APPENDIX 7

DIFFICULTIES OF DIVIDED JURISDICTION

A Study Prepared for the Royal Commission on Dominion-Provincial Relations

BY . . .
J. A. CORRY

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Difficulties of Divided Jurisdiction

A Study Prepared for the Royal Commission on Dominion-Provincial Relations

BY

J. A. CORRY

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Difficulties of Divided Jurisdiction

EDITORIAL FOREWORD

J. A. Corry, assistant professor of Political Science at Queen's University, was retained by the Royal Commission on Dominion-Provincial Relations to study the operation of joint Dominion-provincial administration in those fields in which jurisdiction is shared or co-operation attempted. This study is in a sense a companion work to Professor Corry's "*Growth of Government Activities Since Confederation*". In connection with his studies for the Commission Professor Corry interviewed many of the leading Dominion and provincial officials concerned. The method of presentation and any expressions of opinion are solely the responsibility of the author, and not of the Commission.

The most important fields of divided jurisdiction, based on interpretation of the British North America Act by courts, are marketing, regulation of insurance companies, fisheries, and the settlement of labour disputes. Professor Corry concludes that "when the Dominion and province share the administration of some single function of government, it... leads, in most cases, to friction, waste and inefficiency." He adds, however, that Canadians may prefer, for the sake of local autonomy, to pay these costs rather than to set up unitary control where that is the only practicable alternative. (But as functions in which the Dominion and the provinces have concurrent powers, such as assistance to agriculture, are not examples of divided jurisdiction in the sense considered in this study, Professor Corry's conclusion must not be taken to be a condemnation of concurrent powers.)

A second group of functions in which both Dominion and provincial governments participate is made up of activities which are unquestionably within provincial jurisdiction but which the Dominion Government assists financially on certain conditions. Since 1912 the Dominion has experimented with conditional grants to the provinces for agricultural instruction, employment services, highways, technical education, eradication of venereal disease, old age pensions, and unemployment and farm relief. Most of these grants were launched as temporary measures, and only the grants for old age pensions, employment services, and unemployment relief are now in force.

Professor Corry finds that for certain limited purposes which can be clearly defined and measured by professional standards, such as highway construction, the conditional grant proved useful. His general conclusion, however, is that it has not been and is not likely to be a successful or desirable device, although he notes that it may be preferred to an increase in federal power for reasons unconnected with the efficiency or economy of the particular service.

The study concludes with an appendix discussing the present confused and doubtful constitutional position of the delegation of power by Dominion to province or by province to Dominion.

The first draft of this study was completed in August, 1938, and after having been circulated to the Dominion and provincial governments for comment, was revised where necessary and put in its present form in the spring of 1939.

DIFFICULTIES OF DIVIDED JURISDICTION

Chapter I

INTRODUCTION

The following is a discussion of some of the difficulties that have arisen from the division of legislative power between the Dominion and the provinces. It is not primarily concerned with the legal and constitutional difficulties of plotting accurately the line of division. The perplexities of the constitutional lawyers have led to prolonged and costly litigation, the frustration of various experiments of Dominion and provincial legislatures and, at times, to an unfortunate hesitation in dealing with pressing problems where it was difficult to say whose responsibility they were. These things are unfortunate from the point of view of economy and efficiency but it is probable that, in large measure, they are part of the price of federalism.

The division of power in a federal state raises other problems of a governmental or administrative character. The constitution may expressly give concurrent powers to federal and provincial legislatures as in the case of agriculture and immigration under the British North America Act. Through oversights on the part of the framers, confusion on the part of the interpreters or the impact of economic and social change on rigid categories, we find ourselves in a position where the division of power splits several functions of government in two. As a result, performance of a particular function often requires co-operation between the provinces and the Dominion. There are two distinct aspects to the problem of co-operation in the performance of any single function. First, there is legislative co-operation—securing substantial agreement by ten legislatures as to policy and the detailed means of advancing that policy. When agreement has been reached and uniform or "meshing" legislative measures have been enacted, that aspect of the co-operation is closed—for the moment, at least. The second problem then arises—how to secure and maintain administrative co-operation. In respect of some kinds of co-operative legislation, administrative co-operation may not be necessary. For example, uniform legislation on company law would presumably leave each of the ten units free to administer its own legislation. However, in functions such as the regulation of insurance companies, some degree of administrative co-ordination is desirable on grounds of economy and uniformity of regulation. In other functions again, such as enforcement of compulsory grading, packaging, and marking of natural products, efficiency as well as economy demands unity of administration and, therefore, a very high degree of co-operation if joint administration by province and Dominion is to be tolerably successful.

That is to say, in those functions where power is at present divided and where active administration is necessary to make governmental policy successful (which seems increasingly true of the newer functions of government), an acute problem of administrative co-operation is raised. It is raised because, under the British North America Act, the division of executive power follows the line of division of legislative power—except in executive enforcement of judicial decisions. Each government must provide its own officials to enforce its own laws. This problem of building an efficient administrative machine out of pieces of federal and pieces of provincial power is a puzzle peculiar to federal systems. So far it has been dealt with in a hand-to-mouth fashion and little attention has been paid to the fundamental issues involved. It has been little explored by students of federalism and thoroughly tested results of experience are hard to find. In the remarks that follow, an attempt is made to set out the basic considerations and illustrate them with specific examples.

As already pointed out, difficulties of administrative co-operation due to a division of power differ in quality and intensity. Under the concurrent power relating to agriculture, the chief difficulty seems to be in the duplication of services offered. The present study makes no attempt to explore that matter. Government officials are not anxious to point out duplications and it would often require an expert to decide what is, in fact, a duplication. Nor is there in this study any discussion of legislative co-operation except to suggest that the difficulties of getting ten legislatures to agree and to persist in that agreement must not be lightly dismissed.

This study concentrates on the problem of administrative co-operation in the discharge of those functions which, by their nature, require a high degree of co-operation if they are to be carried out successfully.

Because the opinions advanced here are, on the whole, adverse to joint administration of such functions, it is perhaps wise to make clear at the beginning that there is no intention to decry co-operation, as such, between provinces and Dominion. If the federation is to endure, obviously there must be a great deal of it just as there must be a great deal of give and take amongst individuals who live in the same world, apart altogether from law or custom. But there is a great difference between informal co-operation which a spontaneous feeling of sympathy or solidarity will carry to completion and the formal institutionalized co-operation which is expected to work over long periods of time when spontaneity will have died out of the relationship. What is meant perhaps requires homely illustration.

It is one thing to make a loan to a relative or friend who has got caught in the depression; it is quite another to invite him and his family to come to live with you and your family until the storm blows over. If the storm lasts very long, the difficulties of adjustment, which this co-operative effort involves, will probably outlive the generous impulse which prompted the offer. No juggling of the arrangements for the first use of the bathroom in the morning or the evening paper in the evening is likely to bring about a harmonious relationship. Unless you are very exceptional people, you will probably decide that the root of the trouble is that friends and relatives should not be involved in too many intimate relationships if they are to remain friends. Having ignored that basic truth, you have entered on a relationship which involves friction and disharmony.

Of course, if the depression is severe and prolonged and your own circumstances are limited, you may still decide that your scale of values requires you to put up with it. That is to say, if you put family solidarity above your own peace of mind, you may accept the situation even though it is unsatisfactory. The parallel is not an exact one. There is no evidence that joint administration is more economical in terms of money cost. But it may be felt preferable to endure the jangling of joint administration than to pay the price of increased federal power.

When Dominion and province share the administration of some single function of government, it is believed that the very nature of the situation generally leads to friction, waste, and inefficiency. Of course, this is not so in all joint activities in all provinces at all times. The results vary according to a number of factors. However, Canadian experience so far seems to indicate that administrative performance in these joint activities, taken as a whole, falls short of the standard of reasonably good administration. At the same time, it should be emphasized that administrative efficiency is only one of the factors to be taken into account in any final assessment of the distribution of powers in a federal state. For example, the existing measure of provincial autonomy may be thought necessary for the preservation of values more important than a smoothly-running administrative machine. The dangers of a highly centralized government may be regarded as being so great as to justify the continuance and even the extension of relationships which are unsatisfactory when looked at solely from the administrative point of view. This study is restricted to an estimate of administrative efficiency. It is not concerned with the final question of policy, the weighing against each other of the factors mentioned above.

There are two kinds of situation where administrative co-operation involving formal continuous relationships has either been attempted or must be contemplated under the constitution as it now stands. First, there are the fields of government action which have been cut in two by the interpretation of the courts. The most important of these are the marketing of natural products, fisheries, regulation of insurance companies, and investigation of labour disputes. So far there has been very little of what may be called joint administration in these fields. The technique which has been used in the past to evade joint administration has been declared unconstitutional by the courts[1] and it seems probable that their view would be upheld by the Privy Council. If valid delegations of power by the province to the Dominion, or *vice versa*, cannot be made, more joint administration in these fields in the future must be expected in the absence of any revision of the British North America Act.

Secondly, there are some fields of governmental action which are clearly provincial but which the provinces failed to cultivate, because of lack of financial resources or some other reason. The Dominion has been willing or anxious to assist the

[1] *Rex* v. *Zaslavsky*, [1935] 3 D.L.R. 788; *Rex* v. *Brodsky*, [1936] 1 D.L.R. 578; *Rex v. Thorsby Traders, Ibid.*, p. 592.

provinces in occupying these fields and has made grants for the promotion of specified activities. The reasons for giving these subventions have been mixed. One reason has been the feeling that important national interests were to be served by the uniform development of these aided activities throughout the country. Here there is an admission of some federal responsibility, even though vague and indirect. Another reason, which excludes any admission of federal responsibility, has been that some of the provinces need financial assistance and that a grant for a particular activity will release provincial resources for other purposes. From 1912 on, the Dominion has experimented with conditional grants to the provinces for agricultural instruction, employment service, highways, technical education, venereal disease, old age pensions, and unemployment and farm relief. All these grants, with the exception of the grants for employment service and old age pensions, were launched as temporary measures. At present, the grants to old age pensions, employment service, and unemployment relief are the only ones in force, if the unearned balances of Manitoba under the technical education grant be excepted.

However, the administrative technique used in all these grants is essentially the same. The funds are given to the provinces on condition that they spend equivalent or specified sums, maintain certain standards, and aim at specified objectives. The provinces undertake the actual administration of the activity and the federal government installs inspection and audit controls in an attempt to satisfy itself of proper application of the funds. This involves the establishment of fixed administrative relationships between the provinces and the Dominion and creates a problem of Dominion-provincial co-operation.

Officials engaged in Dominion-provincial co-operation generally attribute most of their difficulties to "personalities." Any inquiry as to why there is a marked tendency for personalities to clash in these fields of divided jurisdiction raises a question which is fundamental to this study and which should be discussed first. Is it possible for two bureaucracies (using the word in a purely descriptive sense with none of the sinister connotations sometimes attached to it) responsible to separate and independent authorities, to co-operate efficiently and harmoniously over a long period of time? This is an underlying question in all activities which depend upon the sustained co-operation of Dominion and provincial officials. Unfortunately, it is a question to which it is impossible to give a conclusive answer by way of logical demonstration. There are, however, some reasons for thinking that two bureaucracies, so placed, tend to be "rival centres of power" (an expression used by Professor E. S. Corwin) rather than eager co-operators for the fulfilment of a grand national purpose.

The higher officials in any government department are presumably able men to whom their job is a career—or at least, their best present prospect for a career. They can scarcely be satisfactory civil servants unless they find, in their work, the main expression of their personality. We all try, in one way or another, to put our stamp on our environment. The readiest objective yardstick for reassuring ourselves and impressing our superiors is expansion of an activity for which we supply the driving power. Use of this measure was perfectly, because, in all probability, unconsciously, exemplified by the Dominion official who said in his annual report, "Despite a heavy reduction in inspections under the Potato Export Regulations and a slight decrease under the Requested Inspection Service, the total number of inspections compares very favourably with last year."[2]

This bears directly on the subject of this study because, frequently, the most likely area for expansion is the borderland of the activity in which Dominion and provincial officials are supposed to be co-operating. The official employed by the province knows that his calculable future is in the hands of the province. (The same argument applies equally to the Dominion officials.) If he is capable and ambitious, he must try to master uncertainties which interfere with his control of the situation. The actions and attitudes of Dominion officials are among those uncertainties. Thus there is a powerful incentive for him to try to extend his authority as far as possible over any disputed borderland between them. He must use the faith that is in him to secure an administrative policy which furthers and vindicates his judgment. That is to say, when the ideas of the Dominion officials do not jibe with his, he must fight for the adoption of his own. If he merely assents to the proposals of Dominion officials, he is inviting the province to search for another official who will have originality. He wants credit for his contribution to the administration of the activity. The only way he can be certain of receiving it is to be able to show that he and his staff are really responsible for the achievement. Or the reverse — when things go badly, there is a strong temptation to "pass the

[2] Annual Report of the Department of Agriculture (Dominion) 1931-32, p. 194.

buck" and justify it to himself by saying that, if he had had complete control, things would not have reached this condition.

The whole situation seems to point to the probability of rivalry and friction. It is not to be charged to the perversity of civil servants. It might almost be said that the more zealous civil servants are, the more likely are difficulties of this kind to develop. It is at least certain that the only guarantee against it is that the officials at the top in the two services, which are required to co-operate, should have the same conception of ends and means and should be eager, above all things, to promote those ends. Given anything less than that—and considerably less must be regarded as normal—friction seems to be inherent in the situation. It is believed that this friction explains, in part, why it has been impossible to cut down overlapping in the regulation of insurance companies. It must be admitted that this analysis receives little confirmation from the many civil servants who have been asked about it. Almost without exception, they say that entirely satisfactory co-operation exists between Dominion and provincial officials in the fields where administrative co-operation is being tried. It is impossible to say how far this is an overstatement which they justify by a suspicion that, even if they revealed their difficulties, the nature of them would be misunderstood. At any rate, it is abundantly clear that they are, almost without exception, anxious to escape from a continuance of this co-operation and they are unanimous in saying that its success depends almost entirely on personalities. If the personalities did not "click," they say, the situation would be intolerable.

There is no doubt that a good deal of rivalry and friction arising from this source has existed between Dominion and provincial officials in the past. Frequent instances can be found in the history of Dominion and provincial activity in the field of agriculture, and in other fields as well. However, it is said that at present serious difficulties arise only occasionally.

It is certainly true that there is not nearly as much friction as there has been in the past. In the early days of co-operation in any field, there is bound to be considerable confusion over the delimitation of tasks. For a long period there was no clear understanding between the Dominion and provincial departments of agriculture as to what were the appropriate activities of each. Some years ago such an understanding was reached, machinery of co-ordination was established, and much of the rivalry eliminated. It can probably be laid down as a principle that, except when a personal vendetta develops between the higher officials, a progressive improvement in the administrative relationships in the fields jointly occupied by the Dominion and province will emerge. As points of difference are raised and settled in one way or another, the area of likely friction is narrowed.

Yet this area will always remain considerable. Personnel is subject to change, making fresh accommodations necessary. Old activities take new directions in response to changing conditions and new activities are launched. Moreover, it is believed that the above analysis of official psychology is confirmed by the fact that similar rivalry occurs between different departments of the same government and even within branches of the same department. The placing of some activity in the hands of a single government or of a single department does not prevent friction. The real advantage of unified administration is that it provides a single authority which can break a deadlock with despatch and whose very existence is a deterrent to prolonged bickering.

If this aspect of officialdom is over-emphasized here, there is some justification because we are prone to an unreflecting enthusiasm for the abstract idea of co-operation. It is much too easily assumed that it is only necessary to counsel co-operation between officials and all obstacles are overcome. This is the reason for trying here to put the other side of the matter as sharply as possible. And it may be hazarded that officials tend to minimize present difficulties of this kind because they fear—quite reasonably—that what is an obstinate natural difficulty will be widely misunderstood as sheer perversity on their part.

In order to prevent misunderstanding, it should be noted that concurrent jurisdiction is not a real instance of divided jurisdiction. In a concurrent field, the power to establish single control of any branch of administration clearly exists. The device of concurrent powers has the prime advantage of flexibility and it can avoid the awkwardnesses of divided jurisdiction. The chief administrative problem raised by concurrent powers is due to the tendency for the Dominion or provincial department to stake out claims for itself on territory which the other thinks—either at the time or at some later date—should belong to it. As suggested in this discussion, this difficulty can be avoided to a great extent if, from the very inception of concurrent jurisdiction, a clear understanding is maintained between province and Dominion as to the appropriate activities of each within the field.

Chapter II

MARKETING OF AGRICULTURAL PRODUCTS

Interpretation of the British North America Act has divided the powers, which must be used to regulate marketing, between the provinces and the Dominion. To state it briefly, the buying and selling of any article of commerce is a trade or business and regulation of a trade or business is primarily a matter of property and civil rights.[3] But when a trade or business conducts export or inter-provincial transactions, these transactions are beyond the powers of the province and any regulation of them is a matter for the Dominion.

This division has raised acute difficulties in attempts to regulate the marketing of agricultural products. It has not much affected, thus far, the marketing of other natural products like lumber and fish because, apart from canned and pickled fish, no thorough-going attempt has been made to regulate the marketing of them. It does not raise a serious problem in regulation of the marketing of manufactured goods because the principal object there is to protect the consumer. Thus, for example, there is nothing to prevent a province insisting, as some of them have, on standards of quality in electrical gadgets. It has the power to prevent the sale of them within the province if they do not reach certain standards of quality.

The purpose of imposing standard grades, standard packages, and honest marks for agricultural products is much more complex. It is not merely to protect the consumer. These regulations aim to protect the producer in his dealings with the middleman. They seek to improve quality by providing a premium to competent producers. They seek to facilitate all dealings in the product and thus to lower handling charges. The accomplishment of these objects is calculated to increase demand and promote agricultural prosperity.

