

Delegation of Legislative Power in Canada

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Introduction

Delegation of legislative power in Canada, though still a source of fascination for constitutional scholars, is not today a "live subject". This is in sharp contrast to the situation some years ago when it was a major issue, not only in the courts and with legal commentators, but also in any serious political discussion of constitutional change. This difference in attitude results from the development by the courts and political authorities of greater flexibility in constitutional interpretation and arrangements. Some of the flexibility has arisen from the judicial tendency of finding wider areas of concurrent power and the increased use by governments of their spending powers and their rights over natural resources to influence, if not to regulate, activities otherwise falling outside their competence. In addition, the courts have developed a number of techniques to achieve the major benefits of delegation while avoiding its more serious drawbacks. The purpose of this article is to review the latter development.

B.N.A. Act Provisions

The *British North America Act*, 1867, makes no general provision for the delegation of legislative power from one level of government to the other. There are, however, a number of provisions for transferring power to the federal Parliament from the provincial legislatures. One is the power given the federal Parliament by the combined effect of sections 91(29) and 92(10)(c) to declare works wholly situate within a province to be for the general advantage of Canada or for the advantage of two or more provinces. The effect of such a declaration is to give the federal Parliament complete jurisdiction over such works, including the power to revoke the declaration and return the works to provincial jurisdiction.¹

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¹ The most comprehensive discussion of this power is that in Andrée Lajoie, *Le pouvoir déclaratoire du Parlement* (1969); for a briefer discussion, see Gerard V. La Forest and Associates, *Water Law in Canada — the Atlantic Provinces* (Ottawa, 1973), 56 *et seq.*

Again, section 94 provides as follows:

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provisions for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

While judicial examination has been negligible, a reading of the section indicates that the steps to be taken to transfer legislative power over property and civil rights and procedure in provincial courts to the federal Parliament are simple. The federal Parliament must first pass a law providing for uniformity of all or any part of the laws relative to such matters. From that time federal power over any matter comprised in the Act becomes "unrestricted". However, such Act does not become operative in a province until it is adopted and enacted by the legislature. In view of the extraordinary character of this power and its virtual desuetude, it seems likely that courts would demand that the federal, and possibly the provincial legislation make the intent to exercise it abundantly clear.² Though there is some conflict of opinion,³ the probability is that the effect of the clauses adopting the provisions of the *British North America Act* in the provinces joining the Union after 1867 is to make the section applicable to all the provinces except Quebec, despite the reference by name to the other original provinces.⁴ The transfer of jurisdiction under the section may well differ from delegation. Those who have commented on it have concluded that the transfer is permanent and cannot be retransferred to the provinces.⁵ This is a possibility, although the term "unrestricted" does not exclude re-transfer and may be limited to giving a wide power of amending the federal Act.

² For an excellent analysis, see F.R. Scott, *Section 94 of the British North America Act* (1942) 20 Can. Bar Rev. 525.

³ See *Report of the Royal Commission on Dominion-Provincial Relations* (Book II, Recommendations, Ottawa, 1940), 73.

⁴ See *Attorney-General of British Columbia v. Attorney-General of Canada* (1889) 14 A.C. 295, 304 (*per* Lord Watson) respecting the similar situation under s.109 of the *B.N.A. Act*; *In re Reference re Alberta Statutes* [1938] S.C.R. 71 (respecting s.90); see also Scott, *supra*, f.n.2.

⁵ See *Report of the Royal Commission on Dominion-Provincial Relations*, *supra*, f.n.3; Scott, *ibid.*

So too, by virtue of judicial interpretation, the "Peace, Order and Good Government" clause in section 91 may effectively operate to transfer legislative power from the provinces to the federal Parliament. Matters which in their origin may be local or private may attain such dimension as to affect the body politic of Canada, and so come within federal legislative control.⁶ A common manifestation of this situation is in emergency situations. The power thus transferred is returned to the provinces when the emergency subsides.

