THE B.C. POWER CASE:

NEW RESTRICTIONS ON PROVINCIAL CONTROL OVER FEDERAL COMPANIES

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The decision of the British Columbia government to expropriate the British Columbia Electric Company Limited provoked a torrent of comment and debate among observers of Canadian politics which even now, almost three years after the event, shows few signs of ending. The decision of Chief Justice Lett, of the British Columbia Supreme Court, that the expropriation was unconstitutional[1] will provide students of Canadian constitutional law with material for discussion for years to come. And one of the more frequently discussed aspects of the case will probably be the increased immunity that it offers federally incorporated companies from the operation of provincial statutes.

Some knowledge of the facts leading up to the expropriation is essentail to a proper understanding of the decision. Unfortunately, space limitations prevent an attempt to tell the whole story in an article like this, and, in any event, human limitations preclude the possibility of reproducing so intricate a web of technical complexity and political intrigue with complete objectivity and accuracy. A bare outline will have to suffice.

The present government of British Columbia has for several years viewed the Peace River, in the northeast section of the province, as the key to British Columbia's future economic development. To harness the might of that giant would, it is thought, not only meet existing needs for electric power, but also attract industry to the wilderness through which the river now winds, resulting some day in the growth there of a great industrial complex which would strengthen the provincial economy enormously. The government's first attempt to develop the area was the controversial Wenner-Gren scheme, by which the entire project was entrusted to private enterprise. When this scheme aborted, it was decided that the undertaking should be administered publicly. A beginning has now been made, both on the power project itself, and on the first of the industries which it is hoped will be attracted to the wilderness.

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1. *British Columbia Power Corporation Limited* v. *A.-G. of British Columbia, et al* (1963) 44 W.W.R. 65.

Matters have been complicated, however, by the possibility of a similar large-scale power development on the Columbia River, in the southern part of the province. For two decades discussions have been carried on between Canada and the United States about joint development of the Columbia, which joins the two countries. Finally, in 1961, a treaty was signed, one of the terms of which entitled Canada to a portion of the extra power that could be generated in the United States as a result of controlling the water by dams in Canada. The British Columbia government regarded this with some concern, because if the Peace River project were developed, as it was apparently determined would be the case, the province would have little need for the downstream benefits from the Columbia in the foreseeable future. In fact, if the power potential of the Columbia on the Canadian side of the border were developed simultaneously with the Peace River project, there would probably be a power surplus over and above the downstream benefits, even if the envisioned industrialization of the wilderness were to occur. Accordingly, British Columbia proposed selling the downstream power benefits to the United States in return for enough money to finance the dam construction on the Canadian side. The federal government's initial disagreement with this proposal led to the federal-provincial stalemate over the Columbia, and the resulting delay in Canadian ratification of the treaty.

In the meantime, the distribution of all electric power in the province was in the hands of a privately owned monopoly. The British Columbia Electric Company Limited (hereinafter referred to as B.C. Electric) was the last giant private enterprise power company remaining in Canada. This fact alone would have made the company a natural target for the criticism of the socialistically inclined New Democratic Party, which formed the official opposition in British Columbia, and posed a substantial threat to the government's security of tenure. The additional fact that electric power cost the consumer more in British Columbia than anywhere else in Canada led almost inevitably to the N.D.P.'s advocating public ownership of B.C. Electric as part of their election platform. The government was aware that this particular plank had considerable attraction for the voters.

At the same time, British Columbia was annoyed by the fact that the federal government reaped a sizeable annual revenue from the operations of B.C. Electric in the form of a 50% corporation income tax, a levy that is not paid by any of the other large power enterprises in the country, because, being publicly owned, they are exempt from tax. The Premier of British Columbia had tried unsuccessfully on several occasions to persuade the federal government to return this revenue to the province in one form or another. Public ownership seemed the only way to free the consumers of electric power in British Columbia from the burden of federal taxation.

But the *causa causans* of the expropriation was probably a desire to force the hand of the federal government in the dispute over the down-

stream benefits of the Columbia project. B.C. Electric controlled the distribution of all electric power in the province. If the province owned B.C. Electric, it could direct it to look to the Peace River project for its future power needs. This would mean that British Columbia would have no use for the Columbia downstream benefits, and the federal government would have no alternative to agreeing to the sale of those benefits to the United States. So, as soon as it had proven to its own satisfaction (if not to that of its critics) that the Peace River could be developed as economically as the Columbia River, the British Columbia government introduced at a special sitting of the provincial legislature in August, 1961, a bill providing for the expropriation of B.C. Electric. The legislature passed the Act unanimously.[2]