If this policy is to be effective, the regulative structure must be placed on the channels of assembly rather than on those of distribution. Grading, packaging and marking provisions must be enforced at the point where the producer makes contact with the dealer or processor. However, at this point, it is very often impossible to say whether the particular lots being graded will remain in provincial trade or will ultimately be drawn into inter-provincial or export trade. Yet, even if the sole purpose were to grade surpluses in order to ensure their access to export markets, there are strong reasons for grading at this point. If grading is postponed until the product reaches an export warehouse, the uncertainty as to grade must constantly hamper movement into export channels.

The logic of the situation argues for the grading of the whole product as early as possible in the assembling process. The difficulty is that it is often impossible to say, at this stage, whether the power to inspect and assign the grades rests with the Dominion or with the province. Even if it were possible, it would be a waste and a duplication to maintain two sets of inspectors. Unified administration is necessary if the function is to be performed most efficiently.

The development of government intervention to ensure the marketing of agricultural products in accordance with certain standards is discussed elsewhere.[4] It will suffice here to recall a few facts about it. The need for standards was first felt in export trading and consequently the standards were hammered out and applied by the Dominion. It was soon discovered, however, that in order to make the export provisions fully effective and to facilitate domestic trade in these products as the domestic market expanded, it was desirable that the standards should not be limited in application to the export trade. They could be, and were, extended to inter-provincial trade by Dominion authority. But, if intra-provincial transactions were to be covered, provincial authority had to be relied on. The provinces took the view that the function could be most appropriately performed by the Dominion which had accumulated a good deal of experience in the field and accordingly they sought to confer authority on the Dominion.

Up until 1935, the technique used for this purpose was as follows. The relevant Dominion act

[3] This statement is justified in its generality, by the present state of the authorities. However, the Dominion grading and inspection legislation has not yet been examined by the Privy Council. It is therefore possible that such legislation may be upheld as valid "regulation of trade and commerce", even in respect of purely intra-provincial transactions. But, in view of the whole trend of interpretation, it seems improbable.

[4] See J. A. Corry, *The Growth of Government Activities since Confederation*, Section II.

was framed in general terms to cover all transactions.[5] Provincial legislation was then enacted declaring that, in so far as the Dominion legislation and the regulations thereunder were beyond the powers of the Dominion and within the powers of the province, these invalid provisions of the Dominion act were to be a part of the law of the province. The provincial legislation went further. It provided that these provisions were to remain a part of the law of the province as long as the Dominion act remained in force, unless it was before that time repealed by the province;[6] and that any alterations in the Dominion act or regulations which required provincial adoption might be confirmed by the Lieutenant-Governor in Council without any further action by the legislature.[7]

This method of legislative co-operation which may be called the "enabling legislation device" has been used in a number of situations where it was desired to extend unified Dominion administration over the whole field of regulation. It was first used to support the Dominion Live Stock and Live Stock Products Act which provided for the regulation of stockyards and stockyard traders and for compulsory grading of live stock products such as eggs, poultry, wool, and hides.

In 1923, British Columbia, Saskatchewan, and Nova Scotia passed enabling legislation[8] and most of the other provinces later took the same step. The Dominion Dairy Industry Act was amended in 1934 to extend compulsory grading generally to substantially all trading transactions in dairy produce[9] and most of the provinces have passed enabling legislation.[10] The Dominion legislation respecting fruit, vegetables, and honey was drawn together in the Fruit, Vegetable and Honey Act of 1935. Its provisions respecting grades, packages, and marks are framed in general terms[11] and at least one province (British Columbia) has enacted the enabling provisions.[12] The Dominion Meat and Canned Foods Act contains general provisions for the inspection of canned fish[13] and British Columbia and Nova Scotia have passed validating measures.[14]

These enactments deal mainly with grading and inspection matters, but the device has been used for other purposes. After the Privy Council, in 1930, declared the provisions of the Dominion Fisheries Act, which purported to restrict the operation of fish canning and curing establishments to those who held a licence from the Minister of Fisheries, to be *ultra vires*,[15] Nova Scotia sought, in 1933, to cure the invalidity in part by enabling legislation.[16] The Natural Products Marketing Acts, enacted by the Dominion and the provinces in 1934,[17] made use of the device for the purpose of enabling the Dominion and the provinces to trade administrative authority back and forth. And, incidentally, the provinces have used the device to give the Dominion administrative authority over industrial disputes within the sphere of provincial jurisdiction.[18] That is to say, they have sought to extend the provisions of the Dominion Industrial Disputes Investigation Act beyond the restricted field marked out for it by the Snider case.[19]

The enabling legislation has not always been framed in identical terms in all the provinces.[20] However, the language used is very similar in all cases.[21] It may be that some of the acts are so

[5] *e.g.* See The Live Stock and Live Stock Products Act, Statutes of Canada, 1923, c. 18, s. 9.

[6] *e.g.* Statutes of Saskatchewan, 1923, c. 48, s. 2, "If and in so far as any provision of The Live Stock and Live Stock Products Act 1917 (Dominion) and the amendments thereof and the regulations thereunder heretofore enacted or made, is within the legislative authority of the Province and outside that of the Dominion of Canada, such provision shall have the force of law in Saskatchewan and, unless otherwise enacted by the Legislature of Saskatchewan, shall be and remain in full force and effect therein to all intents and purposes whatsoever, until the same is repealed by the Dominion Parliament or revoked by the Governor General in Council, as the case may be."

[7] *Ibid*, s. 3, "The Lieutenant-Governor in Council may, by proclamation put into force in the Province any amendment to the said Act and regulations which may hereafter be enacted by the Parliament of Canada or made by the Governor General in Council, and which is within the legislative authority of the Province and outside that of the Dominion, whereupon such amendment shall have the force of law in Saskatchewan...", concluding in the same words as s. 2, set out above.

[8] Statutes of British Columbia, 1923, c. 63; Saskatchewan, 1923, c. 48; Nova Scotia, 1923, c. 8.

[9] Statutes of Canada, 1934, c. 12.

[10] Statutes of British Columbia, 1935, c. 16; Saskatchewan, 1935, c. 57; Ontario, 1936, c. 14; Quebec, 1933, c. 26.

[11] Statutes of Canada, 1935, c. 62.

[12] Statutes of British Columbia, 1936, c. 21. Many of the provinces had enacted enabling legislation respecting fruit, root vegetables and honey when each of these products was dealt with in a separate Dominion Act.

[13] Revised Statutes of Canada, 1927, c. 77, ss. 17-27.

[14] Statutes of British Columbia, 1932, c. 4; Nova Scotia, 1932, c. 13.

[15] *Re* Fisheries Act, 1914, [1930] I D.L.R. 194.

[16] Statutes of Nova Scotia, 1933, c. 13. This Act provided that no persons should be entitled to operate a lobster cannery in Nova Scotia unless he held a licence from the Dominion Minister of Fisheries. It is possible that there may be no constitutional objection to making the "O.K." of a Dominion authority a condition precedent to the access to provincial resources.

[17] Statutes of Canada, 1934, c. 57, and *e.g.* see Statutes of Saskatchewan, 1934, c. 62; Alberta, 1934, c. 34; Nova Scotia, 1933, c. 9; 1934, c. 38; British Columbia, 1934, c. 38.

[18] All the provinces except Prince Edward Island enacted such legislation. British Columbia repealed its enabling act in 1937.

[19] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

[20] *e.g.* compare the terms of the Saskatchewan legislation set out in note (6), p. 12 with Statutes of Nova Scotia, 1934, c. 50. Other variations will be found in other cases but none of them appears to be any more significant from the point of view of the constitutional difficulty.

[21] It should perhaps be pointed out that the powers which this "meshing" legislation purports to afford have not been fully used by the Dominion. Substantial structures of regulation have been raised upon them and it does not seem necessary to set out in detail here the extent to which they have been used. The scope of Dominion marketing regulation at the present time is adequately set out in the memorandum submitted to the Royal Commission on Dominion-Provincial Relations by the Dominion Director of Marketing.

framed that they will manage to clear the constitutional hurdle which upset the Live Stock and Live Stock Products Acts of the three Prairie Provinces. Even though this be true, they are all so similar that they seem equally involved in certain constitutional considerations which will be discussed later.

The provision of the enabling legislation which purported to validate future changes in the Dominion act and regulations was introduced to evade the chief administrative difficulty of this type of "meshing" legislation. In the absence of some such provision, any amendment of the Dominion act which required provincial validation would be inoperative in a province until fresh provincial legislation adopting the amendment was secured. Co-operation between ten legislatures is bound to be a clumsy process subject to many delays, and a variety of issues irrelevant to the particular amendment are likely to get entangled in it. The sessions of the provincial legislatures do not coincide with those of the Dominion—a fact which, in itself, might involve embarrassing delay.

Furthermore, in any field of government intervention where active administration is going on, the bulk of the detailed rules governing the administration must be laid down by regulation under the statute rather than by the statute itself because frequent adjustment of these rules is likely to be necessary. Hence it was desirable either to have the amendments to the regulations prospectively validated by the provincial legislature, or to give the Lieutenant-Governor in Council power to validate them as and when the Dominion department found it necessary to make them. Otherwise, administration would be seriously hampered through having to wait for provincial legislatures to convene and enact legislation confirming the changes. It is to be noted that delays in provincial validation of amendments to the act and the regulations would not merely hamper the application of grading provisions to intra-provincial transactions. As pointed out above, it is practically impossible, in respect of many products, to disentangle the intra-provincial from the inter-provincial and export transactions at the point where grading and inspection provisions ought to be applied. If co-operation on the legislative level falters, it embarrasses the whole activity on the administrative level.

It was to evade these administrative difficulties that provisions for the prospective validation of changes in the Dominion act and regulations were inserted in the provincial "enabling" legislation. The insertion of these provisions meant, in effect, that future legislative action in a particular area of provincial jurisdiction was to be initiated by the Dominion. This made it plausible to argue that the provincial "enabling" act was not a case of legislation by reference—*i.e.*, the incorporation in a provincial act of a body of words and phrases, identified by specific reference thereto—but rather a delegation of provincial legislative power to Parliament. This was the view taken by the Saskatchewan Court of Appeal in *Rex* v. *Zaslavsky* where the validity of the Saskatchewan Live Stock and Live Stock Products Act came before the courts. They held the act to be *ultra vires*, because, in substance, it was a delegation of provincial legislative power to the Dominion.[22] This opinion has since been confirmed by the Manitoba and Alberta Courts of Appeal in *Rex* v. *Brodsky* and *Rex* v. *Thorsby*, respectively.[23] This particular constitutional difficulty could have been evaded at the cost of serious administrative inconvenience if the provincial legislation had merely incorporated the then existing Dominion act and regulations, leaving future changes to be dealt with specifically as they arose. However, it seems probable that the whole scheme would still have been vulnerable on constitutional grounds. There would not have been any delegation of legislative power. But in so far as Dominion officials were authorized to grade or inspect products which remained in intra-provincial trade, there would still have been a delegation of provincial executive authority to the Dominion. There is some reason for thinking that Lord Watson's dictum against delegation in *Canadian Pacific Railway* v. *Bonsecours*,[24] upon which the above decisions are based, is quite as applicable to executive as to legislative power.

It is possible to go further than that. It is believed that a strong case can be made to show that the use of this technique of Dominion-provincial co-operation plunges the whole matter into a constitutional morass. A Dominion statute providing for compulsory grading of a product in perfectly general terms must be *ultra vires* from its very inception and not merely from the date on which a court declares it to be so. How then can a provincial statute, enacted at a later date, give life to this still-born creature of the Dominion? Even if this miracle can be worked, it would require, at the very least, the co-operation of all nine of the provinces.

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[22] See note (1) p. 8.
[23] *Ibid.*
[24] *Canadian Pacific Railway Company* v. *Bonsecours*, [1899] A.C. 367.

If one province refrains from enacting the supporting legislation, any application of it to that province is unconstitutional. That is to say, the Dominion legislation remains unconstitutional in part. But since its enacting clauses are perfectly general, there is no way of severing the constitutional from the unconstitutional, short of rewriting the statute in limited terms. Where severance is not possible except by a new act of creation, the whole enactment falls to the ground.[25]

This argument is limited to the specific instance of legislative co-operation under discussion. The difficulty which it raises is purely one of legal construction and therefore not insuperable in all circumstances. Careful draftsmanship might assist the ingenuity of a court to uphold a co-operative scheme. Furthermore the legislature which is supreme might outlaw the narrow legalistic logic of the argument by express directions in the statute. Nevertheless, the hazards are considerable. It must be remembered that the Privy Council has recently ignored a legislative direction to sever on the ground that the valid portion of the statute in question could not be contemplated as existing independently of the invalid portions.[26] Judicial resourcefulness is an important practical factor. No doubt, a supreme legislature amply endowed with perseverance can find, by a process of trial and error, a formula for this difficulty which will stand the scrutiny of the courts. Even then, the question of the constitutionality of delegation, which is an entirely separate issue, will still remain.

This study is concerned with administrative rather than constitutional difficulties.[27] It has been necessary to digress to the constitutional question for two reasons. In the first place, the principal administrative difficulty met in activities brought under unified Dominion administration by the device of enabling legislation is the doubt as to the constitutionality of the structure. The difficulties attributable to federalism are almost entirely overcome when automatic validation of Dominion legislation and regulations and amendments thereto is secured. Of course, there is always the uneasy feeling that some day the Dominion and one or more provinces may fall out and the province withdraw the enabling legislation. In actual experience, up to the present time, this has never occurred. Some provinces have withdrawn their enabling legislation but only after judicial decision had gone against it. However, as soon as doubts about the constitutionality of the device arose, the Dominion officials felt obliged to step warily in enforcement of the regulations. They have refrained as a rule from prosecuting violations when there was some ground for thinking that the transaction in question would turn out to be a purely intra-provincial one. This laxity in administration tends to weaken observance of the regulations and, if it goes too far, will demoralize the activity. Dominion officials who administer the policies supported by the enabling legislation device say they frequently feel as though they were seated on a powder barrel. Such a feeling may induce caution and reasonableness, admirable qualities in a civil servant, but it may also induce paralysis.

In the second place, doubts about the constitutionality of the device are so strong that they are leading to its abandonment. The provinces have not attempted to revamp their legislation to meet the specific objections of the courts in *Rex* v. *Zaslavsky* and *Rex* v. *Brodsky*. Instead, they have begun to experiment with a new legislative device for attaining the same results. Saskatchewan's reply to *Rex.* v. *Zaslavsky* was to rewrite the Live Stock and Live Stock Products Act. It provides for provincial control of provincial transactions. It enables the Lieutenant-Governor in Council to set up grades and standards in live stock and live stock products and authorizes him to appoint the inspectors and other officials necessary for the proper administration of the legislation.[28] Substantially similar legislation was enacted by Quebec in 1935, New Brunswick in 1937, Ontario in 1937.[29] However, the Ontario and Quebec legislation is much more sweeping. It enables the provincial governments to set up grades and appoint inspectors for agricultural products generally. British Columbia, in 1937, repealed her enabling legislation respecting fruit, vegetables and honey and provided for administration machinery of her own.[30] It seems that this method of procedure will supplant the enabling legislation device and the form of co-operation which it sought to attain. Therefore, it is not necessary to investigate further into the workings of the administration which that device envisaged.

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[25] *e.g.* See *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1925] A.C. 561, at p. 568.

[26] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1937] A.C. 377, at pp. 388-9.

[27] Some of the constitutional problems raised by this study are considered in an appendix attached hereto.

[28] Statutes of Saskatchewan, 1936, c. 77.

[29] Statutes of Quebec, 1935, c. 30; New Brunswick, 1937, cc. 52, 53; Ontario, 1937, c. 24.

[30] Statutes of British Columbia, 1937, c. 23.

On the surface, separate legislation by both Dominion and provinces on the subject of marketing of agricultural products gives the appearance of a decision by each authority to exercise its own powers in its own sphere. However, the confusion which differing provincial and federal grades and separate unco-ordinated administration would introduce into this field of regulation is so great that the desirability of avoiding it is conceded everywhere as a matter of principle. The experience of the United States confirms this view. Consequently, the provinces which have enacted separate legislation do not propose to enact separate grades and a duplicating force of officials. Their intention is to enact the federal grades and standards as their own and to appoint Dominion inspectors and field staff as provincial officials. The only contemplated exceptions to this plan are of minor importance.

Firstly, there is some possibility of establishing, for some products, a grade of quality below the federal grades for the purpose of intra-provincial trade. Secondly, the increased volume of inspection work required, when intra-provincial transactions are added, may lead to the appointment of additional inspectors by a province.

Subject to these qualifications, the intention of the provinces, so far as can be learned at present, is to maintain uniformity of standards and to unify administration in the hands of a field staff who are both Dominion and provincial officials. Within the past two years the provinces of Alberta, Saskatchewan, Manitoba, and Ontario have enacted the federal egg grades and appointed federal inspectors as provincial inspectors. Apart from this, similar action is expected under the Ontario, Quebec and New Brunswick statutes mentioned above. At the time of writing, this action is merely in prospect.

