overnment or the states have the residual powers does not seem critical. ie experiences of all six countries suggest that their constitutional texts do little n the historical evolution of these federalist systems. Regardless of how ire allocated, federal systems will experience tension between demands for tate autonomy and demands for greater centralization.

Federalism can be a technique for centralizing or decentralizing governmental In the U.S. and Canada, federalism was utilized to integrate formerly ious colonies into a single nation. In Argentina, Brazil, Mexico and Venezuela sm was utilized to decentralize former colonies that had been highly zed. To this day, the U.S. and Canada have remained less centralized than the merican Republics. One consequence of the greater decentralization has been problems with threats of secession.

Federalism requires an independent judiciary to "umpire" the system. At a um, the judiciary needs to be able to declare state legislation invalid because of :ts with the federal constitution or statutes. Despite the formal guarantees of il independence, Latin American judiciaries historically have been far too dent upon the other branches of government to perform this function adequately. ilso have had considerable difficulty in adequately protecting individual rights, in ecause of the heavy centralization of power. Entrusting the umpiring function to ederal Executive or Congress has led to a massive centralization of the powers of entral government at the expense of the states.

Federalism is not much of a bulwark against tyranny. Federalism has been an nificant barrier to dictatorships in the Latin American federal republics. Moreover, .S. experience suggests that the federal government, not the state governments, requently been far more vigilant in protecting the rights of minorities.

Federalism involves an ongoing process of political conflict and compromise. ical checks as well as judicial checks need to be built into the system. States need to dequately represented in the federal legislature so that the normal political esses will assure respect for the federal structure. The U.S. Senate, where each state he same number of senators, has been better at fulfilling this function than the dian Senate, whose members are appointed for life by the federal government. Yet in systems where each state is equally represented by elected representatives in the al Senate, there is considerable skepticism as to whether the political constraints of alism actually function.

The evolution of federalism is not a unilinear process that inevitably leads to ressive centralization. While five of the six American federalist republics have ved towards greater centralization, Canada has evolved in the other direction. eover, the evolutionary process has been cyclical rather than unilinear.

At present, the most critical problem of federalism is financial. Without cient financial independence, state autonomy quickly disappears. Effective ralism requires that both the federal and state governments have adequate and pendent tax bases. Some aggrandizement of federal power through attaching litions to federal grants to the states is inevitable, but limits on such conditional ...uine federal system. In all six countries, the federal

governments are attempting to cut back sharply on federal spending and to transfer responsibility for social programs to the states and provinces. Increasingly, the problems of federalism are becoming problems of how tax revenues are shared between the states and the federal government, and how the societal responsibilities that are transferred from federal governments to the states will be funded.

Federal systems "are most successful in societies with the human resources to fill many public offices competently and with material resources plentiful enough to allow a measure of economic waste in payment for the luxury of liberty." Without large cadres of relatively well-educated and well-paid civil servants to staff the multiple layers of bureaucracy, federalism is unlikely to function well.

Finally, form does not matter as much as substance. None of the federal systems of the Americas closely follows the allocation of powers laid down in its constitution. Federalism is no substitute for competent and honest political leadership. Alexander Pope's couplet makes the point succinctly:

> For forms of government let fools contest;
> whate'er is best administered is best.

3. Devices for Intergovernmental Cooperation in a Federal State

(a) General

-Research Note-

FEDERALISM AND FLEXIBILITY

In 1937 the Privy Council portrayed Canada's federal system in a severe metaphor. The Canadian federation, Lord Atkin said, "still retains the watertight compartments which are an essential part of her original structure".[1] The metaphor is powerfully evocative, suggesting impermeable jurisdictions vigorously policed by the Courts. Suggestive as it is, the metaphor could only have been conceived in constitutional litigation, a process which offers perspective from where intergovernmental processes become dysfunctional and break down. The metaphor is unimaginable from within Canada's operating constitution. A more accurate image would be the meshing of interlocking and interpenetrating jurisdictions as constitutional power is geared into political action. As in all federations, Canadian governments treat each other as partners (or competitors); it is only in rare cases that federal and provincial

J.E. Magnet, "Constitutional Law of Canada: Cases, Notes and Materials"

1 *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326, 354.

p.129 Ltd

Vol. 1 - 8th edition (2001) Edmonton: Juriliber

orities experience the circle of their constitutional jurisdiction as closed.[1] ughout the framework of Canadian governance the norm is that federal and incial authorities consult, coordinate and co-operate to bring the totality of rnmental power to bear on practical subject matters, notwithstanding that in theory adian political power may be riven with jurisdictional divides.

It is useful to ask: what are the instruments by which governments coordinate anada?

Canadian federalism has created numerous constitutional, legislative and inistrative tools to overcome the watertight division of responsibilities supposedly ntial to federal union. These are:

- formal constitutional amendment
- *de facto* constitutional amendment, utilizing:
  - ☐ court interpretation and adaptation of constitutional limitations
  - ☐ creation and modification of constitutional usages, customs and conventions
  - ☐ creation of quasi-constitutional requirements
- concurrent exercise of power
- fiscal arrangements, including
  - ☐ federal spending in areas of provincial jurisdiction;
  - ☐ provincial spending in areas of federal jurisdiction
  - ☐ intergovernmental transfers and equalization schemes
- creation of conjoint regulatory schemes harmonized by
  - ☐ formal delegation of power
  - ☐ informal administrative cooperation
  - ☐ intergovernmental agreements
- bureaucratic, ministerial and First Ministers conferences
- limited opting out of and into fiscal and regulatory schemes, with compensation

---

[1] J. Peter Meekison, formerly Deputy Minister of Alberta's Department of Federal and Intergovernmental Affairs gives an interesting and insightful explanation for this. "While jurisdiction may be important," he writes, "it may not be in anybody's interest to seek a clarification of where the boundaries lie. Thus, it may be better to cooperate than to risk losing jurisdiction:" "Distribution of Functions and Jurisdiction: A Political Scientist's Analysis," in Watts and Brown (eds.), *Options for a New Canada* (Toronto: U of T Press, 1991), p. 259 at 264.

HERPERGER, "DISTRIBUTION OF POWERS AND FUNCTIONS IN FEDERAL SYSTEMS"

IN SHAPING CANADA'S FUTURE TOGETHER: PROPOSALS (1991)
(OTTAWA: SUPPLY AND SERVICES CANADA) at pp. 21-24.

DEVICES FOR FLEXIBILITY AND ADJUSTMENT

In most federal systems, the constitutional enumeration of the distribution of government powers and functions established at the time of federation has proven to be remarkably enduring. The United States constitution, for example, has over two centuries continued to provide the basic blueprint for the workings of a very successful federal system. Change, however, is as much a function of the life of governments as it is of societies, and so the distribution of powers must respond to this dynamic. Formal constitutional amendment is the most obvious means to effect such change when deemed necessary, and it has been employed occasionally in most federations. However, it is not the only means by which federal systems adapt their distribution of powers and functions to changing circumstances. What follows is a cursory examination of several devices for flexibility and adjustment evident in federal systems: [...]

1. Extensive Concurrency

[Editor's note: Concurrency refers to the fact that both Parliament and the provincial legislatures may regulate particular subjects. Concurrency may arise by specific constitutional provision, such as s. 95 of the *Constitution Act* relating to agriculture and immigration, or by judicial interpretation of a particular subject. Because both orders of government may regulate the same subject, there is potential for conflict in the rules provided by each order of government. Generally speaking, such conflicts are resolved by a constitutional rule which stipulates that the federal law prevails in the case of conflict.]

In the context of the current constitutional debate in Canada, recent proposals have suggested that increased recourse to concurrent powers could provide an effective means of accommodating the competing demands for constitutional reform evident in Quebec and the rest of Canada. According to advocates of these proposals, a significantly expanded list of concurrent powers with provincial paramountcy ... would allow a province such as Quebec to achieve additional jurisdictional powers to protect and enhance its distinctiveness within the country, while at the same time allowing other provinces to retain the benefits of common action through federal jurisdiction. While such a device could result in a *de facto* degree of jurisdictional asymmetry, provinces would retain equality of constitutional status, as the opportunity for enhanced provincial autonomy would remain equally available to all provinces within the federation.

2. Intergovernmental Delegation

As noted above, several federal systems have constitutionally assigned the federal government legislative authority in certain fields of jurisdiction, while leaving the executive and administrative responsibility for the delivery of programs, services or regulations in these areas with the constituent units of the federation. Another means by which federal systems may be made more adaptable to changing circumstances is the device of a temporary delegation of powers. Delegation can be either from the federal government to the regional governments or vice versa; to or from one or more of the constituent units (i.e., not requiring unanimous consent of all units) or both legislative

executive powers; for varying periods of time (with an opportunity for formal :w); and for one or more subject matters. The advantage of such arrangements is they enable the temporary transfer of authority to meet the needs of special ımstances. The use of delegation does not violate the federal principle as long as e are provisions for the consent of affected governments and for proper fiscal ıpensation.

Most federal systems provide for the delegation of executive authority. If not licitly stated in the constitution, the practice has usually been sanctioned by the ırts. In terms of legislative authority, provisions for delegation are not as widespread, l usually occur only from the federal to state governments. Of the established erations, only the Australian constitution provides for the delegation of legislative hority, and then only from a state to the federal legislature. However, in all newer mmonwealth federations, with the exception of Nigeria, the constitutions have nerally permitted the delegation of legislative authority from the federal to state ;islatures. In Canada, proposals to revise the Constitution to allow for legislative legation have been advanced by the Rowell-Sirois Commission, the 1964 First inisters' Conference (which produced the Fulton-Favreau amending formula) and, ost recently, the 1991 Beaudoin-Edwards Special Joint Committee on the Process for mending the Constitution.

Federal-Provincial Agreements or Accords

It has been proposed that the Canadian Constitution recognize the ability of the ederal and provincial governments to enter into agreements or accords relating to pecified subject matters and to provide the protection of the Constitution to such greements under certain circumstances. The device of federal-provincial agreements is ntended to satisfy competing jurisdictional claims without resorting to a formal mendment of the Constitution. Canada has had a long history of intergovernmental greements, covering matters such as tax collection and economic and regional evelopment. An example of the potential of this approach is the recently concluded greement between the federal government and the province of Quebec on immigration. Considered a major step in resolving federal-provincial differences in this area, the greement nonetheless remains subject to legislative override and is not entrenched in he Constitution. [See *Canada Assistance Plan Reference*, infra]

In its final report released in 1985, the Macdonald Commission advocated the nclusion of a provision allowing for the constitutional entrenchment of ederal-provincial agreements. It cited the example of the 1985 Atlantic Accord reached by the federal and Newfoundland governments, which provides for the joint management of offshore resources and the sharing of revenues. It is interesting to note that the wording of the Atlantic Accord actually anticipates the possibility that its provisions may eventually become constitutionally entrenched.

4. Optional Occupation of Jurisdiction: "Opting Out" and "Opting In"

The device of optional occupation of jurisdiction is foreseen in specific provisions in *Canada's Constitution Acts, 1867 to 1982* and in some recent proposals for constitutional reform. Two approaches to this device are possible. First, there is the concept of "opting out", which can apply to matters of concurrent jurisdiction (such as

pensions and survivors' benefits, as enumerated in section 94A), to the application of constitutional amendments (sections 38(2) and 40 of the *Constitution Act, 1982*), or to fields in which the federal government exercises its spending power in areas of exclusive provincial jurisdiction (for example, the proposed section 106A of the Meech Lake Accord). In principle, such "opting out" could allow provinces to establish programs parallel to federal initiatives and could provide for reasonable fiscal compensation.

The second approach, "opting in", finds its conceptual origins in two provisions of the Canadian Constitution: section 94 of the *Constitution Act, 1867*, which provides for the authority of the federal Parliament to pass uniform laws in relation to property and civil rights in three of the four original provinces of the federation (never invoked); and section 23(1)(a) of the *Charter of Rights and Freedoms* in the *Constitution Act, 1982*, which enumerates certain minority language educational rights which do not come into effect in Quebec until that province gives its consent.

5. Interstate Agreements

An interstate agreement (or compact) is another example of a device allowing for flexibility in the distribution of powers, and it finds its origins in the United States constitution. The device permits two or more states to enter into an agreement for joint action, and becomes effective upon achieving Congressional consent. Applied to the Canadian context, these arrangements could establish federation-wide standards for such matters as interprovincial trade barriers and professional certification. The advantage of this approach is that it allows for the achievement of an interprovincial consensus in relation to certain subjects without the direct intervention of the federal government, whose initiative might be perceived by the constituent units of the federation as merely an attempt to expand its own jurisdiction.

(b) Delegation

(I) General

G. V. LA FOREST, "DELEGATION OF LEGISLATIVE POWER IN CANADA"
(1975), 21 MCGILL L.J. 131.

The *British North America Act, 1867*, makes no general provision for the delegation of legislative power from one level of government to the other. [...]

JUDICIAL DECISIONS RESPECTING DELEGATION

It has long been firmly settled that both the federal Parliament and the provincial legislatures are sovereign within their spheres, and concomitantly that they can freely delegate to their respective Governors in Council, municipalities and bodies of their own creation. However, from a very early period, there have been several judicial and academic assertions (the weightiest being a statement of Lord Watson during the argument in *C.P.R.* v. *Bonsecours* in 1899) that the federal Parliament could not give legislative jurisdiction to a provincial legislature, and that the provinces laboured under the converse disability. But most of these statements could be explained

ay by saying that either Parliament or a legislature was prevented from divesting lf of jurisdiction in favour of the other. Such divesting can be distinguished from egation, which may be defined "as entrusting by a person or body of persons, of the ver residing in that person or body of persons, *with complete power of revocation or endment remaining in the grantor (or delegator)*". In a word, since the delegator may ny time revoke, the power remains in him, the delegatee being simply an agent.

Serious interest in delegation began developing in the 1920's and 1930's when existence of a divided legislative jurisdiction made comprehensive regulation of al areas of the economy extremely difficult... Satisfactory results, said the Privy uncil, "can only be obtained by co-operation". But even where co-operation could be hieved, the careful manner in which legislation had to be drawn made implementation ficult. [...] Not unnaturally, numerous commentators looked to delegation as a way of oiding these difficulties. [...]

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

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

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

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

[...] Some of the judges advanced more fundamental arguments for their osition. Rand J. thought that, responsibility for a particular area of jurisdiction having en vested in a particular body, it was intended that it should deliberate upon it and ltimately be responsible for the discharge of that function to the electorate. Taschereau made a similar point, and Estey and Fauteux JJ. also noted that delegation would ivest one level of government of responsibility and give it to the other. Rand J. also ferred to the fundamental distinction between delegation to a subordinate body when a tailed scheme is considered and a broad delegation to another legislative body. He aid:

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

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

OTHER DEVICES

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

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

Conditional Legislation

A conditional statute is one whose operation is determined by a condition, for example, the existence of a state of fact or the action of an individual or body. Thus, the common provision that an *Act* shall come into force on proclamation is conditional legislation. The issue is the extent to which the federal Parliament or the provinces may employ one another to decide upon an action on which a statute is conditional. Here the courts have found no constitutional limitation... As the Supreme Court of Canada underlined in the... case of *Lord's Day Alliance of Canada* v. *Attorney-General for British Columbia*, Parliament can limit the operation of its own *Act* to an event or condition, but it cannot extend the jurisdiction of the provincial legislatures by delegation.

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

Incorporation or Adoption

A legislature may choose to employ the device of incorporating by reference (or adopting) another statute rather than repeat the whole of its provisions. Since the incorporated or adopted provisions derive their authority from the incorporating or

pting legislature, and that legislature has considered them, there seems no logical und (other than ease in finding the material) for invalidating such legislation even ugh the incorporated material appears in a statute of another legislature. The courts e long upheld statutes incorporating existing legislation of another legislature, but a ferent problem is raised where a legislature purports to adopt the law of another islature as it exists or is amended from time to time: then the legislature whose islation is adopted is the one exercising discretion in respect of change, not the opting legislature. The situation is clearly quite similar to delegation. [...]

[T]he Supreme Court of Canada in *Attorney-General of Ontario* v. *Scott* [...] held the validity of the Ontario *Reciprocal Enforcement of Maintenance Orders Act*, hich incorporated defences available to maintenance orders made in reciprocating untries. [...] The matter is, therefore, settled. One point, however, should be phasized. This device does not extend the legislative sphere of the adopting gislature; it can only adopt legislation that it would have been able to enact itself.

The device has raised some minor problems relating to such matters as the anner of charging an individual with an offence, the reconciliation of provisions here a matter is dealt with under both the adopting and adopted legislation (for ample, where penalties are provided under both), and the exercise of powers in lation to interprovincial undertakings in a manner different from their exercise in lation to intraprovincial undertakings. But these are the types of problems that will anish as more familiarity with the technique develops.

onjoint Schemes

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

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

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

So far as the latter is concerned, it is obvious that if parallel administrative structures are employed, duplication is likely to result. Moreover, administrative officers responsible to different bodies will almost inevitably have differences of view. These problems can be avoided by a single administration, but even here the maintenance of continuing cooperation cannot be effected if the government that hires the administrative officers concerned seeks to follow policies adverse to those of the other government. But most of the other problems have in fairly recent years been overcome by one level of government delegating executive and administrative authority

(including the power to make regulations) to administrative agencies created by th other. The validity of this device [...] was approved by the Supreme Court of Canada i 1952 in *P.E.I. Potato Marketing Board* v. *H.B. Willis Inc.* [...]

In a comment on this case, Professor Laskin (now Laskin C.J.) suggested that i could be interpreted as permitting interdelegation between the federal Parliament an provincial legislatures in relation to matters on which the delegated body i independently competent [...] What Laskin was proposing was the principle (discusse in the preceding section but not then established) that a province acting within it legislative competence (*e.g.*, respecting property and civil rights) could adopt b reference federal legislation (*e.g.*, criminal law) not only when it was already i existence, but also future amendments.

In truth this amounts, for practical purposes, to a limited form of legislativ delegation, for it permits a legislature other than that giving the law ultimate power t exercise effective discretion. But this is an oblique and highly convenient transgressio against the principle prohibiting interdelegation. It permits uninterrupted uniformity c laws as regards a scheme the general structure of which has been considered by th adopting legislature. In a word, the technique does not substantially offend against th underlying reasons for the rule against delegation and the gains in flexibility ar extensive. [...]

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

ADVANTAGES AND DISADVANTAGES OF DELEGATION

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

Delegation may also make legislative action easier where a single activit looked at from a functional point of view, could be regulated in its entirety by differe levels of government because the entire activity falls under several constitution rubrics. Delegation can avoid duplication of effort, both at the legislative a administrative levels, and prevent the confusion that inevitably results even when the is cooperation. As already mentioned, without some kind of delegation, difficulties cooperation arise at three different levels:

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

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

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

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

A further dimension to this argument is that the giving of power to one level of nment may have been done to prevent the other from having that power. Thus, one e reasons for not granting indirect taxation to the provinces is that this may have the t of creating tariff walls and imposing the primary burden of taxation on residents of a province. In other words, the grant of power may not only be looked as a positive vesting of power in the federal Parliament but as an implied ibition against the provinces.

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

Another argument against delegation relates to situations where there is gation to or [illegible] one or several, but not all, provinces. This, it may be argued, would e a constitutional "hodge podge", a result the Fulton-Favreau formula tried to

DEVICES FOR INTERGOVERNMENTAL COOPERATION: DELEGATION

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

SUMMARY AND APPRAISAL

As can be seen, there are weighty arguments for and against delegation. Not surprisingly, the first reaction of the courts both here and in other federations (for example, the United States) is to attempt to protect the general structure of the Constitution by finding a constitutional bar to delegation. Even where there is a general clause under which a general transfer of power could be made, as is the case under the Australian Constitution and to a more limited extent under section 94 of the *B.N.A. Act*, such clause tends to become a dead letter because of the felt need to maintain the integrity of the federation.

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

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

However, if in future constitutional discussions it is thought advisable to provide expressly for delegation, the best balance between the advantages and disadvantages would be to permit one level of government to make laws within the legislative competence of the other if that other consents to the particular statute. [...] This requirement for consent would make for a certain uniformity and help to avoid the creation of a special status for any province, but it would tend to limit seriously the use of the express delegation power and make it more restrictive than the techniques to transfer authority now available under the constitution. A scheme for delegation should also provide that a province cannot revoke delegated power for a certain period. Otherwise it could, in some cases, effectively dismantle a national scheme constructed at considerable expense.

ADMINISTRATIVE DELEGATION

HODGE v. R.
(1883), 9 A.C. 117 (P.C.).

e appellant, a Toronto tavern owner, was convicted of an offence pursuant to the *Liquor ence Act of Ontario* (R.S.O. 1877, c. 181). The act provided for the appointment of a ence Commissioner empowered to pass resolutions for the regulation of taverns and ps. A Licence Commissioners Board was authorized to impose penalties for breach of the olutions. Hodge appealed against conviction on the ground that the provincial legislature d no authority to delegate its legislative power to regulate taverns to a Licence mmissioner. Thus, the offence was beyond the power of the Licence Commissioner to ate. The Court of Appeal for Ontario reversed the Queen's Bench Division and sustained conviction. Hodge appealed to the Privy Council.]