Something must be said about the form of the legislation. While B.C. Electric was a provincially incorporated company itself, it was a wholly owned subsidiary of a federally incorporated company called British Columbia Power Corporation Limited (hereinafter referred to as B.C. Power). B.C. Power was authorized by its federal letters patent to carry on, anywhere in Canada or elsewhere, the business, *inter alia*, of an investment and holding company for securities of light, heat, power, gas, or transportation companies. Actually, its business was almost entirely restricted to owning and directing the operations of B.C. Electric. The quantity of its assets other than the stock of B.C. Electric was insignificant by comparison. The same persons acted as directors and principal officers of both corporations. The expropriation Act did not by its terms purport to interfere with the federal company. It provided that all of the shares of B.C. Electric should vest in the Crown in the right of the province, that the existing directors should be dismissed and replaced by provincial appointees, and that the former "shareholders" of B.C. Electric should be paid, as compensation, the paid-up value of their shares according to the company's balance sheet for the previous year end. The Act went on to provide, however, that B.C. Power (which was expressly named) could, at its option, sell the remainder of its assets to B.C. Electric in return for a price equal to $38.00 for each of B.C. Power's issued shares, less the amount paid as compensation for B.C. Electric's shares. The compensation offered to B.C. Power by this latter provision was greatly in excess of the value of its remaining assets. The purpose of the provision appears, therefore, to have been to force B.C. Power into a position of approbating the Act by invoking its "voluntary" feature in order to receive greater compensation for the B.C. Electric shares than required by the "compulsory" aspects of the Act.

A few months later, after an action challenging the legislation had been commenced by B.C. Power, the Act was amended[3] so as to do away with this devious mode of compensation and replace it with a fixed total

2. Power Development Act, S.B.C. 1961, 2nd sess., c. 4.
3. Power Development Amendment Act, S.B.C. 1962, c. 50.

sum to be paid to former shareholders of B.C. Electric. The option of B.C. Power to sell its remaining assets was abolished. The most controversial aspect of the amending Act was that it purported to prevent the challenging of the legislation by any action in the courts, including the one then in progress. In the event, however, these privative provisions proved to be of little consequence, since all the parties agreed that no statute is capable of depriving the courts of jurisdiction to determine its own constitutional validity.[4]

After a spate of preliminary procedural skirmishes,[5] the action finally came to trial on its merits before Chief Justice Lett of the British Columbia Supreme Court, who upheld the plaintiff, B.C. Power. Since then, the parties have negotiated a settlement of the dispute, so the decision will not go to appeal.

Chief Justice Lett's voluminous reasons for judgment are divided into three main sections: 1) the constitutional validity of the legislation, 2) the rights of a special class of debenture holders of B.C. Electric for whom the legislation made no express provision, and 3) the *quantum* of the plaintiff's compensation. This essay is concerned only with the first of these matters: British Columbia's constitutional right to enact the expropriating legislation.

The decision that the Act was *ultra vires* was based on two alternative reasons: 1) that federally incorporated companies like B.C. Power cannot be subjected to provincial legislation of this type, and 2) that the Act related to an undertaking which extends beyond the limits of the province. The court rejected a third reason advanced by the plaintiff: that the Act improperly interfered with the federal treaty-making power. All three reasons involve issues of great interest and importance, but I have chosen to confine the present discussion to the first: the extent to which the fact of federal incorporation can shield a company from the effects of provincial legislation.

No one would deny that while Parliament can endow a federal corporation with the power to operate in the provinces, such a corporation is subject to many provincial statutes. The question is, which statutes? As I understand the authorities, a federal company is subject to every law of the provinces where it carries on business with only three exceptions: 1) Acts not genuinely within provincial legislative competence, 2) Acts which conflict with competent federal legislation, and 3) Acts which impair the status or essential capacities of federal companies.

In holding that the Act expropriating B.C. Electric was *ultra vires*, Chief Justice Lett appears to have felt that it fell within the first and third of these exceptions, and that it may have fallen within the second as well.

4. See (1963) 44 W.W.R., at 81.

5. Chief Justice Lett's reasons for judgment contain a lengthy summary of these preliminary proceedings: (1963) 44 W.W.R., at 75, ff.

The purpose of this essay is to show that in doing so he has given these exceptions a wider operation than they have heretofore enjoyed, thereby placing new restrictions on the ability of the provinces to control their own internal economic destinies. This involves taking a closer look at each of the exceptions.

Acts Not Genuinely Within Provincial Legislative Competence

Provincial statutes have on occasion been held to be *ultra vires* because they were directed exclusively at federal companies. An illustrative case is *Madden et al* v. *Nelson and Fort Sheppard Railway Co. et al*,[6] which involved the somewhat different, but analogous, problem of provincial control of federally regulated transportation enterprises. The Privy Council held *ultra vires* a British Columbia statute imposing liability on dominion railway companies for any cattle killed or injured on their tracks, unless the tracks were fenced. The basis for the decision was simply that inasmuch as the Act was not a law of general application, but was directed expressly at federal railways, it could only be regarded as an attempt to legislate on a subject within the exclusive jurisdiction of the federal Parliament; it was not legitimately within any head of provincial competence.

However, it is not correct to say, as many have, that *every* provincial Act directed at federal companies is unconstitutional, or that *only* provincial statutes of "general application" can affect federal companies. The rationale of decisions like the *Madden* case was explained very well by Chief Justice Harvey of Alberta in *Re Companies Act, 1929, In Re Royalite Oil Co. Ltd.*:[7]

> If the Legislature is supreme there can be no jurisdiction in the Courts to hold its legislation invalid on the ground that it is not uniform or is not general in its application. Therefore where we find statements in these judgments that the provincial legislation would be upheld if it applied to all companies alike, implying that otherwise it could not be upheld, *I think what is meant is that if it is not so uniform the Court would be justified in concluding that the Legislature's real purpose was not to exercise an authority clearly given to it by sec. 92 but that it had in reality some ulterior purpose for the carrying out of which it had no authority*, and to determine whether that is the case the whole Act and its scope must be considered.