So far, there has been little or no experience of the working of what may be called the "conjoint legislation" device. Therefore, it is impossible to speak with any assurance about the administrative difficulties, if any, which it will involve. However, a number of difficulties which seem likely to arise may be pointed out. They are regarded as likely because there is no reason to expect continuous unanimity of view on any subject between two separate and—some would add—sovereign authorities. Firstly, the main advantage aimed at by the "enabling legislation" device has been lost. Adjustments in the Dominion regulations no longer become effective in the province by simple confirmation by the Lieutenant-Governor in Council. Amendments to the Dominion act and regulations do not become effective in respect of intra-provincial transactions until they have been adopted by the provincial legislature or executive as the case may be. Presumably, any such change must be the result of an agreement between the Dominion and the provinces. No surer way of offending sensibilities can be imagined than for the Dominion to notify the provinces that a change in the regulations is required and that they will please act accordingly. Nor is it a mere matter of the sensitiveness of provincial officials. The provincial executive is responsible to the legislature and the legislature is responsible to the electorate. They do not do their duty unless they exercise their judgment upon requests for changes in provincial statutes and regulations. Therefore, adjustment in the rules governing the activity must be a matter of Dominion-provincial agreement. No one who is familiar with the history of our achievements in that respect will be optimistic about the results. It is not suggested that there will be disagreement on every trivial detail, but it is probable that there will be enough to bedevil the administration of a grading scheme. It will mean delay and confusion and, if it goes very deep, it will destroy unity of administration.

Delay in needed adjustment of the regulations is not the only danger to be faced. Provincial and Dominion officials are not likely to agree completely on standards of quality. The same product produced under widely differing conditions in the different provinces shows some variation in characteristics. Uniform standards of quality, no matter how defined, are likely to bear somewhat unfavourably on one or more products of one or more provinces. There may well be no justification for that prejudicial effect beyond the overriding necessity for a single uniform standard. In such a case, the divergence of interest and duty between Dominion and provincial departments of agriculture is clear. The Dominion department must insist on a single standard even though the contours of that standard may pinch a particular province. The provincial department is under a duty to promote the welfare of agriculture in the province. Standing on that ground, they can justify resistance to the federal grade as defined.

One of the arguments frequently used to show that the officials of two authorities, which are independent of each other, can co-operate harmoniously if kept free from political considerations is that they can find a basis of agreement in scientific criteria. No doubt there is some truth in this. However, in the application of scientific criteria, there is often room

for subtle but reasonable differences of judgment. Already this has appeared in the administration of the conjoint legislation of Quebec and the Dominion respecting fruit. The Quebec officials have sought in their promulgation of Dominion grades to improve on the definition of some of the grades of fruit. In the result there is some ground for saying they have changed the meaning of the definition.[31] The change, if such it be, may not be particularly important. But it does show that it is not mere phantasy to expect that a provincial department, equipped with power to establish grades, will experiment, from time to time, with some of its own.

There is equally good reason for expecting that the power which the provincial legislation gives for the appointment of a field staff for the enforcement of grading provisions will be used, sooner or later, for appointing provincial inspectors in place of, or in addition to, the Dominion inspectors. In fact, Quebec has already appointed a number of fruit inspectors of its own under the Agricultural Products Act of 1935. In the particular case, there were satisfactory reasons for doing so. Very little Quebec fruit moves into inter-provincial and export trade and consequently the Fruit Branch of the Dominion Department of Agriculture maintains a very small field staff in Quebec. When Quebec provided for grading of intra-provincial shipments, the existing Dominion staff could not handle it; the Dominion was not prepared to increase its staff and that forced Quebec to appoint a number of her own inspectors.

There have been signs of a somewhat similar situation developing in Ontario. When the Farm Products Act of 1937 was enacted, Ontario asked the Dominion department to put in a staff to grade substantially all the dressed poultry moving to market in Ontario. (At present the Dominion merely maintains a number of grading stations at selected points.) The Dominion department could not see its way clear to do so and Ontario hinted that they might be compelled to set up their own staff. Whether this was more than a form of pressure for the extension of a desired service is not clear. Nor is it possible to say, without an investigation of the whole problem, whether Ontario would have been justified in doing as suggested. But the incident does indicate the most probable point of disagreement between the Dominion and a province.

There is every reason for expecting a province to question the adequacy of the service supplied by the Dominion staff in the province. Obviously, it is not possible to provide for the grading of all produce moving to market. When the great bulk of a product is marketed subject to grade, the purpose of the service is being carried out. At some point, the law of diminishing returns is encountered. Where that point is placed depends on what factors are taken into account: Dominion and province may not light upon the same factors and friction is likely to develop. The demand for an improved provincial service may very well coincide with the need for some additional posts to reward faithful workers. A provincial grading and inspection staff may be the result.

This suggests something which must never be forgotten in any analysis of the administrative troubles of divided jurisdiction. Where the legislature and executive are linked by cabinet responsibility, political considerations may obtrude at any time into the administrative sphere. While the cabinet system ensures unity of administration within a single political unit, it tends to undermine any unity of administration in the fields of divided jurisdiction in a federal state. As long as the federation continues, there are certain to be numerous occasions when the Dominion and a province will be at loggerheads over some political issue. Such conflicts are not by any means always due to the perversity of politicians or the faction of parties, though there are times when these seem a sufficient explanation. There are real divergences of interest between any single province and the Dominion and these, along with the surface effervescence of politics, will continue to create disturbances. If the dispute is a serious one, the cabinet system tends to transmit its repercussions into those sectors of divided jurisdiction where province and Dominion are trying to carry on co-operative activities. Indeed, a politician, intent on gaining his point, will not always be able to refrain from interfering in such activities in a way which will create nuisance values for himself. Such nuisance values are strong bargaining points in his favour.

Thus there are a number of factors which make it not unlikely that, in some provinces, at least, unified administration established under the device of conjoint legislation will break down into separate administration with provincial grades and provincial inspectors alongside the Dominion system for inter-provincial and export trade. Such a result would be most unfortunate. It would involve duplication and unnecessary expense. Moreover, because of the frequent impossibility of telling, at

[31] Information supplied by R. L. Wheeler, of the Dominion Department of Agriculture.

the time of grading and inspecting, whether a particular lot of produce will go into provincial or inter-provincial trade, it will make for confusion, perhaps for rivalry, and may subject the owner and dealer, who naturally prefer inspection by a single authority, to delay, annoyance and expense. Uncertainty as to whether a provincial grade will stand up to a Dominion grade, and *vice versa*, will hamper the movement of produce and complicate commercial dealings in it.

Most important, perhaps, is the fact that a provincial system can be used to promote provincial economic exclusiveness. While one cannot speak with assurance on the subject, it appears unlikely that there is any constitutional prohibition against a provincial enactment requiring that produce shipped into the province should be graded on arrival according to provincial grades. If such legislation is valid, it would be easy to use it in such a way as to hamper inter-provincial trade in an indirect way.

Grades could be so defined as to strike at the special peculiarities of the produce of the chief competing provinces. This is not merely fanciful. Several of the Atlantic seaboard states of the United States have so defined a fresh egg that the mid-west and western states cannot ship fresh eggs into those states—except by aeroplane! Inspections could always be delayed on pretexts which could not be exposed quickly enough to help the dealer. A very little discouragement of this kind will go a long way in reducing inter-provincial trade.

When the provinces have moved into this field of marketing with their conjoint legislation it will be easy and, at times, tempting for them to set up separate grades and administration. Perhaps the likelihood of such an occurrence is over-estimated here in view of the general agreement, in principle, that this field should be under Dominion administration alone. Nevertheless, the distractions of everyday practice always make inroads on principle and sometimes completely subordinate it.

Even though the unified administration secured by the conjoint legislation device does not break down, there are other difficulties, besides those already mentioned, which will interfere with the efficiency of administration. It is to be noted that, while administration of field work is to be unified, administration is not unified throughout. The graders and inspectors are both Dominion and provincial officials and therefore subject to instructions from both Dominion and provincial departments. The scriptural warning is still true, even though the two masters happen to be government departments. If there is a strong demand in a provincial legislature that intra-provincial trade should get priority of grading and inspection service, it will be very difficult for a provincial department to avoid instructing the field staff accordingly. The Dominion department may well feel that inter-provincial and export shipments have first claim. No judgment is made here as to which is the correct view. Apart altogether from that question, the official in the field is put in an impossible position.

A concrete illustration may be given. The Dominion Dairy Industry Act, s. 5, forbids the manufacture or sale of oleomargarine in Canada. The Ontario Farm Products Control Act of 1937, a scheme of conjoint legislation, does not enact this particular prohibition. Does this mean that manufacture and sale of it in Ontario is to be legalized? If so, what is the duty of a dairy inspector who knows it is being manufactured in Ontario? Doubtless a Privy Council decision would define his duty precisely. But it is imperative for him that he should know at once in order to avoid trouble with and between his two masters.

The fact that legislative power over the field is divided and the exact line of division is hard to plot will lead also to confusion in enforcement through the prosecution of offenders. This, in turn, will react upon efficiency of administration. It requires a good deal of constitutional subtlety to determine whether a particular charge should be laid under the provincial or the Dominion statute—subtlety which the field staff and local counsel engaged to prosecute cannot be expected to possess. For example, after the decision in *Rex* v. *Brodsky* upset the Manitoba enabling legislation in connection with the Dominion Live Stock and Live Stock Products Act, the legislature by conjoint legislation in 1936, enacted the substantive provisions of the Dominion act. By regulation under this act, the province adopted the Dominion regulation which forbids any dealing in "eggs of a condition unfit for human consumption." In 1937, a prosecution was launched against one Malian for breach of this regulation. As the transaction was intra-provincial, the charge was laid under the provincial statute. On appeal, from a conviction before a police magistrate, the County Court judge allowed the appeal on the ground that the provincial regulation was, in substance, legislation on criminal law and therefore *ultra vires*.[32] He pointed out that s. 224 of the Criminal Code forbids specifically

[32] *Rex* v. *Malian* (unreported).

the sale of food unfit for human consumption.[33] He therefore concluded that the charge should have been laid either under the Criminal Code or under the Dominion act.

His decision is probably correct. But this is only one illustration of a number of constitutional pitfalls which hamper enforcement and will continue to do so as long as constitutional power in the field is divided. At present there is confusion and some bickering over the division of responsibility in enforcement proceedings. The usual procedure is for the Dominion to appoint counsel and pay him in all cases, remitting the fine to the province whenever it appears that the offence is against the provincial enactment. This spectacle of Dominion officials and appointees enforcing provincial legislation has caused murmurings among the members of provincial legislatures in at least one province and may lead to a demand for provincial enforcement of provincial laws. Such a further division of responsibility in the field can only lead to further difficulties.

In addition to the administrative difficulties which seem to be likely under the conjoint legislation device, there is a possibility that the holding of both Dominion and provincial office by the same individual at the same time may be unconstitutional or, rather, illegal. There is an old Common Law doctrine of incompatibility of offices which has been revived, to some extent, in the United States for preventing situations of this kind.[34] It could be used here by an ingenious court to strike down this structure of regulation. The doctrine did not forbid plural office-holding as such but interfered where the duties under the two offices were in conflict or seemed likely to be so. Enough has been said about possible conflicts of interest between Dominion and provincial departments of agriculture to show that the requirements for application of the doctrine might be met.

The discussion in this section has referred only to agricultural products. It should be pointed out that an almost exactly similar situation arises in the grading and inspection of canned and pickled fish. As noted above, British Columbia and Nova Scotia, the two chief provinces involved, have used the enabling legislation device to confer jurisdiction on Dominion administrative officers.[35]

In recent years, there has been a widespread tendency to extend state intervention beyond regulation of the quality of the marketed product to the control of the marketing process. In Canada, the earliest attempts were provincial, beginning with the Produce Marketing Act in British Columbia in 1927,[36] and the compulsory wheat pool legislation in Saskatchewan in 1931.[37] The decisions of the courts soon made it clear that no provincial scheme of marketing control could be adequate when substantial portions of the locally grown product were marketed beyond the province.[38] In 1934, Dominion authority was invoked for the furtherance of marketing schemes by the Natural Products Marketing Act.[39]

The act established a Dominion Marketing Board, with power to regulate the marketing of any natural product. The scope of regulation under the act included the time and place at which, and the designation of the agency through which, the product should be marketed. The Board was also authorized to fix standards of quality and determine how much of any product should be sold in a given time, a power which implied the ability to fix a price. Normally, the detailed control of a particular marketing scheme was to be delegated to a local board, representative of the producers of and dealers in the particular product. A tribute to the British North America Act was paid by the provision that these powers should not be exercisable within a province unless (*a*) the principal market for the product lay outside the province, or (*b*) some part of the product was exported.

We know now that this demarcation of the authority of the Dominion Board went beyond Dominion legislative power.[40] In addition, the difficulty already discussed arises. At the time when the powers of the Marketing Board must be exercised, if they are to be effective, it is not possible to say whether a particular lot of the product to be controlled will go into extra-provincial trade or will remain in intra-provincial trade. At the time the Dominion act was passed, it was recognized that there must be a single administrative authority for each product produced in a particular area. Provincial-Dominion co-operation was therefore necessary. Accordingly, the Dominion act contained two facilitating provisions. First, the Governor General in

[33] Dominion pure food legis'ation has been upheld as valid legislation on criminal law. See *Standard Sausage Co.* v. *Lee*, [1934], 1 D.L.R. 706.

[34] See Jane Perry Clark, "Joint Activity between Federal and State officials," 21, *Political Science Quarterly*, p. 230.

[35] See note 14, p. 12.

[36] Statutes of British Columbia, 1926-27, c. 54.

[37] Statutes of Saskatchewan, 1931, c. 88.

[38] *Lawson* v. *Interior Tree, Fruit and Vegetable Committee* [1931] 2 D.L.R. 193; *Re* Grain Marketing Act, (1931) 2 W.W.R. 146.

[39] Statutes of Canada, 1934, c. 57.

[40] *Re* Natural Products Marketing Act, 1934, [1937] A.C. 377.

Council was given power to authorize any marketing agency established by the law of a province "to be and to exercise the functions of a local board" under the Dominion act. That is to say, a portion of Dominion power might be delegated to a provincial authority. Secondly, the Dominion Board was authorized to accept and exercise any powers which might be conferred upon it by provincial legislation.[41]

Provincial legislation to complete this structure of regulation was forthcoming.[42] This legislation was not identical in all the provinces but substantially it aimed everywhere at the same result. Provision was made for a provincial marketing board with wide powers similar to those possessed by the Dominion Board. The Board was then authorized to exercise any Dominion powers which might be conferred on it by the Dominion Board and the Lieutenant-Governor in Council was empowered to confer provincial powers on the Dominion Board.

Nothing need be said here about the great constitutional complexities of this Dominion and provincial legislation. Enough has been said above[43] to indicate a belief that weighty constitutional objections to it can be taken, apart altogether from those taken by the Privy Council against the Dominion act. By use of the legislation, it was planned to trade powers back and forth between the Dominion and the provinces in such a way as to make possible a single administrative authority for each defined area of production of any product. That authority (usually a local board representative of producers and dealers) would be able to control the whole product marketed from that area without bothering about the unanswerable inquiry as to where any particular lot of produce would ultimately be marketed.

It will be quite readily seen that this situation creates administrative problems similar to those discussed in connection with grading legislation. However, before turning to these difficulties, it should be pointed out that there is not, in legislation of this type, the same urgent need for nationwide uniformity as in the case of grading legislation. Compulsory co-operative marketing is still in the experimental stage. As a policy, it raises vexed economic and political issues on which there is not likely to be a great measure of agreement in the near future. Such schemes may be desirable in a primary industry which is badly demoralized in one or more provinces, but not in other industries or provinces. That is to say, there is not at present any general unanimity on the need for uniformity and this therefore seems to be a field where diversity is desirable. Provincial experiments should be allowed to prove themselves before any nationwide scheme of compulsory co-operative marketing is launched.[44] However, the short experience of operations under the 1934 legislation indicates that any such scheme will be faced with difficulty, due to divided jurisdiction.

The practice under marketing schemes established pursuant to the 1934 legislation was first to determine whether the bulk of the product in question found its market inside or outside the province of production. If the former, the Dominion Board delegated its power to a provincially-constituted authority. If the bulk was marketed outside the province, the provincial board delegated power to a Dominion-constituted authority. Thus the "local boards" in most cases were exercising powers which were partly Dominion and partly provincial. Though they enjoyed a considerable autonomy in their management of marketing schemes, it was by no means complete and they were subject to control by both the Dominion and provincial marketing boards.

The Dominion act became law in July, 1934, and twenty-odd schemes were approved under it before the change in government in 1935. The new government declined to proceed with vigorous administration of the act until its constitutionality was determined. Early in 1937, the Privy Council declared it to be *ultra vires*. Consequently, there was a very short experience in the actual administration of these schemes. Furthermore, the Dominion Board in practice conceded almost complete autonomy to the local boards.[45] Hence there was little opportunity for learning how far Dominion and provincial officials would have managed to escape friction if both had been actively concerned in directing administration.

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[41] Statutes of Canada, 1934, c. 57, s. 10. "Whenever a scheme of regulation relates to an area of production which is confined within the limits of a province, the Governor in Council may authorize any marketing board or agency established under the law of the said province to be, and to exercise the functions of a local board with reference to the said scheme."

S. 11. "The (Dominion) Board may exercise any power conferred upon it by or pursuant to provincial legislation with reference to a natural product and may authorize a local Board to exercise any such power."

[42] See note (17), p. 12.

[43] See p. 13.

[44] The constitutionality of such experiments, as long as they are restricted to transactions entirely within the province, has recently been upheld by the Privy Council. See *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708.

[45] Information secured from an unpublished manuscript of Dr. L. G. Reynolds of Harvard University.