Finally, Professor Lederman has suggested that some administrative delegation is called for by the constitution in the criminal law field, with the federal Parliament enacting criminal law and procedure by virtue of section 91(27), and the provinces administering it by virtue of their power over the administration of justice under section 92(14).⁷ The expression "called for" may be somewhat strong. Some would argue that the delegation to the provincial Attorneys-General of functions relating to the criminal law is done pursuant to federal legislation, not by constitutional imperative. Nonetheless, Professor Lederman's general point seems basically sound. The better view is that the administration of justice includes the administration of criminal justice, but that the federal Parliament can, in the exercise of its paramount power over criminal law, vest the administration of criminal law in persons other than provincial authorities.⁸

Judicial Decisions Respecting Delegation

It has long been firmly settled that both the federal Parliament and the provincial legislatures are sovereign within their spheres, and concomitantly that they can freely delegate to their respective Governors in Council, municipalities and bodies of their own creation.⁹ However, from a very early period, there have been several

⁶ See, *inter alia*, *Russell v. Reg.* (1882) 7 App. Cas. 829; *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.* [1923] A.C. 695; *Toronto Electric Commissioners v. Snider* [1925] A.C. 396; *Attorney-General for Ontario v. Canada Temperance Federation* [1946] A.C. 193.

⁷ W.R. Lederman, *Some Forms and Limitations of Co-operative Federalism* (1967) 45 Can. Bar Rev. 409, 425.

⁸ See *The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (Ottawa, 1972), 75.

⁹ See, *inter alia*, *Hodge v. Reg.* (1883-4) 9 App. Cas. 117; *In re George Edwin Gray* (1918) 57 S.C.R. 150; *Shannon v. Lower Mainland Dairy Products Board* [1938] A.C. 708; *Reference re Regulations (Chemical) under War Measures Act* [1943] S.C.R. 1; *Reference re Section 16 of the Criminal Law Amendment Act 1968-69* [1970] S.C.R. 777.

judicial and academic assertions (the weightiest being a statement of Lord Watson during the argument in *C.P.R. v. Bonsecours*¹⁰ in 1899) that the federal Parliament could not give legislative jurisdiction to a provincial legislature, and that the provinces laboured under the converse disability.¹¹ But most of these statements could be explained away by saying that either Parliament or a legislature was prevented from divesting itself of jurisdiction in favour of the other. Such divesting can be distinguished from delegation, which may be defined "as entrusting by a person or body of persons, of the power residing in that person or body of persons, *with complete power of revocation or amendment remaining in the grantor (or delegator)*".¹² In a word, since the delegator may at any time revoke, the power remains in him, the delegatee being simply an agent. This approach could be buttressed by the dictum of David J. in *Ouimet v. Bazin*¹³ supporting delegation between federal and provincial legislatures.

Serious interest in delegation began developing in the 1920's and 1930's when the existence of a divided legislative jurisdiction made comprehensive regulation of vital areas of the economy extremely difficult. A prime example was the judicial declaration that several marketing schemes, both federal¹⁴ and provincial,¹⁵ were invalid as extending into the realm of the other level of government. Satisfactory results, said the Privy Council, "can only be obtained by co-operation".¹⁶ But even where co-operation could be achieved, the careful manner in which legislation had to be drawn made implementation difficult. Thus, the federal *Natural Products Marketing Act, 1934*^{16a} was carefully designed to dovetail with provincial statutes, but

¹⁰ [1899] A.C. 367.

¹¹ *Citizens' and Queen Insurance Co. v. Parsons* (1881) 4 S.C.R. 215, 314, 317 *per* Taschereau J. and 348 *per* Gwynne J.; *St. Catherine's Milling and Lumber Co. v. Reg.* (1887) 13 S.C.R. 577, 637 *per* Strong J.; Lefroy, *Canada's Federal System* (1913), 70; Clement, *The Law of the Canadian Constitution* 3d ed. (1916), 380, 382.

¹² See Raphael Tuck, *Delegation — A Way Over the Constitutional Hurdle* (1945) 23 Can. Bar Rev. 79, 89.

¹³ (1912) 46 S.C.R. 502, 514; see also *Reg. v. O'Rourke* (1882) 1 O.R. 464, 481.

¹⁴ *Attorney-General of British Columbia v. Attorney-General of Canada* [1937] A.C. 377 (*Natural Products Marketing Act* reference).

¹⁵ *Lawson v. Interior Fruit and Vegetable Committee* [1931] S.C.R. 357; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.* [1933] A.C. 168.

¹⁶ *Attorney-General of British Columbia v. Attorney-General of Canada*, *supra*, f.n.14, 389.