R BARNES PEACOCK [for the Court]: – [...] Assuming that the local legislature d power to legislate to the full extent of the resolutions passed by the License mmissioners, and to have enforced the observance of their enactments by penalties d imprisonment with or without hard labour, it was further contended that the perial Parliament had conferred no authority on the local legislature to delegate those wers to the License Commissioners, or any other persons. In other words, that the wer conferred by the Imperial Parliament on the local legislature should be exercised full by that body, and by that body alone. The maxim *delegatus non potest delegare* as relied on.

It appears to the Justices, however, that the objection thus raised by the pellants is founded on an entire misconception of the true character and position of the ovincial legislatures. They are in no sense delegates of or acting under any mandate om the Imperial Parliament. When the *British North America Act* enacted that there ould be a legislature for Ontario, and that its legislative assembly should have clusive authority to make laws for the Province and for provincial purposes in relation the matters enumerated in sect. 92, it conferred powers not in any sense to be ercised by delegation from or as agents of the Imperial Parliament, but authority as lenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament the plenitude of its power possessed and could bestow. Within these limits of subjects d area the local legislature is supreme, and has the same authority as the Imperial arliament, or the Parliament of the Dominion, would have had under like rcumstances to confide to a municipal institution or body of its own creation authority make by-laws or resolutions as to subjects specified in the enactment, and with the bject of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an ttempt to provide for varying details and machinery to carry them out might become ppressive, or absolutely fail. The very full and very elaborate judgment of the Court of ppeal contains abundance of precedents for this legislation, entrusting a limited iscretionary authority to others, and has many illustrations of its necessity and onvenience. It was argued at the bar that a legislature committing important regulations agents or delegates effaces itself. That is not so. It retains its powers intact, and can, henever it pleases, destroy the agency it has created and set up another, or take the atter directly into his own hands. How far it shall seek the aid of subordinate agencies, nd how long it shall continue them, are matters for each legislature, and not for Courts f Law, to decide.

The Justices do not think it necessary to pursue this subject further, save to adc that, if by-laws or resolutions are warranted, power to enforce them seems necessary anc equally lawful. Their Justices have now disposed of the real questions in the cause. [...]

The provincial legislature having thus the authority to impose imprisonment with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners. [...]

The Justices do not think it necessary or useful to advert to some minor point of discussion, and are, on the whole, of opinion that the decision of the Court of Appea of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbl advise Her Majesty.

- Research Note -
ADMINISTRATIVE DELEGATION

In 1690, John Locke wrote this important passage in his *Second Treatise of the Civi Government*:

> "[...] The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.
>
> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands. [...]"

In the 1930s, United States constitutional law moulded this dictum into an operati constitutional doctrine. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) considere s. 9 of the *National Industrial Recovery Act* of 1933, an aggressive statute meant to de with the crippling economic crisis of the depression. Section 9 of the *Act* dealt wi overproduction and consequent collapsing prices in the petroleum industry by allowin federal enforcement of state conservation orders. President Roosevelt exercised th power by an implementing Executive Order. This order was challenged in the *Panam Refining* case. The United States Supreme Court invalidated s. 9 of the *Act* on th ground that it unlawfully delegated legislative power. Chief Justice Hughes found th s. 9 provided no standard for the President to follow; "disobedience to his order is mad a crime punishable by fine and imprisonment;" "among the numerous and divers objectives broadly stated [in the *Act*] the President was not required to choose;" "th Congress left the matter to the President without standard or rule, to be dealt with as h pleased."

"There are limits of delegation which there is no constitutional authority to transcend. We think that s. 9(c) goes beyond those limits. [...] The Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstance and conditions in which the transportation is to be allowed or prohibited. If s. 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. [...] Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us but of the constitutional processes of legislation which are an essential part of our system of government."

ve months later, the United States Supreme Court considered s. 3 of the same *Act* in *L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Section 3 ıthorized the President to approve various trade association codes of fair competition. he codes vigorously regulated various trades, but the approval process for the Codes as secretive and without supervision. In a concurring opinion, Justice Cardozo (who ıssented in *Panama Refining*) stated:

"The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. [...] Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them."

'anama Refining and *Schechter* remain on the books, and subsequent cases cknowledge their authority. However, later cases appear to restrict the non-delegation octrine to a hortatory principle. The principle seems to be a caution to the legislative rchitects who create administrative power, rather than a constitutional knife used by ourts to cut away offensive statutes. The leading modern cases are *Mistretta v. United :tates*, 488 U.S. 361 and *Industrial Union Department, AFL-CIO v. American 'etroleum Institute*, 448 U.S. 607. In *Mistretta*, the court noted that in the aftermath of *'anama Refining* and *Schechter*, the court "upheld, again without deviation, Congress's ıbility to delegate power under broad standards." In *Industrial Union Department*, the Court overturned the statute at issue for reasons unrelated to the non-delegation loctrine. Interestingly, Justice Rehnquist, in a concurring decision, would have applied he non-delegation doctrine as an additional lever to upset the *Occupational Safety and Health Act* at issue. Justice Rehnquist stated:

"The non-delegation doctrine serves three important functions. First, and most abstractly, it insures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most resp[...]ve to the popular will. [...] Second, the doctrine guarantees

that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. [...] Third, and derivative of the second, the doctrine insures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."

The hortatory principle appears to be well formulated in the words of Chief Justice T who observed that the limits of delegation "must be fixed according to common se and the inherent necessities of the governmental co-ordination:" *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

In the 1982 Supplement to his *Administrative Law Treatise*, Professor Da put forward five possible views with respect to delegation of legislative power to administrative agency. These five positions are summarized as follows:

1. A doctrine that legislative power may not be delegated is unthinkable. Almost the whole of the Code of Federal Regulations [analogous to the Consolidated Regulations of Canada] would be invalidated. Adoption of the idea would be irresponsible.

2. Delegation to an administrative body must be accompanied by meaningful standards.

3. The Constitution [of the United States] requires that Congress make all major policy decisions.

4. Major policymaking cannot be delegated to the courts.

5. Legislative power may be delegated to agencies as Congress chooses, including the power to make major policy.

Sir Barnes Peacock dealt with one critical argument against delegation of import regulation making power to administrative or executive agencies in *Hodge v T Queen* (1883-4), 9 A.C. 117. Considering the argument that by such delegation t legislature "effaces itself," Sir Barnes Peacock replied:

"That is not so. It [the legislature] retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands."

His Justice's conclusion that only legislatures, and not courts of law, must decide ho far delegation may go is perhaps too strong. It is possible to conceive of a legislatu committing virtually unlimited power to make regulations to administrative entities particular fields. It may prove useful for the court to assist legislative partners develop a hortatory principle against creation of autocratic power. Clearly, any use o non-delegation doctrine in Canada would have to be extremely rare. Still, in a spirit earnest partnership with the legislative branch, courts may develop norms of delegatio that prohibit the creation of despotic or tyrannous power in executive entities, and, if t rare case calls for it, overturn legislation offensive to it.

INTERLEGISLATIVE DELEGATION

A.G.N.S. v. A.G. CAN.
[1951] S.C.R. 31.

ference on a Bill which empowered the Lieutenant Governor of Nova Scotia to delegate to liament the province's legislative power over local employment. The Bill also permitted the va Scotia Legislature to receive and exercise delegated powers from Parliament in relation ederal employment and indirect taxation.]

NFRET C.J.: In each of the supposed cases either the Parliament of Canada, or the gislature of Nova Scotia, would be adopting legislation concerning matters which ve not been attributed to it but to the other by the Constitution of the country. [...]

The Parliament of Canada and the Legislatures of the several Provinces are vereign within their sphere defined by *The British North America Act*, but none of em has the unlimited capacity of an individual. They can exercise only the legislative wers respectively given to them by sections 91 and 92 of the Act, and these powers ust be found in either of these sections.

The Constitution of Canada does not belong either to Parliament, or to the egislatures; it belongs to the country and it is there that the citizens of the country will nd the protection of the rights to which they are entitled. It is part of that protection that arliament can legislate only on the subject matters referred to it by section 91 and that ich Province can legislate exclusively on the subject matters referred to it by section 2. The country is entitled to insist that legislation adopted under section 91 should be assed exclusively by the Parliament of Canada in the same way as the people of each rovince are entitled to insist that legislation concerning the matters enumerated in ection 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with he power and the duty to legislate concerning the subjects exclusively distributed by the onstitutional Act to each of them.

No power of delegation is expressed either in section 91 or in section 92, nor, ndeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the *British North America Act* there were to be, in the words of Lord Atkin in *The Labour Conventions Reference*, "watertight compartments which are an essential part of the original structure."

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other [...]

The appeal should be dismissed with costs.

KERWIN J.: [...] The *British North America Act* divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division. The fact that section 94 was considered necessary to provide in certain contingencies for the uniformity in some of the provinces of laws relating to property and civil rights and court procedure, indicates that an agreement for such a delegation as is here contended for was never intended. To permit of such an agreement would be inserting into the Act a power that is certainly not stated and one that should not be inferred. The appeal should be dismissed with costs.

TASCHEREAU J.: [...] The *British North America Act, 1867*, and amendments have defined the powers that are to be exercised by the Dominion Parliament and by the Legislatures of the various provinces. There are fields where the Dominion has exclusive jurisdiction, while others are reserved to the provinces. This division of powers has received the sanction of the Imperial Parliament, which was then and is still the sole competent authority to make any alterations to its own laws. If Bill 136 were *intra vires*, the Dominion Parliament could delegate its powers to any or all the provinces, to legislate on commerce, banking, bankruptcy, militia and defence, issue of paper money, patents, copyrights, indirect taxation, and all other matters enumerated in Section 91; and on the other hand, the Legislatures could authorize the Dominion to pass laws in relation to property and civil rights, municipal institutions, education, etc. etc. all matters outside the jurisdiction reserved to the Dominion Parliament. The powers of Parliament and of the Legislatures strictly limited by the *B.N.A. Act*, would thus be considerably enlarged, and I have no doubt that this cannot be done, even with the joint consent of Parliament and of the Legislatures.

It is a well settled proposition of law that jurisdiction cannot be conferred by consent. None of these bodies can be vested directly or indirectly with powers which have been denied them by the *B.N.A. Act*, and which therefore are not within their constitutional jurisdiction. [...]

It has been further argued that as a result of the delegation made by the Federal Government to the Provinces, the laws enacted by the Provinces as delegatees would be federal laws and that they would, therefore, be constitutionally valid. With this proposition I cannot agree. These laws would not then be enacted "with the advice and consent of the Senate and House of Commons", and would not be assented to by the Governor General, but by the Lieutenant Governor, who has no power to do so. Moreover, as already stated, such a right has been denied the Provinces by the *B.N.A. Act*.

If the proposed legislation were held to be valid, the whole scheme of the Canadian Constitution would be entirely defeated. The framers of the *B.N.A. Act* thought wisely that Canada should not be a unitary state, but it would be converted into one, as Mr. Justice Hall says, if all the Provinces empowered Parliament to make laws with respect to *all matters* exclusively assigned to them. Moreover, it is clear that the delegation of legislative powers by Parliament to the ten Provinces on matters enumerated in Section 91 of the *B.N.A. Act* could bring about different criminal laws, different banking and bankruptcy laws, different military laws, different postal laws, different currency laws, all subjects in relation to which it has been thought imperative that uniformity should prevail throughout Canada.

For the above reasons, I have come to the conclusion that this appeal should be dismissed.

ND J.: [...]That Canadian legislatures may delegate has long been settled: *Hodge* v. *Queen* [(1883), 9 App. Cas. 117]. Notwithstanding the plenary nature of the sdiction enjoyed by them, it was conceded that neither Parliament nor Legislature either transfer its constitutional authority to the other or create a new legislative an in a relation to it similar to that between either of these bodies and the Imperial liament. [...]

These bodies were created solely for the purposes of the Constitution by which h, in the traditions and conventions of the English Parliamentary system, was to islate, in accordance with its debate and judgment, on the matters assigned to it and no other. To imply a power to shift this debate and this judgment of either to the other o permit the substance of transfer to take place, a dealing with and in jurisdiction erly foreign to the conception of a federal organization.

So exercising delegated powers would not only be incompatible with the nstitutional function with which Nova Scotia is endowed and an affront to nstitutional principle and practice, it would violate, also, the interest in the substance Dominion legislation which both the people and the legislative bodies of the other ovinces possess. In a unitary state, that question does not arise; but it seems to be quite dent that such legislative absolutism, except in respects in which, by the terms press or implied of the constituting Act, only one jurisdiction is concerned, is compatible with federal reality. If a matter affects only one, it would not be a subject delegation to the other; matters of possible delegation, by that fact, imply a common erest. Dominion legislation in relation to employment in Nova Scotia enacted by the gislature may affect interests outside of Nova Scotia; by delegation Nova Scotia might pose an indirect tax upon citizens of Alberta in respect of matters arising in Nova otia; or it might place restrictions on foreign or interprovincial trade affecting Nova otia which impinge on interests in Ontario. The incidence of laws of that nature is tended by the Constitution to be determined by the deliberations of Parliament and not any Legislature. In the generality of actual delegation to its own agencies, Parliament, cognizing the need of the legislation, lays down the broad scheme and indicates the inciples, purposes and scope of the subsidiary details to be supplied by the delegate: nder the mode of enactment now being considered, the real and substantial analysis nd weighing of the political considerations which would decide the actual provisions lopted, would be given by persons chosen to represent local interests.

Since neither is a creature nor a subordinate body of the other, the question is ot only or chiefly whether one can delegate, but whether the other can accept. elegation implies subordination and in *Hodge* v. *The Queen, (supra)*, the following oservations (at p. 132) appear:–

> Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. [...]
>
> It w[...]rgued at the bar that a legislature committing important regula[...]ns to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

Subordination, as so considered, is constitutional subordination and not t implied in the relation of delegate. Sovereign states can and do confer and acc temporary transfers of jurisdiction under which they enact their own laws within t territory of others; but the exercise of delegation by one for another would be incongruity; for the enactments of a state are of its own laws, not those of another state

Subordination implies duty: delegation is not made to be accepted or act upon at the will of the delegate; it is ancillary to legislation which the appropri legislature thinks desirable; and a duty to act either by enacting or by exercising conferred discretion not, at the particular time, to act, rests upon the delegate. No su duty could be imposed upon or accepted by a co-ordinate legislature and the propos bill does no more than to proffer authority to be exercised by the delegate solely of own volition and, for its own purposes, as a discretionary privilege. Even in the case virtually unlimited delegation as under the *Poor Act of England*, assuming that degree be open to Canadian legislatures, the delegate is directly amenable to his principal f his execution of the authority. [...]

The practical consequences of the proposed measure, a matter which tl Courts may take into account, entail the danger, through continued exercise of delegate power, of prescriptive claims based on conditions and relations established in relianc on the delegation. Possession here as elsewhere would be nine points of law an disruptive controversy might easily result. The power of revocation might in fa become no more feasible, practically, than amendment of the Act of 1867 of its ow volition by the British Parliament.

I would, therefore, dismiss the appeal with costs.
[The judgments of Kellock, Estey and Fauteux JJ. are omitted.]

R. v. FURTNEY
[1991] 3 S.C.R. 89.

STEVENSON, J. [for the Court]: — [...] The appellants were charged in an informatio that, on five occasions, they counseled licensees of bingo lottery schemes to violate th terms and conditions of their licences relating to bingo lotteries, contrary to s. 190(3) o the *Criminal Code*.

The appellants challenged the provisions of ss. 190(1)(b) and (2) (now ss 207(1)(b) and (2)). They submitted that Parliament exceeded its powers of delegation ir permitting exemptions from criminality for charitable or religious organizations operating a lottery pursuant to a licence issued by the Lieutenant Governor-in-Council of a province. [...]

Criminal Code, R.S.C. 1985, c. C-46:

"207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful. [...]

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor-in-Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor-in-Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose; [...]

"(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor-in-Council of a province as described in paragraph (1)(b), (c), (d) or (f) may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor-in-Council of that province, the person or authority in the province designated by the Lieutenant Governor-in-Council thereof or any law enacted by the legislature of that province may prescribe.

"(3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section
(a) in the case of the conduct, management or operation of that lottery scheme,
(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or
(ii) is guilty of an offence punishable on summary conviction;
or
(b) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction." [...]

The appellants were acquitted at trial as a result of their seeking and obtaining, an agreed statement of facts, a determination that there was an *ultra vires* delegation criminal law. [...]

The leading authority on what is best described as prohibited interdelegation is *torney General of Nova Scotia* v. *Attorney General of Canada*, [1951] S.C.R. 31. It tablishes that Parliament cannot delegate its legislative authority to a provincial gislature. We must, then, ask whether the impugned provisions of the Code delegate gislative authority over some aspect of the criminal law to the provincial legislature.

On the other hand, if what Parliament does is not characterized as a delegation a legislative power to a provincial legislature, this authority does not govern. [...]

In *Coughlin* v. *Ontario Highway Transport Board*, [1968] S.C.R. 569, this urt recognized that Parliament may incorporate by reference provincial legislation as may from time to time exist. That is not a delegation. There, federal legislation gave e provincial transport board authority to license extra-provincial undertakings upon

like terms and conditions as if the undertaking were a local one within the provinc Cartwright, J., for the majority, upholding the legislation said, at p. 575:

> [...] there is here no delegation of lawmaking power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist. [...]
>
> Thus, in the exercise of its powers generally, and the criminal law specifically, Parliament is free to define the area in which it chooses to act and, in so doing, may leave other areas open to valid provincial legislation.

If a province legislates in respect of an open area, it is not doing so as delegate, but in the exercise of its powers under s. 92 of the *Constitution Act, 1867*. Th proposition is discussed in the context of the exercise of the criminal law power i *Lord's Day Alliance of Canada* v. *Attorney General of British Columbia*, [1959] S.C.F 497. There the federal *Lord's Day Act* made it unlawful to engage in public games c contests "except as provided in any provincial Act or law now or hereafter in force' This court held that provincial laws permitting the otherwise prohibited conduct wer not *ultra vires*, but rather provided a condition of fact that Parliament had provided as limitation on its own statute. The permissive legislation fell within s. 92 and there wa no delegation to the province. In *Lord's Day Alliance of Canada* v. *Attorney General fo Manitoba*, [1925] A.C. 384, the Privy Council had recognized that Parliament was fre to prohibit and to forbear from prohibiting in the exercise of its legislative authority ove criminal law.

In my view, the regulation of gaming activities has a clear provincial aspec under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in th case of a clash between federal and provincial legislation. [...]

I agree with Dreidger in *The Interaction of Federal and Provincial Law* (1976), 54 Can. Bar Rev. 695, when he concludes that inter-delegation i constitutionally impermissible because there is a constitutional prohibition founde upon the granting of exclusive powers to the Parliament on one hand, and the provincia legislatures on the other.

The prohibition is against delegation to a legislature. There is no prohibitio against delegating to any other body. The power of Parliament to delegate its legislativ powers had been unquestioned, at least since the *Reference as to the Validity of th Regulations in Relation to Chemicals*, [1943] S.C.R. 1. The delegate is, of course always subordinate in that the delegation can be circumscribed and withdrawn. Th Lieutenant Governor-in-Council has capacity or status to receive a delegated power: *R* v. *Wilson* (1980), 119 D.L.R. (3d) 558 (B.C.C.A.), at p. 568. He is not subject to any constitutional prohibition against the acceptance of delegated authority. It may be that ir some instances a delegation to the Lieutenant Governor would be tantamount to a delegation to a legislature. That question need not be resolved in this case, because the essential elements of the substantial federal scheme are spelled out in the Code and what was done by Lieutenant Governor was to make administrative decisions relating to matters of essentially provincial concern. These decisions fall within the ambit of the decision in *Re Peralta*, (cites omitted).

Thus Parliament may delegate legislative authority to bodies other than incial legislatures; it may incorporate provincial legislation by reference and it may the reach of its legislation by a condition, namely the existence of provincial lation.

I now analyze and characterize the sections in question here.

Section 207(1)(b) does not impose any right or duty on a provincial legislature. ives authority to the Lieutenant Governor-in-Council or a person or authority ified by him. Regardless of the nature of the delegation, it is not a prohibited r-delegation.

Section 207(2) similarly does not impose any right or duty on a provincial slature, with the exception of the last phrase which provides that a licence issued by nder the authority of the Lieutenant Governor-in-Council may contain such relevant ns and conditions as "any law enacted by the legislature of that province may cribe".

I do not read that provision as a delegation of legislative authority by liament. In my view, the provision may be read as incorporating by reference vincial legislation authorizing the Lieutenant Governor-in-Council to issue licences taining relevant terms and conditions or as excluding from the reach of the criminal prohibition, lotteries licensed under provincial law so long as that licensing is by or er the authority of the Lieutenant Governor-in-Council. Dreidger, in the article to ch I have referred, notes that the *Criminal Code* exemption for lotteries conducted in ordance with a provincial statute is not a delegation. I agree. [...]

I would answer the constitutional questions as follows: [...]

> 2. Are paragraphs 207(1)(b), (2) or (3) of the *Criminal Code* of Canada, R.S.C. 1985, c. C-46, or any combination thereof, *ultra vires* Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the Federal Government?
>
> A. No.