There were, however, threats of difficulty, particularly in British Columbia. Many of the local boards in that province were determined to attempt regulation which the Dominion Board thought unwise. The provincial Minister of Agriculture and the provincial officials also had strong views on policy and they intervened in the operations of local boards. Serious clashes were avoided because the Dominion Board allowed the local boards to prove or disprove their policies by experience. Dominion officials take the view that if they had tried to exercise substantial control over the local boards, they would have met with serious difficulties. It is hard to see how it could have been otherwise, in view of the controversial nature of this type of marketing control and the fact that the techniques to be used are all in the experimental stage. No easy solution for these Dominion and provincial disputes, involving rival economic and political theories, could have been found because no superior authority existed to break a deadlock.

Chapter III

REGULATION OF INSURANCE COMPANIES

A number of spectacular legal contests have been necessary to mark out the line of division of legislative power for the regulation of insurance companies and it is not at all certain that the position is, even now, completely clarified. The chief administrative difficulties which have arisen have been due to this uncertainty about jurisdiction. For example, up until the decision of the Privy Council in 1916 on the case of *Attorney-General of Canada* v. *Attorney-General of Alberta*,[46] provincial companies doing business outside the province of incorporation were subject to supervision by the Dominion Superintendent of Insurance although, for many years, the Dominion had not attempted to coerce provincial companies into accepting supervision. However the decision in that case denied the power of the Dominion to impose it. Consequently, the Dominion withdrew from the exercise of supervision over such companies.[47] The adjustment of Dominion and the expansion of provincial supervision, which is thus involved, causes a good deal of administrative confusion if one looks at the matter from the point of regulation of the business as a whole.

Such legal contests have an unsettling effect on administration which tends, in turn, to cause friction between the Dominion and provincial officials concerned. Apart from this, there is no inherent reason why the division of regulative power over insurance companies should lead to serious administrative inefficiency. The need for single unified administration, which exists in respect of marketing regulation, is not acute here. One authority can regulate provincial companies while another regulates Dominion and foreign companies and still provide efficient regulation. The fixing of the statutory incidents of the contract, which is within the legislative power of the provinces, does not raise any administrative problem. The chief need, in that respect, is for uniformity of legislation, although it is probably true that the task of the authority which regulates the companies would be facilitated if it also controlled the incidents of the insurance contract. Also, there is no doubt that some coordination of supervision is desirable in order that all companies may do business on nearly equal terms but it is not vital for efficient regulation.

The principal evils of divided jurisdiction in this field are those of duplication and overlapping, resulting in nuisance and added expense to the companies and thus increasing the cost of insurance. These seem likely to persist as long as the present constitutional position continues. Even though the Dominion and the provinces agreed upon an exact division of the field to avoid duplication of licences, reports and records, there would still remain the duplication involved in five to ten staffs doing the work which one could perform as well or better.

This study does not purport to deal with overlapping and duplication as such. It is, however, concerned with one question which arises here. Why has it been impossible for the Dominion and provincial departments of insurance to eliminate the multiplication of licences, reports and records? Why has the number of these increased? It appears that, as successive court decisions went against the Dominion, the larger provinces expected the Dominion to relinquish the regulation of insurance companies. The Dominion has always refused to do so, taking the view that the decisions could not be interpreted as denying its power to regulate Dominion and foreign companies. Apart from abandoning the supervision of provincially-incorporated companies and repealing certain provisions which were substantially regulation of the incidents of the contract,[48] the Dominion has consistently maintained its claim. This resulted in friction between the Dominion Department of Insurance and certain of the provincial departments.

After the Privy Council decision of 1931, denying the Dominion claim to regulate British and foreign companies under the heading of "Aliens" and "Regulation of Trade and Commerce,"[49] there was a proposal to settle the spheres of Dominion and province by agreement. Wide differences in the views of higher officials connected with the ad-

[46] (1916) 26 D.L.R. 288.

[47] Statutes of Canada, 1917, c. 29, ss. 2 (d), 4.

[48] The regulation of the incidents of the insurance contract is a matter of provincial jurisdiction. See *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96.

[49] *Attorney-General for Quebec* v *Attorney-General for Canada*, [1932] A.C. 41.

ministration of insurance legislation contributed to the failure of the proposal. It has not been possible to secure a first-hand account of their differences. Echoes of these can be found in the pages of the Annual Reports of the Ontario Superintendent of Insurance.[50] For example, in 1927, Parliament raised the initial deposit required of foreign companies from $50,000 to $100,000, largely for the purpose of stemming the flood of foreign companies moving into the field at that time. The Association of Provincial Superintendents, meeting at Quebec in 1927, thought this curtailment of competition was unjustifiable and that it bore too heavily on the mutual companies, who, they argued, were seriously embarrassed when obliged to segregate a part of their funds to make a deposit. In his 1927 Report, the Ontario Superintendent argued against this Dominion provision and charged it with causing a great increase in the writing of insurance by unlicensed companies.[51]

The extent of the various differences between Dominion and provincial officials is not known. As often happens in disagreements of this kind, reasonable arguments are available on both sides. There are certain obvious advantages in having a single regulating authority and the steady movement towards voluntary acceptance of Dominion supervision by the larger insurance companies is a recognition of this fact. On the other hand, it can be argued that small local companies of various kinds which supply a peculiar service under peculiar conditions in a limited area are not likely to derive any great advantage from federal supervision. There is perhaps some ground for the fear that, over a long period of time, remote control would be prejudicial to them. The volume of their business, contrasted with that of the larger companies, is very small. And they have not the facilities, possessed by the larger companies, for putting their point of view before a distant federal department. In these conditions, it can be argued that, in the case of a conflict of interests, the apparatus of central supervision would tend to be accommodated to the needs of the larger companies.

It should be pointed out, however, that, up to the present time, our limited experience of federal supervision of small local companies has not confirmed this fear. For twenty years, a number of farm mutuals in Nova Scotia have been under the supervision of the Dominion Department. Contrary to the predictions from some quarters, they have not been driven out of business and officials of the provincial government in Nova Scotia say that these companies have not made any criticism of federal supervision.

Beyond this, no judgment is made here on the merits of these arguments. That is something which should be settled by the constitution or by a competent legislature. The basic cause of the difficulty lay in the unfortunate obscurity of the constitutional position. No one need be surprised—or critical—if civil servants who believe in their jobs and in their judgment try to exert their authority in borderland areas. The reasons for thinking this to be natural have already been discussed in the introduction to this study. Difficulties of this kind are likely to be of frequent occurrence in fields of divided jurisdiction, if the line of demarcation of authority is not sharply and clearly drawn.

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[50] See Annual Reports, Ontario Superintendent of Insurance, 1926, p. 388; 1927, pp. XI-XIII; 1929, p. 9.

[51] *Ibid.*, 1927, p. XI.

Chapter IV

FISHERIES

It is not necessary to describe the complicated constitutional position with respect to fisheries. Divided jurisdiction has led to divided administration. Legislative power over all fisheries rests with the Dominion. However, a power of making detailed regulations must be delegated to an administrative body. Thus, the Dominion Department of Fisheries has the responsibility for defining the terms on which fishing shall be carried on. On the other hand, all non-tidal fisheries in eight of the provinces, and all fisheries above the head of navigation from the sea in Quebec, are the subject of ownership in the province and the actual administration of them falls within the power of the province. That is to say, the Dominion department makes the rules and provincial officials apply and enforce them. In tidal waters, however (and, in Quebec, in all waters navigable from the sea) the existence of a public right of fishery has been held to bring the entire administration within the sole power of the Dominion. In any province which has both tidal and non-tidal waters, actual administration of the fisheries, as distinct from the power of regulation, is divided by the constitution between the Dominion and the provinces.

By special arrangement, which ignores the constitutional division, Quebec administers all the fisheries in the province, except those about the Magdalen Islands, the Dominion retaining only the power of making the regulations and of administration in the excepted area. In Nova Scotia, all administration is, by agreement, in the hands of the Dominion. Substantially the same position exists in Prince Edward Island and New Brunswick with the exception of the leasing of angling privileges in New Brunswick. Ontario and the Prairie Provinces have no developed tidal fisheries. Therefore, it is only in British Columbia that actual administration is, in practice, divided between the province and the Dominion. Roughly speaking, that division is marked by the head of tide. However, Dominion administration follows the salmon up the rivers and lakes in order to protect them in the spawning beds and the provincial department carries on some research and promotion work in respect of the seacoast fisheries. This does not involve any physical overlapping and it is doubtful whether the integration of administration under a single authority would effect any reduction of total expenditures on the activity. The game branch of the provincial department of the Attorney-General takes the enforcement of the inland fishery regulations in its stride and the provincial department of fisheries carries on a number of activities relating to the seacoast fisheries which are beyond the powers of and additional to those carried on by the Dominion department.

It should be made quite clear that the major criticism of the administration of fisheries in the provinces most vitally interested in the fishing industry does not arise out of divided jurisdiction. Careful analysis of that criticism indicates that it is fundamentally an objection to remote control. The normal difficulties of remote administrative control are complicated in the case of the seacoast fishing industry because only two provinces are vitally interested. It is extremely hard for these provinces to press effectively for the attention which they think fisheries should get, because of the competition of all the nation-wide interests which demand the attention of the federal government. However, the substance of this criticism cannot be considered in a study which is limited to an analysis of divided jurisdiction.

The chief difficulty attributable to divided jurisdiction arises from the fact that the Dominion authority is everywhere responsible for making the regulations. In areas where the Dominion does not administer, it has no field staff through which to learn of the actual conditions and thus to judge what regulations are necessary. It has no choice but to accept the requests of the provincial authority which is administering and therefore conversant with local conditions. However, the making of regulations is a Dominion responsibility and the Department of Fisheries does not feel justified in merely rubber-stamping provincial proposals. Thus it tries to make what investigation it can of the

provincial requests. Sometimes, it feels that a particular regulation should not be made. That may involve inquiry, correspondence, references to the Department of Justice and so forth. This results in delay and the provincial authority gets the impression that its wishes and interests are being ignored or neglected. The delay may well be prejudicial when, as it sometimes happens, a rapid change in the regulations is desirable.

In addition, whenever regulations are made by one authority and applied by another, confusion about the meaning of the regulations is inevitable. In the Manitoba hearings before the Royal Commission on Dominion-Provincial Relations it was pointed out that the regulations were sometimes difficult to understand. This is to be expected; obscurities arise in their application to particular circumstances. It is the fact that authoritative interpretation has to be sought at Ottawa which complicates the matter.

Some difficulty arises in the enforcement of inland fisheries regulations through prosecution in the courts. It is not entirely clear at what point fish that have been caught pass out of Dominion jurisdiction into provincial jurisdiction. Several provinces have passed supplementary legislation in aid of complete enforcement of fishery regulations.[52] This leads to confusion among the enforcing officers as to whether charges should be laid under the provincial or Dominion act. Defence counsel frequently plead lack of jurisdiction and prosecutions sometimes fail on technical grounds.[53] The difficulty is similar to that already mentioned in connection with marketing legislation. It obstructs enforcement and, because it seems quite irrational to the public, tends to bring the entire fisheries regulations into disrepute.

The situation gives considerable scope for "passing the buck." For example, the Dominion department advises that Quebec requested a particular regulation which was duly provided by the Dominion. In application, it caused a good deal of protest among the Quebec fishermen. The Quebec officials met this criticism by saying they recognized its force but that they were powerless because the Dominion makes the regulations! This is precisely what one would expect in such a situation and similar illustrations are forthcoming from other fields of divided jurisdiction. Very few of us can withstand the temptation to take an easy way of deflecting criticism from ourselves.

Officials say that, in their co-operation in the administration of fisheries, relationships have been satisfactory and there have been no serious clashes. They do say, however, that a high degree of co-operation is not to be expected in relationships of this kind. It requires extra effort, beyond routine duties, to work out those accommodations which would be prescribed from above in a unified administration. That effort has been made only in the comparatively few cases where the chief officers concerned had an unusual enthusiasm for the maintenance and development of fisheries. It is clear that effective co-operation, in situations of this kind, involves going beyond routine effort in the search for accommodations and whether it will be forthcoming in a given situation is always doubtful.

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[52] *e.g.* see Statutes of Manitoba, 1930, c. 15, ss. 94-128.
[53] *e.g.* see *Rex v. Wagner*, [1932] 3 D.L.R. 679.

Chapter V

CONCILIATION IN AND INVESTIGATION OF INDUSTRIAL DISPUTES

Under the Conciliation and Labour Act, the Dominion Department of Labour offers a service of conciliation for industrial disputes. As conciliators under this act never go beyond mediation and have no power to attempt compulsion in any form, no question of an invasion of provincial legislative domain can arise. However, in some provinces it has been felt that the Dominion does not provide an adequate number of conciliators and therefore cannot act quickly enough in trying to mediate between employers and employees. In addition, as provincial regulations governing the relations of labour and capital increase, enforcement of these regulations inevitably draws the provinces into conciliation work. Consequently, an increasing number of provinces are extending their own conciliation services[54] and the possibility of duplication becomes more likely. Up to the present, it has been uncommon for both province and the Dominion to have conciliation officers in attendance on a particular dispute at the same time.[55] There has been little or no joint or co-operative administration in conciliation matters. Sometimes, however, Dominion conciliators have gone in to try to settle a dispute after provincial mediation has failed.

A somewhat different position arises in the investigation of disputes under the Dominion Industrial Disputes Investigation Act, where compulsory powers to require postponement of strikes and lockouts, the giving of evidence and production of documents are involved. The Snider case made it clear that the Dominion had no power to legislate for industrial disputes as such and that its right to exercise compulsion in an industrial dispute depended upon a general power to legislate for the particular industry in which the dispute arose. For example, the Dominion is entitled to intervene in a dispute between the Canadian Pacific Railway and its employees, not because of the dispute but because the railway is an inter-provincial one. Thus the Dominion act was amended to limit its application to those industries over which general Dominion jurisdiction was clear.

However, there were a number of other industries which seemed to be charged with a national interest which the terms of the British North America Act did not recognize. Accordingly, provision was made for bringing all mining and public utility enterprises within the terms of the act, even though the Dominion had no general jurisdiction over them. The act declared that its terms should apply to disputes in these industries if and when provincial enabling legislation made them subject to it.[56]

Pursuant to this invitation by the Dominion, all the provinces except Prince Edward Island passed enabling legislation[57] in terms similar to that described above in connection with marketing.[58] This legislation purported to validate the Dominion statute in respect of these industries and to authorize Dominion-appointed boards to intervene in accordance with the procedure set out in the Dominion act. The difficulty of getting expeditious adoption of amendments to the Dominion act was met by providing that the Lieutenant-Governor in Council might bring them into effect by proclamation.

The result has been to divide industrial disputes into three groups. First, there are those in which the Dominion can intervene because of exclusive legislative power over the industry. Secondly, there are those in which it can intervene because of the provincial enabling legislation and thirdly, those which still remain entirely within provincial jurisdiction. In this latter group, of course, there is nothing to prevent the Dominion from offering its conciliation services.

The present study is concerned only with the second group which involves an effort at Dominion-provincial co-operation. As long as a province is content that the Dominion should handle these disputes, unity of administration is preserved and the federal tie does not complicate the task of investigation and conciliation. Wherever the province supports the enabling legislation device and the constitutionality of that device is not challenged, it meets the difficulty. The trouble is that the province does

[54] See A. E. Grauer, *Labour Legislation*, c. 8.

[55] The evidence given by the federal Deputy Minister of Labour before the Commission at p. 4668 may seem, at first glance, contradictory to this statement. Inquiry in the department brought the reassurance that the statement in the text is correct.

[56] See Revised Statutes of Canada, 1927, c. 112, ss. 21 (f) and 3 (d).

[57] *e.g.* see Revised Statutes of Ontario, 1937, c. 203.

[58] See p. 11 *et seq.*

not always support it and its constitutionality is coming more and more into question. In fact, in 1937 British Columbia repealed its enabling legislation,[59] and New Brunswick objected strenuously to the exercise of Dominion powers under the enabling legislation.

In those provinces which provide a conciliation service, some confusion and friction is likely to develop. The parties to the dispute are unlikely to agree, in many cases, in their preference for Dominion intervention or provincial mediation. If the employer shows a preference for one, that is a strong reason for the employees preferring the other. Calculation of the relative advantage to be gained by the use of one or other service cannot be prevented. Moreover, there may be some reasons for opposite preferences. It may be felt that one of the governments concerned is generally sympathetic to employers while the other lends its ear readily to the arguments of organized labour. The choice of mediators as champions by opposed interests is not conducive to co-operation and harmony.

The Minto coal strike in New Brunswick in 1937 shows how friction develops in such a situation. When the men went on strike the officer of the provincial Fair Wage Board undertook conciliation and the employers agreed to abide by his decision. The employees refused to accept the proposal of the provincial officer and applied to the Minister of Labour at Ottawa for a board under the Industrial Disputes Investigation Act. This application was opposed by the employers, who argued that the Dominion act did not apply to this particular dispute and suggested that they might take out an injunction against its application. The New Brunswick government was drawn into the matter when it heard that the Dominion intended to appoint a board. It denied that the act was applicable to the particular dispute and challenged the constitutionality of its own enabling legislation, quoting *Rex* v. *Zaslavsky*.[60] It also insisted that the provincial Fair Wage Board would be able to reach a satisfactory solution and that federal intervention would merely prolong the dispute. These objections were not pressed after the Dominion affirmed the constitutionality of the arrangement and clarified its contention that this dispute was within the terms of the legislation. However, the Attorney-General of New Brunswick expressed "great disappointment" when the formation of the Dominion Board was announced.[61]

This may be no more than the natural amount of negotiation required for two independent authorities to understand one another's position. Nevertheless, one can see how a provincial government, once its officers have gone into the field to mediate, must support their effort to push through a settlement and how natural it is for them to resent what seems to be outside interference. Also a provincial government may feel that its view of a proper solution of the dispute is more in keeping with provincial interests than that which is likely to be advocated by a board appointed by the Dominion. There may very well be a conflict of interest between the province and the Dominion and if so, it is certain to emerge. As the provinces establish conciliation services of their own, these incidents are likely to be more numerous. Furthermore, the delay involved in negotiation of this kind and in the tendency of the parties of the dispute to apply to different authorities is a serious matter. It may result in crippling financial loss for the employers and it may mean intense hardship among the employees.