It is, therefore, possible for a provincial statute aimed expressly at federal companies to be constitutionally valid, so long as it is a genuine exercise of control over matters within the legislative competence of the province. For example, most provinces have statutory provisions dealing

6. [1899] A.C. 626.

7. [1931] 1 W.W.R. 484, 25 Alta. L.R. 206, at 498 (W.W.R.). Emphasis added.

expressly with the registration of federal companies operating within the province.[8] Such provisions were held to be *intra vires* in the *Royalite* case.

Chief Justice Lett's acceptance of this view is evidenced by the fact that he quoted the above words of Chief Justice Harvey not once, but twice.[9] Yet his actual decision seems to refute the idea.

His Lordship held that the legislation before him was not a law of general application. This finding was based on the undeniable facts that: 1) the Act was aimed solely at B.C. Electric (the take-over could have been effected under an existing expropriation statute, but the government chose instead to pass a special Act, with terms more favourable to itself), and 2) the legislators knew that the sole beneficial owner of B.C. Electric was B.C. Power, a federal corporation. But it does not seem to me to follow inevitably from these facts that the law was not one of general application. Surely the legislation would have been passed no matter who happened to own B.C. Electric. The important thing was the enterprise itself, not the identity of its owner. In my opinion, the legislation was directed at B.C. Electric, not at B.C. Power. It was a law of general application since its function was not to discriminate against federal companies, but to expropriate a specific desired property, whoever its owner might be.

Even harder to understand is Chief Justice Lett's conclusion that because the Act was not one of general application it was *ultra vires*. As he himself went to some trouble to show, the fact that a statute is one of general application is relevant only to establish that it is a genuine exercise of provincial legislative jurisdiction, and not a colourable attempt to invade the field of federal company law. If the statute is in pith and substance in relation to a matter of provincial concern, the fact that it singles out federal companies should not affect its validity.

What, in pith and substance, was the nature of the expropriating Act? It seems to me that although the British Columbia government undoubtedly acted from mixed motives, all of them were fundamentally related to the problem of providing British Columbia with a desirable scheme for distributing electric power and developing its power resources. Chief Justice Lett's bald assertion to the contrary:

> Nor does the legislation relate generally to the business itself of the generation and transmission of power.[10]

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8. See, for example, the following sections of the Manitoba Companies Act, R.S.M. 1954, c. 43:

   419 (2) A provincial corporation shall be registered forthwith upon incorporation, a foreign corporation before, *and a Dominion corporation within thirty days after, commencing to exercise its power or commencing business in the province* . . .

   420 (2) . . . the corporation shall, before being registered, file with the Provincial Secretary a certified copy of its general by-laws, rules, or regulations, *and a copy of its charter, if a Dominion or foreign corporation* . . .

   (Emphasis added). Fraser & Stewart, *Company Law of Canada*, 5th ed., points out, at p. 79, that only one province does not have similar legislation, and that in some provinces the corresponding provisions are contained in Acts exclusively applicable to extra-provincial corporations.

9. (1963) 44 W.W.R., at 114 and 116.

10. *Ibid.*, at 115. A similar statement occurs at p. 128: "It does not legislate in respect of the production and sale of power for the benefit or protection of the public."

ignores the history of the events leading up to the expropriation. Since the problem of provincial power resources is unquestionably within provincial competence,[11] I submit that even if the legislation were not of general application it would not necessarily be *ultra vires.*

Strictly speaking, Chief Justice Lett's decision on this point did not involve any new departures. He simply found as a fact that the character of the legislation was not in pith and substance one which fell within provincial jurisdiction. He acknowledged that his finding that the statute was not of general application was to be treated only as evidence of that character. Nevertheless, from the provincial point of view, his decision constitutes a dangerous precedent. In the first place, his method of determining that the Act was not one of general application would, if followed, virtually eliminate the possibility of provincial expropriation of specific property owned by a federal company except, perhaps, under the terms of a general provincial expropriation Act. And in the second place, his characterization of the Act before him as not relating in pith and substance to matters within provincial competence might tempt future courts to disregard the social, political and economic background of legislation, and to treat the fact that it refers specifically to federal companies as almost *conclusive* evidence of its non-provincial character.

Acts Which Conflict With Competent Federal Legislation

It is possible that the federal and provincial legislatures might have "overlapping" jurisdiction over some matter affecting federal companies. In such circumstances, even competent provincial legislation would be overborne if the Parliament of Canada "occupied the field" with incompatible legislation.[12] For example, if a province enacted that all companies doing business in the province should, on pain of a fine, publish an annual statement disclosing the amount of its profit or loss during the preceding year, the Act would be applicable to federal corporations. If, however, Parliament then amended the federal Companies Act to provide that no federal company might disclose its profits or losses publicly without the authorization of its shareholders at an annual meeting, the provincial Act would cease to operate with respect to federal companies.