^{16a} 24-25 George V, S.C. 1934, c.57.

founded on the shoals of rigid constitutional interpretation.¹⁷ Not unnaturally, numerous commentators looked to delegation as a way of avoiding these difficulties.¹⁸

Such an attempt arose in 1935 before the Saskatchewan Court of Appeal in *R. v. Zaslavsky*.¹⁹ There the federal Parliament had enacted the *Live Stock and Live Stock Product Act*^{19a} with a view to regulating marketing in live stock and live stock products. Since there was doubt about the validity of this Act, Saskatchewan passed an Act of the same name^{19b} under which it was provided that if the federal Act and the regulations under it were within provincial competence, the provisions should have the force of law in the province and, unless otherwise enacted by the province, continue in force until repealed by Parliament or the Governor-General in Council; it further provided that amendments of the federal legislation might be brought into force by provincial proclamation. The Court first held the federal Act *ultra vires* as dealing with a provincial matter. Turning to the provincial Act, the Court found it void as an attempt by the province to vest in the federal Parliament powers not conferred by the *British North America Act*. The case was followed in *R. v. Brodsky*²⁰ and *R. v. Thorsby Traders*²¹ by the Manitoba and Alberta Courts of Appeal.

The issue was squarely raised before the Supreme Court of Canada in 1951 in *Attorney-General of Nova Scotia v. Attorney-General of Canada*.²² This was an appeal from the Supreme Court of Nova Scotia²³ on a reference regarding the validity of the *Delegation of Legislative Jurisdiction Act*, a proposed Act of that province which, *inter alia*, empowered the province:

¹⁷ *Supra*, f.n.16. For accounts of this see J.A. Corry, *Difficulties of Divided Jurisdiction*, ch. 1 (Appendix 7 to the *Report of the Royal Commission on Dominion-Provincial Relations*, *supra*, f.n.3); Doull J. (diss.) in *Re Bill 136 in the Nova Scotia Legislature* [1948] 4 D.L.R. 1 (N.S.S.C.).

¹⁸ R.W. Shannon, *Delegated Legislation* (1928) 6 Can. Bar Rev. 245; Raphael Tuck, *supra*, f.n.12; Corry, *ibid.*; Scott, Case and Comment (1948) 26 Can. Bar Rev. 984; Ballem, Case and Comment (1954) 32 Can. Bar Rev. 788; Ballem, Case and Comment (1951) 29 Can. Bar Rev. 79; Laskin, Case and Comment (1956) 34 Can. Bar Rev. 215.

¹⁹ [1935] 3 D.L.R. 788.

^{19a} R.S.C. 1927, c.120.

^{19b} R.S.S. 1930, c.151.

²⁰ [1936] 1 D.L.R. 578 (Man. C.A.).

²¹ [1936] 1 D.L.R. 592 (Alta. S.C. (App. Div.)).

²² [1951] S.C.R. 31.

²³ *Re Bill 136 in the Nova Scotia Legislature* [1948] 4 D.L.R. 1.

- (a) to delegate to the federal Parliament authority to make laws relating to employment in industries falling within provincial jurisdiction;
- (b) to apply provincial laws relating to unemployment to industries within federal jurisdiction if the federal Parliament delegated authority to the province to do so; and
- (c) to impose an indirect retail sales tax if the federal Parliament should delegate authority to the province to do so.

The Supreme Court of Nova Scotia, by a majority, held the statute *ultra vires*, and the decision was affirmed by the Supreme Court of Canada.

The decision rests largely on an appeal to authority and arguments of a textual nature. Rinfret C.J. and Kerwin and Kellock JJ. thought that if a power of delegation had been intended, it would have been expressly given. Rinfret C.J. and Taschereau and Fauteux JJ. stressed that legislative powers under sections 91 and 92 are given "exclusively" to the appropriate legislature. Kerwin and Fauteux JJ. also noted that it had been thought necessary to insert section 94 to provide for Parliament's jurisdiction to make uniform laws in certain circumstances. Finally, Rand, Estey and Fauteux JJ. questioned the ability of the federal Parliament or the provinces to accept delegation in view of their status; each was sovereign within its sphere, but delegation involves subordination to the delegator.

These textual arguments could, if desired, be turned around as Doull J. did in his dissenting judgment in the Nova Scotia Supreme Court. The federal Parliament or a legislature does not lose its exclusive control by delegating for it retains its power of revocation. No express power is required to authorize delegation because Parliament and the legislatures are sovereign, and that this is not inimical to the structure of the constitution is evident from section 94. Parliament or the legislatures were not giving up their sovereign powers by accepting a subordinate position in relation to matters not assigned to them by the constitution. In a word, the governing considerations were differing philosophies of Canadian federalism. In Doull J.'s judgment, it was imperative to find a way out of the rigid watertight compartments.