BRITISH COLUMBIA (MILK BOARD) v. GRISNICH
[1995] 2 S.C.R. 895.

ie B.C. Milk Board (the Appellant) challenged a decision of the B.C. Court of Appeal, which ld that in every order made by an administrative tribunal, the tribunal had to state on the face the order the legislative source of its authority. Both the federal and the provincial vernment had delegated authority to the B.C. Milk Board. Gilbert and Ronald Grisnich were iry farmers who challenged one of the Milk Board's orders, which had collected over 00,000 in levies from the Grisnich family, due to the Grisnich's over-quota production of lk.

ie majority, led by Iacobucci J., held that there was no requirement on administrative bunals to state their source of authority. LaForest, L'Heureux-Dubé, and Gonthier JJ. ncurred, but in so doing, also discussed a point not commented on by the majority — the lidity of a tribunal being endowed with powers from both the federal and provincial vernments in lig[...] the doctrine emanating from the *Nova Scotia Inter-delegation* case [...]

LAFOREST J.: [...] The very point of an administrative inter-delegation scheme su as the one in the case at bar is to ensure that a provincial marketing board is possessed the totality of regulatory power over one agricultural product. The very reason su joint federal-provincial schemes are necessary is because no one level of governmen constitutionally empowered to regulate all aspects of intraprovincial a extraprovincial trade. As the respondents noted, the administrative inter-delegati scheme is a means of allowing Parliament to delegate administrative powers to a bo created by the provincial legislature in a manner that avoids the rule against legislati inter-delegation established by this Court in *Attorney General of Nova Scotia Attorney General of Canada*, [1951] S.C.R. 31 ("*Nova Scotia Inter-delegation*"). T constitutionality of such arrangements has been repeatedly endorsed by this Court; s for example *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392, a *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198. To requi an administrative agency overseeing and implementing a national marketing scheme "choose" between its federal and provincial authority would defeat the very *raiso d'être* of the scheme.

The respondents, however, suggest that a system of dual, or "mirror", legislation, wi both federal and provincial regulations clearly identified, could accomplish tl objectives served by the current joint delegation scheme, while at the same tin allowing the citizen to know more clearly what level of government was responsible any given situation. Not only does this proposal strike me as being duplicative ar expensive, but it is also hard to understand how such a scheme would assist tl individual citizen. There is a certain simplicity, and indeed a form of accountabilit that results from Parliament and the provincial legislatures having empowered *or* expert body, with authority derived from both sources, to regulate a particular ar complicated technical area of the law. Citizens affected by milk regulations benef from a scheme that requires them to comply with the regulations of only or administrative body, rather than two. A system of dual legislation would likely onl increase the number of subordinate regulations, rules and orders in this area, thu potentially contributing to greater frustration and malcontent on the part of the citizenry

In his oral presentation, counsel for the respondents relied in support of hi position on certain principles emphasized by this Court in the *Nova Scoti Inter-delegation* case. He argued that the basic principles of Parliamentary democrac and accountability that motivated the Court in reaching its decision in that case shoul be extended to the current situation. Just as Parliament and the provincial legislature are obliged to frame their own legislation carefully, so that it falls squarely within permissible head of authority under the Constitution, so too, he urged, shoul subordinate bodies exercise care and discipline in drafting their subordinate orders an regulations. He suggested that our constitutional order requires the imposition of thi discipline on subordinate bodies, in order that the twin principles of Parliamentar democracy and accountability are met.

In my view, the *Nova Scotia Inter-delegation* case is not determinative in the present case for two reasons. First, unlike the *Nova Scotia Inter-delegation* case, the present case is not a *legislative* delegation case. We are not talking here of one level o government delegating powers over one of its areas of jurisdiction to another government. Instead, the case at bar involves an administra[...] inter-delegation scheme, where Parliament and provincial legislatures have both ch[...]n to empower one

ıbordinate body to implement the details of a national marketing strategy, the broad ıtlines of which they have co-operatively established. There was no question in the *'ova Scotia Inter-delegation* case that each level of government was free, acting within s own constitutional sphere, to delegate authority to a subordinate body. That the same ıbordinate body can accept and exercise powers from both levels of government is vident from the decisions of this Court in *P.E.I. Potato Marketing Board* and the *gricultural Products Reference* referred to above.

Second, I do not believe the principles of Parliamentary democracy and ccountability emphasized by the Court in the *Nova Scotia Inter-delegation* case varrant imposing on administrative bodies the kind of requirement advocated by the espondents. All that is constitutionally required of subordinate bodies — as of federal ınd provincial governments — is that they act within their jurisdiction, not that they tate the source of this jurisdiction. As for the question of accountability, in the *Nova Scotia Inter-delegation* case, the Court was concerned with this principle at its most undamental level. At issue was the accountability of federal and provincial governments for law-making in broad and substantive policy areas exclusively reserved o them under the Constitution. In the present case, the appellant is responsible for illing in the details of a national scheme, already agreed to in principle by both levels of government. By nature, the appellant's orders are technical and specific. They are not designed to establish broad policy directions or strategies, for this more general course has already been set by the federal and provincial governments acting co-operatively. In so far as it may be somewhat confusing for the citizen to sort out the question of jurisdiction because two levels of government are ultimately accountable for the appellant's actions, that is the very nature of a national marketing scheme. If we are going to tolerate joint delegation arrangements — permissible as a matter of constitutional law and desirable, in my view, as a matter of practice — then we must accept that the details of these arrangements will be implemented by marketing boards empowered from multiple sources. Citizens must look first to these boards to be accountable for their actions, and then to the two levels of government that have constituted them. In my view any potential loss in accountability that results in this situation is more than made up for by the benefits and practicalities of the joint delegation arrangement.

Appeal allowed with costs.

REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS, REPORT ON A RENEWED CANADA, ISSUE 66

(OTTAWA: QUEEN'S PRINTER, 1992) (CO-CHAIRS, G.-A. BEAUDOIN AND D. DOBBIE), pp. 67-69.

DELEGATION

The Constitution does not permit the delegation of legislative power by Parliament to a provincial legislature, or vice versa. The federal government has proposed that the Constitution be amended to permit this form of delegation.

Legislative delegation would provide Parliament and the legislatures with greater flexibility in recognizing the different needs of different provinces. It would also provide a broader means for coordinating the exercise of federal and provincial powers, fostering intergovernmental cooperation and harmonizing laws. Legislative delegation

could be an important tool for streamlining government services and regula improving the functioning of the Canadian federation and responding to the nee particular provinces for the ultimate benefit of Canadians as a whole.

Despite these advantages, legislative delegation has raised a numbe concerns among the witnesses who appeared before us. These concerns reflect the that the federal government's proposals do not elaborate how and under circumstances legislative delegation would be permitted. In the past, federal-provi arrangements have been largely negotiated in secret with little if any p participation. If this practice were extended to legislative delegation, it would at great criticism. Concerns also arose on the basis that delegation could result rearrangement of the federal-provincial distribution of powers and responsibil without appropriate public consultation.

We consider that these concerns must be addressed before legisla delegation is permitted. To do this, we suggest that the proposal to permit legisla delegation should contain a number of limits on its use.

First, powers should only be delegated by law, after consultation with public and debate in Parliament and the provincial legislative assemblies. Legisla delegation must be done openly and publicly with an opportunity for a renewed Se to safeguard against any erosion of the federal-provincial division of powers responsibilities. As part of this consultation, the governments involved in the delega of power and other governments should consider the effect of the delegation on federation as a whole. If the proposed delegation would have effect outside of boundaries of the province concerned, then perhaps it should be the subject discussions at a First Ministers' Conference.

Second, Parliament or a provincial legislature should be able to define scope of the powers it delegates and impose conditions governing their exercise. In way, Parliament and the legislatures could ensure that the powers they delegate are u in a way that is consistent with the objectives of the delegation.

Third, delegation should be accompanied by financial compensation reflect the costs involved in administering legislation enacted under the delegated powers the financial compensation shall reflect the spirit of section 36 of the *Constitution A 1982*.

Fourth, in the case of delegation to a provincial legislature, the provinc government should assume the official languages obligations of the federal governme

Fifth, each delegation of power should be renewed every five years to provi an opportunity to determine whether the power still needs to be delegated. Over t course of a number of years, circumstances may change and there must be a mechani for ensuring that there is a continuing need for a delegation of the power and that t terms of the delegation reflect this need.

Finally, where Parliament or a legislature decides that a delegation of its pow is no longer needed, or that its terms should be changed, it should be able to revoke amend the delegation. This would ensure that ultimate accountability remains with t

:gating Parliament or legislature. However, to prevent undue disruption and ensure a ›oth reversion of power, there should be a requirement to give reasonable advance ıce of the revocation or amendment.

We recommend that the proposal to permit legislative delegation between Parliament and the provincial legislatures be adopted within a constitutional framework that will ensure that the concerns expressed about it are met.

e Beaudoin-Dobbie Report included a detailed text of a constitutional amendment to permit :rlegislative delegation which implemented its concerns. This text received consideration ing the multilateral constitutional process in 1992, but ultimately, for lack of consensus, the posal was dropped. The Status Report of July 16, 1992 from the multilateral meetings on Constitution stated that there was a consensus not to pursue the issue of legislative ɜrdelegation.]

) Executive Federalism and Intergovernmental Agreements

D.V. SMILEY, THE FEDERAL CONDITION IN CANADA
(MCGRAW-HILL RYERSON, 1987).

Canadians live under a system of government which is executive dominated ıd within which a large number of important public issues are debated and resolved ırough the ongoing interactions among governments which we have come to call :xecutive federalism." Of this latter dimension Michael Jenkin has written: "More than ıy other federation, Canada relies on intergovernmental negotiation to help resolve ɔlitical differences." These negotiations range from the involvement of federal and rovincial officials in the grading of meat to the highly publicized first ministers' onferences dealing with constitutional reform or the fundamental aspects of economic olicy. In the last two decades there has emerged a new kind of agency having direct ɜsponsibility for particular public services or programs with the mandate of conducting vhat Richard Simeon has called "federal-provincial diplomacy." [...]

The executive consists of the federal and provincial cabinets and the appointed ›fficials who within the framework of law and custom work under their direction. Such :xecutives under the normal circumstances in which governments retain the continuing ;upport of majorities in the House of Commons and the provincial legislatures have the ive following powers:

1. The executive not only carries out the terms of legislation, but also designs almost all bills which are presented to the legislature. Further, within the terms of legislation, the executive formulates orders-in-council and other statutory instruments with the force of law.

2. Under Sections 53 and 54 of the Constitution Act, 1867 all bills for taxation and for the appropriation of public moneys must be introduced into the House of Commons by a minister of the Crown. Similar provisions are in effect in the provinces.

3. The executive has unshared responsibility for relations with other governments, whether those jurisdictions are domestic or foreign. This has included the role of negotiation of the Constitution, the most crucial element of political action. The

agreement between the federal government and the governments of all the provinces l Quebec which formed the basis for the Constitution Act, 1982 was concluded amc first ministers, although in the events leading up to this other governmental actors l been involved: the Leader of the Opposition, members of the Senate-House Commons Committee on the Constitution, the appellate courts of three provinces a the Supreme Court of Canada.

4. The executive controls its own internal organization. As we shall see later in t chapter, this organization has been a crucial determinant of the way execut federalism operates.

5. Many adjudicative functions are carried out within the executive.

As we saw in the last chapter, the bias of the Westminster model is towa "strength, order and authority" in government both in Ottawa and the provinces. A Birch has written that "the most important tradition of British political behaviour is t the government of the day should be given all the powers it needs to carry out its polic Something the same can be said of Canada, and it is pointless to inquire whether t way of viewing government is a cause or a result of executive dominance.

Notwithstanding the thrust of the Westminster model toward strong a decisive government, the federal imperative is that territorially-bounded interests given a strong influence in the governmental process. Some reconciliation of these t circumstances can be effected by conferring on the states or provinces constitutio jurisdiction over those matters in respect to which spatially based differences are m profound, while assigning to the central authorities control over matters wh non-territorial cleavages are dominant. This is essentially what the Fathers Confederation did in establishing the first political community which attempted combine the Westminster model with federalism. [...]

The proximate reconciliation between the federal and parliamentary princip which was effected by the Confederation settlement of 1864-67 has long since brok down. [...]

[T]he two orders of government are inextricably involved in one anothe activities over a wide range of matters. Further, the general expectation of the Fathers Confederation that matters under the jurisdiction of the federal government would ı divide Canadians along provincial or French-English axes has proven unattainable. T result is a situation in which federal and provincial governments are both interdepend and autonomous and in which there is a relative lack of institutional machinery effecting the authoritative resolution of conflicts between them.

Even in situations where the Constitution confers exclusive jurisdiction some subject on one of the orders of government, the interests of the other may directly involved. To take one important example, Parliament has the exclusive pov to enact laws in respect to unemployment insurance; but the levels of unemploym benefits and the conditions under which those are paid have a direct and immedi impact on the demands for social assistance provided by the provinces and th constituent municipalities. [...]

In general, then, the constitutional distribution of powers between Parliament ıd the provinces underlies a situation in which the two orders of government are highly ıterdependent but are not related to one another through hierarchical structures of ›wer. This interdependence, as we have seen, occurs even in those situations in which ɛe Constitution confers explicit power over particular matters on one order or the other. hus, a continuous process of federal-provincial consultation and negotiation is at the ɜart of the Canadian federal system. It is not that the constitutional division of powers ; interpreted by the courts is unimportant. The bargaining position of the participating overnments will in large part be determined by this division.

D.V. SMILEY, "AN OUTSIDER'S OBSERVATIONS OF FEDERAL-PROVINCIAL RELATIONS AMONG CONSENTING ADULTS"

IN R. SIMEON, ED., CONFRONTATION AND COLLABORATION: INTERGOVERNMENTAL RELATIONS IN CANADA TODAY

(TORONTO: INSTITUTE OF PUBLIC ADMINISTRATION OF CANADA, 1979) AT 105-113.

/ly charges against executive federalism are these:

'irst it contributes to undue secrecy in the conduct of the public's business.

;econd, it contributes to an unduly low level of citizen-participation in public affairs.

Third, it weakens and dilutes the accountability of governments to their respective egislatures and to the wider public.

-ourth, it frustrates a number of matters of crucial public concern from coming on the public agenda and being dealt with by the public authorities.

Fifth, it has been a contributing factor to the indiscriminate growth of government activities.

Sixth, it leads to continuous and often unresolved conflicts among governments, conflicts which serve no purpose broader than the political and bureaucratic interests of those involved in them. [...]

First to secrecy. It is I believe undeniable that executive federalism contributes to the undue secrecy by which public affairs are conducted in Canada. This secrecy is not very profound – there is a great deal of information about federal-provincial affairs on the public record and journalists and even scholars can penetrate what confidentiality there is in many cases. However, we are likely to have a federal freedom of information act and corresponding legislation in most if not all of the provinces in the next five years or so and it is almost inevitable that these enactments will confer on governments the power to withhold from public scrutiny documents involving federal-provincial relations.

The second charge is that executive federalism contributes to an unduly low level of citizen-participation in public affairs. In part this is a result of the secrecy to which I have already referred. In larger part it is a result of the extra-ordinary complexity of the process. For example, how can one reasonably expect intelligent public or even parliamentary debate on the *Federal-Provincial Fiscal Arrangements and Established Programs Financing Act of 1977* – perhaps one of the most important enactments of Canadian Parliament in recent decades? And I would also defy anyone with specialized training, to make sense of the national dimension and emergency doctri as these were argued in the Anti-Inflation reference of 1976. But apart from secrecy : complexity, executive federalism discourages citizen participation by contributing 1 very minimal role for political parties in the formulation of public policy and in articulation and aggregation of public demands. Political parties – and I am speak here of the extra-parliamentary components of parties rather than caucuses and cabir – are not very influential in matters related to policy, although they of course play a v role in the nomination of candidates for public office and strive to elect such persons. far as governments themselves are concerned, partisan complexions are not v important in federal-provincial relations and it would be a most extraordinary even any intergovernmental conference divided on partisan lines. Executive federalism tl restricts the role of parties in public policy and the constructive participation of citiz in the formulation of policy by party activity.

Federalism in its Canadian variant weakens the accountability of governme to their respective legislatures and the wider public. As participation was the cause c decade ago, so is the accountability of those who act in the name of governments tod. In a formal sense the British-type parliamentary system meets the accountabil criterion well – ministers are responsible for the acts carried out under the legal authoı conferred upon them and the cabinet is collectively responsible for its policies to ' legislature. It is almost trite to say that these traditional doctrines of ministerial ɛ cabinet responsibility are now under question as being misleading or inoperative impossible to attain. My own views on the matter are confused. The pristine doctrines ministerial and cabinet responsibility cannot be applied without some signific: modifications to governments with the scope of activity which prevails today. Yet reject these doctrines completely is surely indefensible for without them we appear have no guides to the most fundamental of political relations – between governme and legislatures, among members of the political executive, between elected politici: and bureaucrats, between governments and those whom they govern. At any ra federalism contributes to the weakening of the responsibility of the executive to 1 legislature.

To the extent then that the actual locus of decision-making in respect to increasing number of public matters has shifted from individual governments intergovernmental groupings the effective accountability of executives both to th respective legislatures and to those whom they govern is weakened. [...]

But in an even more crucial sense federalism puts some issues permanently almost permanently on the public agenda and keeps others off. [...]

Canadian politics is almost monopolized by territorially-based conflicts to 1 neglect of other issues which divide Canadians along other cleavages – for examp rich as against poor, authoritarians as against – liberals, the upwardly-mobile as agaiı those with stable or declining status and so on. Why is Ottawa so much mc preoccupied with the reduction of regional economic disparities than with redistributi measures on an inter-personal basis? How was it that the crucial debate over pub retirement pensions of the mid-1960's involved hardly at all the intergeneratioı distribution of burdens and benefits? [...]

Let us be frank about it. Executive federalism "organizes into politics" the ests of governments and of those private groupings which are territorially :entrated. The system almost by its inherent nature weakens the influence of other ests.

Federalism is thus an important influence in perpetuating inequalities among adians. This is so despite countervailing efforts of the central government to narrow onal economic disparities and to sustain national minimum standards of public enditures and services by the provincial and local governments. One of the results of continuing conflicts between Ottawa and the provinces is to displace other conflicts ong Canadians, particularly those between the relatively advantaged and those who less so. So long as the major cleavages are between governments, inequalities *within* provinces are buttressed. I would also argue but in a tentative way that the processes executive federalism have contributed to the somewhat indiscriminate growth of ernment activity in the past two decades! [...]

The historian T.W. Acheson has said this of the recent involvement of the onal authorities in the Maritime provinces:

> Another side effect of the federal intervention was the creation of a new bourgeoisie elite composed of professional civil servants, medical doctors and academics who joined the lawyer-politic-ian-businessman leadership of the community and gave to it a distinctly professional flavour. Indeed, with its emphasis upon place and sinecures, and with the patron-client relationship which the monopolistic hierarchies of provincial govern-ments and institutions of higher learning encouraged, Maritime society began more closely to resemble an eighteenth – than nineteenth-cen-tury society. [...] It was a captive elite largely dependent for opportunity, position, and status on federal resources and ultimately subject to the will of the federal government. Most important, it was an elite with no resource base, one incapable of generating anything more than services, producers of primary or secondary goods played little role in its ranks.

While governmental and political activity is less dominant in the larger ovinces there has arisen a competitiveness between the federal and provincial thorities that has resulted in a costly duplication of effort.

My last charge against executive federalism which I shall discuss in somewhat ore detail than the others is that it leads to continuing conflicts among governments. .]

One of the crucial elements in contemporary executive federalism is the creasing importance of intergovernmental affairs specialists, of officials and agencies ot responsible for particular programs but rather the relations between jurisdictions. ..]

The role of the intergovernmental affairs specialist is to protect and extend the owers of the jurisdiction for which he works, and an important element of this power dheres in its financial resources. Despite the high-flown justifications that such persons make for their occupations, this is in fact their only important role. The game is at least as intricate as international diplomacy, with which it shares many similarities, and the players have the satisfaction that no one has as yet been killed because of their activities. The context is clubby and when new members join they soon discover that they can't be very influential unless and until they accept the almost wholly implicit rules of the club. In his stance toward other governments the federal-provincial relations specialist has a single-minded devotion to the power of his jurisdiction. And because his counterparts in other governments have the same motivations, conflict is inevitable. In his relations with elements of his own government the objective of the federal-provincial specialist is to ensure that operating agencies will not by collaborative intergovernmental interactions weaken the power of federal or provincial jurisdiction as such.

I have come to the pessimistic conclusion that as governments become more sophisticated in their operations conflict among these governments will increase in scope and intensity.

-Research Note-

DEMOCRATIC DEFICIT

It is true that Canada relies on executive federalism to power the federal system. It is also true that executive federalism is quite secretive and that this produces a substantial democratic deficit. It is also true that Canadians become annoyed about this secrecy when made aware of it.

What follows from these observations? First, it is hard to see why there is any need to entrench executive federalism deeper into constitutional forms. The Meech Lake Accord would have introduced requirements for a First Ministers Conference each year on the "Canadian economy and such other matters as may be appropriate," and a second First Ministers Conference on various subjects, in addition to an open agenda.[1] For reasons of democratic deficit, it is difficult to be enthusiastic about these proposals If these conferences are to evolve, they should evolve by custom, and hopefully will do so in a way and by means that respond to the perceived democratic deficits they produce. Entrenchment in the Constitution would increase the democratic deficit, and make responding with curative procedures more difficult.