11. The relevant sections of the B.N.A. Act, 1867, 30 Vict., c. 3, would appear to be s. 92(10) ("Local works and undertakings") and s. 92 (16) ("Generally all matters of a merely local or private nature in the province"). In *Reference Re Water Powers* [1929] S.C.R. 200, 2 D.L.R. 481, the Supreme Court of Canada held that the provinces have the right to legislate with respect to development of power on provincial rivers (subject, of course, to federal jurisdiction over navigation and shipping, extra-provincial works and undertakings, etc.), but left open the question of provincial jurisdiction with respect to interprovincial rivers.

12. Two studies of the "occupied field" principle have recently been published: Lederman, "Concurrent Operation of Federal & Provincial Laws," (1963) 9 *McGill Law Journal* 185, and Laskin, "Occupying the Field: Paramountcy in Penal Legislation," (1963) 41 *Canadian Bar Review* 234. As to the application of the doctrine to legislation respecting federal companies, see Smith, *The Commerce Power in Canada and the United States*, at p. 97.

Section 30 of the federal Interpretation Act[13] reads in part as follows:

> In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall (a) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure . . .

The plaintiff argued that since the expropriation Act deprived it of property, interfered with some of its contracts, and limited its access to the courts, it therefore conflicted with the terms of a competent federal statute. While Chief Justice Lett was not "prepared to go so far as to accept . . . (this) . . . contention as conclusive",[14] it is evident that he was impressed by it.

I submit that the argument has no merit. *Generalia verba sunt generaliter intelligenda.* General words are to be interpreted in a general way. Few statutes can be as general in this sense as the Interpretation Act, the provisions of which are designed to cover a wide range of situations. To few statutes is the rule more applicable that general language must be read as being impliedly subject to certain exceptions or qualifications in particular contexts. It would be nonsensical to regard section 30 of the Interpretation Act as bestowing *absolute* property rights, freedom of contract, or access to the courts on federal corporations. A corporation cannot, for example, lawfully hold property or enter into a contract if such acts would be contrary to criminal law; nor may it have access to the courts after a statutory limitation period has expired. The rights bestowed by section 30 of the Interpretation Act must be regarded as being granted *in accordance with the law.* And this means not only in accordance with federal law, but also with provincial law where relevant. It is well established, for example, that in spite of a section in the federal Companies Act giving them a general land-holding power, federal companies are subject to provincial mortmain laws restricting their power to hold land.[15] It is also well settled that, in spite of the above terms of the Interpretation Act, federal companies are subject to provincial liquor prohibition legislation restricting their freedom of contract.[16] In the same way, I submit, a federal company would be bound by provincial expropriation legislation if it were otherwise constitutionally valid.

There is one Privy Council decision which seems to support the plaintiff's argument: *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Company.*[17] A Quebec statute gave a provincial corporation the exclusive right to produce and sell electricity within a thirty-mile radius of a certain village. An earlier federal statute had incorporated another company, and expressly given it the power to produce and sell

13. R.S.C. 1952, c. 158. The section was held to be *intra vires* in *John Deere Plow Co.* v. *Wharton* [1915] A.C. 330, at 340.
14. (1963) 44 W.W.R., at 112.
15. *Great West Saddlery Co. Ltd.* v. *R.* [1921] 2 A.C. 91.
16. *A.-G. of Manitoba* v. *Manitoba License Holders' Association* [1902] A.C. 73.
17. [1909] A.C. 194.

electricity anywhere in Canada. The federal company asserted its right to operate within the provincial company's "exclusive" zone, and in the resulting litigation its claim was upheld by the Privy Council. Sir Arthur Wilson, who delivered the Privy Council's seven paragraph opinion, relied solely upon the "occupied field" theory:

> . . . where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in the present case.[18]

The case can probably be distinguished from the circumstances of the *B.C. Power* case on the ground that the federal legislation there involved[19] was less general in nature than the Interpretation Act. I would go further than that, however, and suggest that the case was wrongly decided. Surely the language of the incorporating statute was general enough that it should have been interpreted as impliedly subject to the terms of competent federal and provincial law. In his casebook, *Canadian Constitutional Law*, Professor Bora Laskin asks:

> Is the basis of the judgment in this case consistent with the Privy Council's views in *Lymburn* v. *Mayland* . . . ?[20]

I submit that not only is it inconsistent with the *Lymburn* case, which will be discussed later,[21] but it is also incompatible with the decisions referred to above which establish that federal legislation of so general a nature cannot override a specific competent provincial statute.

A finding that general legislation like the Interpretation Act prevails over specific provincial legislation like that which faced Chief Justice Lett would have ramifications reaching far beyond the problem of expropriating the property of federal companies. It would virtually wipe out the principle that federal companies must obey provincial laws.

Acts Which Impair The Status or Essential Capacities of Federal Companies

Even if a provincial statute is within provincial jurisdiction and does not conflict with federal legislation, it will not apply to federal companies if its effect would be to impair the "status or essential capacities" of such

18. *Ibid.*, at 198. Apparently the decision was announced orally at the conclusion of argument, and only later backed up by brief written reasons. No authorities were mentioned in the reasons.

19. S.C. 1896-7, c. 72, s. 7:
> 7. The Company may . . .
> (a) manufacture, supply, sell and dispose of gas and electricity for the purpose of light, heat or motive power, and any other purpose for which the same may be used; and may deal with, manufacture and render saleable and sell or otherwise dispose of coke, coal tar, pitch, asphaltum, ammoniacal liquor, and other residual products arising or to be obtained from the materials used in the manufacture of gas; . . .

