdom, with its local jurisdictions of England, Scotland and Ireland."

Mr. Garrett's suggestion is that there should be a Federal Act for companies with Dominion objects, and provincial Acts for those whose objects are strictly provincial. To my mind, the change would not be worth while. Confusion would result, and there are other objections which it is not now necessary to anticipate. I am sure Mr. Garrett does not consider this an ideal solution, and puts it forward by way of compromise.

[1] [1921] 2 A.C. 91.

(2) "That the Act should be of the 'Memorandum' type, which is in one form or other the type that prevails everywhere."

This will no doubt be conceded. The Acts of this character are more perfectly developed, and the fact that it is the system in England would, through a better understanding of our law, promote a greater degree of confidence on the part of the English investor.

Furthermore it is the appropriate method of retaining any desired degree of control where the question of *ultra vires* arises. The "natural person" company is not so controllable.

(3) "That there should be registration in every jurisdiction where there is 'residence,' the right to registration being acknowledged, except in the case of such legislation as 'prohibition Acts.'"

Registration at a nominal fee should be compulsory in every province where the company carried on business, so that service *ex juris* would not be necessary. Annual and other returns would be filed in every such province.

(4) "That powers should be everywhere controlled by the principle of the *ultra vires* doctrine—modified if thought fit."

The draft of the Committee of the Commissioners as reported in the proceedings of the Canadian Bar Association for 1922, at page 382, is as follows:—

"15B. Any contract made by a company shall, as between the contracting parties and all parties claiming any right thereunder, be binding upon the parties thereto, notwithstanding that such contract was beyond the powers of the company, and in any action brought in any court of this province, upon or in respect of any such contract, no person shall plead that the contract was beyond the powers of the company."

I should prefer the recognition of the *ultra vires* principle fully for it is a necessary safeguard to investing capital, but if the modification is to be allowed I should have preferred to say that the powers of a company shall be limited to those stated in the memorandum or necessarily incidental thereto, provided that unless it shall be proved by or on behalf of the company that any one contracting with the company in respect of an object beyond its powers was aware of the limitation, the company would be bound as if it had the power. The provisions suggested by the committee for restraining and penalizing the directors in respect of *ultra vires* transactions are a necessary and desirable corollary.

(5) "That fees should be moderate and uniform and regulations, disclosure, returns and general company law identical, except in genuine special cases."

I think a greater revenue can be secured by getting a substan-

tial lump sum for registration than under an annual licence, having regard to the number of companies that never become going concerns or drop off in early youth. The former method is not considered burdensome in British Columbia, and it is more equitable to grade the fees to the capital.

The words "uniform" and "identical" are superfluous if there be but one Act. Special cases would be dealt with by special Acts of parliament. Provincial inspection of trust and loan companies would still be practicable, or if the right be not clear, it could be protected in the amending Act.

(6) "That Dominion 'exclusive' powers should continue and provincial 'exclusive' powers be admitted—the sham Dominion company would be a thing of the past."

If there be but one act the perplexities created by conflicting jurisdictions would be ended. Under any other system they would continue. Probably a new series of appeals to the Privy Council would ensue.

(7) "That foreign companies be registered only in the provinces where they carry on business."

Under the one Act plan, in addition to registering as they do now, they should be required to notify the provincial registrars of the location of their registered office or place of business for service and other purposes as in the case of Canadian companies. Many such companies would prefer incorporating subsidiary companies under the Canadian Act.

(8) "That classes of business which assume national dimensions and importance, such as the grain trade and insurance, be allowed as proper subjects for Federal supervision and legislation—this suggestion however with considerable reservation."

This would appear to be outside the subject in hand. Such legislation would not be company law, but to such extent as it might be, then the one Dominion Act would meet the condition.

The uniform Act plan seems to be the only one receiving consideration, but if it is possible of accomplishment, why should we stop short of the more perfect method? Idealism should not be an objection but a recommendation. We should not allow our minds to be warped by precedent, as is so often charged against us, nor permit our actions to be fettered by unwillingness to follow the dictates of logic. The business man demands the reform and his idea is the one act plan. Are we not his servants and in duty bound to support his demand? I ask those to whom provincial rights are an object of worship to contrast the fetish of State Rights in hampering law reform in the republic to the south, with the advantages of a system

which has provided a general law on banking, bills of exchange, crimes, and the other topics delegated to parliament. Wherein has any province lost any advantage to its citizens by Dominion-wide legislation on these subjects? I venture to predict that the abandonment of a system at once offensive and confusing and the adoption of one of simplicity, certainty and permanency would result in an increased influx of capital and industries for the development of our country.

The subjects of Insurance, Rights and Property of Married Women, Partnership, and Bulk Sales with respect to which uniform legislation is proposed, are alike of Dominion interest and importance and might be similarly dealt with. It would not be an unpopular step. Every business man would approve and no interests would be prejudiced, so that our legislators need not fear criticism. An attractive argument in its favour would be its tendency to reduce the cost of law making. Even to the man whose business is confined to one locality and one province, it is of no concern whether his one-man company is governed by an act found in Dominion or provincial statutes, but to the outsider who does business with him it is of decided importance and satisfaction to know what law affects his debtor and that that law is the one he is familiar with.

In respect of objects that are not of purely local concern, it is desirable that there should be but one law for Canada. Matters which affect us as residents of a province should be the sole subject of provincial control. Provincial boundaries are intended for convenience in the management of the affairs of the locality, and it is illogical that provincial legislatures should have any voice in the making of laws which affect us as Canadians. A common law is a bond of union and sympathy and insularity in law-making promotes a like attitude between the provinces and their citizens. Let us ever adopt that course which will assist us to realise that we *are,* and not merely promising one another, to be, one people.

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