Second, it is hard to see that the democratic deficit can be removed by any legal or constitutional prohibition on intergovernmental interchanges. These practices are the outgrowth of Canadian governmental culture. A better way to shake the democratic deficit out of intergovernmental culture would be to experiment with oversight by representative institutions. Representative institutions are where the democratic spirit runs strongest in Canada's governmental system. It might be profitable to try strengthening legislative committee oversight of executive federalism patterns; allowing representative institutions to review key intergovernmental appointments; requiring intergovernmental ministries and their para-public outgrowths to report annually to representative institutions.

---

1 *Constitution Amendment, 1987* [Meech Lake Accord], secs. 8 and 12 (proposed but not proclaimed). The *Charlottetown Accord, Draft Legal Text*, Oct. 9, 1992, s. 31, would have added s. 37.1 to the *Constitution Act, 1982* which simply would have required an annual first mininsters conference with nothing said about the agenda.

Perhaps reforms with legislative oversight would reduce the democratic deficit Canadian style executive federalism and imbue its culture with more accountability d a stronger democratic spirit. If these experiments were tried, undoubtedly they ould themselves have to be reviewed continually to judge what worked and what did ot.

l) Intergovernmental Agreements

REFERENCE RE CANADA ASSISTANCE PLAN

[1991] 2 S.C.R. 525.

he *Canada Assistance Plan* authorized the federal government to enter into agreements ith provincial governments to pay them contributions toward their social assistance and elfare expenditures. Canada entered into agreements with each province in 1967. The *anada Assistance Plan* provided for a procedure for alteration or termination of the ontribution. Canada unilaterally terminated its contribution. Canada's termination was by an ct of Parliament, the *Government Expenditures Restraint Act*, S.C. 1991, c. 9, which did not illow the stipulated procedure. British Columbia, Alberta, and Ontario challenged the nilateral cancellation on various grounds.

he challenge raised two issues: whether Canada had authority to cancel its contribution, and hether Canada had followed the correct procedure when it canceled its contribution. The upreme Court of Canada held that Canada did have the necessary authority to cancel its ontribution, but did not follow the correct procedure. However, the court went on to hold that e *Restraint Act* was nevertheless effective to terminate Canada's contribution.]

OPINKA J. [for the Court]: – [...] In general, the language of the Plan is duplicated in he Agreement. But the contribution formula, which actually authorizes payments to the rovinces, does not appear in the Agreement. It is only in s. 5 of the Plan. Clause 3(1)(a) f the Agreement provides that "Canada agrees [...] to pay to the province of British Columbia the contributions or advances [...] that Canada is authorized to pay to that rovince under the Act and the Regulations". That means, of course, the contributions or dvances authorized by s. 5 of the Plan, an instrument that is to be construed as subject to mendment. This is the effect of s. 42(1) of the *Interpretation Act* which states:

42(1) Every Act shall be so construed as to reserve to Parliament the power of repealing r amending it, and of revoking, restricting or modifying any power, privilege or dvantage thereby vested in or granted to any person.42(1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the *Interpretation Act* governs the interpretation of the Plan and all federal statutes where no contrary intention appears, the matter will be resolved by reference to it.

It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the Plan. To assert the contrary would be to negate the sovereignty of Parliament. This basic fact of our constitutional life was, therefore,

present to the minds of the parties when the Plan and Agreement were enacted a concluded. The parties were also aware that an amendment to the Plan would have to initiated by the government by reason of the provisions of s. 54 of the *Constitution A 1867*. If it had been the intention of the parties to arrest this process, one would ha expected clear language in the Agreement that the payment formula was frozen. Instea the payment formula was left out of the Agreement and placed in the statute where was, by virtue of s. 42, subject to amendment. In these circumstances the natu meaning to be given to the words "authorized to pay [...] under the Act" in cl. 3(1)(a) that the obligation is to pay what is authorized from time to time. The government wa therefore, not precluded from exercising its powers to introduce legislation Parliament amending the Plan. [...]

If this appears to deprive the Agreement of binding effect or mutuality, whic are both features of ordinary contracts, it must be remembered that this is not an ordina contract but an agreement between governments. Moreover, s. 8 itself contains a amending formula that enables either party to terminate at will. In lieu of relying o mutually binding reciprocal undertakings which promote the observance of ordina contractual obligations, these parties were content to rely on the perceived politic price to be paid for non-performance.

The result of this is that the Government of Canada, in presenting Bill C-69 t Parliament, acted in accordance with the Agreement and otherwise with the law whic empowers the Government of Canada to introduce a money bill in Parliament. [...]

REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS REPORT ON A RENEWED CANADA, ISSUE 66

(OTTAWA: QUEEN'S PRINTER, 1992) (CO-CHAIRS: G.-A BEAUDOIN AND D. DOBBIE), pp. 67-69.

INTERGOVERNMENTAL AGREEMENTS

Intergovernmental agreements are important tools for coordinating th activities of the federal and provincial governments. They have been concluded in a hos of areas and relate to the exercise of powers, the expenditure of money, the provision o services and the administration and enforcement of laws.

Although intergovernmental agreements are similar to agreements betwee private individuals, they differ substantially in at least one way. Because of th constitutional principle of parliamentary supremacy, they are not binding on Parliamen or the legislatures. This results in uncertainty and, as the recent challenge to the *Canad Assistance Plan* amendments has shown, it can create bitter divisions betwee governments.

Two of the federal government's proposals recognize this problem. The government has offered to negotiate and give constitutional protection to agreements relating to immigration and cultural matters. However, we consider that this problem should be addressed more generally. For example, the government's proposals relating to shared-cost programs and conditional transfers (proposal 27) illustrate another area in which intergovernmental agreements may require constitutional protection.

There are a number of ways in which intergovernmental agreements can be otected. The greatest protection would be afforded by a constitutional amendment that ould make them part of the Constitution. However, the complexity of the nstitutional amendment process makes this impracticable in most cases. Not only ould it be difficult to give the agreements constitutional status, it would also be fficult to change or revoke them should the need arise.

A better way to give intergovernmental agreements stability and protect them om unilateral changes would be to provide a process in the Constitution for their pproval. The agreements would not form part of the Constitution and the *Canadian harter of Rights and Freedoms* would apply to them. The approval process would be esigned to open the agreements to public scrutiny and debate.

We propose a process that would provide for the approval of an agreement by ws or resolutions passed by Parliament and the legislature of each province that is a arty to the agreement. Once approved, any alteration or revocation of the agreement ould have to be approved as well, unless the agreement itself established a different rocess for its alteration or revocation. This process would give stability to itergovernmental agreements and it would ensure public debate in Parliament and the egislatures on the merits of the agreements.

We recommend that the *Constitution Act, 1867* be amended to provide a mechanism for giving more certainty to the public policy process in relation to intergovernmental agreements and protecting them from unilateral amendment.

This recommendation was transformed during the 1992 multilateral meetings on the onstitution, and incorporated into the *Consensus Report on the Constitution* (Charlottetown ccord) as item 26. The Charlottetown Accord was decisively rejected by Canadians in a 1992 eferendum.]

CHARLOTTETOWN ACCORD, 1992

26. Protection of Intergovernmental Agreements.

The Constitution should be amended to provide a mechanism to ensure that designated agreements between governments are protected from unilateral change. This would occur when Parliament and the legislature(s) enact laws approving the agreement.

Each application of the mechanism should cease to have effect after a maximum of five years but could be renewed by a vote of Parliament and the legislature(s) readopting similar legislation. Governments of Aboriginal peoples should have access to this mechanism. The provision should be available to protect both bilateral and multilateral agreements among federal, provincial and territorial governments, and the governments of Aboriginal Peoples. A government negotiating an agreement should be accorded equality of treatment in relation to any government which has already concluded an agreement, taking into account different needs and circumstances.

INTERGOVERNMENTAL COOPERATION: INTERGOVERNMENTAL AGREEMENTS

- Research Note -

INTERGOVERNMENTAL AGREEMENTS

Intergovernmental agreements are one of the more important instruments by wh[illegible] intergovernmental relations are conducted in the Canadian political syst[illegible] notwithstanding that such agreements are not protected by the Constitution nor by th[illegible] Courts (*Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525[illegible] Intergovernmental agreements are amazingly diverse as concerns the parties involve[illegible] (federal-provincial; provincial-provincial; aboriginal-federal; aboriginal-provincial) and in the subject matter they cover.

Canadian intergovernmental agreements are not reduced to a standard form. No centra[illegible] secretariat monitors them. Notwithstanding the bewildering complexity of form content and ongoing compliance management, the agreements remain a majo[illegible] instrument by which Canadian governments coordinate policy objectives.

Conservative estimates of intergovernmental agreements in Canada place the number at about one thousand.[1] However, considering that there are over 600 First Nations governments in Canada which have each entered into numerous treaties with the federal, provincial, municipal, and other tribal governments, this number is *very* conservative. Add the thousands of municipal-municipal, Regional-municipal, and provincial-municipal agreements, and a number of at least 5,000 intergovernmental agreements seems more in order.

Some of the intergovernmental agreements are enacted into implementing statutes. For example, the James Bay and Northern Quebec Agreement, to which the federal government, Quebec, the Grand Council of the Crees and the Northern Quebec Inui[illegible] Association are all parties, was ratified by legislation in *An Act Approving the Agreement Concerning James Bay and Northern Quebec*, S.Q. 1976, c. 46 and the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32. The legal status of the agreement was defined in *Cree Regional Authority v. Quebec* (1991) 47 F.T.R. 251, where Rouleau J. stated that the Agreement itself imposed obligations and duties amendable only by way of statute (at 267).

In addition to legislation which implements the agreements, there are also statutes which grant authority to designated Ministers to enter into intergovernmenta[illegible] agreements. For example, the *Federal-Provincial Fiscal Arrangements Act*, R.S.C 1985, c. F-8, as am. S.C. 1995, c. 17, permits the Minister (Finance or Nationa[illegible] Revenue) to pay fiscal equalization payments (ss. 3-4), to pay fiscal stabilizatio[illegible] payments (ss. 5-6), to enter into tax collection agreements (ss. 7-8), to pay establishe[illegible] program financing contributions (s. 13), to make payments for post-secondary education (s. 20) and extended health care programs (s. 23). The provinces generall[illegible]

1 Nigel Banks, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta. L. Rev. (No. 4) 792.

:ovide for complementary enabling legislation within existing statutes.[1] Some rovinces, Saskatchewan for example, have enacted specific legislation which allows ie provincial minister to enter into all intergovernmental agreements.[2]

he legal capacity of governments to enter into intergovernmental agreements and to elegate this power to officials has been unambiguously upheld by the Courts. In *Re Inastan and the Queen*, (1977), 15 O.R. (2d) 1977, the Ontario Court of Appeal upheld he delegated authority of the Acting Director of Corrections authorized by a ederal-provincial agreement between the province of Saskatchewan and the federal ;overnment: "There is no question of delegation of legislative jurisdiction" the Court ield, "each [level of government] was operating properly within its own sphere dealing with [these] situations" (at 520).

While the capacity to enter into the agreements is clear, the legal status of the intergovernmental agreements themselves is much less so. It is not clear whether third parties can sue the governments for non-performance of the agreements. Any lawsuit founded in the agreements must respect Crown immunities doctrines. Agreements implementing constitutional obligations, for example, the obligation to provide minority language education, must conform closely to the constitutional obligation, and may be challenged as failing to do so.

The agreements have been challenged only in a few occasions. In addition to the *Reference Re CAP* (supra p. 160), the agreements have given rise to challenges by third parties who might receive the benefits accorded by the agreements. In *Finlay v. Minister of Finance*, [1986] 2 S.C.R. 607, the Court granted standing to an individual who would receive welfare benefits under Manitoba's *Social Allowance Act*, as funded by the Canada Assistance Plan. For the court, Le Dain J. had no question of the suitability of Finlay's challenge of government action under the CAP:

> There will no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing will raise issues that are not appropriate for judicial determination, but the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such are clearly justiciable. [at 632]

The Courts have also made clear that federal and provincial parties to an intergovernmental agreement are free to unilaterally change the agreements. This is the teaching of the Supreme Court of Canada in *Reference Re Canada Assistance Plan*, supra. In refusing to uphold British Columbia's challenge to unilateral Federal modification of the CAP agreement, Mr. Justice Sopinka stated:

1 See, for example, *Family Responsibility & Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31, s. 55; *Shortline Railways Act, 1995*, S.O. 1995, c. 2, s. 15; *Federal-Provincial Farm Assistance Act*, R.S.A. 1980, c. F-7, s. 1; *College & Institute Act*, R.S.B.C. 1996, c. 52, s. 4.

2 *Federal-Provincial Agreements Act*, R.S.S. 1978, c. F-13.

> If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between governments [...] In lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance.

The Court relied on principles of parliamentary sovereignty in holding that a party to intergovernmental agreement could unilaterally change, or abrogate the agreeme: However, a contrary view appears to exist where the agreements are incorporated way of statute and where the agreement creates duties in law. In *Cree Region Authority* (supra, at p. 267), Rouleau J. said that "the [James Bay & Northern Quebe agreement cannot be amended or supplanted without participation of all of the origir signatories."

The Beaudoin-Dobbie report[1] explored the constitutional position of unilater amendment of intergovernmental agreements. The report recommended recognition the constitutional principle of parliamentary sovereignty but suggested certa constitutional modifications that would make the agreements more stable. The Repc advocated for an approval process for the intergovernmental agreements, giving the heightened public scrutiny and to allow for an informed debate on the agreements. Th process would also apply to changes or modifications to the agreement. Agreements th went through this process would have constitutional force in a certain period.

It is doubtful whether the criticism that intergovernmental agreements can be annulle unilaterally reflects real problems in current Canadian federalism. Almost ever international treaty (including the U.N. Declaration of Human Rights, the GATT, an the NAFTA) that the Canadian government enters into can also be unilaterally annulle It is rare that governments withdraw from these treaties, absent extraordinar circumstances. Moreover, in a *flexible* system, opting-out *should* be within the powe of the party. Rigid adherence to agreements made decades ago without regard to th current environment is not necessarily positive, especially when the agreements mad are as detailed as the *Agreement on Internal Trade*, which consists of over 1800 article Perhaps the death of this recommendation in the Beaudoin-Dobbie report does no require any extensive grief.

In Australia, Germany and the United States, the power to enter into intergovernment agreements is found in the constitution. Canada has reached the same position without specific constitutional text. A Charlottetown-type of provision advocated in th *Beaudoin-Dobbie Report* goes further than merely making intergovernment agreements resistant to unilateral governmental abrogation; in essence the specific procedure would give governments easier access to a limited form of constitution amendment. Were there a serious problem here (which there is not) such a text migh

1 Canada, *Report of the Special Joint Committee on a Renewed Canada [Beaudoin-Dobbie Report]* (Ottawa: Queen's Printer, 1992), p. 67

attract few objections. Given the remarkable rigidity Canada's Constitution already imposes on constitutional amendments, more rigidity for aligning jurisdictional responsibilities is probably not advisable. Proposals for a new constitutional procedure to stiffen intergovernmental agreements seem to be more of a theoretical solution to a non-existent problem, and are more likely to damage Canadian federalism by draining away some of its flexibility, than to improve it.

Nonetheless, it is clear that some changes are necessary for intergovernmental agreements to find their proper fit in the political fabric of Canada. A constitutional procedure to entrench the agreements makes the agreements too rigid. The rigidity of other policy instruments is what has led these governments to the flexible intergovernmental agreements in the first place.

Certain changes are required to improve the accessibility problems that intergovernmental agreements currently have. It would be helpful to have a central registry for intergovernmental agreements. This would assist in making the agreements more accessible to citizens most affected by them. A legal databank of litigation on the agreements also seems in order to improve accessibility. Research on the form and content of the agreements might help us understand if the agreements have any lowest common denominators which could assist governments in the future.

Changes to the status of intergovernmental agreements could also be made to improve their democratic-deficit problems. At current, the agreements are made with no public scrutiny or debate. They do not require ratification by legislatures; no notice or hearing need be given to any parties. The answer to these problems likely does not lie in the machinery of constitutional law. The better solution would be for provincial legislatures or Parliament to enact their own legislation mandating an approval or consultative process. When individuals were concerned with the tight control over information held by governments up to the 1980s, the solution was not found in the Constitution — it was found in statutory *Freedom of Information Acts*. There is no reason to think that this situation is any different.

4. Key Concepts in Constitutional Law

(a) Supremacy of the Constitution

CONSTITUTION ACT, 1982
s. 52(1)

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

- Research Note -
LAWS INCONSISTENT WITH THE CONSTITUTION

Section 52(1) of the *Constitution Act, 1982* states that any law t inconsistent with the provisions of the Constitution is of no force or effect. St which conflict with the Constitution are invalid in the most radical sense; they (become law. In Strayer, *The Canadian Constitution and the Courts* (3d ed., 198 author states at p. 32:

> Now we need look no further than s. 52 of the *Constitution Act, 1982* for the principle of supremacy of the Constitution [...] and for the intended consequence of supremacy; that is, the invalidity of inconsistent laws.

In *R. v. Therens*, [1985] 1 S.C.R. 613 at 638, the Supreme Court of Canada, spc through Le Dain J. stated:

> [...] the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection. This results from s. 52 of the *Constitution Act, 1982*, which removes any possible doubt or uncertainty as to the general effect which the *Charter* is to have by providing that it is part of the supreme law of Canada and that any law that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect.

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 148, Dickson J. emphasizc importance of s. 52(1):

> [...] The Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms*, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the *Constitution Act, 1982* so mandates.

Again in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 312, Dickson C.J.C. saic

> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.
>
> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law.

"Constitutional Law of Canada" (Loose-leaf Edition) Vol. 1, P.W. Hogg, (Toronto: Carswell, 1997). 2001.

pliedly abandoned its authority over Quebec (and there was no significant insurgency within Quebec), would the courts pronounce the separatist regime lawful.[149]

5.8 Cooperative federalism

The formal structure of the Constitution carries a suggestion of eleven legislative bodies each confined to its own jurisdiction, and each acting independently of the others. In some fields, that is exactly what happens.[150] However, in many fields, effective policies require the joint, or at least complementary, action of more than one legislative body. Particularly is this so where humanitarian and egalitarian sentiments have called for nation-wide minimum standards of health, education, income maintenance and other public services, most of which are within the territorially-limited jurisdiction of the provinces.

The formal structure of the Constitution also carries a suggestion of eleven separate fiscal systems, with each province levying taxes to raise the revenue it needs for its legislative policies, and the federal government doing the same. But if this were in fact the case the poorer provinces would be forced to provide much lower standards of public services, and much less economic opportunity, for their residents. In order to counter Canada's disparities in regional wealth, the richer regions have to help the poorer regions. To some extent they have always done so, but the current redistribution of governmental revenue through shared-cost programmes and equalization grants is on an unprecedented scale of size and complexity.

No federal nation could survive and flourish through war and peace, depression and inflation — to say nothing of shifting popular values — without the means of adapting its constitution to change. But the formal institutions lack the capacity to respond. Major change does not come through the courts: judicial interpretation accomplishes only incremental changes in the Constitution, and the changes do not necessarily reflect the needs of the day. Nor does change typically occur through the amending process. The amending procedures of the Constitution Act, 1982 require such broad consensus for most amendments that they cannot be a regular form of adaptation.

The related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to

149 See Brossard, note 124, above, 309; Matas, note 124, above, 393-395.

150 There is a school of thought that holds that competition between governments is more typical than cooperation, and more desirable, because competing governments are more likely to provide people with the policies they prefer: Royal Commission on the Economic Union and Development Prospects for Canada, *Report* (Macdonald Report) (1985) Supplementary Statement by Albert Breton, vol. 3, 486-526; Smiley, *The Federal Condition in Canada* (1987), 94-97. This model of "competitive federalism" is close to the idea of provinces as "social laboratories": note 45, above.

mitments which require legislative action. In a system of responsible government, it is only in an unusual cabinet or parliamentary situation that there is any possibility of a Premier or Prime Minister having a commitment repudiated on his return home from a conference. Thus, the first ministers, when they meet, bring together the totality of executive power and (in practice) legislative power. As well, in Canada the relatively small number of provinces keeps the number of participants at a manageable level which facilitates direct relationships between the governments and ensures that each government has an influence on the result.

The picture of intergovernmental relations does not end at the level of the first ministers. There are several important standing federal-provincial committees of ministers, and nearly every cabinet minister meets with his counterparts in the other governments from time to time. It has been said only half in jest that there are usually more provincial cabinet ministers in Ottawa on any given day than there are federal cabinet ministers. Similarly, there are frequent meetings of permanent government officials from the provincial and federal governments. At any given time, there are over 150 organizations, conferences and committees involved in intergovernmental liaison, indicating the vast array of consultative organisms within the Canadian federation. In addition, of course, there are countless informal contacts among civil servants of all governments.[154]

The dominant role of the executive branch of government in working out intergovernmental relations has led Smiley to characterize the Canadian constitution today as ''executive federalism''.[155] It certainly must be frustrating for legislators to find that their role is confined to ratifying arrangements worked out elsewhere. But in any country, whether federal or unitary, which has adopted the system of responsible government, the legislative bodies have little real influence in policy-making in any case. The federal Parliament, despite its representation from all parts of the country, is too dominated by cabinet and the party system to be a suitable forum for federal-provincial adjustment; and it does not pretend to such a role.[156] It is the elected and permanent officials of the executive branches of the federal and provincial governments who, through ''diplomacy'', search for cooperative means to accomplish limited social and economic objectives which require the action of more than one government.[157] The next chapter, Financial Arrangements, is almost a case-study of cooperative (or executive) federalism. It includes failures as well as successes, but the process which it describes is undeniably an important feature of Canada's constitutional law.