20. P. 576.

21. *Infra*, note 36.

companies in the province. So, in *A.-G. of Manitoba et al* v. *A.-G. of Canada et al*[22] a provincial statute prohibiting all companies in the province from selling their own shares without the permission of administrative authorities was held by the Privy Council to be *ultra vires*, so far as federal companies were concerned, since a company cannot exist in a meaningful sense without the ability to seek subscriptions of capital.

To what extent were the status and capacities of B.C. Power impaired by legislation expropriating its principal property and sole substantial business undertaking? The terms of its letters patent were wide enough to enable it to go into many other forms of business in the province. The Attorney-General contended that for this reason the legislation did not involve sufficient impairment to be constitutionally offensive. Chief Justice Lett paraphrased the argument as follows:

> The argument of counsel for the attorney-general, in effect, suggests that all that was done by the 1961 Act as amended was to say to the plaintiff company: You have been given $171 million for your shares in a provincial corporation. Your status or capacity have not been interfered with, nor have you been prevented from exercising your powers or sterilized in all your functions and activities. You can carry on your business as a holding company and reinvest the money that has been given you in whatever other investment you are authorized by your charter to make, including the holding of shares of any other company.[23]

In rejecting this argument, Chief Justice Lett relied heavily on the evidence of an officer of B.C. Power as to the possibility of engaging in some other business:

> B.C. Power's objects, as set out in its letters patent of its incorporation, are substantially confined to the public utilities field and the holding company or investment trust field. Since the 5th of August last I have spent a considerable time investigating the possibilities of B.C. Power engaging in other lines of business, and so far I have met with no success.
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> Q. Could you give the Court some idea of the efforts you have made? A. I have examined the possibilities of finding an investment in the shape of control of a public utility company in Canada, and I have come to the conclusion that there is no company of which control could be obtained at an attractive price of any size at all, and certainly nothing in any way comparable to the B.C. Electric Company and its system. So far as a holding company or investment trust is concerned, I find that it is almost an invariable rule that the shares of investment trusts sell on the market at 25% or more under the break-up value of their portfolios, and that would make such a venture as this immediately unattractive to B.C. Power and its shareholders. In addition to that, a lot of the shareholders of B.C. Power are insurance companies and investment trusts and pension funds. I have discussed this problem with a few of them, and they are all against B.C. Power going into a thing of that kind because they say in effect, "That is our business to invest; we think we can do it very well ourselves, and why should we leave our monies with you who have no experience in the field to handle for us". So that, as I say, very reluctantly I have come to the conclusion that there is nothing for B.C. Power in either of these fields.[24]

On the basis of this evidence the Chief Justice found that the legislation "made it impossible for the plaintiff to carry on a like business or, in

22. [1929] A.C. 260.
23. (1963) 44 W.W.R., at 140.
24. *Ibid.*, at 137-8.

fact, to carry on any business in the fields in which it had previously operated."[25] This led him to the conclusion that the legislation was *ultra vires,* because it "had the effect of sterilizing the plaintiff in all the functions and activities carried on by it in the provinces, thereby impairing in a substantial degree its status and essential capacities."[26]

Assuming that he was factually correct in finding that it would be inexpedient for B.C. Power to engage in any other business, was Chief Justice Lett justified in treating that circumstance as relevant to the constitutional question? Should the inability of a federal company "in a practical business sense"[27], to find a new activity in the province to replace one that has been expropriated, properly constitute impairment of its "status and essential capacities"? If so, no federal company doing business in a field where there is little room for further competition (which is the case with most major utilities) need fear provincial expropriation, so long as its activities are substantially restricted to that business.[28]

The idea that the status and essential capacities of a federal company may not constitutionally be interfered with by provincial legislation can be traced to *John Deere Plow Co.* v. *Wharton,*[29] in which the Privy Council declared *ultra vires* a provincial Act requiring all federal companies to take out a license before doing business in the province. The principle upon which the decision was based was stated to be that ". . . the status and powers of a Dominion company as such cannot be destroyed by provincial legislation"[30], and the offensive provincial statute was described as one which ". . . strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion . . .".[31] In *Great West Saddlery Co. Ltd.* v. *R.*[32], a similar case, Viscount Haldane described the test in almost the same terms:

> If . . . the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law.

It should be noted that this test referred only to interference with the "status", "capacities", or "powers" of federal companies; nothing was said about interfering with their "functions" or "activities".

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25. *Ibid.*, at 138.
26. *Ibid.*, at 140-1.
27. *Ibid.*, at 140.
28. The proviso is of little significance, since it would be a simple matter for a company involved in several different business undertakings to form a separate corporate entity for each undertaking.
29. [1915] A.C. 330.
30. *Ibid.*, at 341.
31. *Ibid.*, at 344.
32. [1921] 2 A.C. 91, at 100.

The first use of the latter terms appears to have been in a *dictum* of Lord Atkins' in *Lymburn* v. *Mayland*:[33]

> . . . legislation will be invalid if a Dominion company is *"sterilized in all its functions and activities"* or "its status and essential capacities are impaired in a substantial degree" . . .

