Privy Council Appeal No. 125 *of* 1927.

The Attorney-General of Manitoba and another - - - *Appellants*

v.

The Attorney-General of Canada - - - - - *Respondent*

AND

The Attorney-General of Ontario - - - - - *Intervener*

FROM

THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT DUNEDIN.
VISCOUNT SUMNER.
LORD ATKIN.
CHIEF JUSTICE ANGLIN.

[*Delivered by* VISCOUNT SUMNER.]

By Order in Council dated the 4th June, 1927, two questions were referred to the Court of Appeal of Manitoba for hearing and consideration, and in due course the Court of Appeal, following the decision of the Supreme Court of Canada in *Lukey* v. *Ruthenian Farmers' Elevator Company, Limited* (1924, S.C.R., p. 56), returned the answer "No" to both questions, but gave leave to appeal to His Majesty in Council. In effect, therefore, the present appeal, brought pursuant to that leave, is an appeal against *Lukey's* case above mentioned.

The questions were: 1. Are the provisions of the Sale of Shares Act of Manitoba, being ch. 175 of the Consolidated Amendments 1924, *intra vires* of the Provincial Legislature in so far as they purport to apply to the sale of its own shares by a Dominion company?

2. Assuming that "The Municipal and Public Utility Board Act" of Manitoba, being ch. 33 of the 1926 Statutes of

Manitoba, has been duly brought into force by proclamation of the Lieutenant Governor, are the provisions of the said ch. 33 *intra vires* of the Provincial Legislature in so far as they purport to apply to the sale of its own shares by a Dominion company ?

The statutes in question have to be considered as a whole and with the assistance of counsel their Lordships have gone through the sections in detail, but those on which the questions referred specially depend are Sections 4 to 13 inclusive of the earlier and Sections 162 to 165 inclusive of the later Act. Their effect may be sufficiently summarised as follows.

Under the Sale of Shares Act no company, however or wherever incorporated, might sell or offer to sell or try to sell in Manitoba any shares, stocks, bonds or other securities of any company (with exceptions not for present purposes material) without first obtaining from the Public Utility Commissioner a certificate and a licence. It was common ground that the word " sell " in both Acts included, along with sales in the stricter sense of the word, subscriptions and applications by members of the public for shares in a company or securities created and issued by a company, and allotment of such shares or securities in accordance with the applications, so as thereby to make the allottees corporators or secured creditors of the company. In order to obtain the requisite permission to sell, the company was required to file with the Commissioner a statement, showing in detail the plan on which it proposed to transact business, a copy of all contracts and instruments to be entered into between itself and its contributors, a statement showing its name and location, and an itemised account of its actual financial condition and the amount of its property and liabilities, and such other information touching its affairs as the Commissioner might require, with certain other documents relating to the law governing its incorporation in the case of a company not organised under the laws of Manitoba. The Commissioner was thereupon to examine these materials, and if in his judgment the company satisfied him with regard to the above-mentioned matters, he was to grant the certificate and permission required ; in the contrary event he might require the company to make such alterations in its articles, contracts and plan of business as in his judgment might be necessary, and until he was satisfied in these respects his permission was to be withheld.

Turning to the later Act, the Municipal and Public Utility Board Act, 1926, which repeals the previous Sale of Shares Act and takes its place, it is to be observed that the duties of the Commissioner are now to be discharged by a Board, called the Municipal and Public Utility Board, an incorporated body, consisting of a chairman and two other members. The Board acts with more publicity, more formality, and more resemblance to the proceedings of a court of law than the Commissioner under the earlier statute and, so far as the present matter is concerned, its conclusions are open to review by the Court of Appeal on any point of law or on any question affecting the jurisdiction of the

Board, but its powers and functions do not appear to differ for present purposes from those of the Commissioner. Section 162 provides as follow :—

> " No person, firm, or corporation shall sell, or offer or agree to sell, or directly or indirectly attempt to sell in Manitoba, any shares, stocks, bonds or other securities of or issued by any company, unless the company has first been approved by the Board as one the securities of which are permitted to be sold in Manitoba and a certificate to that effect . . . issued by the Board."

There follow elaborate provisions under which the Board is enabled, as the Commissioner had been, to arrive at a decision, favourable or unfavourable to the company's application for the required permission, and in either case, subject always to the above appeal, its decision is final.

It will thus be seen that, under requirements made in their discretion by the Commissioner or the Board, the exercise of powers expressly given to the Company might be forbidden and compliance with statutory obligations prevented, such as sales of the Company's shares, directed in terms by the Dominion Companies Act, Section 58 (2), or permitted in specific cases, Section 75, or generally for the Company's purposes, Section 84 (*c*), and conclusions, duly arrived at by the competent Dominion Minister, might in effect be overridden or set aside by the Provincial Commissioner or the Board. The Company might be prevented from having the benefit attaching to compliance with Section 28, and so eventually forfeit its Dominion incorporation, Section 29, and in general it could only launch its enterprise subject to provincial and non-Dominion requirements.

In the case of a company, incorporated for purposes not wholly provincial and under the powers of legislation of the Dominion of Canada, their Lordships cannot doubt that the provincial legislation above summarised interferes, directly and not merely incidentally, in material respects and to a substantial extent, with the capacity of the company to raise capital, as and when its directors may deem it necessary to do so in accordance with its articles and the provisions of the Dominion Companies Act, and so derogates from its status and consequent capacities as a Dominion company.