---

154 Smiley, *Canada in Question* (3rd ed., 1980), 94.

155 Smiley, *The Federal Condition in Canada* (1987), 83.

156 In the United States' Congress the absence of strict party discipline has allowed regional interests to be somewhat better accommodated. This is one reason why there are fewer relations between governments in the United States than in Canada. For more comparisons in the financial area, see ch. 6, Financial Arrangements, under heading 6.9, ''Conclusions'', below.

157 Simeon, *Federal-Provincial Diplomacy* (1972) is a study of three cases of federal-provincial negotiations.

29.7 Environmental protection

(a) Introduction

The environment,[87] comprising as it does "all that is around us", is too diffuse a topic to be assigned by the Constitution exclusively to one level of government.[88] Like inflation,[89] it is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction.

(b) Federal power

At the federal level, the most obvious sources of power are the following. The criminal law power (s. 91(27)) provides power to prohibit activities that are harmful to the environment. This power has been used to uphold the Canadian Environmental Protection Act, which established a regulatory structure for the identification and control of toxic substances.[90] The power over fisheries (s. 91(12)) provides power to regulate the environment of fish.[91] The power over navigation and shipping (s. 91(10)) provides power to regulate the activities of ships, such as the discharge of oil and other harmful substances.[92] As well, the jurisdiction over coastal waters outside the boundaries of the provinces would include the power to control pollution in Canadian waters (s. 91(1A)).[93] There is also federal jurisdiction over international and interprovincial rivers, where pollution in one province will be carried into other provinces or countries.[94] The

87 See Laskin, "Jurisdictional Framework for Water Management" in Ministry of Northern Affairs and National Resources, *Resources for Tomorrow* (1961), 211; Gibson, "The Constitutional Context of Canadian Water Planning" (1968) 7 Alta. L. Rev. 81; Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970) 48 Can. Bar Rev. 66; Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall L.J. 647; Alhéritière, "Les problèmes constitutionnels de la lutte contre la pollution de l'espace atmospherique au Canada" (1972) 50 Can. Bar Rev. 561; Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U. Toronto L.J. 54; Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnnel" (1977) 23 McGill L.J. 207; Monahan, *Constitutional Law* (1997), ch. 11.

88 *Friends of Oldman River Society* v. *Can.* [1992] 1 S.C.R. 3, 63, 64, 70.

89 *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, 458.

90 *R.* v. *Hydro-Québec* [1997] 3 S.C.R. 213; for discussion, see ch. 18, Criminal Law, under headings 18.4a, "Environmental protection", and 18.10, "Criminal law and regulatory authority", above.

91 See the earlier section of this chapter, 29.5, "Fisheries", above.

92 In *R.* v. *Crown Zellerbach* (1984) 7 D.L.R. (4th) 449 (B.C.C.A.), it was held that a federal prohibition of dumping waste at sea could not be upheld under s. 91(10) without showing some potential harm to shipping or navigation. The s. 91(10) argument was not pursued in the Supre[illegible] Court of Canada, where the law was upheld under p.o.g.g.: [1988] 1 S.C.R. 399, 418.

93 *R.* v. *Crown Zellerbach* [1988] 1 S.C.R. 399, 417 (obiter dictum).

94 *Ibid.*; *Interprovincial Cooperatives* v. *The Queen* [1976] 1 S.C.R. 477.

of the Minister of Transport[104] to encompass an environmental assessment of a project that was mainly within provincial jurisdiction.[105]

The Supreme Court of Canada held that the Guidelines Order was valid, and that it did impose on the Minister of Transport the duty to require an environmental assessment of the project. The federal Parliament had the power to provide for an environmental assessment as an incident of any institution or activity that was otherwise within federal jurisdiction. However, "the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility".[106] That responsibility was "a necessary condition to engage the process", but it was open to Parliament to require a review that extended to "the environmental effect on all areas of federal jurisdiction".[107] In this case, the effect of the Guidelines Order was to require the Minister of Transport, in his capacity as a decision-maker under the Navigable Waters Protection Act, "to consider the environmental impact of the dam on such areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here".[108]

What, then, was the head of federal power under which the Department of the Environment Act, and its creature, the Guidelines Order, were enacted? La Forest J.'s answer to this question was prefaced by the proposition that Parliament has the power to enact legislation "under several heads of power at the same time".[109] The power to provide for environmental impact assessment came from all "the relevant subject matters enumerated in s. 91 of the Constitution Act, 1867".[110] That was the authority for "the substance" of the Guidelines Order. As for the "procedural or organizational element that coordinates the process of assessment", that "may be viewed either as an adjunct of the particular legislative powers involved" or as an exercise of "the residuary power in s. 91".[111] Therefore, the Guidelines Order was within the power of the federal Parliament.

The effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental impact assessment of any project that has

---

104 The federal Minister of Fisheries and Oceans was also asked by the Friends of the Oldman River Society to order an environmental assessment of the project on account of the impact on the fishery, but he refused. The proceedings were also brought against him, but the Supreme Court of Canada confined its reasons to the obligation of the Minister of Transport.

105 If the project were within federal jurisdiction, for example, an airport, then all aspects of environmental assessment would be within federal jurisdiction, because the province would lack the authority to halt the project.

106 [1992] 1 S.C.R., p. 50.

107 *Id.*, pp. 50-51.

108 *Id.*, p. 50.

109 *Id.*, p. 51.

110 *Ibid.*

111 *Id.*, p. 52, citing *Jones* v. *A.G.N.B.* [1975] 2 S.C.R. 182, 189, where the Court had upheld the federal Official Languages Act under the residuary branch of the peace, order, and good government power. For discussion, see ch. 17, Peace, Order and Good Government, under heading 17.2, "The gap branch", above.

zoning, construction, purification of water, sewage, garbage disposal and noise.[115] The provinces can also control activities on provincial public lands (s. 92(5)), which contain much mining and lumbering.[116] The provinces also possess the power to tax (s. 92(2)), and can use it to tax the consumption of products that cause pollution, such as gasoline, and to exempt products that reduce pollution, such as insulation.[117]

115 *R.* v. *Young* (1973) 1 O.R. (2d) 564 (C.A.) (anti-noise by-law upheld).
116 Chapter 28, Public Property, above.
117 See next chapter, Taxation, below.

Hogg, P.W., "Constitutional Law of Canada" (Toronto: Carswell, 1997.).

11

Treaties

11.1 Definition of treaty *11-1*
11.2 Power to make treaties *11-2*
11.3 Procedure for making treaties *11-3*
(a) Signing *11-3*
(b) Ratification *11-4*
(c) Role of Parliament *11-4*
11.4 Implementing treaties *11-5*
(a) The need for legislation *11-5*
(b) The federal problem *11-7*
(c) The United States *11-7*
(d) Australia *11-8*
11.5 Implementing treaties in Canada *11-9*
(a) Section 132 *11-9*
(b) Labour Conventions case *11-10*
(c) Evaluation of Labour Conventions case *11-12*
11.6 Provincial treaty-making *11-16*

11.1 Definition of treaty

A treaty is an agreement entered into between states which is binding in international law.[1] A treaty may be between only two states (bilateral), or more than two states (multilateral). It may be called a "treaty", or it may be called any one of a variety of other names: a "convention", a "charter", a "protocol", and many others, including simply an "agreement". For those versed in international diplomacy, each of these names does carry certain connotations as to the nature of the treaty, but the various names are of no legal significance: all agreements between states which are intended to be binding in international law, by whatever name they are called, are treaties.

1 For a valuable collection of materials, notes and bibliography on the law of treaties in Canada, see Kindred (ed.), *International Law* (5th ed., 1993), ch. 3.

light of the constitutional law respecting the implementation of treaties. For the moment, it suffices to say that the provincial claim has never been accepted by the federal government, and the federal government does in fact exercise exclusive treaty-making powers.

11.3 Procedure for making treaties

(a) Signing

International law does not prescribe any formal procedures for the making of treaties, and there are a variety of procedures in use. The most formal treaty is in "head of state" form, which means that for Canada the Queen would be named as a party. Until 1947, treaties in head of state form required a formal act by the King in London, but since 1947 it has become possible to conclude all formalities in Canada.[6] However, the treaty in head of state form has become so unusual in international practice that Canada has never since 1947 had occasion to use its new formal powers.[7] The treaty in head of state form has been supplanted by its less formal cousin, the treaty in intergovernmental form, which is a treaty in which the governments (not the formal heads of state) of the agreeing states are named as the parties. Treaties in intergovernmental form are signed by an official (called a plenipotentiary) who acts under the authority of an "instrument of full power", which is a document signed by the foreign minister (for Canada the Secretary of State for External Affairs) granting to the plenipotentiary "full power" to sign the treaty.[8] A third kind of treaty, which is less formal than the treaty in intergovernmental form, and which is now more common, is the treaty in exchange-of-notes form. This is concluded by an exchange of notes (or letters) between the two agreeing states; the notes may be signed by the states' foreign ministers or by ambassadors or high commissioners or even by a minister in charge of a department other than external affairs.[9] A treaty in exchange-of-notes form does not consist of a single formal document, but of two documents: the first is the note in which one state proposes to another the terms of the agreement, and the second is the note in reply in which the other state accepts the proposed terms. Multilateral treaties are rarely concluded in exchange-of-notes form.

---

6 Before 1939 any document which required authentication under the Great Seal of the Realm had to be sealed in London, because Canada had no Great Seal of its own. The Seals Act, S.C. 1939, c. 22, created the Great Seal of Canada, and obviated the necessity to send documents to London for sealing. But treaties in head of state form still had to go to London for the King's approval prior to sealing in Canada, because the Governor General lacked the authority to give this approval. This disability was removed in 1947 with the adoption of new Letters Patent constituting the office of Governor General: note 3 and accompanying text, above.

7 Gotlieb, note 4, above, 40.

8 Gotlieb, note 4, above, 87, gives an example of an instrument of full power.

9 *Id.*, 33.

resolution in each House approving the treaty. The resolution is not in statutory form, and does not receive royal assent. Of all the treaties which Canada ratified between 1946 and 1966 approximately one quarter were submitted to Parliament for approval. However, there is no practice of securing Parliament's approval of treaties which do not require ratification, and these are now the more common kind of treaty.[14]

11.4 Implementing treaties

(a) The need for legislation

The narrative so far has been concerned with the making of treaties, that is to say, the formation of treaty obligations. But the making of a treaty must be distinguished from the implementing of the treaty, that is to say, the performance of the treaty obligations. As soon as a treaty is made and in force, the states that are parties to the treaty come under an obligation in international law to implement the treaty.

Canada's constitutional law, derived in this respect from the United Kingdom, does not recognize a treaty as part of the internal (or "municipal") law of Canada. Accordingly, a treaty which requires a change in the internal law of Canada can only be implemented by the enactment of a statute which makes the required change in the law. Many treaties do not require a change in the internal law of the states which are parties. This is true of treaties which do not impinge on individual rights, nor contravene existing laws, nor require action outside the executive powers of the government which made the treaty. For example, treaties between Canada and other states relating to defence, foreign aid, the high seas, the air, research, weather stations, diplomatic relations and many other matters, may be able to be implemented simply by the executive action of the Canadian government which made the treaty.[15] But many treaties cannot be implemented without an alteration in the internal law of Canada. For example, treaties between Canada and other states relating to patents, copyrights, taxation of foreigners, extradition, and many other matters, can often be implemented only by the enactment of legislation to alter the internal law of Canada.[16]

The rule that a statute is needed to implement a treaty which involves a change in Canada's internal law contrasts with the rule in the United States. The United States' Constitution, by article 6, simply makes "all treaties" part of "the supreme law of the land". The reason for this difference between Canada and the United States lies in the different procedures for making treaties. We have already

14 Gotlieb, note 4, above, 18.

15 However, any expenditure of money requires parliamentary appropriation.

16 See Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307.

statute is clearly and unmistakably inconsistent with a treaty or other rule of international law, then there is no room for interpreting it into conformity with the international rule and the statute must be applied as it stands.[22]

(b) The federal problem

In a unitary state, there is rarely any difficulty in performing a treaty obligation which necessitates a change in the internal law of the state. In the United Kingdom or New Zealand, for example, once the government has entered into a treaty, it can easily secure the passage of any legislation which is necessary to perform the treaty obligations. There is only one Parliament for the whole country and that Parliament has power to make laws upon all subject matters. Moreover, in a system of responsible government, the government is usually able to control the Parliament. The result is that the government which has the power to form treaty obligations also has the power to see that the obligations are performed through legislative action. The position of a federal state is not so simple. Because legislative power is distributed among a central and several regional legislative bodies, there is the possibility that treaties made by the central government can be performed only by the regional legislative bodies which are not controlled by the central government and which can rarely be persuaded to act in unison.

(c) The United States

In the United States, as we have already noticed, article 6 of the Constitution makes a treaty part of "the supreme law of the land". A treaty made by the central government will therefore become law even if it deals with a subject matter which would otherwise be within the legislative competence of the states; and, if the treaty conflicts with existing or subsequent state laws, the treaty will take precedence.[23]

---

22 The text deals with only a small part of the relationship between international law (which includes both customary and conventional (treaty) law) and domestic law (both statutory and common law). For fuller studies, see Claydon, "The Application of Human Rights Law by Canadian Courts" (1981) 30 Buffalo L. Rev. 727; Claydon, "International Human Rights Law and the Interpretation of the Charter" (1982) 4 Supreme Court L.R. 287; Mendes, "Interpreting the Charter" (1982) 20 Alta. L. Rev. 383; Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265; Schabas, *International Human Rights Law and the Canadian Charter* (2nd ed., 1996). As these works show, the growing body of international human rights law may be an important influence on Canadian domestic law.

23 Where there is conflict between a treaty and a federal statute (an Act of Congress), the rule is that whichever of the two is later in date is deemed to repeal the earlier to the extent of the inconsistency: *Edye* v. *Robertson* (1884) 112 U.S. 580. Of course, if a federal statute does alter or repeal a treaty rule, the United States will be in breach of its treaty obligation in international law.

implemented a treaty prohibiting racial discrimination. In *Commonwealth* v. *Tasmania* (Franklin Dam) (1983),[28] the Court upheld a federal statute that prohibited the construction of a hydro-electric dam in Tasmania, on the ground that the dam would flood a wilderness area listed for preservation by the "World Heritage Committee", an international body acting under a treaty for the protection of the cultural and natural heritage of the world; the construction of the dam would otherwise have been within the jurisdiction of the Tasmanian Legislature (which had in fact purported to authorize construction).

These decisions of the High Court of Australia, and especially the *Franklin Dam* case, indicate that the federal Parliament's external affairs power includes an extensive power to implement the terms of treaties.[29] The dominant school of thought holds that the mere fact that Australia has entered into a treaty in good faith[30] brings the subject matter of that treaty within the external affairs power. A minority school of thought, concerned about an unreviewable expansion of federal power, holds that the subject matter of a treaty must possess some objective (but hard to define) "international" element in order to come within the external affairs power. The former school gained the ascendancy in the *Franklin Dam* case, but the Court split four to three,[31] with the three dissenting judges calling for an additional international element which in their view was lacking from the preservation of wilderness in Tasmania.[32]

11.5 Implementing treaties in Canada

(a) Section 132

Canada has a provision in its Constitution which is addressed to the power to perform treaties. Section 132 of the Constitution Act, 1867 provides that:

28 (1983) 158 C.L.R. 1; folld. in *Richardson* v. *Forestry Commn.* (1988) 164 C.L.R. 261 (upholding interim protection order under treaty power).

29 For a discussion and commentary on the Australian jurisprudence, see Strom and Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993), 25 Ottawa L. Rev. 39; Struthers, "'Treaty Implementation . . . Australian Rules': A Rejoinder" (1994), 26 Ottawa L. Rev. 305.

30 A "colourable" treaty, entered into simply to augment legislative power, would not of course satisfy this school, but it is not easy to imagine how colourability would be established, and in practice the problems have arisen with multilateral treaties, where the large number of party states makes a colourability argument completely implausible.

31 The majority consisted of Murphy, Mason, Brennan and Deane JJ.; the dissenters were Gibbs C.J., Wilson and Dawson JJ.

32 In *Burgess*, Evatt and McTiernan JJ. and, perhaps, Latham C.J. took the absolute view; Dixon and Starke JJ., who concurred in the result, insisted upon an additional international element, which they found to be present. In *Koowarta*, Mason, Murphy and Brennan JJ. took the absolute view; Stephen J., who concurred in the result, and Gibbs C.J., Aickin and Wilson JJ., who dissented, insisted upon an additional international element, which Stephen J. found to be present, and the dissenters found to be absent.

be interpreted as conferring power to implement Canadian treaties. The answer came in the *Labour Conventions* case (1937).[37] In 1919, 1921 and 1928 the International Labour Organization, of which Canada was a member, adopted three conventions under which the members agreed to enact laws limiting the working hours of employees, and requiring a weekly rest and a minimum wage. These treaties were not to be binding upon a member state until the state had ratified them. The government of Canada ratified the three treaties in 1935. The government then introduced into the federal Parliament the legislation which was necessary to perform the treaty obligations, and the Limitation of Hours of Work Act, the Weekly Rest in Industrial Undertakings Act and the Minimum Wages Act were duly enacted.[38] The Supreme Court of Canada, sitting as a bench of six judges, divided evenly as to the validity of the statutes; but the Privy Council held them to be invalid. Lord Atkin, who wrote the Privy Council's opinion, rejected the argument that s. 132 supplied the power to enact the statutes. Section 132 authorized the performance of treaty obligations that bound Canada "as part of the British Empire", but not those that bound Canada "by virtue of her new status as an international person"; s. 132 authorized the performance of the treaty obligations which arose "under treaties between the Empire and ... foreign countries", but not those which arose under treaties between Canada and foreign countries.[39] On this reasoning, it followed that s. 132 was inapplicable.

If s. 132 did not supply the legislative power to implement Canadian, as opposed to Empire, treaties, where was the power to be found? In effect, Lord Atkin answered that this was the wrong question. For the purpose of the federal distribution of legislative powers, he said, "there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained".[40] In other words, in classifying a statute which was required to implement a Canadian treaty, one was supposed to disregard the fact that the purpose of the statute was to implement a treaty and look to the substantive subject matter of the statute. If the statute which was required for implementation of the treaty related to a matter allocated by s. 91 to the federal Parliament, then the federal Parliament would have the power to implement the treaty. If, on the other hand, the statute which was required for the implementation of the treaty related to a matter allocated by s. 92 to the provincial Legislatures, then the provincial Legislatures would have the power to implement the treaty. In this particular case, disregarding the existence of the treaties (the labour conventions), the statutes related to conditions of employment in industry, a matter within the class of subjects "property and civil rights in the province" which was allocated by s.

37 *A.-G. Can.* v. *A.-G. Ont.* (Labour Conventions) [1937] A.C. 326.
38 These three statutes were part of the "Canadian new deal".
39 [1937] A.C. 326, 349.
40 *Id.*, 351.

92(13) to the provincial Legislatures.[41] The result was, therefore, that it was the provincial Legislatures, and not the federal Parliament, which had the power to enact legislation of the kind necessary to implement the labour conventions. The federal legislation was accordingly unconstitutional.

(c) Evaluation of Labour Conventions case

It was in the *Labour Conventions* case that Lord Atkin used his famous "watertight compartments" metaphor: "while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure".[42] For many critics, this dictum has typified the narrow and inflexible approach of the Privy Council to the interpretation of the Canadian Constitution. The reasoning in the *Labour Conventions* case is certainly open to criticism. It is true that the framers of the Constitution Act, 1867 did not contemplate that Canada would acquire treaty-making power in its own right, but does it follow that s. 132 cannot be "strained" or "tortured" to cover the uncontemplated event?[43] Section 132 makes abundantly clear that the federal Parliament was to have the power to implement treaties. Surely, it is an unduly narrow and literal interpretation of the section to refuse to allow it to continue to cover what is essentially the same subject matter. The result of the *Labour Conventions* case is that the federal Parliament has the power to implement "Empire treaties"[44] under s. 132, but no power to implement Canadian treaties under s. 132. As F.R. Scott has said: "So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of 'watertight compartments' existed; once she became a nation in her own right, impotence descended".[45] This may overstate the case, but the result is unquestionably anomalous.

Even if one agrees with the proposition that s. 132 cannot be extended to cover Canadian treaties, Lord Atkin's conclusion in the *Labour Conventions* case does not necessarily follow. The key to Lord Atkin's reasoning lies in his assertion, quoted above,[46] that for the purpose of the federal distribution of powers "there is no such thing as treaty legislation as such". This means that legislation implementing a treaty may not be classified as "in relation to" the treaty, but must be

41 See sec. 20.8, "Labour relations", below.

42 [1937] A.C. 326, 354.