This statement of the principle was reaffirmed by the Privy Council in *S.M.T. (Eastern) Limited* v. *Winner et al*,[34] and was the basis of Chief Justice Lett's conclusion that since B.C. Power could find no other power company to operate, its functions and activities, and therefore its status and capacities, had been substantially impaired.

However, the words "all its functions and activities" are open to several meanings. Three possible interpretations are: 1) all the functions and activities in which the company is *in fact* engaged, 2) all the functions and activities in which the company is *empowered* to engage by its letters patent, or 3) all functions and activities of *any kind* whatsoever.

Chief Justice Lett gave the words the first meaning, but he had very little authority for doing so. He purported to rely on several cases in which a provincial statute had been declared inoperative because it sterilized the functions and activities of a federal company, but every one of them involved legislation of the third type—prohibiting *all* business activities of unlicensed companies, etc. The general pronouncements contained in these cases have, therefore, limited application to legislation like the Act expropriating B.C. Electric, which interfered only with the particular activity in which the company happened to be engaged.

As a matter of fact, the Privy Council has on several occasions expressly held such provincial legislation to be constitutionally valid. Provincial liquor prohibition legislation, for example, has been held *intra vires*, despite its effect on federally incorporated liquor companies.[35] A better-known example was *Lymburn* v. *Mayland*,[36] which concerned a provincial statute prohibiting the sale of securities by anyone other than a provincially licensed broker or salesman. In holding that the Act applied to

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33. [1932] A.C. 318, at 324. Emphasis added. Lord Atkin purported to be quoting these passages from the *Great West Saddlery* case. Actually, no such language occurs in that case.It does contain some statements which lend support to a "functional" approach, however:
> Their Lordships are unable to take the view that these sections . . . are directed solely to the purposes specified in s. 92. They interpret them . . . as designed to subject generally to conditions the *activity* within the province of companies incorporated under the Act of the Parliament of Canada. ([1921] 2 A.C., at 122, emphasis added).
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> . . . the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers confered upon it by the Dominion. (*Ibid.*, at p. 123).

In any event, since a company's functions and activities are the external manifestations of its status, capacities and powers, it seems only reasonable that the former should be regarded as evidence of the extent to which the latter have been impaired.

34. [1954] A.C. 541. Of course, this case involved provincial interference with federal "works and undertakings", rather than federal companies, so there was greater justification for stressing the "activity" aspect. See *Infra*, note 43.

35. *A.-G. of Manitoba* v. *Manitoba License Holders' Association* [1902] A.C. 73. The situation is well described in Weganest, *Canadian Companies*, at p. 38-9:
> . . . while it is competent for the Dominion Parliament to authorize a company to carry on business in every province, the effect of provincial legislation under some head of provincial jurisdiction might nevertheless be to render it impossible for the company to carry out its objects. So, a company might have a Dominion charter authorizing it to sell alcoholic liquors, while in virtue of provincial temperance legislation the company might be entirely prohibited from so selling.

federal companies that happened to be engaged in the sale of securities, as well as to anyone else, Lord Atkin stated:

> A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and *may find its special activities completely paralysed*, as by legislation against drink traffic or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the province as to the business of all persons who trade in securities.[37]

Chief Justice Lett attempted to distinguish the *Lymburn* case on three grounds; that in contrast to the legislation before him, the Act with which the *Lymburn* case was concerned was: 1) one of general application, 2) one whose "main object" was within provincial competence, and 3) one which did not "wholly preclude" the activity in question, but merely regulated it.[38] I have already dealt with the first two points in the discussion of legislation beyond provincial competence. As to the third distinction, it should be sufficient to point out that the type of regulation involved in the *Lymburn* case was substantially the same as that with which the *John Deere* and *Great West Saddlery* cases were concerned. In all three cases the effect of the legislation was wholly to preclude federal companies from engaging in certain activities until they obtained a provincial license. The only way in which the regulations differed was as to the extent of the activities regulated. While the prohibition of all business was held to be *ultra vires* (*John Deere* and *Great West Saddlery* cases), the prohibition of a certain activity, selling securities, was held to be *intra vires* (*Lymburn* case).

It can, of course, be argued that a distinction based only on the degree of regulation is not a valid one, because a province could, by a *series* of separate statutes with respect to particular activities, effectively control *all* the activities of federal companies. The answer is that many legitimate provincial powers are capable of abuse, but will not be judicially restrained until abuse actually occurs. For example, if a province attempts to drive a certain type of federally regulated business out of the province by imposing an unbearable tax burden, the courts will intervene,[39] but up to that point the mere potentiality of abuse will not affect the validity of the provincial power to impose direct taxation. Similarly, whenever a federal company challenges a particular Act, it is free to show that the cumulative effect of the impugned Act and earlier statutes is to prevent companies like it from engaging in such a large number of activities that their continuing existence in the province is substantially jeopardized. If it suc-

36. [1932] A.C. 318.

37. *Ibid.*, at 324. Emphasis added. The argument that the legislation would prevent a federal company from selling its own shares, and thereby jeopardise its existence, which had appealed to the Privy Council in *A.-G. of Manitoba et al* v. *A.-G. of Canada et al*, *supra*, note 22, was rejected on the ground that the *Manitoba* case involved a total prohibition, while in this case federal companies were free to sell their shares, so long as they did so through a licensed broker or salesman.