This delay is well illustrated by the Minto case. The New Brunswick fair wage officer made a report on conditions in the Minto field, containing certain recommendations on July 12th, 1937. The New Brunswick Fair Wage Board was not appointed until August 12th, 1937 (a delay which, of course, is not chargeable to divided jurisdiction but to the fact that the province was moving into the field of conciliation for the first time). On December 16th, the Fair Wage Board made a report adopting most of the recommendations of the fair wage officer. In the meantime the employees had decided to insist upon a Dominion board under the Industrial Disputes Investigation Act. Considerable time was taken up in negotiation between Dominion and province on this matter and the board was not appointed until December 23rd. It made its report on July 10, 1938, one year after the report of the New Brunswick fair wage officer, and its recommendations were substantially the same as his.

It must be pointed out that, as soon as the formation of a Dominion board was announced, the men returned to work. Thus the use of the Dominion service quickly realized one of the main objects of the Dominion act, the speedy resumption of

[59] Statutes of British Columbia, 1937, c. 31.
[60] See note 1, p. 8.

[61] Montreal Gazette, December 17th, 1937.

the industry. The delay due to divided jurisdiction did not have disastrous consequences in this particular case. But the existence of two authorities certainly complicated the matter and in another case, delay of this kind might vitiate the usefulness of efforts at investigation and conciliation.

The difficulties which will be caused by repeal of the enabling legislation and the establishment of varying provincial regulations is illustrated by recent developments in the bituminous coal fields of Southern Alberta and British Columbia. Most of the mines in this group are in Alberta but there are some at Fernie and Michel in British Columbia. The workers in these mines are members of the United Mine Workers of America and early in 1938 a dispute arose between the union and the employers. The parties to the dispute made a joint request for a board under the Industrial Disputes Investigation Act. Substantially, such a request amounts to an agreement for arbitration; the compulsory powers of the act are not in question and s. 64 makes the act applicable to any industry whatsoever when there is a joint request.

British Columbia objected to the appointment of a board covering the British Columbia sector of the dispute on the ground that the enabling legislation had been repealed. This objection was withdrawn when the fact of the joint request became known. It was pointed out by British Columbia, however, that failure of the Dominion board to reach a settlement would not authorize the parties in British Columbia to resort to strikes or lock-outs. The British Columbia legislation enacted in 1937 on the repeal of the enabling legislation forbids a strike or lock-out until the dispute has been referred to arbitration under the statute.[62] That is to say, the United Mine Workers could call out their members in Alberta after failure of Dominion mediation but they could not lawfully extend that strike into British Columbia until a provincial board had tried to settle that fraction of the dispute which fell within British Columbia.

[62] Statutes of British Columbia, 1937, c. 31, ss. 45-6.

The difficulty, of course, is that the settlement of the dispute in British Columbia may be conditional on securing certain objectives in Alberta and a British Columbia board is powerless to do anything about what goes on in Alberta. The situation is the same whether the Alberta side of the situation is being handled under Dominion authority or under provincial authority. If the Dominion board succeeds in settling this dispute, it will be because a joint request from both employers and employees was forthcoming. Failing such a joint request, the enabling legislation is the only device for maintaining a single authority in attempts to settle disputes such as the one under discussion. Where it breaks down, the whole matter is likely to be complicated by separate authorities, working at cross-purposes.

In industries like coal mining and transportation, where a vital national interest is involved, the importance of a single authority is clear. It was a recognition of this which led to the use of the enabling legislation device after the Snider case. In other industries, not directly charged with a national interest, a comparable situation arises when the units of one of these industries are linked across provincial boundaries, either by membership of employees in a single union or by unified financial control in the industry or by employers' associations. When a dispute arises in such an industry, the problem cannot be divided along provincial boundaries for the attention of separate conciliating authorities. In many of its aspects, such a dispute is a single problem and its expeditious settlement calls for a single mediating authority.

As pointed out above, British Columbia has already repealed the enabling legislation. The establishment and further extension of arbitration and conciliation services in the other provinces gives them an opportunity of following suit. Thus the enabling legislation device seems likely to break down at a time when the case for an extension of it is growing stronger.

Chapter VI

CONDITIONAL GRANTS

The second type of continuous administrative relationship between the Dominion and the provinces arises out of the conditional grants. Here the constitutional position is fairly clear. Power to conduct the activity rests with the provinces and the Dominion insists upon supervision of the activity as a condition to the grant of financial assistance. It should be noted, however, that a recent dictum of the Privy Council suggests the possibility of a limitation on the power of the Dominion to contribute to activities within the provincial sphere.[63]. At one time or another, seven different activities have been thus subsidized by the Dominion. Of these, only the grants for employment service, old age pensions and unemployment relief are at present in existence. As the administrative pattern for all these grants was essentially the same, a sketch of the relationships established under the grants for old age pensions and unemployment relief can be taken as fairly typical. Only these two activities will be described, though illustrations of particular difficulties may be drawn from the others.

In order to qualify for federal aid for old age pensions, a province must first enact a statute, providing for a system of pensions in accordance with the conditions established in the Dominion act and the regulations thereunder. Then it must enter into an agreement with the Dominion expressly accepting the conditions imposed by the Dominion, in return for a promise by the Dominion to make quarterly reimbursement to the province of three-quarters of its payments for old age pensions. The province must provide for a scheme of administration which the Dominion regards—prospectively, at any rate—as satisfactory.

The Dominion act and regulations set down the conditions of eligibility for pension and indicate the kind of evidence which may be accepted as satisfactory proof of eligibility. The pension authority, established by the province and responsible to the province, decides upon the application of persons for pension. It applies the regulations to particular cases and makes the substantial decisions. After awarding pensions to A and B and others, the province makes monthly payments to them. Travelling auditors from the Dominion Department of Finance make a quarterly audit of all payments. (Since the administration of old age pensions was transferred in 1935 to the Department of Finance which has a technically equipped staff at its command, Dominion audit control has been considerably stiffened.) In addition to checking all expenditures, these auditors also check the evidence on file respecting each award in order to be satisfied that it is adequate to support the award within the meaning of the Dominion act and regulations. It is at once obvious that differences will arise between the Dominion and provincial officials as to the meaning of the regulations. For example, if the only evidence on the record as to age is the statement of the applicant that he is seventy years of age, the auditors will disallow on the ground that the evidence does not support the award.

This review of the record is purely formal. They do not go behind the record to inquire into the truth of documents which are satisfactory on their face. Such an inquiry may be made in particular cases but it is obvious that to do so in every case would be to duplicate and sometimes to go beyond the detailed investigation already made by the provincial officials. Two things are clear. First, the Dominion officials cannot be sure of their own knowledge that the successful applicants are really entitled to pension. Second, they cannot check the correctness of the decisions in which applications for pension have been refused. The Dominion function is limited to an audit of payments.

The provinces are required to submit quarterly statements of their expenditures on old age pensions. Also, they are obliged to make monthly reports in detail setting out the names of pensioners, amounts paid as well as all increases, decreases and closures made during the month. The Auditor-General makes occasional test audits in order to check up on the sufficiency of audits made by Dominion and provincial agencies engaged in administration. But it would be impossible for him, except in particular cases, to go deeper than the

[63] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 355 at p. 366, per Lord Atkin.

auditors of the Department of Finance. Finally, the Dominion act provided for an inter-provincial board to be composed of Dominion and provincial officials concerned with the administration of old age pensions. Its purpose was to provide satisfactory interpretation of the Dominion regulations when dispute arose. Such a body met in 1928 and again in 1930, but was never re-convened until November, 1937.[64]

It is difficult to give a reasonably accurate brief description of the Dominion-provincial relationships under the unemployment relief grants, because they were hastily constructed for a temporary purpose and have been frequently revised in detail because of the magnitude and difficulties of the task. An attempt will be made to select the significant features of the administrative relationships.

Since 1930, the Dominion has made its principal contributions to direct relief and to jointly-financed relief works. These contributions have been made under annual agreements with the provinces, which set out the main conditions upon which federal aid was granted. These conditions varied somewhat from year to year. In 1930 and 1931, regulations were made under the Relief Acts defining these conditions. This practice was not continued and since that date the conditions, which the Dominion was concerned to enforce, have been set out in the annual agreements.

To obtain assistance in financing relief works, the provinces have been required to submit their projects, along with an estimate of the cost of each, to the Dominion Department of Labour for advance approval. The 1936 agreements provided, for the first time, that when projects were executed under contract, the contracts must have Dominion approval. Actual field direction or supervision (as the case may be) of the execution of these projects falls to the province but Dominion officials inspect these works during construction and after completion. In addition, provincial accounts relating to such projects are subject to Dominion audit.

In the case of direct relief, the Dominion inserts a broad definition of direct relief in the annual agreements. Apart from certain very broad requirements (*e.g.* Canadian residents only are eligible and no one shall be discriminated against on grounds of race, religion or political affiliation), the Dominion has refused to define what shall constitute eligibility for relief and the scale on which it shall be paid. These are matters to be determined by the authorities primarily responsible, the provinces and/or the municipalities. They must provide the standards and the actual administration. It is for them to determine whether particular individuals shall receive relief. The Dominion claims only an audit and supervisory control.

Prior to August 1, 1934, the Dominion reimbursed the provinces for a fixed percentage of their expenditures on direct relief. Under that plan all relief accounts had to be submitted to the Dominion with supporting vouchers and the Unemployment Relief Branch of the Department of Labour conducted a pre-audit to see that the expenditures were in accordance with the agreements and were properly vouched for. After review of doubtful cases by the Auditor-General, cheques reimbursing the provinces were issued.

This routine check in Ottawa could never go behind the vouchers to find what the actual facts were. In order to form some opinion of the honesty of and the sufficiency of investigation by provincial officials, the Auditor-General conducted post-audits locally where he went carefully into the merits of each voucher. According to what the local circumstances seemed to require, these post-audits might involve an exhaustive investigation or merely a test audit. In addition to this, inspectors from the Unemployment Relief Branch of the Department of Labour were sent into the field to investigate special complaints. This was never a systematic overhauling of provincial administration of relief. It was rarely more than an inquiry into charges of flagrant abuses.

On August 1, 1934, the Dominion discontinued its percentage contribution and resorted to a monthly grant of a fixed sum, the amount being based on certain calculations of the needs of each province. Since that date, the provinces have not submitted details of their relief accounts with vouchers to the Dominion Department of Labour. They file instead a monthly statement of their total relief expenditures and of the number of persons receiving direct relief. The monthly grants are paid directly into the consolidated fund of the province which promises, in the agreement, to apply the amount solely to relief purposes. Pre-audit of provincial expenditures was discontinued for a time and the post-audit by the Auditor-General and the investigation of complaints by Department of Labour inspectors became the sole checks. However, in 1937, pre-audit of provincial expenditures was restored and the Comptroller General now maintains a staff in each provincial capital, auditing relief expenditures.[65]

[64] Lucila Gettys, *The Administration of Canadian Conditional Grants*, 1938, p. 124.

[65] *Ibid.*, p. 170.

These two specimens of structure will suffice to reveal most of the difficulties of the conditional grant. The commonest objection to it is that it flouts the first principle of responsibility in that one authority provides funds which another spends. The Dominion, it is said, does not do its duty by the taxpayer when it relinquishes control of expenditure. The provincial government which spends is not checked by a fear that responsibility for unwise expenditure will be brought home to it. The advocates of conditional grants know this as well as anyone else. They reply that the techniques which they advocate affords two adequate checks for use by the Dominion. First, the grant is made for a particular purpose; the Dominion can—and should—define precisely what that purpose is. It can—and should—establish certain standards of administration and accomplishment. Once this is done, the Dominion can ascertain by inspection and supervision how far the province has complied with the terms of the grant and penalties by way of deductions can be exacted for failure. Secondly, when this sanction is not adequate to secure satisfactory provincial performance, the whole grant may be withheld until the defects are remedied. Thirdly, the fact that the provinces pay a substantial percentage of the cost is a valuable incentive to economical administration. The soundness of conditional grants depends entirely on the extent to which these checks can be made effective in practice.

The first point to be noticed is that the provinces make the decisions which result in the expenditure of public money. It is true that the Dominion attempts to define with some precision the principles upon which awards of old age pensions are to be made. In the case of relief, the Dominion could define the principles with more precision if it wished to do so. Even so, the provinces apply these principles to the particular facts and in so doing they must interpret the principles. The authority which interprets a principle and applies it to the facts sets the measure of the activity. The only way in which the Dominion can effectively supervise and control the activity is to review the award of a pension or relief. As long as the Dominion does no more than review the record (the material on file in support of the application) it has no check at all upon provincial officials who might be concerned to cover up the inadequacy of the supporting evidence or who were careless in making an investigation of the truth of that evidence. The Dominion officials supervising the activity have no choice, in the vast majority of cases, but to rely on the integrity and industry of the provincial officials. The only escape from that would be to duplicate the provincial staff of investigators.

Moreover, a review of the record alone frequently reveals that an interpretation has been put on the pension regulations or the relief agreement which conflicts with the view taken by the Dominion auditor. Of course, the Dominion can enforce its interpretation by refusing to contribute on any other terms. However, peremptory insistence on its interpretation is likely to prejudice the whole activity in the future. It is vital, in the great majority of cases, to be able to convince provincial officials that this is the correct interpretation. Otherwise, natural resentment at what seems an arbitrary overriding of their judgment bodes ill for the harmonious co-operation which is so necessary in relationships of this kind. It is clear from what has been said in the last paragraph that there are a multitude of ways in which an exasperated provincial official can even the score. Also, serious disagreement on one point tends to breed friction in other places. Hope for harmonious and efficient co-operation depends largely on the discovery of clear-cut objective criteria for measuring the activity—criteria which command agreement by their clarity.

Such criteria are almost impossible to find. For example, in old age pension administration, there must be constant application of the concepts of "residence" and "income." The courts have been trying for years to hammer out a clear-cut definition of "residence." They have never succeeded. The best that can be done is to define it relatively to a particular purpose and, even then, no amount of imagination can conjure up all the possibilities. The accountants, economists and lawyers all disagree as to the meaning of "income." Some of the uncertainty can be cleared up by expanding the definition in great detail. Unfortunately, when detailed definition goes beyond a certain point, it causes more confusion than it clarifies. In defining the standard so as to exclude cases A and B, case C may be overlooked and accidently excluded. But case C may be one which obviously ought to have been included and disagreement will then arise over it. Such a disagreement is likely to be the sharper because exclusions arising from over-definition are frequently ridiculous. The provincial official reasonably feels that the exclusion of this type of case is an injustice; yet the Dominion official is obliged to uphold the regulation as a matter of principle.

Many concepts which appear on the surface to be clear-cut turn out not to be so on application. For example, the concept "seventy years of age" is objective only if there is a complete system of birth registration. If it is necessary to fall back on statutory declarations and family Bibles, the reliability of such evidence is open to opposing inferences and disagreement. It is known that the annual revisions of the relief agreements have not eliminated disagreements about their meaning and it is unlikely that the recent revision of the old age pensions regulations will succeed in doing so, though, of course, it has reduced the number of disagreements.

This need of objective criteria which are so clear that they command assent is so important that further illustration is perhaps justified. The Dominion makes grants towards the maintenance of provincial employment offices. The agreements outline the expenditures that are shareable, require the provinces to keep certain records, to render monthly statements of their expenditures, and to submit to Dominion inspection of the employment offices. The Dominion audits the accounts and rules out expenditures it will not share.[66] After twenty years' experience, the allowable items are fairly well defined and little trouble arises on that score. But this audit, conducted in Ottawa, was not designed to measure efficiency and, of course, it does not enable the Dominion to determine whether the employment service, to which it contributes, is efficient or inefficient. An objective standard would be hard to arrive at. The available facts include the number of registered applicants, vacancies notified, placements made, etc. But these facts must be weighed against the elusive circumstances of time and place. To any criticisms, the province can always retort that employment conditions and not the employment service, are to blame. There is no standard of efficiency which commands assent by its obvious correctness.

The efficiency of an employment service can only be tested by trial and error. If there is a suspicion that the personnel and methods employed are not producing satisfactory results, that is a ground for experimenting with other personnel and other methods. However, the Dominion cannot dictate such changes to the provinces. The Dominion failed in its attempt to sell the idea of a highly trained employment office personnel to the provinces at the inauguration of the service. At the outset, Dominion officials made regular inspections of the employment offices.[67] Once the service was organized and under way, there were no substantial results to be gained by inspection. The inspector cannot give orders to provincial employees on the spot, his suggestions and recommendations are often ignored, and there is no accepted yardstick for measuring efficiency. Naturally enough, inspections have become infrequent and of small significance.

It is sometimes argued that conditional grants can be used by the Dominion to force the provinces to improve their standards of public administration. This is not the place to consider whether the pot has the right to call the kettle black. Assuming, for the sake of argument, that it has, it must be pointed out that there is no compellingly conclusive criterion of good administration. Perhaps it will be possible, when a province is thirsty for a grant, to get an admission that its administrative standards are not as good as they might be and the submission of plans for their improvement. If, after the grant has begun, the Dominion disagrees with the provincial notion of improvement, there is no assurance that the province can be convinced on the point. The one way of proving the point would be to reorganize the service and demonstrate the improvement. This is the very thing the Dominion cannot do. Thus the Dominion must forego its program of "uplift" unless it wants to withhold the grant—an alternative which will be discussed later.