43 [1937] A.C. 326, 350.

44 It was not technically accurate even in 1867 to speak of "treaties between the British Empire and foreign countries". Treaties were not made in the name of the British Empire. They were made by the King on the advice of his British ministers, and unless they contained provisions to the contrary they automatically bound all of his possessions. The non-technical language reinforces the argument made in the text that the language should not be read excessively literally: see Kennedy, *The Constitution of Canada 1534-1937* (2nd ed., 1938), 552.

45 Scott, "Labour Conventions Case" (1956) 34 Can. Bar Rev. 114, 115.

46 Note 40, above.

disturbed at this prospect. The proliferation of multinational treaties concerning health, education, welfare, labour relations, human rights and other matters within provincial jurisdiction which have been sponsored by international organizations of which Canada is a member is a sufficient reason for caution. It is arguable that, while s. 132 may have been the appropriate rule when treaties were confined to such matters as defence, diplomatic relations, boundaries and international trade, it may no longer be the appropriate rule for an era when treaties cover a wide range of domestic affairs as well.

W. R. Lederman[55] has suggested a middle ground between full acceptance of the *Labour Conventions* rule and its complete rejection. He takes the view that the federal Parliament ought to possess the power to implement treaties, but he suggests that the Court should have to make a finding of "national concern" before upholding a federal statute that implements a treaty on a subject matter that would otherwise be within provincial jurisdiction. Normally, he says, the entering into of the treaty would suffice to establish that its subject matter had become of national concern, but where the subject matter of the treaty was "something quite fundamental for provincial automomy" the national concern test would not be satisfied, and the power to implement the treaty would remain provincial.[56] A disadvantage of this thesis is the vagueness of the controlling concepts, which would make it very difficult to identify in advance the appropriate implementing authority for each treaty.

A different approach would be to confine the *Labour Conventions* rule to those treaties that are concerned only with the harmonization of the domestic law of states or the promotion of shared values in domestic law. The conventions in issue in the *Labour Conventions* case were of this kind, seeking to elevate the standards of working conditions in the member states. Such treaties should be contrasted with those under which the party states undertake reciprocal obligations to each other. Treaties on taxation, extradition or trade, for example, will bind each party state to treat the nationals of the other state in particular ways. Each state undertakes its obligations in return for promises that its nationals will receive comparable treatment in the other state. With treaties of this kind, the international character of the obligations cannot be doubted, and the inability of the federal government to ensure the fulfilment of Canada's part of the bargain would be a very serious disability.

Even if the *Labour Conventions* rule continues to govern the implementation of treaties, so that there is no treaty power as such, the federal catalogue of legislative powers is extensive enough to enable many treaties to be implemented by the federal Parliament. Moreover, the existence of a treaty will often be relevant to the characterization of implementing legislation, and will tend to support the federal Parliament's power to enact the legislation. In *R.* v. *Crown Zellerbach*

---

55 Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), ch. 19.
56 *Id.*, 358.

judicially considered and approved, is an arrangement that the provinces have made with foreign countries for the reciprocal enforcement of maintenance orders where the dependent spouse is in one jurisdiction and the spouse who is obliged to pay maintenance is in another.[61] Many other reciprocal arrangements have been made, for example, with respect to succession duties, motor vehicle registration, drivers' licences, fire-fighting and tourist information.[62] The provinces have also entered into contracts with governments in foreign jurisdictions, for example, to lease property or to acquire telephone services or electricity.[63] These various arrangements or contracts are not intended to be binding in international law, and therefore they do not involve an assertion of treaty-making power.

In recent years there have been claims that the provinces do have treaty-making power under the Constitution, and at international law. So far as international law is concerned, it seems that the provinces would be accepted by foreign countries as having treaty-making capacity if the Constitution of Canada clearly accorded that capacity.[64] And so the question comes back to the Constitution. The Constitution is completely silent as to the power to make treaties. As explained earlier, this is because the framers did not envisage that Canada would acquire the power of an independent nation to make treaties. Section 132 confers the power to implement British Empire treaties on "the Parliament and government of Canada" — a provision which is hardly encouraging to the proponents of provincial treaty-making power. However, in the 1960s Quebec asserted that the provinces did have treaty-making power. The primary argument for this position is that the exclusive right conceded to the provinces by the *Labour Conventions* case to implement treaties upon subjects within provincial legislative competence must carry with it the power to make treaties upon subjects within provincial legislative competence. As the treaty-making power devolved from the imperial government to Canada, the federal government acquired treaty-making power with respect to s. 91 subjects, and the provinces acquired treaty-making power with respect to s. 92 subjects. This conclusion was not affected by the broad delegation to the federal government in the Letters Patent constituting the office of Governor General,[65] because of the doctrine that within Canada executive powers are distributed on substantially the same basis as legislative powers, which normally means that the provincial governments have executive powers which match the provincial legislative powers.[66] So the argument runs.[67]

---

61 *A.-G. Ont.* v. *Scott* [1956] S.C.R. 137.

62 See Gotlieb, *Canadian Treaty-Making* (1968), 25; Jacomy-Millette, *Treaty Law in Canada* (1975), 69-78.

63 Gotlieb, previous note, 30.

64 See Bernier, *International Legal Aspects of Federalism* (1973), ch. 2.

65 Note 3, above.

66 See ch. 9, Responsible Government, under heading 9.2, "Law and convention", above.

67 See Morin, Comment (1967) 45 Can. Bar Rev. 160; Jacomy-Millette, note 61, above, 85-94; the argument is criticized by Morris, note 4, above, and Gotlieb, note 61, above, 27-32. The issue is canvassed from a number of points of view in papers contributed to Ontario Advisory

did, the privative provision of s. 76 prevents the Court from inquiring whether the record discloses any error in law in the decision.

Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796, [1970] S.C.R. 425, 11 D.L.R. (3d) 336; *Anisminic Ltd. v. Foreign Compensation Com'n*, [1969] 2 A.C. 147 (H.L.); *Bell v. Ontario Human Rights Com'n*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1; *Wrights' Canadian Ropes Ltd. v. M.N.R.*, [1946] S.C.R. 139, [1946] 2 D.L.R. 225, [1946] C.T.C. 73; affirmed [1947] A.C. 109 (P.C.); *Short v. Henderson (J.W.), Ltd.*, [1946] S.C. (H.L.) 24; *Ready Mixed Concrete (South East), Ltd. v. Minister of Pensions & National Ins.*, [1968] 1 All E.R. 433, [1968] 2 W.L.R. 775, were also cited.

We must look to the intent and purpose of the *Workmen's Compensation Act*. One of these purposes is to raise funds to provide for the payment of compensation to employees. I am of the opinion that it is necessarily incidental to the purpose of the Act that the Board determine who are employers and employees in order to establish the appropriate levies. There are obvious cases where a person at common law is an employee. There are other cases where the question of an employee relationship does not arise. However, there are cases where it is essential for the purpose of a specific Act to determine whether or not the parties are employers and employees and I think that in the present case this function has been given by the Legislature to the Board as incidental to the operation of its jurisdiction. It would have been better if it had clearly said so, but it did not. The reason may be that the Court of Appeal of Ontario in *Berg v. Pigeon Timber Co. Ltd.*, [1934] O.R. 357, [1934] 3 D.L.R. 124, in considering this very Act, was of the opinion that it could not interfere with the decision of the Board regarding who was an employer or a workman. I quote from p. 363 O.R., p. 128 D.L.R., as follows:

> While I think that on the plain wording of the Act the argument of Mr. Manning is unanswerable, that the only persons covered are employers and workmen, yet I am of opinion that the adjudication by the Workmen's Compensation Board that the plaintiff came within the term "employer" and, upon proper steps being taken, was eligible for the benefits of The Workmen's Compensation Act (*supra*), is an adjudication by which this Court is bound. It is in the nature of an adjudication *in rem*. The Workmen's Compensation Board has, by the Legislature, been made absolute in the administration and operation of The Workmen's Compensation Act. Their determination of matters either of law or of fact, including construction of the Act, are without appeal and are absolute. The Court is expressly precluded from interference and, consequently, the Board, having determined that the respondent is an employer, I think we are bound in this action to accept their conclusion.
>
> Whether the Board has interpreted the Act correctly is, in my view, immaterial.

While this decision is not directly applicable to the facts of the case before us, I find that it is sufficiently relevant to be binding upon this Court.

In the present case, while the contract states that an operator is an independent contractor, the terms of it are so restrictive that they create doubt as to whether he is or is not. The Board having directed its attention to the specific question, it had to determine as part of its function and found that the operators of the stores were employees, I hold that this Court has no jurisdiction to interfere.

There is a remaining question of whether or not the employees of the store operator are employees of the operator or of Mac's Milk Limited. While it was submitted that even if the operator was found to be an employee of Mac's Milk Limited for the purposes of the Act, his employees were not necessarily employees of Mac's Milk Limited and should so be ruled. This is a difficult matter to determine and in this regard the Court was cited the case of *Short v. J.W. Henderson Ltd.*, a decision of the House of Lords. That case is not of particular help because, while the Court determined that modern working conditions and regulations were such that often the old common law rules of determination of employment had to be varied, I do not find that any such working regulations are applicable in the present case. However, it would be most unusual to have an operator of a store as an employee of the company and have it provided that his employees were not employees of the company. This is a question of determination of who is or who is not an employee, and I find that this was a matter within the jurisdiction of the Workmen's Compensation Board of Ontario and is therefore not open to review in this Court.

The application will therefore be dismissed with costs.

Application dismissed.

[COURT OF APPEAL]

Re Anaskan and The Queen

EVANS, MACKINNON AND ZUBER, JJ.A. 17TH JANUARY 1977.

Criminal law — Prisons — Penitentiary Act authorizing Solicitor-General to enter into agreement with Province to accept prisoners serving sentences of less than two years into penitentiary — Province enacting legislation to authorize provincial Government to enter into agreements with federal Government — Agreement for transfer of prisoners valid — No unlawful subdelegation by Province to federal Government involved — Each Government acting properly within its own sphere — Penitentiary Act (Can.), s. 15 — Federal-Provincial Agreement Act, 1972 (Sask.), c. 46, s. 5.

Criminal law — Prisons — Penitentiary Act authorizing Solicitor-General to enter into agreement with Province to accept prisoners serving sentences of less than two years into penitentiary — Whether Solicitor-General or Deputy must personally consider each transfer — Whether provision authorizing such

agreement overrides direction in Criminal Code that such sentences not to be served in penitentiary — Penitentiary Act (Can.), s. 15 — Cr. Code, s. 659(3).

Pursuant to Order in Council, P.C. 1972-465, made under s. 15 of the *Penitentiary Act*, R.S.C. 1970, c. P-6, the Solicitor-General was authorized to enter into "an agreement with the government of any province for the confinement in penitentiaries" of prisoners serving terms of less than two years in provincial institutions "in any instance when it appears to the Solicitor-General that such confinement in a penitentiary or other institution is desirable". The accused who was sentenced to a term of less than two years in Saskatchewan was transferred from the provincial institution to the federal Penitentiary for Women in Ontario pursuant to an agreement entered into by Saskatchewan and the federal Government. On her application for *habeas corpus* it was argued that the Solicitor-General or his Deputy must personally consider each transfer, which was not done in this case, and that s. 15(1) of the *Penitentiary Act* authorizing such transfer agreements could not qualify the direction in s. 659(3) of the *Criminal Code* providing that a person not serving a sentence of two years or more shall be sentenced to imprisonment in a place of confinement within the Province other than a penitentiary. This latter section was enacted in 1954, whereas s. 15 of the *Penitentiary Act* was enacted in 1961. The accused's application for *habeas corpus* was dismissed. On appeal by the accused to the Court of Appeal, *held*, the appeal should be dismissed.

Neither s. 15(1) of the *Penitentiary Act* nor the Order in Council requires that the Solicitor-General or the Deputy Solicitor-General personally consider each individual transfer to a federal institution. The use of the words "an agreement . . . for the confinement of persons" clearly contemplates a general agreement concerning all such transfers, and by necessary implication allows for the determination and administration of the transfers being carried out by proper departmental officers. The Solicitor-General's only personal obligation was the execution of the general agreement itself.

With respect to s. 659(3) of the *Criminal Code* it would appear that s. 15 of the *Penitentiary Act* was enacted in the light of s. 659(3) and covered a specific exception to the general words of that section. In statutory interpretation the particular intention expressed in a statute has always been considered to be an exception to or qualification of the general intention expressed. Accordingly, the accused could be validly transferred pursuant to a s. 15 agreement notwithstanding s. 659(3).

[*Metropolitan Borough and Town Clerk of Lewisham v. Roberts*, [1949] 2 K.B. 608; *R. v. Harrison* (1976), 28 C.C.C. (2d) 279, 66 D.L.R. (3d) 660, [1976] 3 W.W.R. 536, 8 N.R. 47; *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505, [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584, 25 C.R.N.S. 270, [1974] 4 W.W.R. 49, *sub nom. R. v. Burnshine and A.-G. Ont. (Intervenant)*, 2 N.R. 53, refd to]

Criminal law — Prisons — Accused on application for habeas corpus with certiorari in aid seeking to be removed from federal penitentiary in Ontario — Accused in penitentiary pursuant to transfer initiated by provincial civil servants in Saskatchewan — Ontario Court has no jurisdiction to quash order or determination of Saskatchewan civil servant made by virtue of his office established by Saskatchewan statute — Penitentiary Act (Can.), s. 15 — Corrections Act, 1967 (Sask.), c. 64.

Courts — Jurisdiction — Accused on application for habeas corpus with certiorari in aid seeking to be removed from federal penitentiary in Ontario — Accused in penitentiary pursuant to transfer initiated by provincial civil servants in Saskatchewan — Ontario Court has no jurisdiction to quash order or determination of Saskatchewan civil servant made by virtue of his office established by Saskatchewan statute — Penitentiary Act (Can.), s. 15 — Corrections Act, 1967 (Sask.), c. 64.

Extraordinary remedies — Habeas corpus — Accused on application for habeas corpus with certiorari in aid seeking to be removed from federal penitentiary in Ontario — Accused in penitentiary pursuant to transfer initiated by provincial civil servants in Saskatchewan — Ontario Court has no jurisdiction to quash order or determination of Saskatchewan civil servant made by virtue of his office established by Saskatchewan statute — Penitentiary Act (Can.), s. 15 — Corrections Act, 1967 (Sask.), c. 64.

Criminal law — Prisons — Inmates' rights — Accused transferred from reformatory to penitentiary under federal-provincial agreement — Decision to make transfer administrative — Accused not entitled to hearing in accordance with principles of natural justice — Penitentiary Act (Can.).

[*R. v. Institutional Head of Beaver Creek Correctional Camp, Ex p. MacCaud*, [1969] 1 C.C.C. 371, [1969] 1 O.R. 373, 2 D.L.R. (3d) 545, 5 C.R.N.S. 317; *Ex p. McCaud*, [1965] 1 C.C.C. 168, 43 C.R. 252 [affd *ibid.*, p. 170*n* C.C.C., p. 256 C.R.]; *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, [1976] 1 S.C.R. 453, 50 D.L.R. (3d) 349, 3 N.R. 391; *Mitchell v. The Queen* (1975), 24 C.C.C. (2d) 241, [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 77, [1976] 1 W.W.R. 577, 6 N.R. 389, refd to]

APPEAL by the accused from the dismissal of her application for *habeas corpus* with *certiorari* in aid.

R. R. Price and *C. F. Dombek*, for accused, appellant.
H. Erlichman, for Attorney-General of Canada, respondent.
E. G. Ewaschuk, for Attorney-General of Saskatchewan, respondent.

The judgment of the Court was delivered by

MACKINNON, J.A.:—The issue in this appeal is whether the appellant, who was sentenced in the Province of Saskatchewan on December 3, 1975, to a term of imprisonment of two years less a day, was legally removed from a provincial correctional centre in Saskatchewan to the federal Prison for Women at Kingston, Ontario, where she now is.

facts

The appellant is a Métis, now 18 years old, who was convicted of robbery by a District Court Judge in Regina and sentenced, as stated, to two years less a day. On the same day, December 3, 1975, she was convicted of uttering, theft over $200, and theft under $200, and was sentenced to various lesser terms for these offences to be served concurrently with the sentence imposed on the robbery charge.

The appellant was immediately sent to the Pine Grove Correctional Centre at Prince Albert, Saskatchewan where she was placed in close custody. On January 14, 1976, at the request of the provincial authorities, the procedures and statutory authority for which I shall discuss in a moment, the appellant was transferred by federal officials from the provincial institution to the Prison for Women at Kingston, Ontario, an institution operated by the Canadian Penitentiary Service.

By originating notice of motion, the appellant brought an appli-

cation for a writ of *habeas corpus* and for a writ of *certiorari* in aid thereof, which applications were heard and dismissed on June 17, 1976.

Originally this Court was asked to wade through a sea of cases to reach some 18 different points. During the course of the argument counsel for the appellant stated that he was abandoning the "technical" points as to whether the various orders, requests and agreements had been properly executed, and we were, accordingly, left with four submissions. They were, in the order argued, that:

(1) Section 15(1) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, does not and cannot authorize the Government of the Province of Saskatchewan to enter into an agreement with the Government of Canada for the transfer of inmates from provincial correctional institutions to a federal penitentiary outside the Province.
(2) In any event, any action pursuant to such agreement must be taken personally by the responsible Minister, that is, by the Solicitor-General or the Deputy Solicitor-General.
(3) Section 15(1) does not alter, amend or qualify s. 659(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, which is a mandatory direction (with an exception not relevant here) that anyone sentenced to less than two years' imprisonment be sentenced to confinement in a provincial institution.
(4) Under the circumstances of this case, before requesting a transfer of the appellant from a provincial institution in Saskatchewan to a federal penitentiary in Ontario, there was a duty on the provincial authorities to act fairly and to allow the appellant to be heard in accordance with the principles of natural justice and fundamental fairness.

To deal with the first three issues, it is necessary to recite the legislative acts and actions in some detail. Section 15 of the *Penitentiary Act* reads:

> 15(1) The Minister, with the general or special approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement with the government of any province for the confinement in penitentiaries or any other institution under the direction or supervision of the Service, of persons sentenced or committed under the criminal law of Canada to imprisonment for more than six months but less than two years, but any such agreement shall include provisions whereby such persons shall be confined at the expense of the provincial government concerned.
>
> (2) A person who is confined in a penitentiary or other institution pursuant to an agreement made under subsection (1) shall, during the term of his sentence or period of committal, be deemed to be lawfully confined.

On March 9, 1972, the Governor-General in Council, on the recommendation of the Solicitor-General, enacted the following Order in Council, P.C. 1972-462:

> HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Solicitor General, pursuant to subsection 15(1) of the Penitentiary Act, is pleased hereby to authorize the Solicitor General to enter into an agreement with the government of any province for the confinement in penitentiaries or any other institution under the direction or supervision of the Canadian Penitentiary Service, of persons sentenced or committed under the criminal law of Canada to imprisonment for more than six months but less than two years, in any instance when it appears to the Solicitor General that such confinement in a penitentiary or other institution is desirable; in any such agreement entered into, the Commissioner of Penitentiaries shall retain the right to direct that any inmate or class of inmates shall be confined in a particular penitentiary or class of penitentiary and that the province shall in such agreement undertake to pay all the costs attendant upon confinement in that penitentiary or class of penitentiary.

Purportedly pursuant to this authorization the Government of Canada entered into an agreement with the Government of Saskatchewan on November 21, 1973. In this agreement the Government of Canada covenanted, *inter alia*, to confine in a penitentiary or any other institution under the direction or supervision of the Canadian Penitentiary Service, on the request by or on behalf of the Province, any person sentenced or committed in the Province under the criminal law to imprisonment for more than six months but less than two years. The financial obligation for such transfers was clearly spelled out in the agreement.

Section 3 of the Saskatchewan *Federal-Provincial Agreements Act, 1972* (Sask.), c. 46, authorized the Government of Saskatchewan to enter into agreements with the Government of Canada "for any purpose of provincial interest". On February 26, 1974, by O.C. 403/74, pursuant to s. 5 of the *Federal-Provincial Agreements Act, 1972*, the Saskatchewan Minister of Social Services was authorized to initiate, co-ordinate, organize, plan, direct and control within Saskatchewan the arrangements provided for in the agreement of November 21, 1973, which agreement had been authorized by s. 3 of the Act. He was also authorized to engage personnel to carry out the programme provided for in the federal-provincial agreement.

On December 22, 1975, the Acting Director of Corrections for the Province of Saskatchewan wrote to the Canadian Penitentiary Service requesting that the appellant be transferred for incarceration in the federal penitentiary at Kingston. On January 7, 1976, the Acting Director of Corrections made an order of transfer of the appellant to the Prison for Women, Kingston, "by virtue of the provisions of s. 48 of the *Saskatchewan Correction Act, 1967*, s. 15 of the *Penitentiary Act, 1960-61* and subsequent to the memorandum of agreement signed on the 21st November 1973 . . ." and also "by virtue of the authority vested in the Minister of Social Services by Order-in-Council No. 403/74 . . .".