Some of the judges advanced more fundamental arguments for their position. Rand J. thought that, responsibility for a particular area of jurisdiction having been vested in a particular body, it was intended that it should deliberate upon it and ultimately be responsible for the discharge of that function to the electorate. Taschereau J. made a similar point, and Estey and Fauteux JJ. also noted

that delegation would divest one level of government of responsibility and give it to the other. Rand J. also referred to the fundamental distinction between delegation to a subordinate body when a detailed scheme is considered and a broad delegation to another legislative body. He said:

In the generality of actual delegation to its own agencies, Parliament, recognizing the need of the legislation, lays down the broad scheme and indicates the principles, purposes and scope of the subsidiary details to be supplied by the delegate: under the mode of enactment now being considered, the real and substantial analysis and weighing of the political considerations which would decide the actual provisions adopted, would be given by persons chosen to represent local interests.²⁴

He also underlined the danger that once a power was delegated, there would be a tendency for the power to remain with the delegatee. Taschereau J. seemed to think there was a danger that general delegation could lead to a unitary state and, on the other hand, that different laws might be enacted in the various provinces on matters in which the framers of the constitution thought uniformity imperative. An appraisal of these various arguments will be made later.

Other Devices

Interdelegation between the federal Parliament and provincial legislatures, therefore, appears impossible. However, other legislative devices have been used to achieve flexibility. These are:

- (1) conditional legislation;
- (2) incorporation by reference (or adoption); and
- (3) conjoint schemes with administrative cooperation.

Conditional Legislation

A conditional statute is one whose operation is determined by a condition, for example, the existence of a state of fact or the action of an individual or body. Thus, the common provision that an Act shall come into force on proclamation is conditional legislation. The issue is the extent to which the federal Parliament or the provinces may employ one another to decide upon an action on which a statute is conditional. Here the courts have found no constitutional limitation. This can be demonstrated by *Lord's Day Alliance of Canada v.*

²⁴ *Attorney-General for Nova Scotia v. Attorney-General for Canada, supra*, f.n.22, 49.

Attorney-General for Manitoba.²⁵ There the federal *Lord's Day Act* made it an offence to conduct or run Sunday excursions "except as provided by any provincial Act or law now or hereafter in force".^{25a} Manitoba subsequently passed an Act providing that it was lawful to run or conduct excursions on Sunday. Though a provincial prohibition of such activities would have been *ultra vires*, a permission of this kind was in the view of the Privy Council either legislation respecting property and civil rights or a local or private matter, and so valid. It was, the Board decided, within the competence of Parliament to leave open to the provinces a liberty to legislate in an area they already possessed, even though a complete prohibition would have ousted provincial responsibility. This the Board saw as very different from delegation, where the federal Parliament intends to give effect to *ultra vires* provincial legislation. As the Supreme Court of Canada underlined in the similar case of *Lord's Day Alliance of Canada v. Attorney-General for British Columbia*,²⁶ Parliament can limit the operation of its own Act to an event or condition, but it cannot extend the jurisdiction of the provincial legislatures by delegation.

Considerable use has been made in recent years of this device, under which provinces were permitted to "opt out" of social service schemes devised by the federal authorities and to instead accept tax credits permitting them to devise their own schemes.

Incorporation or Adoption

A legislature may choose to employ the device of incorporating by reference (or adopting) another statute rather than repeat the whole of its provisions. Since the incorporated or adopted provisions derive their authority from the incorporating or adopting legislature, and that legislature has considered them, there seems no logical ground (other than ease in finding the material) for invalidating such legislation even though the incorporated material appears in a statute of another legislature. The courts have long upheld statutes incorporating existing legislation of another legislature, but a different problem is raised where a legislature purports to adopt the law of another legislature as it exists or is amended from time to time: then the legislature whose legislation is adopted is the one exercising discretion in respect of change, not the adopting legislature. The situation is clearly quite similar to de-

²⁵ [1925] A.C. 384.

^{25a} R.S.C. 1906, c.153, s.8.

²⁶ [1959] S.C.R. 497.

legation, and could have been so characterized;²⁷ indeed, in order to avoid the problem the Ontario Court of Appeal in *Reg. v. Fialka*²⁸ interpreted a provision of the *Ontario Summary Convictions Act*,^{28a} adopting certain provisions of the Criminal Code of Canada "as amended and re-enacted from time to time", as referring to those provisions as amended and re-enacted before the Ontario Act was passed.

