*Privy Council Appeal No.* 107 *of* 1918.

**In the matter of "The Initiative and Referendum Act," being Chapter 59 of the Acts of the Legislative Assembly of Manitoba, 6 George V.**

FROM

## THE COURT OF APPEAL FOR MANITOBA.

---

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1919.

---

*Present at the Hearing*:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.
LORD SCOTT DICKSON.

[*Delivered by* VISCOUNT HALDANE.]

---

In this case questions were raised in the Province of Manitoba as to the validity of an Act passed by its Legislature and entitled the Initiative and Referendum Act. In consequence, under a Statute which enabled him to do so, the Lieutenant-Governor in Council referred to the Court of King's Bench of the Province the two questions which follow :—

1. Had the Legislative Assembly jurisdiction to enact the said Act, and, if not, in what particular or respect has it exceeded its powers ?

2. Had the Legislative Assembly jurisdiction to enact sections 3, 4, 4*a*, 7, 8, 11, 12, 17 (subsection 1) of the said Act, or any of them ; and, if so, which of them ?

On the 27th October, 1916, these questions came before Mathers, C.J. By consent there was no argument, and the learned Judge decided that the Legislative Assembly had jurisdiction to pass the Act and the several sections referred to in the second question.

The matter was then brought before the Court of Appeal of the Province, and was argued before Howell, C.J., and Richards, Perdue, Cameron and Haggart, J.A. On the 20th December, 1916, the Court of Appeal delivered judgment, answering the

questions submitted in the negative. The answer to the first question was: "No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith." The answer to the second question was: "As to sections 3, 4, 4*a*, 7, 9 and 11 the answer is 'No.' As to sections 12 and 17 (subsection 1) the answer is, 'Taken with their context, No.'"

In October, 1918, special leave was granted by His Majesty in Council to the Attorney-General of the Province to appeal to the Sovereign in Council, and by Order dated the 25th November in the same year leave was granted to the Attorney-General of Canada to intervene.

It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the Province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the Constitution of Canada should come before that Court prior to being brought to London for argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs to the Supreme Court under the Constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the Judges of that Court. However, the Attorney-General of the Province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal for Manitoba.

The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change by the Assembly in the session in which it is submitted, must be submitted by the

Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is *intra vires*. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly," on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.

The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the repeal of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from these already referred to, are made for the repeal of such Act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding $100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the matters referred, not exceeding twelve hundred words for each side.

The framework of the Constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the Resolutions adopted by the Conference of Canadian and other delegates held at Quebec in October, 1864. The object was to form in the first instance out of the old Province of Canada, along with Nova Scotia and New Brunswick, a Dominion with a constitution similar in principle to that of the United Kingdom. Provision was made for the extension of this Constitution to other Colonies, such as Newfoundland and Prince Edward Island, should they desire to come in, and also to Rupert's Land and the North-Western Territory. It is out of these last that the Province of Manitoba was formed, the provisions of the Act of 1867 that are applicable having been meantime strengthened by subsequent Imperial and Dominion legislation. The Executive Government of Canada was declared by the Act of 1867 to remain

vested in the Queen, and, by section 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V of the Act established analogous Constitutions for the Provinces. For each of these there was to be a Lieutenant-Governor. Although he is under section 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (1892, A.C. 437), that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign, the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of Dominion Government. Section 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the Government of a Province. The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a Central Government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plentitude 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 importance of bearing this in mind when construing the subsequent provisions of the British North America Act will presently appear. After thus defining the executive power the Statute goes on to provide for a Legislature for each Province, and concludes Part V by declaring in section 90 that what has been laid down as to the Dominion Parliament in regard to Appropriation and Money Bills, the recommendation of Money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State, and of one year for two years, and of the Province for Canada.

The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the Dominion Parliament and the Provincial Legislatures. Nothing in section 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect. The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion. Had the Provinces possessed the residuary capacity, as in the case with the States under the Constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies. But it is not so, and it is therefore unnecessary to pursue a point which is merely speculative. The language of section 92 is important. That section commences by enacting that "in such Province the Legislature may exclusively make laws in relation to matters" coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, "the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, excepting as regards the office of Lieutenant-Governor."

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the Province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing section 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the Province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as 69, the principle of which has been applied to Manitoba by section 2 of the Dominion Statute of 1870, which formed the new Province out of Rupert's Land and the North-Western Territory, and established it with the Constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far *ultra vires*.

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the Constitutional

head, and renders him powerless to prevent its becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in section 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under section 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the Clerk of the Executive Council shall have published in the "Manitoba Gazette" a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the *ultra vires* character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act of 1865, therefore, which was invoked in the course of the argument, does not assist the appellants.

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. 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 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* (9 A.C., 117), 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.

They have already indicated that on the point considered earlier in this judgment they are of opinion that the first part of the first question submitted for judicial decision, that relating to the jurisdiction to pass the Act, must be answered in the negative. As to the second part of this question, and as to the second question submitted which covers the same ground, namely, whether the Legislative Assembly could enact sections 3, 4, 4*a*, 7, 9, 11, 12 and 17 (subsection 1), or any of them, they agree

with the Court of Appeal, subject to a reservation as to section 12, in thinking that none of them were validly enacted, for they were merely steps towards the accomplishment of a purpose that was *ultra vires*. As to section 12, if the last sentence were omitted they think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and its context, it could have been validly enacted. But it is obvious that this provision was introduced where it stands in the midst of a number of other sections as preparatory to the accomplishment of *ultra vires* purposes.

It may well be, therefore, that the Court of Appeal was right in refusing to look at it apart from the rest of the sections, the purposes of which it was put in to subserve. Their Lordships think it unnecessary to decide a point which the appellants did not raise as a separate one at the Bar, and which has no relation to the real topic of controversy, or to interfere with the conclusion come to by the Judges in the Court below.

They will humbly advise His Majesty that the questions submitted should be answered in the terms indicated. There will be no order as to costs. The appeal should be simply dismissed.

**In the Privy Council.**

---

IN THE MATTER OF "THE INITIATIVE AND REFERENDUM ACT," BEING CHAPTER 59 OF THE ACTS OF THE LEGISLATIVE ASSEMBLY OF MANITOBA, 6 GEORGE V.

---

DELIVERED BY VISCOUNT HALDANE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.