38. (1963) 44 W.W.R., at 127-8.

39. *Reference Re Alberta Statutes* [1938] A.C. 117.

ceeds in showing this, the Act will be declared *ultra vires*. It is true that questions of degree like this pose difficult problems for the courts, but they are problems of a type that courts successfully cope with daily in every branch of law.

The *Lymburn* approach was followed by the Ontario Court of Appeal in *Giffels and Vallet of Canada Ltd.* v. *R. ex rel Miller*[40] where it was held that a section of the provincial Architects Act which prohibited the practice of architecture without a provincial license could constitutionally apply to a federally incorporated company with powers to engage in that profession. It also found favor with Mr. Justice Ewing, of the Alberta Supreme Court, in *Motor Car Supply Co. of Canada Ltd.* v. *A.-G. of Alberta et al.*[41] Mr. Justice Ewing pointed out that:

> . . . the complete destruction of the trade of a Dominion company in a province may be an incidental result of valid provincial legislation.

Actually, the *Motor Car* case constitutes an extension of the *Lymburn* doctrine. The statute in question imposed a provincial licensing scheme on "*all* trades, businesses, industries, employments and occupations carried on in the province,"[42] subject to a few minor exceptions. Mr. Justice Ewing held that the Act applied to federal companies, even though it enabled the province to prevent such companies from engaging in almost *any* form of business in the province. Probably he went too far. Since the inability to engage in any form of business undoubtedly affects a company's "status", "capacities", and "powers", the decision is very difficult to reconcile with the *John Deere* and *Great West Saddlery* cases.

But even without the *Motor Car* case, the foregoing judicial pronouncements presented Chief Justice Lett with a rather formidable hurdle to clear in order to hold that provincial interference with the particular activity in which a federal company happens to be engaged is constitutionally offensive.

To assist him he had only one really strong authority: *S.M.T. Limited* v. *Winner et al.*[43] That case did not involve a federal company. It concerned a bus line operated by an American between points in the United States and Nova Scotia, via New Brunswick, and the constitutional competence of New Brunswick to subject the line to its legislation. A provincial statute prohibited the operation of motor buses, *inter alia*, on provincial highways without a license issued by a provincial board, and then only subject to the terms of the license. The license which the provincial board issued to the American bus line prohibited the picking up or discharging of passengers within the province. Dissatisfied with this restriction, the bus line challenged the jurisdiction of the province to legislate with respect to its

40. [1952] 2 D.L.R. 720, affirming [1952] 1 D.L.R. 620. See also *Public Accountants Council* v. *Premier Trust Co.* (1964) 42 D.L.R. 411 (Ontario High Court).
41. [1939] 3 D.L.R. 660, at 669.
42. *Ibid.*, at 667. Emphasis added.
43. [1954] A.C. 541.

operations. The Privy Council agreed that the bus line was not subject to provincial legislation of this type, for reasons which appear at first glance to provide strong authority for Chief Justice Lett's position:

> . . . legislation will be invalid if a Dominion company is sterilized in all its functions and activities or its status and essential capacities are impaired in a substantial degree. What provisions have the effect of sterilizing all the functions and activities of a company or impair its status and capacities in an essential degree will, of course, depend on the circumstances of each case, but in the present instance their Lordships cannot have any doubt but that the Act or the license or both combined do have such an effect on Mr. Winner's undertaking in its task of connecting New Brunswick with both the United States of America and with the Province of Nova Scotia.[44]

In other words, their Lordships found that legislation directed toward only one specific type of activity was invalid because its practical consequences could be to put an end to the particular business in which the bus line happened to be engaged in the province.

The falseness of the analogy to the problem of federal companies becomes apparent, however, when the reasoning of the *Winner* case is examined more closely. The basis of the decision was section 92 (10) of the British North America Act:

> 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:
>
> (10) Local works and undertakings other than such as are of the following classes:
>
> (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
>
> (b) Lines of steam ships between the province and any British or foreign country;
>
> (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The combined effect of this section and section 91 (29) is, in the words of Lord Porter in the *Winner* case:

> . . . to leave local works and undertakings within the jurisdiction of the province but to give to the Dominion the same jurisdiction over the excepted matters specified in (a), (b) and (c) as they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under section 91 . . .[45]

It is very important to note that this federal jurisdiction over Winner's bus line existed because it carried on a certain type of *activity* (operating a bus line extending beyond the limits of the province), not because of its corporate structure. Federal jurisdiction in this field exists whether the undertaking is operated by a provincial company, a federal company, a

44. *Ibid.*, at 578.
45. *Ibid.*, at 568.

foreign company, or even an unincorporated enterprise. Federal control over works and undertakings relates to the *activity*, not to the company. It stands to reason, then, that provincial legislation cannot be allowed to prohibit that *particular activity*; if it were, this head of federal legislative jurisdiction could be effectively nullified by the provinces. Parliament's control over federal companies, on the other hand, is based on their method of incorporation, not on the nature of activities in which they engage; it has jurisdiction over them *as companies*. So long as provincial control over certain types of activity does not endanger the continuing existence of federal companies in the province, such control can constitutionally extend to the activities of such companies.