But the courts later upheld legislation of one level of government adopting future legislation of another. In *Reg. v. Glibbery*²⁹ the Ontario Court of Appeal construed section 6(1) of the federal *Government Property Traffic Regulations*,^{29a} which prohibited vehicles from operating on a highway on federal property except "in accordance with the laws of the province", as referring to those laws as existing from time to time and upheld the section as valid. Some time before, the Supreme Court of Canada in *Attorney-General of Ontario v. Scott*³⁰ had upheld the validity of the *Ontario Reciprocal Enforcement of Maintenance Orders Act*,^{30a} which incorporated defences available to maintenance orders made in reciprocating countries. *Reg. v. Glibbery* was later expressly approved by the Supreme Court of Canada in *Coughlin v. Ontario Highway Transport Board et al.*³¹ in 1968. The matter is, therefore, settled. One point, however, should be emphasized. This device does not extend the legislative sphere of the adopting legislature; it can only adopt legislation that it would have been able to enact itself.

The device has raised some minor problems relating to such matters as the manner of charging an individual with an offence,³² the reconciliation of provisions where a matter is dealt with under both the adopting and adopted legislation (for example, where penalties are provided under both),³³ and the exercise of powers in relation to interprovincial undertakings in a manner different from

²⁷ See Laskin, Case and Comment, *supra*, f.n.18, discussed below.

²⁸ [1953] 4 D.L.R. 440.

^{28a} R.S.O. 1950, c.379, s.3(1).

²⁹ [1963] 1 O.R. 232; see also *Reg. v. Brinklow* [1953] O.W.N. 325; *Reg. v. Hughes* (1958) 29 C.R. 111; *Reg. v. Johns* (1962) 39 W.W.R. (n.s.) 49 (Sask. C.A.).

^{29a} [1952] S.O.R. 894, P.C. 4076, of 17 Sept. 1952, in S.O.R. Cons. 1955, v.2, p.1838.

³⁰ [1956] S.C.R. 137.

^{30a} R.S.O. 1950, c.334.

³¹ [1968] S.C.R. 569.

³² See *Reg. v. Johns*, *supra*, f.n.29; *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.* [1972] S.C.R. 811.

³³ See *Reg. v. Hughes*, *supra*, f.n.29.

their exercise in relation to intraprovincial undertakings.³⁴ But these are the types of problems that will vanish as more familiarity with the technique develops.

Conjoint Schemes

Finally, much can be done to avoid the restraints on inter-delegation by administrative cooperation and conjoint schemes. The simplest form of this device is where an official is given power to enforce or administer both federal and provincial laws in relation to one subject matter. For example, the federal government may assign to a provincial fishery officer the task of enforcing fishery laws; such delegation of administrative responsibility may also take place in the reverse.

Cooperation may similarly be effected by parallel legislation intended to secure a common end, through employing independent or combined administrative structures. Problems respecting parallel legislation arise at three levels:

- (a) in securing initial federal-provincial cooperation;
- (b) in drafting legislation that truly meshes without overstepping the legislative bounds of either legislature; and
- (c) in securing efficient and continuing cooperation of administrative officers.³⁵

So far as the latter is concerned, it is obvious that if parallel administrative structures are employed, duplication is likely to result. Moreover, administrative officers responsible to different bodies will almost inevitably have differences of view. These problems can be avoided by a single administration, but even here the maintenance of continuing cooperation cannot be effected if the government that hires the administrative officers concerned seeks to follow policies adverse to those of the other government. But most of the other problems have in fairly recent years been overcome by one level of government delegating executive and administrative authority (including the power to make regulations) to administrative agencies created by the other. The validity of this device had earlier been doubted because the language of the major cases on delegation could be interpreted as restricting delegation to bodies subordinate to the particular legislature. However, it was approved by the Supreme Court of Canada in 1952 in *P.E.I. Potato Marketing Board v.*

³⁴ See *The Queen v. Smith* [1972] S.C.R. 359.

³⁵ For a discussion of these problems, see Corry, *supra*, f.n.17, ch. 1.

*H.B. Willis Inc.*³⁶ There the *Agricultural Products Marketing (Prince Edward Island) Act*^{36a} delegated to the Lieutenant-Governor power to establish marketing schemes within the province of any natural products and to constitute boards to administer the schemes. Pursuant thereto the Lieutenant-Governor appointed the P.E.I. Potato Marketing Board and delegated to it power to regulate the marketing of potatoes in the province. The federal *Agricultural Products Marketing Act*^{36b} authorized the Governor in Council to delegate to marketing boards established under provincial legislation like powers respecting interprovincial marketing. Under this Act the Governor in Council delegated to the P.E.I. Potato Marketing Board powers relating to interprovincial and export trade similar to those given to it by the province with respect to intraprovincial trade. The Board then made several orders imposing licence fees and levies based on the amounts of shipments, and establishing a minimum price. The Supreme Court of Canada upheld the validity of the scheme.