Some of the activities assisted by conditional grants are fairly capable of measurement, *e.g.*, the grant for provincial highways and aid to public works under the unemployment relief grants. Detailed plans for roads, buildings and bridges can be prepared and approved in advance, Dominion inspection and supervision can be concentrated at the point of construction and engineering science provides standards which can be readily applied with good prospect of agreement on the results.[68] In order to earn the grant for combatting venereal disease, the provinces were required to establish clinics with specialist physicians in charge. They were required to maintain diagnostic laboratories and to employ a specialist in venereal disease as superintendent of the activity. They were obliged to give efficient treatment to the inmates of institutions.[69] Here medical science supplies a yardstick for equipment, personnel and treatment. It may not be quite as conclusive as the engineering standards but it makes measurement possible.

[66] For further discussion of the administrative machinery, see Getys, *op. cit.* pp. 39-59.

[67] *Ibid.*, pp. 42, 53.
[68] *Ibid.*, p. 71.
[69] *Ibid.*, pp. 106-8.

The students of conditional subsidies point to the highways and venereal disease grants as cases where the Dominion stuck to its job of supervision and inspection and thus secured efficient performance by the provinces. They attribute failure to follow through the other grants in the same way to lack of will and enthusiasm or to respect for provincial autonomy or the pressure of provincial interests.[70] In large measure, this diagnosis misses the point. Effective supervision and inspection are impossible without objective standards for measuring performance. These are to be found only in activities such as those just discussed.

This view is confirmed by the latest study on federal aid in the United States.[71] The federal government tried to work out standards for judging the performance of the states under different conditional grants but has not met with much success. In most cases, it was impossible to get a satisfactory yardstick. Sometimes a measuring rod was contrived but its application proved to be too costly. For example, there has long been a federal grant in the United States for agricultural extension—promotion of better farming methods among the farmers. The effectiveness of this work was measured by federal officials going out into the field and interviewing farmers to discover how much the extension service had improved their methods.[72] This, of course, was ridiculous but it illustrates how difficult it is to measure performance.

This lack of standards plagues all joint administration in a federal state. However, it is clear that unified administration under Dominion or provincial authority would not result in any improved criteria of measurement. Unified administration has the advantage that it enables a superior to intervene and settle conflicts between lesser officials by means of new instructions, threats, dismissals, and so forth. The federal auditor, supervisor or inspector cannot issue orders to provincial officials on the spot. Sovereignty is divided and Dominion and provincial officials work for different masters. A Dominion official may persuade provincial officials to alter an administrative practice but if he orders them to do so, they are almost certain to retort that they must take their instructions from their superior in the provincial service. If that superior does not see eye to eye with the Dominion field official, there is nothing to do but report the disagreement to their respective superiors. Federal supervision is not and cannot be direction.

A study of the practices of old age pensions and relief administration confirms the conclusion to be drawn from an analysis of the relationship. If a Dominion relief inspector thinks provincial investigators are not doing their job properly, the normal procedure in attempting to get action is for the chief Dominion official in charge to make representations to the provincial official responsible for administration. That is to say, it becomes similar to diplomatic interchange between sovereign states. If the disagreement involves an interpretation of regulations or agreement, it is referred to the Department of the Attorney General in the province and to the Department of Justice at Ottawa for their opinions. All this means vexatious delay with no guarantee that any satisfactory solution will ultimately be forthcoming.

An administrative problem which thus commands the serious attention of the Deputy Minister and involves relationships with another sovereign state (the Dominion or province, as the case may be) is not likely to proceed to a solution without coming to the attention of the political heads of the departments concerned. The difficulty is then raised from the administrative to the political level, where all sorts of considerations irrelevant to administrative efficiency may enter in. In a unified administration most of these questions would be settled at the administrative level where they belong and they would be settled much more quickly. But a divided administration in a federal state must settle most of its difficulties by diplomacy, plagued by the delay and distraction which the intrusion of political issues implies.

The experience of the United States with federal aid to the states shows the same result. Federal supervision cannot impose itself at the point of actual administration;[73] it tends to become a matter of representations between heads of departments. Substantially the same thing happened in the German federation, where most federal laws were administered by state officials subject to federal supervision.[74] However, the experience of Germany and the United States escaped a complication which is a salient feature of the Canadian situation. In the United States and in Germany (up, at least, to the time of the Weimar Republic) there was not the close linking of politics and administration which our system of cabinet government supplies. With us,

[70] J. A. Maxwell, *Federal Subsidies to the Provincial Governments*, 1937, pp. 237 *et seq.*; Gettys, *op. cit.*, pp. 77, 110-1, 174.

[71] V. O. Key, *The Administration of Federal Grants to States*, 1937.

[72] *Ibid.*, pp. 95-7.

[73] *Ibid.*, Ch. III and pp. 37, 46, 73, 177.

[74] See generally, Heinrich von Triepel, *Die Reichsaufsicht*.

there is constant danger that these jointly administered activities will be dragged into political contests between province and Dominion. As already pointed out, the cabinet system not only links politics and administration; it unifies responsibility for all branches of administration in the hands of political ministers. Thus any disturbance in Dominion-provincial political relationships tends to be felt in every joint of their joint activities. It is extremely significant that most of the illustrations of difficulties in the field of old age pensions and relief administration come from those provinces which, for one reason or another, have been at loggerheads generally with the Dominion.

When one comes to consider why the United States has been willing to rely on the technique of conditional grants in embarking on its vast social security program, this factor must be taken into account. The fact that the administration in the United States is insulated from direct contact with the legislature enables them to limit, to some extent, the impact of political considerations on jointly administered activities.[75] However, the most recent study of United States conditional grants agrees with the present analysis in saying that federal supervision and inspection are improperly so called. "Inspectors," snooping about for defects, are an unqualified menace unless they can enforce their will. Otherwise, they achieve nothing but friction and annoyance. Indeed, to be successful, the so-called inspector must lean away from "inspection." He must coax, encourage and cajole but scarcely ever reprimand. In the United States, the term "inspector" is being avoided. He is being called a "regional consultant." The National Guard Bureau inspectors have become "instructors." The field staff of the federal Forest Service insist they are "co-operators," bringing a service of information and ideas to the attention of the state officials.[76] This is, at least, a tribute to the enduring power of the doctrine of "States' Rights."

A study of old age pensions and unemployment relief administration shows that it is not possible to have a thorough and effective supervision of provincial administration without a great duplication of staff. The only fully effective supervision is one that goes to the bottom of the activity and actually judges the question of the eligibility of applicants for pensions or relief, as the case may be. Anything short of that involves essentially a reliance on the integrity and painstaking vigilance of provincial officials. It may be that such reliance is entirely justified but it is not an independent and fully-informed check upon the expenditure of federal funds.

It is argued that the fiscal control secured by the audit of expenditures gives the Dominion a very real control even though it does not go to the bottom of the particular activity. Items which on their face are improperly charged can be disallowed. By going behind the vouchers, on complaint or by spot-audit here and there, frauds and mistakes can be unearthed and provincial administration spurred to make careful investigations. The threat of these procedures, it is contended, will always be vastly more effective than the actual use of them. There is some truth in these arguments. The Dominion can—and does—disallow particular items. The influence of the threat of investigation cannot be calculated but no doubt it is considerable. However, there are several practical limitations on its effectiveness which ought to be pointed out.

The provinces do not readily acquiesce in having their mistakes charged to them. They incline to the view that if, by an honest mistake, an old age pension is granted to some person who is not entitled to it, and from whom there is little prospect of recovering payments already made, the Dominion ought to share the responsibility for the mistake. After all, they argue, these are really co-operative endeavours and both praise and blame should be shared. Of course, if it is clear that the province was reasonably diligent and was defrauded, the Dominion is generally willing to shoulder its share of the loss. On the other hand, if it is perfectly clear that the improper payments are due to unpardonable neglect on the part of the provincial investigator, the provinces generally accept the sole responsibility cheerfully. However, in all other cases, they are quite out of sympathy with the viewpoint of the Auditor-General that the Dominion Treasury shall not be charged except where there is a clear legal warrant for doing so.

Thus, when the Dominion proposes to charge back improper payments, the provinces—or, at least, many of them—have no compunction about resisting. A study of old age pensions and unemployment relief administration shows that provincial arguments run as follows. A province may point out that it is not now paying the full monthly pension it is entitled to pay, that it maintains a very low relief scale, that it voluntarily maintains a clothing depot for relief recipients, which adds to its administrative costs but decreases relief costs

[75] Gettys, *op. cit.*, pp. 175-6.
[76] Key, *op. cit.*, pp. 85-92.

shareable by the Dominion, and that it brutally disallows all doubtful claims. It then hints that if the Dominion insists on being harsh, it may feel obliged to reconsider the wisdom of these economical practices.

The Dominion cannot prevent the provinces from reconsidering the wisdom of such economies unless it wants to withhold the grant. So it becomes a matter of some difficulty to decide whether any saving will ultimately accrue to the Treasury by firmly disallowing particular items. A firm policy of disallowance is almost certain to cause friction and ill-feeling and the province has many ways of retaliating, in the face of which the Dominion is helpless. These considerations suffice to modify greatly the Dominion's resolution to hew to the line.

If the Dominion cannot decide to be ruthless respecting irregularities of which it is aware, that circumstance diminishes greatly a province's fear of the discovery of further irregularities. Furthermore, the Dominion almost always has a number of irons in the fire with the provinces, *e.g.*, uniform companies acts. It is anxious to prevent disputes over these disallowances from rising to the political level where they will prejudice negotiation on other matters.

Thus, in practice, the audit check on expenditures seems to lead to a dilemma. If it is insisted on ruthlessly, it is likely to defeat its own purpose. If it is not applied severely, it will fail to accomplish its purpose. The blame for this dilemma cannot be laid on the provinces. In terms of fairness, there is no answer to the argument made by the provinces, that the burden of honest and reasonable mistakes should be shared. The difficulty is that to abandon the position that expenditures which lack lawful authorization shall not be charged to the Treasury cuts the ground from under the Auditor-General. There is no other ground upon which he can stand. If the test of a chargeable expenditure is the question whether it is the result of a reasonable error by the provincial administration, that opens up an immense field of contention as to what is reasonable. There is no prospect of easy agreement between the provinces and Dominion on such questions and they would cause more friction than arises under present arrangements. Misunderstandings and disputes arise, not so much because of the fault of the Dominion or the province but rather because the administration of conditional grants in a federal state involves relationships in which friction is inevitable.

It has already been suggested that severity in disallowing unauthorized expenditures will have repercussions on the political level. The federal and provincial activities of the political parties are closely linked. A particular government at Ottawa is likely to be more lenient with a government of its own political stripe in the province than with one supported by the opposite party. Moreover, when Dominion officials bear down on a province in these matters, they may expect the federal cabinet minister from that province to bear down on them. It is, of course, natural that he should be asked to protect provincial interests and there is abundant testimony that the expedient is used. It is worth noting that this difficulty is not met in the United States.

Furthermore, these improperly charged items are often not brought to light until some time—in unemployment relief, as many as four or five years—after the expenditure is made. Naturally, the older an item is, the more the province is inclined to rely on the principle of prescription. The important point, however, is that very frequently the provincial government has changed in the interval. It is not uncommon for the new government to repudiate indignantly all responsibility for the maladministration of the wicked government which preceded it. It is not necessary to expand this point. The argument is not a tenable one, but the government which feels very keenly about the unwisdom of its predecessors thinks that it is and that is what matters in relationships of this kind. Agreement is assured where the truth is so clear that he who denies it can be laughed out of court. In no other circumstance can it be counted on with certainty.

The mention of a change of provincial government raises another difficulty. Dominion officials say that the change in provincial official personnel which follows a change of government in some provinces, is one of the most trying things with which they have to contend. With the best will in the world on both sides, it takes some time for Dominion and provincial officials to get acquainted with one another's foibles and curious personal approaches to the activity with which they are jointly concerned. It takes time to work out agreeable and tolerably effective methods of dealing with one another and carrying on the activity. When the worst obstacles have been cleared out of the way, there may be a change of government in the province followed by dismissals and reshuffling of provincial personnel. The process of accommoda-

tion has then to begin all over again. This difficulty might be greatly alleviated by substantial advances in civil service reform in the provinces.

However, if the analysis of the nature of bureaucracy already made in this study is even approximately correct, then the good permanent official with security of tenure, whose job is his career, is just as likely to disagree with the Dominion administration, though for different reasons, as the official who holds his place only between elections. It is known that able provincial officials are just as often in disagreement with the Dominion as the less able ones.

The practice commonly known as "passing the buck" is also found in the administration of conditional grants. For example, disappointed applicants for old age pensions write to the Department of Finance for an explanation of the refusal of their application. They enclose letters or quotations from letters received from a provincial official in which he says it is absurd that the application should have to be refused but goes on to point out that the Dominion defines eligibility and the province is powerless to do anything. This method of placating local annoyance has its lighter side but it must seriously prejudice harmony in joint administration.

There remains one important argument for the soundness of conditional grants—he who controls the purse can make himself master of all. When the Dominion pays the piper, it can call the tune. If the province does not provide reasonably good administration or fails to secure satisfactory results, the Dominion can withhold the grant and enforce its will. The Dominion can enforce its solution of the inevitable disagreements and disputes and insist upon a tolerable degree of harmony because the grant is, after all, conditional.

The experience of the United States with conditional grants is very interesting on this point. The power to withhold the grant has been rarely used there though, on occasion, the threat of it has been effective. The right to withhold has not the potency which is often ascribed to it. It can only be exercised, in practice, in the gravest cases of abuse. "It is of little avail in correcting the weaknesses of an unimaginative, half-hearted, self-satisfied, incompetent state agency which commits no spectacular offences and exhibits a modicum of activity."[77]

The reasons are clear. The Dominion will not give a grant unless the subsidized activity promotes some urgent national interest. If the grant is withdrawn to discipline a provincial administration, it must be at the expense of the national interest involved. The Dominion will, therefore, hesitate to withdraw a grant and the provinces know it. Furthermore, to single out a particular province and say that its government is so bad that it does not deserve assistance is a very serious step. Whatever the reasons for the action, they would certainly be misrepresented in the province. Withdrawal of a grant could not be kept on the administrative level in this country, whatever may be true in the United States. It would be certain to have serious political repercussions. There would be no surer way of damaging the election hopes of the federal government in the province affected.

It may be hazarded that no federal government will ever have the courage to sanction the withdrawal of a grant from any one of the provinces. The good-will of each province is very important to the Dominion administration when there are only nine, though the reaction of any one might be relatively unimportant if there were forty-eight. A government at Ottawa will not withdraw a grant from a government supported by its own party in one of the provinces, because it cannot risk internal dissension. It will scarcely dare to withdraw a grant from a government of a different political faith because of the capital that could be made of its action by the opposition.

Therefore the power to withhold a grant is virtually only a paper power. As a threat, it is a bluff and a poor bluff because it is transparent. Perhaps it can be used to discipline a government guilty of flagrant or outrageous violations and therefore is not without value. But it is tempting to argue that it is a United States device which can only be used with safety where the ruling party in the legislature is not directly responsible for the conduct of administration. It could not be used safely in Canada and a province is not likely to be greatly disturbed by a threat which it does not expect to see carried out.

The conclusion of this examination seems to be that the conditional grant is not a very promising device for solving our constitutional and financial difficulties if other methods are constitutionally practicable in the wide sense of the term. (As pointed out at the beginning, it may be preferred to an increase in federal power for reasons unconnected with the efficiency or economy of the particular service.) In fairness, certain things must be remarked on here. First, it does not work badly

[75] Gettys, *op. cit.* pp. 175-6.
[76] Key, *op. cit.* pp. 88-92.
[77] *Ibid.*, p. 174.

where objective standards of performance are possible. Second, a limited use of it may be justified as a stimulus to provincial activity in important fields which the provinces, or some of them, are neglecting. Third, old age pensions and unemployment relief, upon which emphasis has been placed because they are the currently important illustrations, are not entirely fair examples. In old age pensions the Dominion pays 75 per cent of the cost of the actual pensions while the province bears the other 25 per cent and the cost of administration. It is clear that there is little incentive for the province to improve its administration and perhaps add to its costs to secure hypothetical savings of which only one-quarter would accrue to it. This fact alone is enough to retard administrative improvement. In addition, some accidental circumstances, which had unfortunate effects upon administration, attended the launching of the old age pension scheme—effects which have only slowly been overcome.

In unemployment relief, the administrative machinery was set up hastily to meet a sudden and temporary emergency. Administrative practices were given only secondary consideration. Moreover, for a number of years, the unexpected magnitude of this temporary phenomenon kept on overtaking those who were trying to cope with it and they had no opportunity to overhaul and revise their practices. However, the difficulties which have been discussed here appear to arise from the very nature of the relationships involved. What it has been possible to learn about the administration of the earlier grants gives no reason for thinking that these difficulties are encountered only in contemporary activities.

Thirdly, some reason must be offered for the willingness of the United States to launch its social security program by means of conditional grants to the states. Some of the reasons for expecting the conditional grant to work better there than here have been mentioned in the course of discussion. The insulation of administration from politics is complete in theory, though it is hard to see how it can be complete in practice. Nevertheless, it is a highly important difference. The federal executive power is in the hands of the President and he chooses his cabinet where he will. State interests do not make the same impact on federal administration as they do in this country, where federal ministers are, in some respects, representative of provinces. A slight revision of the ancient precept, "divide and rule," helps to explain why the federal administration can take a firmer position with forty-eight states than can be taken with nine. Also the state and the federation had concurrent constitutional power to deal with some of the aided activities in the United States[78] while in this country constitutional power rests exclusively with the provinces in all activities aided thus far, except possibly agricultural instruction. Where the federal authority has a concurrent power, it is not quite so helpless.