On January 14, 1976, the Federal Classification Services Co-ordinator, "as directed by the Commissioner of Penitentiaries", signed

a transfer warrant directing the transfer of the appellant from the Saskatchewan Penitentiary, Saskatchewan, to the Kingston Prison for Women. She was apparently taken directly from the provincial institution to Kingston and was not, at any time, in the federal penitentiary in Saskatchewan.

From the foregoing recital of the relevant statutes and Orders in Council, it is difficult to appreciate the arguments that s. 15 does not authorize Saskatchewan to enter into such agreements and that, if it does so authorize the Province, it is an improper delegation of legislative authority within the exclusive legislative competence of Parliament. Section 15 authorizes the Solicitor-General, subject to the approval of the Governor in Council, to enter into an agreement with the Government of any Province to accept for confinement in federal institutions persons sentenced under the criminal law to confinement in provincial institutions for certain terms, subject to certain financial arrangements. That was clearly done by the Solicitor-General on behalf of the Government of Canada in the November 21, 1973 agreement. Similarly, the Government of Saskatchewan, in any event, so far as financial arrangements were concerned, was authorized and did enter into the agreement under the authority of the provincial *Federal-Provincial Agreements Act, 1972*. There is no question of delegation of legislative jurisdiction; each was operating properly within its own sphere dealing with situations authorized by s. 15.

It was also argued that the wording of s. 15(1), and in particular the wording of the Order in Council passed under it, required the Minister (Solicitor-General), or his Deputy (the Deputy Solicitor-General), personally to consider each individual transfer. The particular language of the Order in Council relied on in support of this argument were the words "*. . . when it appears to the Solicitor-General* that such confinement in a penitentiary or other institution is desirable . . ." (emphasis added). That argument is met by the fact that both s. 15 and the Order in Council speak of "*an* agreement . . . for the confinement of *persons*" (emphasis added). The quoted words support the conclusion that Parliament, and the Governor in Council, contemplated and intended a general agreement concerning all such transfers, and not separate agreements considered and executed by the Solicitor-General for each individual prisoner. This conclusion is strengthened by the fact that immediately following the words relied upon by the appellant are the words "in any such agreement". This must refer to the agreement covered in the preceding sentence which deals with the confinement of "persons". Further, it should be noted that the Order in Council goes on to state that "in any such agreement" the Commissioner of Penitentiaries has the right to direct that any inmate or "*class of inmates*" (emphasis added) shall be confined in a particular penitentiary or class of penitentiary. Again, the reasonable conclusion seems to be that the agreement referred to was intended to be a general agreement covering all such transfers.

I am of the view that neither s. 15(1) nor the Order in Council enacted pursuant to it require that the Solicitor-General, or the Deputy Solicitor-General, personally consider each individual transfer from a provincial to a federal institution, and, accordingly, on the face of the documents which we have, there was no action shown to have been taken without authority. By necessary implication, the section, the Order in Council and the agreement allow for the determination and administration of the transfers being carried out by the proper departmental officers. As was pointed out by Lord Denning in *Metropolitan Borough and Town Clerk of Lewisham v. Roberts*, [1949] 2 K.B. 608 at p. 621:

> Now I take it to be quite plain that when a minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. This is implicit in the modern machinery of government . . .

To interpret s. 15(1) and the Order in Council as imposing an obligation on the Solicitor-General (or his Deputy) to consider and act personally in each individual transfer would impose an unreasonable and uncontemplated burden on the Minister, which is not required by any reasonable interpretation of the wording of the relevant legislation. In my view the Solicitor-General carried out his personal obligation under the section and the Order in Council by executing the general agreement of November 21, 1973.

The point was clearly stated by Dickson, J., in *R. v. Harrison* (1976), 28 C.C.C. (2d) 279 at p. 285, 66 D.L.R. (3d) 660 at pp. 665-6, 8 N.R. 47 at p. 55:

> The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister is accountable to the Legislature, will act on behalf of the Minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and inefficiency.

The third and final argument dealing with s. 15 was that s. 659(3) of the *Criminal Code* was clear in its terms and could not be altered, varied or excepted from by s. 15(1).

Section 659 [am. 1974-75-76, c. 93, s. 79] states in part:

> 659(1) Except where otherwise provided, a person who is sentenced to imprisonment for
>
> (*a*) life,
>
> (*b*) a term of two years or more, or
>
> (*c*) two or more terms of less than two years each that are to be served

> one after the other and that, in the aggregate, amount to two years or more,
>
> shall be sentenced to imprisonment in a penitentiary.
>
> (2) Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, he shall be sentenced to and shall serve that term in a penitentiary, but if the previous sentence of imprisonment in a penitentiary is set aside, he shall serve that term in accordance with subsection (3).
>
> (3) A person who is sentenced to imprisonment and who is not required to be sentenced as provided in subsection (1) or (2) shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or other place of confinement within the province in which he is convicted, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

The appellant clearly comes within s-s. (3), and it was argued that unless s. 15(1) (and the agreement between the Saskatchewan and the federal Governments pursuant to it) is an exception to s-s. (3), she must serve her sentence in the provincial institution.

Although it may not be of great moment, it should be noted that s. 659(2) states that the person sentenced "shall serve" that term in a penitentiary, whereas s-s. (3) merely requires that the person be "sentenced" to a place of confinement within the Province. It does not make it mandatory in specific terms as does s-s. (2) that the sentence shall be "served" there.

Section 15 was first enacted in 1961 by 1960-61 (Can.), c. 53, s. 16. Section 659(3) was first enacted in 1954 as 1953-54 (Can.), c. 51, s. 634(3). It would appear that s. 15(1) was enacted in the light of s. 659(3) and covered a specific exception, if implemented, to the general words of s. 659(3). That subsequent federal legislation might alter or qualify the effect of certain sections of the *Criminal Code* under certain circumstances is not an unusual or *ultra vires* act. In *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505, [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584, the majority of the Court held, in effect, that Parliament could alter, by s. 150 of the *Prisons and Reformatories Act*, R.S.C. 1970, c. P-24, for the cases that fall within that section, the combined effect of s. 171 [am. 1972, c. 13, s. 11; *idem*, s. 9] and s. 722(1) of the *Criminal Code*.

Parliament in s. 15 has clearly referred to the criminal law of Canada and to people sentenced to prison for more than six months and less than two years under that law. Such people fall within s. 659(3), and Parliament could have had no others in mind when enacting s. 15. The exception under s. 15(1) to the general legislation could not be more plainly stated.

In statutory interpretation the particular intention as expressed in a statute has always been considered to be an exception to or qualification of the general intention expressed. This is so where the intentions which may be incompatible are expressed in the same statute. It seems to me that such interpretation is *a fortiori*

where the intention to alter in specific cases the general rule for sentencing covered by s. 659(3) (assuming the word "sentencing" also means the place where the sentence is to be served), is clearly expressed in the later enactment of s. 15(1).

The final submission made on behalf of the appellant was that the determination to request her transfer from a provincial institution to a federal institution was a *quasi*-judicial decision which required a full and fair hearing, or in any event the application of the rules of natural justice, whatever they might be in this case. It is common ground that the appellant did not participate at all in the procedures leading up to her transfer. The attack is made on the acts or actions of the provincial civil servant in Saskatchewan and not on a federal civil servant or board. It was acknowledged that if the attack had been on a federal tribunal or person exercising powers conferred by an Act of Parliament, this Court would not have any jurisdiction to issue a writ of *certiorari*. For that reason counsel emphasized that his attack was on the acts and actions of a provincial civil servant.

As already noted, on December 22, 1975, the Saskatchewan Acting Director of Corrections formally asked for the appellant's transfer to the federal penitentiary at Kingston. On January 7, 1976, he purported to order the transfer from the Provincial Correctional Centre to the federal Prison for Women at Kingston. I have already recited the authority under which this "order" was purportedly made. I cannot find in s. 15(1), the Order in Council made under it, or in the agreement, any power conferred on a provincial official to make such an "order". The agreement between the two Governments calls for Canada accepting for confinement, on the "request" of the Province, a person committed to imprisonment for more than six months and less than two years, subject to Canada being able to provide suitable facilities.

The so-called "order" can only be considered as a repeat of the earlier request, which request was acceded to by the federal authorities by the transfer warrant of January 14, 1976. I have already pointed out that this transfer warrant directed the escorting officers to take the appellant from the "Director of Saskatchewan Penitentiaries, Saskatchewan", to the Kingston Penitentiary for Women. The appellant was never in a Saskatchewan penitentiary but was taken directly from the provincial correctional institution to Kingston. The appellant did not make an issue of this seeming *hiatus* in the warrant and it may be that s. 15(2), which states that a person confined in a penitentiary pursuant to an agreement under s. 15(1) shall "be deemed to be lawfully confined", would cover this procedural gab.

We were not given any case or statutory authority establishing this Court's jurisdiction over a Saskatchewan civil servant or

official carrying out his duties and responsibilities under Saskatchewan statutes. It was submitted that as the appellant was within the jurisdiction of this Court we thereby had the power to direct that all papers and proceedings had before a Saskatchewan official (or, indeed, tribunal) be brought into this Court, and if we so determined, we could then direct that an order go quashing the decision of the Saskatchewan official or tribunal.

I do not think that the mere presence of the appellant within our geographical jurisdiction allows the Court to extend its prerogative writ powers to the quashing of orders or determinations of an individual or tribunal in another Province, whose appointments are made under and whose powers come from statutes enacted by that other Province. We were not referred to the statute or statutes which establish and govern the duties and powers of the Saskatchewan Director of Corrections, although, presumably, the *Corrections Act*, 1967 (Sask.), c. 64, as amended from time to time, establishes the office, if not all his duties and powers. I am of the view that we do not have any power to quash an order or determination of a Saskatchewan civil servant made in Saskatchewan by virtue of his office established by a Saskatchewan statute.

We did hear extensive argument on whether the actions of the Acting Director were *quasi*-judicial or purely administrative and even if administrative whether they would be subject to *certiorari*. In view of these submissions I think it would be helpful to deal with them even though I am of the opinion that we have no jurisdiction over those actions under the circumstances.

The Acting Director of Corrections, carrying out his responsibility for the administration of provincial institutions, and under the agreement between the two Governments, requested that the appellant be transferred from a provincial institution to a federal penitentiary. There is no "right" in a prisoner to be in a particular institution; that is made clear by the enactment of s. 15(1) and by s-ss. (2) to (4) of s. 13 of the same Act. It is then a matter of policy and of administrative concern where an individual serves his or her sentence. There is no *quasi*-judicial quality in this determination which would call into play the *audi alteram partem* rule or require a hearing of any kind. If the submissions made on behalf of the appellant were accepted as being the law, then every transfer, within the federal penitentiary system itself, or otherwise, would call for a hearing. It was pointed out by this Court in *R. v. Institutional Head of Beaver Creek Correctional Camp, Ex p. MacCaud*, [1969] 1 C.C.C. 371 at p. 377, [1969] 1 O.R. 373 at p. 378, 2 D.L.R. (3d) 545 at p. 550, in dealing with an application by a penitentiary inmate for an order by way of *certiorari* with respect to a disciplinary action taken by the Superintendent that:

> The proper test to be applied is to ask whether the proceedings sought to be reviewed have deprived the inmate wholly or in part of his civil rights in that they affect his status as a person as distinguished from his status as an inmate. If the application of this test provides an affirmative answer, in arriving at that decision the institutional head is performing a "judicial" act.

The Court went on to say that since the inmate's right to liberty is for the time being non-existent, all decisions of the officers of the Penitentiary Service, with respect to the place and the manner of confinement "are the exercise of an authority which is purely administrative . . .". The Court stated that punishment inflicted *upon* the person affected the civil rights of an inmate to personal security, whereas punishment *of* the person, "e.g., alteration of the locale or nature of confinement", did not.

In the instant case there was a change of locale made as a result of a joint administrative decision of provincial and federal officials and it is an action not subject to *certiorari*. The cases in the Supreme Court of Canada dealing with the right to review orders of the National Parole Board on the basis of them being made on a judicial or *quasi*-judicial basis are helpful here. In *Ex. p. McCaud*, [1965] 1 C.C.C. 168 at p. 169, 43 C.R. 252 [affirmed *ibid.*, p. 170*n* C.C.C., p. 256 C.R.], Spence, J., said:

> The question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is altogether a decision within the discretion of the Parole Board as an administrative matter and is not in any way a judicial determination.

This statement of principle was affirmed by the Supreme Court in *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, [1976] 1 S.C.R. 453, 50 D.L.R. (3d) 349, and *Mitchell v. The Queen* (1975), 24 C.C.C. (2d) 241, [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 77. The statement by Ritchie, J., in *Mitchell v. The Queen*, with regard to the duties of the Parole Board, could be applied with equal or greater force here (p. 257 C.C.C., p. 593 S.C.R., p. 93 D.L.R.):

> The very nature of the task entrusted to this Board, involving as it does the assessment of the character and qualities of prisoners and the decision of the very difficult question as to whether or not a particular prisoner is likely to benefit from reintroduction into society on a supervised basis, all make it necessary that such a Board be clothed with as wide a discretion as possible and that its decision should not be open to question on appeal or otherwise be subject to the same procedures as those which accompany the review of decision of a judicial or *quasi*-judicial tribunal . . .

The task of a provincial official in deciding to request a transfer in the interests of the inmate and the administration of the institution itself, where the inmate has no "right" to be in a particular institution, seems to me to be peculiarly an administrative decision. Nor do I believe it to be the type of administrative decision which gives the person affected a right to be heard. The inmate forfeited his liberty by his voluntary act and he has no right to be heard in the determination of where he is to be incarcerated. There is no basic right being affected here such as would give rise to a duty to

act in accordance with the principles of natural justice. If there were such a right, the person sentenced, at the time of sentencing or at least before he is committed to an institution, would have a right to be heard in the decision as to where he is to serve his sentence. Such a prospect serves to emphasize that the decision in this case is purely an administrative one affecting no fundamental or civil right. In addition, it should be pointed out, there has been no suggestion of bias or that the official or officials acted capriciously or dishonestly.

Whether quashing the order or request of the provincial official would be of great assistance to the appellant who is now in the custody of federal officials under a warrant that appears to be correct on its face was not enlarged upon in the submissions.

There was argument directed to the issue of whether a writ of *certiorari* would lie, under any circumstances, to inquire into the acts of federal officials in any application to a provincial Superior Court for *habeas corpus*. However, the question appears to me to be of little significance in this case, as in the application for *habeas corpus* the Court is entitled to look at the public statutes and orders in council to determine whether there was authority for the warrant, and that is what we were asked to do (*Mitchell v. The Queen, supra*). It is not necessary for us to go beyond those public statutes and documents in this appeal to deal with the submissions made.

I would dismiss the appeal.

Appeal dismissed.

[COUNTY COURT]
JUDICIAL DISTRICT OF HALTON

Tencer et al. v. Rockroy Construction (Hamilton) Ltd. et al.

WEST, Co. Ct. J. 31st AUGUST 1976.

Judgments — Finality — Res judicata — Plaintiffs signing offer to purchase land and paying deposit to agent — Deal falling through and plaintiffs bringing action for specific performance or damages — Action settled — Settlement providing for payment of damages to plaintiffs without referring to deposit — Judgment given on minutes of settlement — Plaintiff bringing action for return of deposit against owner and agent — Whether res judicata.

The plaintiffs signed an offer to purchase certain real estate from the owner and paid a deposit to a real estate agent. The deal fell through and the plaintiffs commenced an action against the owner for specific performance and, in the alternative, for damages. Settlement negotiations were commenced and ultimately minutes of settlement were signed whereby the owner agreed to pay the plaintiffs damages and costs. No mention was made in the minutes of settlement of the deposit. The owner brought a motion for judgment in accordance with the terms of the minutes of settlement and judgment was granted to the plaintiffs. In a subsequent action by

the plaintiffs against the owner and the real estate agent for the return of the deposit, *held*, the action should be dismissed.

The plaintiffs were not entitled to raise a further claim against the owner for the return of the deposit. This issue could and should have been resolved in the earlier action and must be considered to be *res judicata* as between the plaintiffs and the owner. The plaintiffs settled the earlier action by accepting payment of damages. Their damages consisted of the loss of profit on resale and the loss of the deposit. These claims did not represent separate causes of action but separate heads of damage arising out of the same cause of action. The judgment in the earlier action, while not after a trial, was an adjudication of the issues between the parties and it was not appealed. While the agent was not a party to the earlier action the same considerations must apply to the claim against it to avoid an incongruous result. This defendant was the agent of the owner and acted on its behalf. The deposit was applied against the obligation of the owner and if judgment should go against the agent it would be entitled to indemnity against the owner. If this should occur the plaintiffs would succeed in achieving indirectly a result that was not available to them directly.

[*Chalmers v. Machray* (1916), 26 D.L.R. 529, 9 W.W.R. 1435, 26 Man. R. 105; affd 55 S.C.R. 612, 39 D.L.R. 396, [1917] 3 W.W.R. 361; *McIntosh v. Parent* (1924), 55 O.L.R. 552; *Ross v. Scottish Union & National Ins. Co.* (1919), 46 O.L.R. 291, 50 D.L.R. 356 [revd 47 O.L.R. 308, 53 D.L.R. 415]; *Re Knowles*, [1938] O.R. 369, [1938] 3 D.L.R. 178; *Hoystead v. Com'r of Taxation*, [1926] A.C. 155; *Cahoon v. Franks*, [1967] S.C.R. 455, 63 D.L.R. (2d) 274, 60 W.W.R. 684; *Cech v. McCabe Grain Co. Ltd.* (1968), 70 D.L.R. (2d) 715; *Peters v. Unacom Industrial Equipment Ltd. et al.*, Blue Sheets (Summaries of Reasons for Judgment) for March 19, 1976, Ontario Reports, 2nd Series, Vol. 9, Part 9, p. 141, refd to]

ACTION for the return of a deposit.

C. D. Gibson, Q.C., for plaintiffs.

M. L. Baker, for defendant, Rockroy Construction (Hamilton) Limited.

John Evans, for defendants, Harvey D. McGrath Real Estate Limited and Harvey D. McGrath.

WEST, Co. Ct. J.:—This is an action for the return of a deposit paid on the signing of an offer to purchase certain real estate. The circumstances surrounding the entire transaction are astonishing to say the least.

On March 23, 1973, the plaintiffs submitted to the defendant Harvey D. McGrath Real Estate Limited an offer to purchase property in the City of Burlington owned by the defendant Rockroy Construction (Hamilton) Limited. The price offered was $80,000 and the plaintiffs tendered with the offer a deposit of $4,000. This offer was rejected by the vendor but a counter-offer to sell the property for $85,000 was made. When informed of the counter-offer, the plaintiffs advised the agent that the counter-offer was not acceptable and the offer and the deposit were returned to them.

On March 26, 1973, the principals of the plaintiffs, Messrs. Tencer and Geist, attended at the agent's office and initialled the counter-offer increasing the purchase price to $85,000. At that time they

Loranger avaient appelé « la forme, la négociabilité et [peut-être] la preuve des effets de commerce[353] ». Puisqu'il désirait codifier le droit tel qu'il existait à ce moment, pourquoi s'étonner de cette identité d'approche ? Il paraît dès lors plausible de supposer qu'aux yeux du législateur fédéral de l'époque la portée de l'article de renvoi édicté en 1891 devait s'apparenter à celle des articles 25 de la loi de 1849 et 2340 du *Code civil du Bas Canada*[354]. Le sénateur Abbott avait d'ailleurs fait expressément référence à cette dernière disposition dans son allocution du 4 juin 1891[355]. Que l'expérience québécoise ait été examinée de façon minutieuse préalablement à l'adoption de la disposition fédérale de renvoi ne devrait pas étonner puisqu'il allait de soi que, dans les autres provinces, la common law viendrait compléter une loi fédérale silencieuse. En réalité, ce n'était qu'au Québec qu'une semblable disposition était susceptible de créer des difficultés.

L'objectif que nous nous étions fixé dans le présent article consistait simplement à offrir un aperçu de l'histoire du droit canadien des effets de commerce, et ce afin de délimiter l'étendue du pouvoir exclusif détenu par le Parlement fédéral en vertu de sa compétence sur ce type particulier de contrat. L'étude entreprise aura permis, nous l'espérons, d'asseoir sur des bases plus solides l'hypothèse voulant que l'ensemble des finalités législatives exclusivement attribuées au Parlement fédéral en vertu de l'article 91 (18) serait confiné aux dimensions purement techniques du contrat constitué par l'effet de commerce.

353. *Guy* c. *Paré*, précité, note 284, 454.

354. Dans un article subséquent, rappelons-le, nous aborderons le difficile problème de l'interprétation à donner à la disposition fédérale de renvoi.