In a comment on this case, Professor Laskin (now Laskin C.J.) suggested that it could be interpreted as permitting interdelegation between the federal Parliament and provincial legislatures in relation to matters on which the delegated body is independently competent.³⁷ This statement must not, however, be read too widely. On the one hand, Laskin was not arguing against the type of administrative delegation there involved, *i.e.*, a delegation to a provincial administrative body of authority — over interprovincial and international trade — that the province did not possess. On the other hand, it seems equally clear that he was not advocating a wholesale breakdown of the ordinary division of legislative authority.³⁸ What Laskin was proposing was the principle (discussed in the preceding section but not then established) that a province acting within its legislative competence (*e.g.*, respecting property and civil rights) could adopt by reference federal legislation (*e.g.*, criminal law) not only when it was already in existence, but also future amendments.

In truth this amounts, for practical purposes, to a limited form of legislative delegation, for it permits a legislature other than that giving the law ultimate power to exercise effective discretion. But this is an oblique and highly convenient transgression against the principle prohibiting interdelegation. It permits uninterrupted uni-

³⁶ [1952] 2 S.C.R. 392.

^{36a} S.P.E.I. 1940, c.40.

^{36b} 13 George VI, S.C. 1941 (1st Sess.), c.16.

³⁷ Laskin, Case and Comment, *supra*, f.n.18.

³⁸ See C.B. Bourne, Correspondence (1956) 34 Can. Bar Rev. 500.

formity of laws as regards a scheme the general structure of which has been considered by the adopting legislature. In a word, the technique does not substantially offend against the underlying reasons for the rule against delegation and the gains in flexibility are extensive. That Laskin clearly perceived the practical result of the techniques (particularly when used in combination) can be seen from the case of *Coughlin v. Ontario Highway Transport Board*,³⁹ which involved federal delegation of administrative power to a provincial administrative board, coupled with incorporation by reference of provincial legislation. The Supreme Court of Canada there upheld the federal *Motor Vehicle Transport Act*^{39a} under which extraprovincial transport undertakings were prohibited to operate unless licensed, and the power to grant such licences was vested in provincial transport boards upon like terms and conditions as if the undertaking were local.

It may be well to add that the Supreme Court of Canada has at its disposal a weapon against a delegation of administrative power or an adoption of future legislation so broad as to amount in substance to a grant of legislative power: it could declare such a device void as being a colourable attempt to escape the restraints imposed by the *Nova Scotia* delegation case.⁴⁰

A word should also be added about delegation of taxing power. Although the Privy Council once described the levying by the federal Parliament of taxes for provincial purposes as improbable,⁴¹ there has been one instance where Parliament has vested in a provincial board the power to levy indirect taxation.⁴² This, as Laskin has pointed out, seems incongruous, having regard to the provisions of sections 54 and 90 of the *B.N.A. Act* providing that provincial revenue measures be initiated by the Lieutenant-Governor (in reality the provincial government).⁴³ Still, federal-provincial fiscal arrangements largely undermined the reality of this argument. There is also the argument that the provinces were limited to direct taxation "within the province" to prevent them from creating interprovincial

³⁹ [1968] S.C.R. 569; for a comment, see K. Lysyk in (1969) 47 Can. Bar Rev. 271.

^{39a} S.C. 1953-54, c.3(1)(2).

⁴⁰ See Lederman, *supra*, f.n.7, 427-28.

⁴¹ *Caron v. The King* [1924] A.C. 999, 1004.

⁴² *An Act to amend the Agricultural Products Marketing Act*, 5 & 6 Eliz. II, S.C. 1956-57, c.15.

⁴³ Laskin, *Provincial Marketing Levies: Indirect Taxation and Federal Power* (1959-60) 13 U. of T. L.J. 1, 9.

tariff walls and from in effect taxing persons in other provinces.⁴⁴ But the argument is met by the fact that the tax is in fact imposed by the federal Parliament, which has the constitutional discretion to do so. However, care may have to be taken in appropriate cases not to offend against the requirements of section 121, which requires articles of the growth, produce or manufacture of any province to be admitted free into the other provinces.

Previous Official Proposals for Delegation

Delegation has on several occasions been considered at the official level as a possible device for giving some flexibility to the constitution. Thus the Rowell-Sirois Commission recommended a general power of delegation between the federal and provincial legislature applying to the whole field of legislative power, subject to the consent of the delegatee.⁴⁵ The delegation proposed could have been made permanent or for a short or long term, and could have included any or all the provinces because it was thought that this flexibility would take into account the different situations of the provinces.