Furthermore, the United States has thrown much more energy into and spent relatively greater amounts on supervision and inspection.[79] No doubt if the federal authority is willing to spend vast sums in this way, duplicating to a considerable extent the state staff, it can secure better results. The task of organizing direct federal administration of many of these activities in the United States would be so stupendous that it is perhaps small wonder an attempt is made to use existing state agencies.[80] There has also been a suggestion that considerations other than those of administrative efficiency weighed in the determination to use the technique of the conditional grant. Finally, the difficulty of amending the United States constitution is so forbidding and the immediate desirability of promoting a particular activity is so great, that the easy route of the conditional grant is chosen.

It is not necessary to recapitulate the conclusions of this study at any length. Canadian experience of activities jointly administered by the province and the Dominion has not been satisfactory. Attention has been concentrated here on the reasons for thinking that this has not been merely accidental or due to failure of organization and management. Naturally, if we profit by our past experience, we can make some improvements in the administrative relationships. However, the reasons given here are sufficient for suspecting that joint administration is inherently unsatisfactory.

In the short run, at any rate—and it is the short run which counts most in everyday affairs—there is a conflict of interest between the Dominion and particular provinces. Even assuming identity of interest, there is the inevitable disagreement about the means of promoting the common interest. In the absence of a common authority to resolve them, disagreements impede and friction tends to debilitate the activity. The importance of unity of direction in administration can scarcely be overemphasized. The political genius which worked its way to the principles of unanimity and collective responsibility of the Cabinet, and the considerations which led the framers of the United States constitution to concentrate executive authority in the President, testify to its immense practical importance.

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[78] Key, *op. cit.*, p. 1; Gettys, *op. cit.*, p. 175.
[79] See generally Key, *op. cit.*
[80] *Ibid.*, p. 383.

THE DELEGATION OF POWER BY DOMINION TO PROVINCE OR BY PROVINCE TO DOMINION

Two separate questions are raised in a discussion of the constitutional validity of delegation. The first is whether one authority can validly delegate legislative power to the other. The second is whether the one can confer any portion of its executive power on the other. It will contribute to clarity of discussion if these two matters are dealt with separately.

Before the validity of the delegation of legislative power can be discussed it is necessary to distinguish the delegation of legislative power from legislation by reference and conditional legislation. There appears to be no doubt about the validity of the two latter practices but it is very difficult to discover, from the pronouncements of the courts, at what point the limits of them are reached and the action of the legislature becomes a delegation of legislative power. Some discussion of conditional legislation and legislation by reference is necessary to clear up the confusion.

Conditional legislation is of frequent occurrence. Whenever a legislature declares its policy in detail but leaves the Governor General or the Lieutenant-Governor, as the case may be, to decide when the act shall come into force, and then to bring it into force by proclamation, it legislates conditionally.[1] Equally, according to the Privy Council, when the legislature gives the executive a discretion, within limits, as to the manner and place of operation, it legislates conditionally and is not delegating legislative power.[2] When the legislature gives to the Governor a power to levy a duty on articles of a certain class at a rate to be determined according to certain principles, it cannot be "argued that the tax in question has been imposed by the Governor and not by the Legislature, who alone had power to impose it."[3]

It can scarcely be doubted now, in view of the frequency with which the courts have adopted the expression, that the power, daily given to subordinate agencies to make detailed rules and regulations under a statute, is properly described as a delegation of legislative power. As the scope and extent of the discretion entrusted increases, there must be some point where the legislature ceases to legislate conditionally and begins to delegate a legislative function. In fact, of course, the distinction, at best, is only one of degree. In each case, a discretion is given to a body extraneous to the legislature; in each case, the exercise of the discretion derives any authority it may have from the act itself.

No English or Canadian cases have been found to elucidate the distinction. The Australian case of *Baxter* v. *Ah Way*[4] indicates how far the concept of "conditional legislation" may be pushed by a particular court. The act in question forbade the importation of certain specified goods and added a general clause covering "all goods, the importation of which may be prohibited by proclamation." No directions were given in the statute to guide the Executive in its exercise of this wide discretion but, nevertheless, the High Court of Australia upheld a proclamation forbidding the importation of opium as being no more than the fulfilment of the condition upon which the law was to become effective.

In the United States, because of constitutional prohibitions of delegation of legislative power, there have been a large number of decisions on the point. The Supreme Court has rarely struck down a statute which grants powers of this kind to the Executive.[5] It generally upholds such a grant as being "a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."[6] That is to say, it is conditional legislation. These cases are useful persuasive authorities for a court which may wish to expand the concept of "conditional legislation."

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[1] *Queen* v. *Burah*, 3 App. Cas. 889.
[2] *Ibid.*, at pp. 905-6.
[3] *Powell* v. *Apollo Candle Co.*; 10 App. Cas. 282 at p. 291.

[4] (1909) 8 C.L.R. 626. On this case, see Moore, "The Powers of Colonial Legislatures" (1922) 4 *Jour. of Comp. Leg.* Part I, p. 11 at pp. 16-17. He thinks this is clearly delegation.
[5] The first instance occurred in 1933. See *Panama Refining Co.* v. *Ryan*, 293. U.S. 388.
[6] *Field* v. *Clark* (1892) 143 U.S. 649. See also *Buttfield* v. *Stranahan*, (1904) 192 U.S. 470; *United States* v. *Grimaud*, (1911) 220 U.S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, (1912) 224 U.S. 194.

This is important because there is no constitutional objection to Dominion or province using one another as an authority for fulfilling the condition on which its legislation is dependent. In *Russell* v. *The Queen*,[7] the provisions of the Canada Temperance Act, which provided for its adoption by a majority vote of the electors in counties and cities, was declared to be a case of conditional legislation. "The Act does not delegate any legislative powers whatever. . . .Parliament itself enacts the condition and everything which is to follow on the condition being fulfilled."[8] Lord Watson seems to have taken a similar view of the nature of this legislation when he spoke of the "adoption" of the Dominion act by the municipality.[9] And the provision of the Canada Temperance Act, which provided for the suspension of the act in any county or city "as long as the provincial laws continue as restrictive" of the traffic in liquor as the act itself is similar in nature. The Supreme Court of Canada has recently held that a suspension of the Canada Temperance Act, declared by Dominion authority under that act, automatically ceased when the Ontario Temperance Act was replaced by the less restrictive Liquor Control Act in 1927. The loosening of the provincial restrictions was the condition upon which Dominion legislation came back into force.[10]

If Dominion legislation can be made conditional upon the action of the municipality, which is a creature of the province, there can be no objection to making it conditional upon the action of the province. Equally, the operation of provincial legislation can be made conditional on Dominion action. The practical importance of it can be seen by reference to the Nova Scotia legislation on the licensing of lobster canneries. In 1933, after the Dominion regulation of fish canneries was struck down by the Privy Council, the legislature of Nova Scotia enacted that, "No one shall at any time can or cure lobsters in the Province except under licence from the Minister of Fisheries of Canada."[11]

In this case, the operation of the legislation itself is not made conditional upon action by Dominion authority. The act came into operation upon its being passed and it therefore differs from the situation under the Canada Temperance Act discussed above. It is rather the securing of rights under the legislation which is made conditional on the action of a federal official. It is open to Nova Scotia, having a plenary power of regulation of a trade or business carried on within the province, to impose any restrictions it wishes on the right to can lobsters. If so, it should be able to say that the right to conduct canning operations shall be conditional upon securing a licence from a federal authority.

However, it is by no means certain that this is the substance of the legislation. It may be argued that, in substance, the executive function of granting licences for the conduct of a purely provincial business has been delegated to a Dominion official. For the act goes on to impose certain limitations on the discretion of the Minister of Fisheries. It provides that licences shall not be granted during the closed season for lobster fishing and that they shall not be refused to any person who has complied with the regulations of the Dominion Meat and Canned Food Act.[12] That is to say, Nova Scotia is not merely interested in imposing a condition on the right to can lobsters but it is also attempting to exercise a substantial measure of control over the granting of licences. This lends strength to the argument that it has really delegated the granting of licences to Dominion officials. The line between what is a condition and what is a delegation is very difficult to draw.

This Nova Scotia legislation raises sharply another question. When the province declares that the granting of canning licences shall be subject to Dominion regulations respecting the closed season for lobster fishing or the canning of foods generally, is that an adoption of these regulations by "reference" as provincial regulations or is it a delegation to the Minister of Fisheries of the authority to make regulations governing the canning of lobsters? This brings up the question of legislation by reference which is also very difficult to disentangle from delegated legislation.

It is well settled that the operative terms of a statute need not all be contained within the four corners of the text. If the legislature desires to incorporate certain provisions of another statute by reference to them, "the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had actually been written in it with the pen, or actually printed in it. . . ."[13]

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[7] 7 App. Cas., 829.

[8] *Ibid.*, at pp. 835, 841.

[9] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348 at p. 369.

[10] Reference *re* Operation of Canada Temperance Act in Counties of Perth, Huron and Peel in the Province of Ontario, 1935, S.C.R. 494 at pp. 506-1. For a contrary view of the meaning of this decision, see (1936) 14 *Canadian Bar Review*, pp. 393 *et seq.*

[11] Statutes of Nova Scotia 1933, c. 13, s. 1.

[12] *Ibid.*, s. 2.

[13] *Re* Woods Estate, (1886) 31 Ch. D. 607 at p. 615, quoted with approval in *Kilgour* v. *London Street Ry. Co.*, (1914) 30 O.L.R. 603 at p. 606. See also Clement, *Canadian Constitution*, 3rd Ed. (1916) at p. 382.

As the adopted provisions do not derive any authority from their source, it would seem highly improbable that their source should have any significance beyond the desirable limitation that some authoritative and easily accessible version of the adopted body of rules should be available. Thus, there would seem to be no objection to the Dominion or a provincial legislature adopting by reference portions of an act of Congress. On the same grounds, Dominion and province ought to be able to adopt one another's legislation by reference. The difficulty arises when the operative act purports to adopt the legislation of another legislature, not only as it exists but also as it may be changed from time to time. Is such adoption, when made prospectively, legislation by reference or is it the delegation of legislative power?

In such a case, a trust is reposed in the other authority. The will of that authority is to be adopted as well as the words it has spoken. The legislature which has competence in the matter puts the cloak of its authority upon the rules which are to be made at the discretion of the body designated. This is precisely what is done in all cases of delegated legislation. Therefore it would seem that, if a clear-cut distinction is to be taken between legislation by reference and delegation of legislative power, it must be made by limiting the former to the case where the body of rules to be adopted has already been announced by the legislature or other authority designated. This is the only criterion which will avoid confusion and uncertainty. On this analysis, the question whether the Nova Scotia statute discussed above is legislation by reference or delegation would depend upon whether the act purports to adopt only Dominion regulations in force at the time of its passing or whether it purports to adopt such regulations as the Dominion makes from time to time. That raises a puzzling question as to the proper interpretation of the statute which cannot be discussed here.

Some judicial support for the criterion suggested above can be found. In such a case, according to Prendergast, J., it would be adoption by reference of the provisions already enacted; delegation as to the amendments and additions later brought in.[14] In an early Ontario case, it is said, by way of dictum, that, if Parliament were to say that Canadian subjects were to be subject to legislation, which might be passed by Congress, the enactment would be unconstitutional as "authorizing a foreign power to legislate for its subjects; an abdication of sovereignty."[15]

However, the courts have not adhered generally to this view. A Dominion act which purported to adopt for the purpose of criminal trials, the qualifications of jurors as they then existed or as they might later be changed by provincial legislation, was upheld on the ground that it was legislation by reference.[16] The judges gave no indication that, even if it were delegation, it would be *ultra vires* but, at the same time, they did not venture to uphold it on that ground.

In *Rex* v. *Zaslavsky*[17] the question was sharply raised on an interpretation of the Saskatchewan Live Stock and Live Stock Products Act. The Dominion act of the same name was framed in perfectly general terms and the Saskatchewan act purported to make such portions of it as were *ultra vires* the Dominion Parliament a part of the legislation of the province. In addition, it provided that any amendments to the Dominion act and regulations might be brought into force as provincial law, in so far as they were *ultra vires* the Dominion, by the Lieutenant-Governor in Council. Furthermore, it provided that the portions so established as provincial law should continue as such until repealed by Dominion authority.

On the analysis suggested above, the specification of the portions of the Dominion act and regulations *then* in force would be legislation by reference. With respect to amendments in the Dominion act and regulations, the Saskatchewan legislature delegated to the Lieutenant-Governor a power to adopt them by reference after they were enacted by the Dominion; a procedure which should be unobjectionable. But the power given to the Dominion by the provincial act, enabling it to repeal what had become a part of provincial legislation, appears to be a delegation of legislative power.*

The Saskatchewan Court of Appeal did not limit their objection to the statute in this way. The majority treated the whole device as a case of delegation[18] and therefore, according to their view, *ultra vires*. However, it should be noted that their only express reason for so holding was that the Dominion was given power to repeal the adopted portions. Even if their objection were limited to

[14] *Re* the Act to Amend the Lord's Day Act [1923] 3 D.L.R. 495 at p. 511.

[15] *International Bridge Co.* v. *Canada Southern Ry. Co.* (1880) 34 Gr. Ch. 114 at p. 124.

[16] *Regina* v. *O'Rourke* (1882) 32 U.C.C.P. 388; on appeal (1882) 1 O.R. 464. See also *Regina* v. *Provost* (1885) 29 L.C. Jur. 253; *Regina* v. *Plante* (1891) 7 Man. L.R. 537.

[17] [1935] 3 D.L.R. 788.

[18] *Ibid.*, at p. 790.

* It could do this anyway.

this one feature of the act, it does not necessarily follow that their decision should have been any different from what it was. That would depend upon whether they found it possible to sever the unconstitutional from the constitutional part of the enactment.

Rex v. *Zaslavsky* has been followed in decisions on similar legislation in Alberta and Manitoba. In the Alberta case, the Saskatchewan decision was adopted without comment.[19] In the Manitoba case, Trueman, J.A., writing for the majority, approved the majority opinion in *Rex* v. *Zaslavsky*.[20] This might be thought to settle the question as to whether a power of repeal given to another body is a delegation of legislative power. However, it can scarcely be so regarded in view of the decision of the Privy Council in *Lord's Day Alliance* v. *Attorney-General of Manitoba*.[21] The Dominion Lord's Day Act made it a criminal offence, *inter alia*, to run or conduct Sunday excursions, "except as provided by a provincial Act or law now or hereafter in force." Manitoba legislation purported to make Sunday excursions lawful and the Privy Council upheld its validity. They upheld it on special grounds, saying that, in the absence of any federal legislation covering the particular field, the provincial enactment would have been valid and the Dominion legislation had left this provincial power intact by the express words of the exception. It is difficult to escape the conclusion, however, that in substance, the provincial enactment was a repeal of a portion of the criminal law. Their Lordships refused to say whether the Dominion act involved either delegation or legislation by reference. It is submitted, therefore, that the point cannot be regarded as settled.[22]

It should be pointed out that this leaves the status of much of the provincial enabling legislation in doubt. In some provinces, the enabling legislation does not contain a provision enabling the Dominion to repeal adopted portions of the Dominion legislation.[23] Is the objection of the Saskatchewan Court of Appeal available against the enabling legislation in such a case? Again, the Manitoba legislation, purporting to validate the Dominion Industrial Disputes Investigation Act, adopts the existing Dominion act and regulations but goes no further.[24] Does the decision in *Rex* v. *Zaslavsky* apply to it?

As far as can be discovered, there are no constitutional objections to legislation by reference and conditional legislation. However, the discussion above shows that it is far from clear what these two concepts cover and therefore difficult to say when a particular legislative device amounts to a delegation of legislative power. The question of the constitutionality of such delegation will now be considered. There is no objection to delegation by Dominion or province to a subordinate agency. At one time, it was thought that all colonial legislatures held their powers by delegation from the Imperial Parliament and that therefore the maxim, *delegatus non potest delegare*, prevented them from delegating further. This opinion got some support from the United States doctrine that the legislatures hold their power by delegation from the people, thus bringing the maxim into play. This view of the power of colonial legislatures was repudiated by the Privy Council in *Queen* v. *Burah*[25] in 1878 and it was specifically held inapplicable to Canada in *Hodge* v. *The Queen*[26] in 1883. The Dominion and provincial legislatures are not delegates from the Imperial Parliament but each possesses plenary and sovereign power within its sphere. Thus the ground upon which a broad application of the maxim has been made in the United States was cut away.

However, it remains true that the British North America Act assigned to Dominion and provinces two mutually exclusive spheres of legislative power. Any objection to the constitutionality of delegation must rest on the broad ground that it is a contravention of the scheme set up by the act; that the establishment of the two spheres indicates an intention on the part of the framers that they should not be obscured or bridged over by any considerations of temporary advantage.[27] Another ground sometimes suggested is that for a legislature to entrust a portion of its powers to another sovereign body is incompatible with its own sovereignty. That is to say, it amounts to an abdication *pro tanto;* is against nature, as it were, and therefore ineffective. No doubt it is impossible for a legislature holding its authority by virtue of an Imperial Act of Par-

[19] *Rex* v. *Thorsby Traders* [1936] 1 D.L.R. 592.

[20] *Rex* v. *Brodsky* [1936] 1 D.L.R. 578.

[21] [1925] A.C. 384.

[22] And, of course, it is always open to the Supreme Court of Canada or the Privy Council to overrule the *Zaslavsky* case.

[23] *e.g.* see the Fish and Canned Fish and Canneries Inspection Act, Statutes of Nova Scotia, 1932, c. 13.