Their Lordships were informed, and the Acts clearly bear it out, that among the objects with which this legislation was framed was the protection of inexperienced residents in the Province from the temptation to participate in enterprises ill-designed, ill-equipped, and ill-conducted, and from consequent losses of their savings and disappointment of their hopes. The subject was one well worthy of the attention and care of statesmen and, it may be, was peculiarly within the domain of provincial regulation ; the method adopted was that of prevention, instead of or in addition to such cure as criminal prosecution and punishment can afford. They do not doubt that the Commissioner under the one Act and the Board

under the other have performed their duties with care and discretion and have been selected for their experience and judgment in the kind of matters with which they deal. They think it probable that the risk of any substantial errors of judgment on their part is small, and that none but unmeritorious companies need find the requirements burdensome, the delay prejudicial, or the result matter of anxiety or loss. It is further the case that there is no discrimination against Dominion companies as such, since all companies are included in the legislation ; that companies, which can sell their shares or securities in other Provinces or abroad or can borrow without security or raise additional funds by capitalising undistributed profits, are at liberty to do so, and, further, by Section 6 of the first Act and by Section 160 (i) (*g*) of the second, it is permissible to them to sell their shares or securities in the Province without licence from the Executive, provided that such sale or attempt to sell is not " made in the course of continued or successive acts " or " transactions of a like character." This last provision appears to be of slight value. Substantially, if capital is to be raised it must either be raised by " selling " the securities issued piecemeal in a succession of transactions to separate purchasers and allottees, or by disposing of the whole issue to some financial house in one transaction. This alternative may not be feasible at all, but even if it were, as the purchasing house in its turn could only dispose of its investment to the public by successive sales to or transactions with the public, which would come under the Acts, the fetter on the financial autonomy of the Dominion company would operate although at one remove, and would interfere with its essential powers in the same way though possibly in a somewhat different degree. It is sufficient to add that, although Sections 174, 178 and 183 of the Act of 1926 may mitigate the effect of the prior legislation, they do not remove the flaw in its validity, which Section 162 preserves.

The general effect of these provisions remains. An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is under these Acts liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilised in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial Executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that Executive may take of the plans, promises and prospects of a creation of the Dominion. The question is whether legislation, which must in many cases have this effect, even though not in all, is *intra vires* the legislature of Manitoba. It appears to admit of only one answer in view of

what is now settled law with regard to the effect of Sections 91 and 92 of the British North America Act on this class of legislation.

The case was argued with much learning and resource, partly on the construction of Sections 91 and 92, partly on the decisions of the Supreme Court of Canada and of their Lordships' Board. It was said that no more was claimed for the powers of the Provincial Legislature than was clearly within its powers in the case of a natural person; that a decision adverse to the validity of these statutes would enable any group of men, who wished to escape provincial prohibitions, which bound them as natural persons, to incorporate themselves as a Dominion company and thus defy the provincial legislation; that power to invest an incorporated entity with capacities is quite distinct from authority for their unrestricted exercise; and that Dominion powers should not be interpreted so as to give protection to fraud. The ultimate authority after all is the British North America Act, and its construction is in this connexion no longer in doubt. These and analogous contentions have been so often canvassed and decided that no good purpose can be served by a re-examination of them. As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the Legislatures of those provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree. The reasoning, by which this result has been arrived at, has been most fully developed in the judgments of the Board in the *John Deere Plow Co.'s* case [1915] A.C. 330 and *Great West Saddlery Co.*, v. *The King*, [1921], 2 A.C. 91. In their Lordships' view the statutes now under consideration do so impair the status and powers of such a company, and accordingly decisions as to property and civil rights like *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, and *The Colonial Building Assc.* v. *Quebec*, 9 App. Cas. 157, or as to local taxation like *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, or as to local regulations of the liquor traffic or other similar matters, like *A.G. of Ontario* v. *A.G. of Canada*, [1896] A.C. 348, and the case of the *Manitoba Licence Holders*, [1902] A.C. 73, do not govern the present case.

This is not a mere case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a mere matter of local police regulation, or local administration, or raising of local revenue, or a mere means of attaining some exclusively provincial object. The capacity of a Dominion Company to obtain capital by the subscription, or so-called sale, of its shares, is essential in a sense, in which holding

particular kinds of property in a province or selling particular commodities, subject to provincial conditions or regulations, is not. Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose. Again, with regard to the later Act, passed after, and no doubt in view of, *Lukey's* case, in their Lordships' view the objections arising under the earlier Act are not met by the provisions, which operate on natural persons within the Province, with or through whom the Dominion company will require to deal; for the object and effect are the same and it is not permissible to do indirectly what cannot be done directly.

Their Lordships are so sensible of the difficulties in which the Provincial Legislatures may find themselves placed in such matters as this, and so anxious not to appear to say anything that might restrict their authority in any case distinguishable from the present, that they refrain from resting their decision upon any other feature in the Acts under discussion than the interference with the status of a company, incorporated under Dominion laws, such as they have mentioned.

Their Lordships are of opinion that the Court of Appeal of Manitoba rightly answered the questions referred to them, and that their decision ought to be affirmed, and so they will humbly advise His Majesty.

In the Privy Council.

THE ATTORNEY-GENERAL OF MANITOBA AND ANOTHER

v.

THE ATTORNEY-GENERAL OF CANADA

AND

THE ATTORNEY-GENERAL OF ONTARIO.

DELIVERED BY VISCOUNT SUMNER.

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