Delegation was also conceived as affording a way out of the rigidities of the amending formula in the Fulton-Favreau proposals, but the delegation procedure there suggested was much more restricted.⁴⁶ So far as delegation from the provinces was concerned, it was limited to the powers under section 92(6) (reformatories), (10) (local works and undertakings), (13) (property and civil rights), and (16) (local or private matters). On the other hand, any federal legislative power could be delegated to the provinces. A second limitation was that the scheme did not envisage general delegation. Rather, power was given to Parliament (or a legislature) to make laws on the above matters, but no statute so enacted was valid in a province unless the province (or Parliament) had consented to the statute. In short, the scheme was limited to particular statutes. Moreover, when Parliament so legislated, four provinces had to consent to the operation of such statutes in those provinces, unless Parliament declared that the federal government had consulted all provinces and less than four were concerned, and all of those concerned consented to its operation. Provincial laws so enacted were valid only where three other provinces did so. The

⁴⁴ See La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (1967), 53.

⁴⁵ *Supra*, f.n.3.

⁴⁶ Guy Favreau, *The Amendment of the Constitution of Canada* (1965), 113-15.

scheme of delegation was, therefore, in its practical effect, more restricted than the delegation possible under existing powers. Provision was made, however, for any province revoking a scheme without affecting it in other provinces.

During the recent constitutional exercise, delegation of legislative power played a relatively minor role. It was not mentioned in the Victoria Charter, although some provinces had earlier referred to it. The Special Joint Committee of the Senate and House of Commons on the Constitution did not recommend it except in specified areas of the criminal law, such as, for example, in relation to off-track betting, lotteries and gaming.⁴⁷ The decreasing importance attached to the subject in successive projects for constitutional review would seem to indicate that the practical problems sought to be resolved by delegation have been taken care of by other means. Even the relatively minor proposals of the Special Joint Committee can easily be effected by the judicial devices previously described.

Advantages and Disadvantages of Delegation

The major advantage of delegation of legislative power is that it gives flexibility to a federal system by making it possible to overcome the difficulties of a water tight division of legislative power. This is particularly so where constitutional amendment is difficult. It can permit one level of government, rather than the other, to deal with a particular matter where experience or circumstances dictate that this is wiser. There may be situations where one level of government is not equipped or prepared to deal with a problem. This was one of the reasons given for empowering provincial boards to deal with extraprovincial motor transport.⁴⁸ Again, the different situations of the various provinces may make it desirable to have delegation to or from some but not all provinces with respect to certain matters. In this way delegation may achieve another type of flexibility.

Delegation may also make legislative action easier where a single activity, looked at from a functional point of view, could be regulated in its entirety by different levels of government because the entire activity falls under several constitutional rubrics. Delegation can avoid duplication of effort, both at the legislative and administrative levels, and prevent the confusion that inevitably results even when there is cooperation. As already mentioned,

⁴⁷ *Supra*, f.n.8, 44-45, 74-75.

⁴⁸ See Ballem, Case and Comment, *supra*, f.n.18, 797-98.

without some kind of delegation, difficulties in cooperation arise at three different levels:

- (a) at the political level, where agreement may be difficult;
- (b) at the legislative level, where the legislation must be made workable while avoiding passage into a forbidden legislative sphere; and
- (c) at the administrative level, where cooperation has to be maintained over a long period, with the dangers of different approaches being developed by political and administrative authorities of both levels of government.

There are, however, important disadvantages to interdelegation. On the one hand, it may be argued that delegation may destroy the federation because the abandonment of powers by the provinces may create a virtually all-powerful federal Parliament. On the other hand, the federation could be reduced to a loose confederacy were the federal Parliament to delegate too many of its powers to the provinces. It is true that delegation in its proper sense involves the power to take back jurisdiction, but this is always difficult, particularly where administrative machinery has been developed.

The mere existence of a power of interdelegation may give rise to difficulties. It may lead to pressures by one level of government on the other to transfer powers, and give rise to friction when there is refusal, and possible unproductive work in deciding whether delegation is wise or unwise whenever such pressures exist.