[24] Statutes of Manitoba, 1926, c. 21.

[25] 3 App. Cas. 889.

[26] 9 App. Cas. 117.

[27] This argument is very forcefully put by Clement, *Canadian Constitution*, 3rd Ed., (1916) at pp. 380-5.

liament, to abdicate in a constitutional manner.[28] But sovereign power is, by definition, inalienable and what a sovereign legislature gives it can take away. Any delegation is always subject to revocation[29] and therefore the abdication argument is devoid of substance. Delegation then is not against nature but it may nevertheless be against the constitution on the ground that neither province nor Dominion has any power, even for purposes of temporary convenience, to shift the boundaries marked out by sections 91 and 92.

At any rate, this was the view of Lord Watson in one of the earliest judicial pronouncements on the subject and, it is believed, the only one ever made directly by the Privy Council.[30] He is reported to have remarked, in the course of the argument in *Canadian Pacific Railway Co.* v. *Notre Dame de Bonsecours*, "The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction." Although the question had been noticed earlier, judges had refused to commit themselves save for a qualified opinion in favour of its constitutionality in *Queen* v. *O'Rourke*.[31].

In the reference to the Supreme Court on the validity of provincial prohibitory liquor laws in 1894, Sedgewick, J., stated, *obiter dictum*, that the Dominion might validly delegate to a municipality the power to make by-laws respecting subjects solely within Dominion jurisdiction.[32] He did not, however, go so far as to say that the Canada Temperance Act involved such delegation. As already seen, that act has been explained as an instance of conditional legislation. The question was next raised in connection with the controversy over the constitutionality of Sunday legislation. After it was clearly settled that prohibition of Sunday activity was a matter of criminal law and therefore solely for the Dominion, the Dominion Parliament enacted a number of general prohibitions of Sunday activity, qualifying each by the words "except as provided in any provincial act or law now or hereafter in force."[33] A number of provincial statutes were passed in pursuance of this authorization and the validity of several of them brought before the courts.

In *Ouimet* v. *Bazin*,[34] the Supreme Court held that the exception in the Dominion act did not purport to authorize restrictive provincial legislation and that the Quebec statute in question was invalid because it enacted specific prohibitions of Sunday activity. Therefore, the forthright statement of Davies, J., that this was a clear case of delegation and that Parliament might delegate its powers as it wished[35] is no more than a dictum. Idington, J., said he could not see that there was anything amounting to delegation or legislation by reference in the Dominion legislation and he expressly refrained from saying whether delegation would be good or bad.[36] The other members of the court did not discuss delegation at all.

A similar case arose in British Columbia two years later[37] and the Court of Appeal adopted the reasoning of the decision in *Ouimet* v. *Bazin*. McPhillips J.A., stated, as an additional ground, that delegation to the province of power to enact criminal laws was unconstitutional. His reason was that the British North America Act had conferred exclusive areas of sovereign authority upon the Dominion and province and that "within the ambit of such authority Dominion and province can solely legislate."[38]

In the meantime, the case of *Kerley* v. *London and Erie Railway Co.*[39] had been before the Ontario courts. It arose out of the Dominion Railway Act of 1904 which provided that, in respect of every railway entirely within a province but already declared to be a work for the general advantage of Canada, the provincial legislature might prohibit its operation on Sundays. The act also provided that any provincial prohibition thus made might be confirmed by the Governor General by proclamation and that, after such proclamation, the provincial

[28] See Keith, *Responsible Government in the Dominions*, (1912), Vol. 1, pp. 365-8; Moore, *op. cit.*, at pp. 13-15. The general validity of this proposition for the Dominions may be open to question since the passing of the Statute of Westminster. But it can only be questioned by the adoption of a juristic theory, thus far alien to British jurisprudence. In any event, it remains true for Canada as long as s. 7 (1) of the Statute withholds from Canada full constituent power over The British North America Act.

[29] See *Re* Gray (1918) 57 S.C.R. 150 at pp. 170-1.

[30] *Arguendo*, in *Canadian Pacific Ry. Co.* v. *Notre Dame de Bonsecours* [1899] A.C. 367, quoted in Lefroy, *Canada's Federal System* (1913) p. 70.

[31] (1882) 1 O.R. 464 at p. 481.

[32] *In re* Prohibitory Liquor Laws, (1895) 24 S.C.R. 170 at 247. The decision in *Grand Trunk Railway Co.* v. *City of Toronto*, (1906) 32 O.R. 120 at p. 123 to the effect that Parliament cannot, by delegation, enlarge the corporate capacity of a municipality created by the province is not inconsistent with this view, although in practice, it might impose severe limitations upon it.

[33] Statutes of Canada 1906, c. 27, ss. 2, 5, 6.

[34] (1912) 46 S.C.R. 502.

[35] *Ibid.*, at p. 514.

[36] *Ibid.*, at p. 519.

[37] *Rex* v. *Waldon* [1914] 18 D.L.R. 109.

[38] *Ibid.*, at p. 114.

[39] (1912) 26 O.L.R. 588.

statute should be as valid and effectual as if it had been passed by Parliament. Boyd, C., upheld provincial legislation which had been passed in pursuance of this Dominion authority and which had been later confirmed by proclamation by the Governor General. He thought the provincial act might be upheld on the ground that the Dominion provisions had, in effect, suspended, *pro tanto*, the Dominion declaration that the railway was a work for the general advantage of Canada,[40] so as to restore provincial jurisdiction over it but that, in any event, this was not a delegation to the province. He held that it was rather an adoption by effective Dominion action of the judgment of the Ontario legislature that it was expedient to prohibit the operation of Sunday trains on this railway.[41]

On appeal, his decision was overruled on grounds which are unconnected with the constitutional question under review.[42] In substance, his opinion seems to have been that this was a case of legislation by reference and it has a bearing on the validity of the provisions of some of the provincial enabling legislation discussed above.[43]

The last case on the validity of Sunday legislation is the reference on the Manitoba legislation, the essential facts of which are set out above.[44] In the Manitoba Court of Appeal,[45] three out of five judges took the view that the Dominion act in question did not involve a delegation of legislative power to the Dominion. Four out of five, however, expressed the opinion that such a delegation would be constitutional while the fifth (Trueman, J.A., who later took the contrary view in *Rex* v. *Brodsky*)[46] did not state his position on the question. On appeal to the Privy Council, their Lordships held the Manitoba legislation valid on special grounds and refused to give an opinion on the point of delegation.[47]

As explained above, their Lordships pointed out that this provincial legislation would have been valid if the Dominion Lord's Day Act had not been enacted. The Lord's Day Act was the occupation of a provincial field by overriding legislation on criminal law. But the Dominion need not make this a sovereign occupancy bringing it within its exclusive legislative jurisdiction. It may be no more than a limited, subordinate occupancy which saves the former rights of the province in the field if the province indicates an intention to re-establish itself there. And that, according to their Lordships, was what the Dominion had done by making its prohibitions expressly subject to any narrowing legislation enacted by the provinces.

In spite of the ingenuity of this argument, it is difficult to avoid the conclusion that the Dominion act really gave the provinces power to amend the criminal law. It may be that some day the Privy Council will be constrained to admit that it has upheld what was, in substance, a delegation of legislative power to the provinces. However, even if this should occur, it will be easy for them to treat it as limited to the single case where the Dominion has validly occupied a portion of a provincial field. Even if the case continues to be supported on the grounds assigned, it has a very narrow bearing on the problem in hand because it is, of necessity, limited to this same single case.

The only later cases raising the point are *Rex* v. *Zaslavsky*, *Rex* v. *Brodsky* and *Rex* v. *Thorsby Traders*, discussed above,[48] in which delegation is declared to be unconstitutional. Thus, there is no authoritative statement on the point by the Privy Council. Lord Watson's remark was merely thrown out in the course of argument. The Canadian courts are divided in opinion on it. With the exception of a British Columbia case,[49] which was later over-ruled,[50] there is no case where legislation has been upheld on the express finding that delegation is a constitutional device. In fact, there seems to be a noticeable tendency to avoid upholding legislation on that ground. On the other hand, the Zaslavsky line of cases have found legislation unconstitutional on that ground. The disagreement also exists among the commentators on the British North America Act. Lefroy questioned the correctness of the dictum of McPhillips, J.A.,[51] while Clement upheld it vigorously.[52]

Scattered dicta of the judges may be found which seem, standing by themselves, to have a bearing on the question.[53] But when these remarks are placed in their context, they will be found to relate to rather different propositions. The conclusion appears to be that it is an open question whether delegation of legislative power between province and

[40] *Ibid.*, at p. 595.
[41] *Ibid.*, at p. 597.
[42] (1912) 28 O.L.R. 606.
[43] See pp. 39-40.
[44] See p. 39.
[45] Re the Act to amend the Lord's Day Act [1923] 3 D.L.R. 495.
[46] See p. 40.
[47] See p. 40.

[48] See pp. 39-40 *supra*.
[49] *Rex* v. *Laity* (1913) 13 D.L.R. 532.
[50] See *Rex* v. *Waldon* (1914) 18 D.L.R. 109.
[51] *Canadian Constitutional Law*, 1918, p. 175.
[52] *Canadian Constitution*, 3rd Ed., 1916, pp. 380-5.
[53] *e.g.* see *Re* Initiative and Referendum Act, [1919] A.C. 935 at p. 945, per Lord Haldane; *St. Catharines Milling Co.* v. *The Queen*, (1887) 13 S.C.R. 377 at p. 637, per Strong, J.

Dominion is constitutional. The British North America Act does not expressly deal with the question one way or the other. By Section 92, the provinces "may exclusively make laws in relation to . . ." By Section 91, "the exclusive legislative authority of the Parliament of Canada extends to . . ." That leaves the matter in the air because all delegated legislation derives its validity from the grant of the delegating legislature and does not impugn any exclusive legislative jurisdiction. The question really is whether the broad scheme of government envisaged by the act requires that province and Dominion should each retain exclusive control of matters within its sphere, delegating, if at all, only to subordinate authorities which are solely responsible to it. It is quite open to the Privy Council to find that, by implication, delegation between province and Dominion is forbidden by the Act.[54] It is submitted that, at present, it is not possible to do more than guess at the result. And, for practical purposes, the whole matter is made more obscure by the lack of any clear distinction between delegation of legislative power, legislation by reference, and conditional legislation.

The present practical concern over the constitutionality of delegation has arisen mainly in connection with the provincial enabling legislation. What has already been discussed in the text of this study may be referred to briefly here. Even if the Zaslavsky case were to be overruled by the Privy Council on the ground that delegation of legislative power is not objectionable, the enabling legislation device may still be subject to constitutional difficulties because, in most cases, the Dominion portion of the legislation is framed in perfectly general terms. For this reason it may well be *ultra vires ab initio* and the valid portion incapable of being severed from the invalid. The argument on this point is developed in the text and need not be further discussed.[55] It at least raises another constitutional doubt. Probably the Nova Scotia Lobster Canneries Licensing Act[56] is clear of any difficulty of this kind. Perhaps the special use of the device made in connection with the legislation on the investigation of industrial disputes also escapes this particular objection because the Dominion act is expressly restricted in application to those provinces which may delegate the required authority.[57]

So far, discussion has been limited to the delegation of legislative power. In most of the cases where that device is used or is likely to be used, administrative action is necessary to carry out the legislation. Indeed, the purpose of the device in a federal state is as much to secure unity of administration as to get unity of legislative action. For example, in the enabling legislation for facilitating the grading of natural products, administrative authority to enforce grades on intra-provincial transactions was handed over to the Dominion. Power to administer fisheries has been given by Nova Scotia to the Dominion and by the Dominion to Quebec. In part, the enforcement of the Migratory Birds Convention Act and of the Dominion regulations respecting fires along railways have been entrusted to provincial game and forestry officers respectively. Six provinces have entrusted police functions to the Royal Canadian Mounted Police. Other illustrations can be found. It is possible that somewhat different considerations apply to the delegation of executive power[58] and therefore it has been reserved for separate treatment. However, very little, if anything, can be said with certainty about it. It has not been discussed by the courts and has received practically no attention from the writers on the constitution.

It will not be easy to decide, in many cases, what amounts to a delegation of executive power. No doubt, when Dominion officials enforce grades in intra-provincial transactions under the enabling legislation device, they are exercising provincial executive authority by delegation. The Dominion cannot provide for such enforcement out of its own administrative armoury. What is the correct view of the conjoint legislation device whereby the province establishes its own grades and provides for the appointment of its own officials and then appoints Dominion inspectors as the provincial officials?[59] Is this a delegation of executive authority or is it merely the selection of the same individual to act in two different capacities, as a provincial as well as a Dominion official? Are the officers and men

[54] For recent examples of provisions found by the Courts to be implied in the British North America Act, see *Ottawa Valley Power Company* v. *Hydro Electric Power Commission* 1937 O.R. 265, esp. at pp. 309-10; Reference *re* Alberta *Bills*, 1938 S.C.R. 100, esp. at pp. 132-4.

[55] See the text at p. 13.

[56] Statutes of Nova Scotia, 1933, c. 13.

[57] Revised Statutes of Canada, 1927, c. 112, s. 3 (1) d.

[58] In this context, it would perhaps be preferable to speak of "administrative power", but the British North America Act speaks only of "executive" power. Since "executive" powers are at the disposal of the legislatures and might be exercised directly by them, it seems correct to speak of the *delegation* of executive power. See The British North America Act, 1867, ss. 12, 65.

[59] *e.g.* see Statutes of Saskatchewan, 1936, c. 77, s. 6.

of the Royal Canadian Mounted Police both Dominion and provincial officials, or are they Dominion officials only? In view of the fact that they act entirely under provincial orders in provincial matters, it would seem that they are both.[60] It would be necessary to consider carefully both the agreements under which they act and the administrative practice before venturing a decided opinion. In such arrangements, there is room for a wide range of variety in the actual circumstances and therefore room for a wealth of verbal ingenuity and uncertainty.

The practical difficulties, which may arise in those cases where the particular official is put in the position of having two masters, do not, it is submitted, affect the constitutional position one way or the other. Equally immaterial should be the fact that a particular piece of executive power is exercised by an official who is not responsible to the legislature from which the power is drawn. For example, the fact that the Quebec officials administering tidal fisheries in Quebec are not responsible to Parliament should not, in itself, be regarded as a contravention of the British North America Act. Such a grant of power to the Quebec administration is not in any way an abdication since ultimate control is retained through the power of revocation. It violates a maxim of political practice but not a rule of constitutional law. It is unlikely that the courts will incorporate the conventions of responsible government as implied terms of the British North America Act.[61]

No judicial decisions or statements on this question have been discovered. The tacit approval, given in cases upholding the Canada Temperance Act, of municipal enforcement of the provisions of the act, has no bearing on the matter because the Canada Temperance Act, when brought into force, formed part of the Criminal law,[62] and was therefore to be enforced by provincial or local administration. It is submitted that any constitutional objection to the delegation of executive power must rest upon substantially the same grounds as those already suggested respecting delegation of legislative power. It must depend upon whether the scheme of the British North America Act is regarded as requiring the exclusive exercise as well as the exclusive ultimate control of the allotted powers.

There is some difference in the terms of the act respecting the exercise of legislative and executive power. The words of ss. 91 and 92 do not, on their face, give the impression of being mandatory. But s. 12 says, respecting those pre-Confederation executive powers, which the federal bifurcation would logically transfer to the Dominion, that they "shall . . . .be vested in and exercisable by the Governor General. . ." On the other hand, s. 65 says, respecting the pre-Confederation executive powers which were to be allotted to the new provinces of Ontario and Quebec, that they "shall. . . .be vested in and shall or may be exercised by the Lieutenant-Governor. . ." The marginal note opposite s. 12 says, "All powers under Acts to be exercised by Governor General with advice of Privy Council or alone," and the note opposite s. 65 is *mutatis mutandis* the same. However, it is doubtful whether the courts would make any analogical extension of these two sections to executive powers derived from sources other than the statutes specifically mentioned therein.[63]

Even if extension by analogy is possible, it remains true that, in the interpretation of statutes, little reliance can be placed upon the use of the words "shall" and "may"[64] and the extent to which legitimate use of marginal notes can be made is open to question.[65] The words of the sections referred to above certainly cannot be regarded as commanding the judges to rule against the delegation of executive power, although they may afford pegs on which to hang arguments adverse to it. It is possible to make out a case either for or against the constitutionality of delegation, pointing out that most of the judicial statements not in harmony with the view adopted are merely *obiter dicta* and arguing quite plausibly that the awkward decisions can be explained on other grounds. The author of this note thinks it is impossible to find any preponderance of argument in the act or in the cases which, of itself, will tip the scale of decision one way or the other. If that is so, a higher court, faced with the necessity of making a decision in a particular case, would be obliged to decide, not on the basis of what the constitution prescribes but upon a consideration of what ends it is thought the constitution should serve. Forecast of judicial opinion on such a difficult matter would be attended by considerable hazards.

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[60] See *King* v. *Irwin*, 1926, Ex. Ct. Rep. 127, which appears to treat a provincial official, to whom federal duties had been assigned, as being, to that extent, a federal officer responsible to the Dominion.

[61] But see, however, Reference *re* Alberta Bills, 1938, S.C.R. 100 at p. 133, per Duff, C. J.

[62] *Russell* v. *The Queen*, 7 App. Cas. 829 at p. 835.

[63] It is possible that the words, "the constitution of the executive authority" in s. 64 should be read as including the manner of exercise of such authority, in which case it is open to argument that Nova Scotia and New Brunswick, at least, have no power to delegate executive power to the Dominion.

[64] Craies, *Statute Law*, 4th Ed. 1936, p. 206.

[65] *Ibid.*, at pp. 179-80.

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