The point is well illustrated by two cases concerning the effect of provincial mechanic's lien legislation on federal companies. In *Fonthill Lumber Ltd.* v. *Bank of Montreal*[46] the Ontario Court of Appeal held that a federally incorporated bank was subject to the Ontario Mechanic's Lien Act. In *Campbell-Bennett Limited* v. *Comstock Midwestern Ltd. et al*,[47] however, the Supreme Court of Canada had held that a federal company operating an interprovincial oil pipeline was not subject to the British Columbia Mechanic's Lien Act, because such legislation, by enabling the sale of portions of the pipeline, would endanger the continuing existence of the entire undertaking. These cases are not inconsistent. They simply show that while provincial mechanic's lien statutes affect federal companies generally, because they do not jeopardize their existence in the province *as companies*; they do not affect interprovincial undertakings if their effect would be to threaten their existence in the province *as undertakings*. So, too, the operation of the *Winner* decision must be restricted to extra-provincial undertakings, and cannot be extended to federal companies generally. A federally incorporated company operating a bus line entirely within the province, and not declared to be a work for the general advantage of Canada, would, I submit, be subject to the New Brunswick licensing legislation.

Chief Justice Lett denied that the *Winner* case could be distinguished.[48] His chief reason seems to have been that in deciding the case the Privy Council relied heavily on decisions like the *Great West Saddlery* case, which involved the problem of federal companies. This is true, but it does not dispose of the distinction. I acknowledge that there is, in Chief Justice Lett's words, an "obvious analogy" between the two types of case. The company decisions establish that provincial legislation may not constitutionally jeopardize the federal characteristics (in those cases, federal incorporation) of enterprises operating in the province. The Privy Council was unquestionably justified in treating those cases as authority for its

46. [1959] O.R. 451. This case involved only the trust fund provisions of the legislation, but there is little reason to doubt that other provisions would be equally applicable to federal companies.
47. [1954] S.C.R. 207.
48. (1963) 44 W.W.R., at 132.

decision that legislation interfering with some other federal characteristic (in that case, the extra-provincial aspects of the enterprise) is equally invalid. My point is simply that the federal characteristics are different in the two types of case, and that different considerations govern the question of whether there has been interference in each case.[49]

In my opinion, this survey of authorities compels one to conclude that Chief Justice Lett erred in holding that provincial legislation directed to a particular activity is invalid if its effect would be to prevent a federally incorporated company from carrying on in the province in the one activity in which it had chosen to engage.

A more difficult problem would have been raised if B.C. Power's letters patent had authorized it to do nothing else but operate B.C. Electric, since the provincial Act would then be interfering with the only power that the federal authorities had bestowed on the company. Yet I doubt that the answer would have been different. The language of the *Lymburn* case is certainly wide enough to cover the situation. And, after all, the breadth of a federal company's charter powers is a matter in the control of the federal authorities and the company itself. If a federal company finds its activities curtailed, it may always apply for an expansion of its objects.

Conclusion

A writer in *Macleans Magazine*, commenting on the *B.C. Power* case, asked a significant question:

> If B.C. can't take over B.C. Electric, can any province take over any utility?[50]

While the question cannot be answered fully without an examination of some aspects of the case that I have not dealt with, I think it can be said on the basis of the foregoing discussion that if Chief Justice Lett's decision is followed in the future it will at least be extremely difficult for any province to take over any enterprise controlled by a federally incorporated company.

One of the great advantages of the federal form of government is the opportunity that it affords for diversity of approach among the provinces to social and economic problems. Experiments can be attempted at the local level without the necessity of obtaining nation-wide agreement. It is, in my opinion, a healthy thing that one province should be able to experiment with socialism, while its neighbor dabbles in social credit theories, and the others follow more orthodox, but far from identical paths. As *Reference Re Alberta Statutes*[51] illustrated, by its effect if not by its

49. Of course, Chief Justice Lett also felt that the legislation before him was *ultra vires* because it interfered with an extra provincial undertaking, but that question is beyond the scope of this essay.

50. 76 *Macleans Magazine* 71-2, September 7, 1963.

51. [1938] S.C.R. 100, [1939] A.C. 117.

language, the courts stand ready to interfere with unduly extreme departures, and even if they fail to do so, federal disallowance is always possible.[52]

The restrictions which the *B.C. Power* decision places on provincial control over federal companies would, if followed, constitute a substantial impairment of this provincial power of economic experimentation. I have tried to show that these restrictions lack legal justification; I submit that to anyone who values the institution of federalism they also lack social and political justification. At a time when political forces appear to be seeking means to increase provincial autonomy without seriously curtailing the power of the federal government to fulfill the duties of a modern welfare state,[53] it would be regrettable if legal forces were moving in the opposite direction.

BEST EVIDENCE

". . . we asked him what happened, and he said that he got hit by a steamroller, and he seemed upset about something . . ."

(From evidence quoted in *Smith* v. *Christie Brown* [1955] O.R. 301, at 303.)

52. B.N.A. Act, *supra*, note 11, s. 90.

53. For a persuasive rebuttal to Laski's view that federalism and the welfare state are incompatible, see McWhinney, *Comparative Federalism*, p. 3, ff.