Also weighing against delegation is the consideration (so well expressed by Rand J. in the passage quoted earlier) that the constitution obviously intended that discretion and financial responsibility respecting certain matters be given to one level of government, rather than the other. This applies more strongly where general powers are delegated as in the *Nova Scotia* delegation case than where delegation is restricted to a particular scheme. Not only is responsibility dispersed in a manner that may be difficult to define, but so are the financial implications. The argument is fortified by the fact that what is delegated may be related to other powers which should be considered in a generalized scheme. For example, in devising general policies respecting interprovincial transport, interprovincial motor transport must be considered; yet the fact that this is currently administered by provincial boards may well inhibit the formulation of policy .

A further dimension to this argument is that the giving of power to one level of government may have been done to prevent the other from having that power. Thus, one of the reasons for not granting indirect taxation to the provinces is that this may have the effect

of creating tariff walls and imposing the primary burden of taxation on non-residents of a province. In other words, the grant of power may not only be looked upon as a positive vesting of power in the federal Parliament but as an implied prohibition against the provinces.

Flowing from the argument that a particular legislature is intended by the constitution to exercise discretion in a particular area is the more fundamental one that that legislature is looked upon by the electorate as having responsibility in the area. Though one must not exaggerate the degree of sophistication of the electorate (particularly where a constitution has many overlapping areas), there is a good measure of truth in the argument.

Another argument against delegation relates to situations where there is delegation to or from one or several, but not all, provinces. This, it may be argued, would create a constitutional "hodge podge",⁴⁹ a result the Fulton-Favreau formula tried to minimize by requiring at least four provinces to participate in a scheme. In truth, however, the many administrative federal-provincial arrangements may already have resulted in a hodge podge. Thus, the federal Department of Insurance acts as a delegate for some provinces in certain matters but not for others. This diversity may indeed be the best way to cope with many situations where wide differences exist among the provinces. In one respect, however, the argument has special cogency. Delegation could be used as a means of giving special status to a province, which could undermine the influence and responsibilities of the Parliamentary representatives from the province given such status. A hodge podge could also occur where all the provinces delegated power to the federal Parliament, but later one withdrew. This could result in the dismantling of complicated and expensive programmes.

Summary and Appraisal

As can be seen, there are weighty arguments for and against delegation. Not surprisingly, the first reaction of the courts both here and in other federations (for example, the United States)⁵⁰ is to attempt to protect the general structure of the constitution by finding a constitutional bar to delegation. Even where there is a general clause under which a general transfer of power could be

⁴⁹ See Lederman, *supra*, f.n.7, 426.

⁵⁰ See Horace E. Read, *Is Referential Legislation Worth While?* (1940) 18 Can. Bar Rev. 415, 434 *et seq.*

made, as is the case under the Australian Constitution⁵¹ and to a more limited extent under section 94 of the *B.N.A. Act*, such clause tends to become a dead letter because of the felt need to maintain the integrity of the federation.

Yet a division of legislative responsibility effected in one era cannot be expected to foresee all future problems, and overlap of authority in relation to emerging social problems is bound to occur. Changing conditions may make it desirable that different levels of government should deal with a problem at different periods. Moreover, the needs of one province may not coincide with those of another at all times, and some accommodation must be made. Accordingly, devices are invented to permit some transfer of functions. This has been true not only in Canada but also in other federations, such as the United States⁵² and Australia.⁵³

The practical result achieved by the courts may well be as good as we are likely to get. Transfer of functions between federal and provincial authorities is necessary, but the equilibrium of the federation must be preserved. The legislature given a power by the constitution should exercise a measure of discretion in the various schemes it transfers. This is, in effect, what the courts have achieved, and consequently constitutional tinkering in this area is not recommended.

However, if in future constitutional discussions it is thought advisable to provide expressly for delegation, the best balance between the advantages and disadvantages would be to permit one level of government to make laws within the legislative competence of the other if that other consents to the particular statute. In other words, we could have a scheme similar to that in the *Fulton-Favreau* formula without requiring the consent of four provinces. This requirement for consent would make for a certain uniformity and help to avoid the creation of a special status for any province,⁵⁴ but it would tend to limit seriously the use of the express delegation power and make it more restrictive than the techniques to transfer authority now available under the constitution. A scheme for delegation should also provide that a province cannot revoke delegated power for a certain period. Otherwise it could, in some cases, effectively dismantle a national scheme constructed at considerable expense.

⁵¹ See C.K. Comans, *Case and Comment* (1953) 31 *Can. Bar Rev.* 814.

⁵² See Read, *supra*, f.n.50.

⁵³ See Comans, *supra*, f.n.51.

⁵⁴ See Lederman, *supra*, f.n.7; Louis Philippe Pigeon, *Le sens de la formule Fulton-Favreau* (1966) 12 *McGill L.J.* 403, 413.