Coveting thy Neighbour's Beer : Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers

Didier Culat*

*Récemment, les gouvernements provinciaux et fédéral du Canada ont négocié des ententes intergouvernementales afin de réduire les barrières au commerce interprovincial. Ces ententes contiennent un nouvel élément : un mécanisme de règlement des différends. Le mécanisme de règlement des différends de l'*Accord sur les pratiques de commercialisation de la bière *s'inspire de celui de l'*Accord général sur les tarifs douaniers et le commerce. *Cette analyse comparative des mécanismes de règlement des différends recommande, en se basant sur l'expérience du modèle international, des améliorations au processus de l'*Accord sur les pratiques de commercialisation de la bière *afin d'assurer un règlement des différends efficace.*

Recent developments have led the governments of Canada to negotiate intergovernmental agreements lowering interprovincial trade barriers. Those agreements include a new element ; a dispute settlement mechanism. The dispute settlement mechanism included in the recently concluded Beer Marketing Agreement *was inspired by that found in the* General Agreement on Tariffs and Trade. *This article conducts a comparative analysis of these dispute settlement mechanisms and recommends, on the basis of the international model's experience, refining the process in the* Beer Marketing Agreement *to ensure an effective dispute settlement mechanism.*

---

*B.A. (U.B.C.), L.L.B. (U.N.B.), L.L.B. (Laval), stagiaire, étude de Pothier, Bégin, Québec.

Les Cahiers de Droit, vol. 33 n° 2, juin 1992, p. 617-638
(1992) 33 *Les Cahiers de Droit* 617

C. de D.

Pages

1. **Intergovernmental agreements** 619
2. **Beer marketing agreement dispute settlement process** 621
3. ***General Agreement on Tariffs and Trade*** 623
   3.1 Dispute settlement process 623
   3.2 GATT : Learning from experience 626
   3.3 Learning from the GATT in Canada 629
4. **Arbitration** 631

Conclusion 635

On September 24th, 1991, the federal government tabled in the House of Commons its latest constitutional proposals. The wide ranging document sought to address many concerns in Canada. Among those concerns were interprovincial trade barriers which impede the free flow of goods in Canada. The proposal brought forward called for an « Economic Union » which would reduce interprovincial trade barriers and expand the domestic Canadian economy[1].

However, this idea of reducing the interprovincial trade barriers is not a new concept. In 1987, at the Premiers Conference in Toronto, the Premiers of the Provinces agreed to negotiate a reduction in the trade barriers between their provinces[2]. In addition, in 1988, the *General Agreement on Tariffs and Trade*, following a complaint by the European Economic Community, ruled[3] that the preferential marketing practices[4] of the provincial liquor commissions were in violation of the GATT. In 1989, the signing of the Canada — United States *Free Trade Agreement* created a situation where there would be less trade barriers between Canada and the United States than there exists between the Canadian provinces[5]. In re-

1. Canada, *Building Together Canada's Future : Proposals*, Ottawa, Supply and Service Canada, 1991, p. 55. The proposed reforms to section 121 of the *Constitution Act. 1867*, 30 & 31 Vict., (U.K.), c. 3 would : 1) widen the definition of the Canadian economic union to include the free flow of goods, people, capital, and services, independent of barriers based on territorial delimitations of provinces and territories ; and, 2) render illegal any law or practices which contravened the principle of the newly defined economic union.
2. Canada, *Report of the Initiatives linked to the Public Sector Market*, Annual First Ministers Conference, Toronto, Ontario, November 26 and 27, 1987.
3. Gatt, *Canada-Importing, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, (1988) B.I.S.D. 35th Supp. 37.
4. A form of interprovincial trade barriers, as we will see below.
5. The provinces are not included in several chapters of the *Free Trade Agreement*, L.C. 1988, c. 65, such as Chapter 13 on Government Procurement or Chapter 17 on Financial Services.

sponse to these pressures and commitments, the provincial governments have negotiated intergovernmental agreements committing themselves to the reduction of interprovincial trade barriers.

The negotiations for the elimination of interprovincial trade barriers has proceeded on a sectorial basis. Among the first sectors targeted were Beer Marketing Practices and Government Procurement. While some intergovernmental agreements concerning government procurement have been concluded on a regional basis[6], the *Intergovernmental Agreement on Beer Marketing Practices* has been ratified[7] by all the provinces.

These agreements on the abolishment of interprovincial trade barriers have included a dispute settlement mechanism. This is a new element in intergovernmental agreements. Previously, as in the *Intergovernmental Agreements concerning the Canada Assistance Plan*[8], there were no dispute settlement mechanisms. If a dispute arose between the parties, the parties were forced either to agree or to terminate the agreement. Now, with a dispute settlement mechanism, the parties foresee the long term duration of an intergovernmental agreement and the possibility that those commitments arising out of the intergovernmental agreement, with the passage of time, could change.

This article will describe the dispute settlement process of the *Beer Marketing Practices Agreement*, compare it to the international model on which, we believe, it was based, and suggest modifications to the process based on the experience of the international model and the Canadian economic situation.

1. Intergovernmental agreements

Before proceeding any further, a preliminary concern must be addressed : What is the legal nature of an intergovernmental agreement ? This is a complex question to which there is no definitive answer. Given that it is a written document between two or more distinct parties which mutually engages those parties to rights and obligations, and that it is subject to the

6. Agreements have only been concluded on a regional basis : Nova Scotia, Prince Edward Island, New Brunswick Memorandum of Agreement : *Reduction of Interprovincial Trade Barriers ; Government Procurement*, October 30, 1990 ; British Columbia, Alberta, Saskatchewan, Manitoba, Memorandum of Agreement : *Western Agreement on Governement Procurement*, March 6, 1989.
7. *Intergovernmental Agreement on Beer Marketing Practices*, (1991) 123 *G.O.* II, 2966.
8. *Canada Assistance Plan*, R.S.C. 1985, c. C-1, s. 8 (2).

interpretative rules of contract law[9], it could be seen as a contract between governments. However, given that : 1) these distinct parties are government entities concluding an agreement emanating from their sovereign jurisdictions ; and, 2) each government has been empowered to conclude the intergovernmental agreement by an Act of its own legislature, subject to the constitutional principle of the supremacy of parliament[10] ; perhaps an intergovernmental agreement could be characterized as being subject to the international law of treaties. It would be our submission, given that intergovernmental agreements, as those to which we will be referring, were concluded between governments inside a federation, that intergovernmental agreements have a hybrid legal nature encompassing aspects of both the law of contracts and the international law of treaties.

This hybrid legal nature creates the situation where some question whether an intergovernmental agreement is in fact an « agreement »[11] since it can be unilaterally abrogated without recourse[12]. At best, it can be submitted that the legal nature of an intergovernmental agreement is akin to that of a « gentleman's agreement ». While the parties to the agreement agree to undertake certain obligations, there are no remedies available in the event of a breach of the agreement by one of the signatories.

The second preliminary question would concern our study of the dispute settlement mechanism. While the intentions of the parties signing the intergovernmental agreement may be manifest from the face of the terms of the accord, it is our submission that the long term viability of the pact will only appear from the strength of the dispute settlement mechanism. A loose dispute settlement mechanism will have little impact on disputes which arise from the non-implementation of the agreement's terms. Conversely, a strong and binding dispute settlement mechanism will

9. *Attorney General British Columbia* v. *Attorney General of Canada*, (1889) 14 A.C. 295 (P.C.) ; *Re. Canada Assistance Plan*, (1990) 46 B.C.L.R. (2d) 273 (C.A.), rev'd, (1991). 58 B.C.L.R. (2d) 1 (S.C.C.), for other reasons ; *State of South Australia* v. *Commonwealth of Australia*, (1962) A.L.R. 547 (H.C.) ; *Re. Agreement between Canada and Alberta*, (1983) 1 F.C. 567 (T.D.). For a further discussion of the legal nature of an intergovernmental agreement, refer to : A. Lajoie, *Contrats administratifs : jalons pour une théorie*, Montréal, Éditions Thémis, 1984, pp. 151-158.
10. Whereby the legislature can legislate and repeal any law it wishes, just like any sovereign state, *Re. Canada Assistance Plan*, (1991) 58 B.C.L.R. (2d) 1 (S.C.C.).
11. K. Wiltshire, « Intergovernmental Agreements in Canada and Australia », (1980) 23 *Canadian Public Administration* 353 ; K. Wiltshire, *Planning and Federalism : Australian and Canadian Experience*, New York, University of Queensland Press, 1986, p. 150.
12. I. Bernier, N. Roy, C. Pentland et D. Soberman, « The Concept of Economic Union in International Law and Constitutional Law », dans M. Kraswick (dir.), *Perspectives on the Canadian Economic Union*, Toronto, University of Toronto Press, 1986, p. 60.

act as a coercive force to fully implement the agreement in fears of a complaint which might force compliance with the terms of the accord. The choice is between an intergovernmental agreement which provides a feasible framework to achieve the ends identified and one which loosely speaks of grand objectives which are doomed to fail before the ink drys.

While the current intergovernmental agreements are unenforceable, the inclusion of dispute settlement mechanisms into intergovernmental agreements may change their legal nature by granting the courts an avenue by which they may intervene to settle the dispute. By pushing the intergovernmental agreement away from its unenforceable « gentleman's agreement » aspect, towards a contractual basis subject to enforcement by the courts, the means by which governments interact may substantially be altered.

2. Beer marketing agreement dispute settlement process

Many goods produced in Canada are accorded a preferential treatment when they are sold in the province where they are produced. One of the best examples in Canada arises in the beer industry. The production and marketing of beer has been characterized[13] as a provincial concern since all beer sold in one province is produced in that province. The provinces maintain this control, to the exclusion of the federal government's 91(2)[14] inter-provincial trade jurisdiction, by requiring that only beer produced in a province can be sold in that province[15]. This practice fosters the industry in

13. *Labatts Breweries of Canada Ltd.* v. *Attorney General of Canada*, [1980] 1 S.C.R. 914 in an obiter comment at 939.
14. If these barriers were eliminated by way of intergovernmental agreement, the federal government would strengthen its control over the national economy as goods would flow freely between provinces and would be characterized as interprovincial trade and be subject to section 91(2) of the *Constitution Act. 1867*, 30 & 31 Vict., (U.K.), c. 3.
15. The beer purchasing practices of the below listed provinces, favours the provinces producers by requiring a Brewer's License for the manufacturing of beer in the province. The Brewer's Licence permits the beer manufacturer to : 1) sell beer to a liquor commission ; and 2) sell beer directly to licensed premises :

British Columbia	*Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237, s.57(2).
Alberta	*Liquor Control Act*, R.S.A. 1980, c. L-17, s. 29(1).
Saskatchwan	*Liquor Act*, R.S.S. 1978, c. L-18, s. 37.
Manitoba	*Liquor Control Act*, R.S.M. 1988, c. L-170.
Ontario	*Liquor Control Act*, R.S.O. 1990, c. L-18, s. 3.
Quebec	*Société des alcools du Québec*, R.S.Q. 1989, c. S-13, s. 25
New Brunswick	*Liquor Control Act*, C.S.N.B. 1989, c. L-10, s. 113.
Prince Edward Island	*Liquor Control Act*, R.S.P.E.I. 1988, c. L-14, s. 11.
Nova Scotia	*Liquor Control Act*, R.S.N.S. 1989, c. 260, s. 63.
Newfoundland	*Liquor Control Act*, S.N. 1979 [illegible]

the province to the exclusion of the beer industry in other provinces. This is considered to be an interprovincial trade barrier[16].

The current round of negotiations for the elimination of such interprovincial trade barriers was conducted jointly among the provincial governments and the federal government. The agreement aimed at allowing beer producers in one province to market their goods in other provinces without the structural blockages imposed by interprovincial trade barriers.

On January 1, 1991, a final text on the *Beer Marketing Practices* was agreed upon. This ageement provides for the elimination of the preferential treatment accorded to the intra-provincial beer industry and includes a dispute settlement mechanism :

Dispute Settlement

11 (1) Any producer of Canadian beer or beer products, from a province that is party to this Agreement, that believes that another party is not conforming to this Agreement will inform his government which will seek a solution directly with the party against which the complaint has been made.

(2) Any party to this Agreement, who believes that another party is not conforming to this Agreement will seek a solution directly with that party.

(3) Failing a resolution of the issue, the parties involved will establish a panel of not more than three (3) neutral and qualified people acceptable to these parties.

(4) The Panel will make a determination of the case and report its findings to the parties involved.

(5) If a party does not implement the Panel determination, the other party to the Agreement involved may suspend the application of

For a further discussion of provincial discriminatory practices in the marketing of alcoholic beverages see : I. BERNIER, « Le GATT et le problème du commerce d'état dans les pays à économie de marché : le cas des monopoles provinciaux des alcools au Canada », (1975) 13 *Can. Y. B. Int'l L.* 98, 102-106.

16. Complaints have been directed against Canada at the GATT concerning this practice in the beer industry. See GATT, *Canada-Importing, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, *supra*, note 3. Currently the United States is petitioning the GATT on a complaint concerning the Canadian marketing practices in the beer industry.

equivalent concessions made under this Agreement to the non-complying party[17].

In short, the complaint of the industry would be subrogated to the industry's home province which would attempt to negotiate a settlement with the impugned province. Failing a negotiated settlement, the parties would establish a Panel charged with making a determination concerning the dispute. The determination would then be reported to the disputing provinces which would then obligate the province found in violation of its *Beer Marketing Agreement* obligations to implement the findings of the panel or suffer the loss of the equivalent concessions made under the *Agreement* by the other province in the dispute.

It is the goal of the Canadian governments to set up a dispute settlement process which is similar in nature to that of the GATT. The parties will benefit from a long consultation process and a gradual increase in pressure on the contravening party in hopes of reaching a negotiated settlement. However, the process will also be plagued by the shortcomings of the GATT process when trying to enforce a decision through retaliatory action.

3. *General Agreement on Tariffs and Trade*

3.1 Dispute settlement process

The *General Agreement on Tariffs and Trade* (GATT) is an international trade arrangement in which Member States (called Contracting Parties) negotiate and implement uniform rules and procedures for the free flow of trade. The GATT has developed a dispute settlement mechanism which is based on political consultations and negotiations. The process facilitates the inter-communication of Member States of the GATT when one member complains of GATT agreement infringements by another Member State. This section of the paper will describe the GATT dispute settlement process, commencing with the internal complaint process and concluding with the adjudication procedure. Further, it will offer some critical comments on the GATT procedure and relate those comments to the dispute settlement procedure modeled on the GATT which is proposed in the *Intergovernmental Agreement on Beer Marketing Practices*.

The GATT dispute settlement process is a combination of internal law and international law. The process begins with a complaint by a person within a Member State. In Canada, while there are no formal complaint procedures, a person who complains that it was denied GATT benefits in

17. *Intergovernmental Agreement on Beer Marketing Practices*, [illegible]

its foreign trade transactions with a Member State would complain to the Federal Minister of International Trade[18]. Individuals do not have standing before the GATT, only governments of Member States can petition the GATT to settle a dispute[19]. This lack of formalized process is to be compared to the structured procedure which has been established in the United States.

In the United States, a complaint is submitted to the United States Trade Representative (USTR) who examines the complaint by virtue of the jurisdiction granted by section 301 of the *Trade Act of 1974* as amended by the *Omnibus Trade and Competitiveness Act of 1988*[20]. The USTR then makes a determination, based on a consultation process with a cross-section of the United States Federal Government[21], whether to accept or reject the complaint. If the complaint is accepted, the process allows for 150 days of consultation and negotiations in which the United States government and the government of the State against which the complaint is directed attempt to reach a negotiated settlement[22]. If no negotiated settlement is achieved, the USTR then directs the complaint to the GATT process. We would submit that the internal complaint process in Canada, while not as formalized as that of the United States, would in effect follow a similar procedure.

The GATT complaint process is governed by Article XXIII of the *General Agreement*[23]. This article provides that the complaining government must show, to the impugned government, in writing, that an objective of the *GATT Agreement* is being nullified or impaired to its detriment[24]. This difficult onus of proof is lessened by the practice of presuming that, when there is a breach of a GATT obligation, it necessarily follows that there is a nullification or impairment of a GATT objective[25].

18. There are no regulations or laws which specify to whom the complaint must be directed. However, given that the negotiations and implementations of international trade agreements (GATT, *Free Trade Agreement*) are the responsability of the International Trade Minister, it is safe to presume that he would be responsible for GATT complaints.
19. J.-G. CASTEL, « The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures », (1989) 38 *I.C.L.Q.* 835.
20. *Omnibus Trade and Competitiveness Act of 1988*, 19 U.S.C. 2411.
21. *Determinations Regarding Petitions*, 15 C.F.R., s. 2006.3
22. *Omnibus Trade and Competitiveness Act of 1988*, *supra*, note 20, s. 303 (a) (2) (B)
23. *General Agreement on Tariffs and Trade*, (1969) B.I.S.D., art. XXIII (hereinafter: *GATT*)
24. *Id.*, art. XXIII.1.
25. J.C. BLISS, « GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects », (1987) 23 *Stan. J. Int'l L.*, 31 ; J.-G. CASTEL, *loc. cit.*, note 19, 836.

The impugned government must give « sympathetic consideration to the representations or proposals made to it[26] ». In common language this requires that the impugned government receive the representation of the complaining government and negotiate with that government in the hope that a settlement can be achieved. This would, under the United States 301 procedure, correspond to the 150 days negotiating period[27].

Failing a negotiated settlement, the complaining government can make an application to the Council of GATT to appoint a Panel to adjudicate the dispute[28]. The request for a Panel, unless opposed by a Member State, will be granted according to the standard practice of the GATT[29]. The Panel will be made up of either three or five neutral international trade experts who are not objectionable to the Member States who are party to the dispute[30]. After consulting with the parties the GATT Council will then give the Panel its Terms of Reference which will be the basis of its investigation and its recommendations. Next, the Panel will conduct a « formal and adversarial[31] » process where the complaining Member State and the impugned Member State make submissions explaining their relative positions. In addition, third parties, who feel that they have a « substantial interest » in the proceedings can be granted intervenor status and make a submission before the Panel[32]. The Panel will then make a finding and report its recommendations in writing to the GATT Council[33]. The Panel determination and reporting should take between three and nine months[34].

While the Panel is hearing the submissions and making its determination, the governments in dispute are invited to negotiate and attempt to achieve a settlement. Often a dispute will be settled to mutual satisfaction before the Panel has a chance to make its full determination[35].

26. GATT, *supra*, note 23, art. XXIII.1.
27. While normally speaking the GATT Consultation period would follow the 301 Complaint Consultation period, the 301 procedure was drafted in conformity with the GATT to include the GATT preliminary consultation period and insure that the complaint not only had a fixed period of consultations/negotiations, but also proceeded directly to a Panel.
28. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, (1978-79) B.I.S.D. 26th Supp. 210, para. 10 (hereinafter: *1979 Understanding*)
29. J.-G. CASTEL, *loc. cit.*, note 19, 836.
30. R.E. HUDEC, « Reforming the GATT Adjudication Procedure: The Lessons of the DISC Case », (1988) 72 *Minn. L. Rev.* 1443.
31. J.C. BLISS, *loc. cit.*, note 25, 38.
32. *1979 Understanding*, *supra*, note 28, para. 15.
33. *Id.*, para. 16.
34. *Id.*, para. 20.
35. J.-G. CASTEL, *loc. cit.*, note 19, 837.

If the Panel's findings are adopted by the GATT Council, the Member State which is found in violation of its GATT obligations is under a duty to implement the recommendations within a reasonable period of time[36]. In the alternative, the Member State may use the Panel findings as the basis of a negotiated settlement with the complaining government[37]. If the Member State which is found in violation of its GATT obligations, fails to implement the recommendations within a reasonable period of time, the complaining government may request the GATT Council authorization to take retaliatory action against that Member State[38]. Retaliatory action has only been used once in the history of the GATT[39]. If the GATT obligations and concessions forming the uniform rules for the free flow of goods, enjoyed by a Member State are suspended, that Member State will be free to withdraw from the GATT[40].

The GATT panel dispute settlement model can be summarized as a consultation process which facilitates communication and negotiations between complaining Member States. As these negotiations are underway, the pressure on the Member States to settle the dispute is increased. The Panel in its adversarial process and findings assists the negotiating parties to crystalize the crux of the litigious issues. From this focused basis, the parties usually find common grounds on which to settle the dispute. The determination process of a GATT panel can further increase the pressure to settle the complaint as the parties in dispute can perhaps better achieve a compromise among themselves than be forced to accept an imposed settlement from a third party. The panel determination is the basis of a finding from which the GATT proposes to settle the dispute. The ultimate sanction which can be imposed, against the recalcitrant Member State which does not implement a GATT finding, is a withdrawal of GATT benefits.

3.2 GATT : Learning from experience

The above described GATT dispute settlement model has undergone some reforms in the current Uruguay Round of GATT negotiations[41].

36. *Id.*, 838.
37. In the recent West Coast Salmon Fishing Dispute between Canada and the United States, Canada used the Panel findings of the GATT and the *Free Trade Agreement* as the basis of a negotiated settlement of the dispute in which the demands of the United States were addressed.
38. GATT, *supra*, note 23, art. XXIII.2.
39. J.-G. Castel, *loc. cit.*, note 19, 838 ; J.-C. Bliss, *loc. cit.*, note 25, 38 ; *Netherlands* v. *United States*, (1955) B.I.S.D. 3rd Supp. 46.
40. GATT, *supra*, note 23, art. XXIII.2.
41. *Ministerial Declaration*, (1987) B.I.S.D. 33rd Supp. 19.

These reforms took effect on a trial basis May 1, 1989[42]. The most significant change has been the imposition of time limits for each step of the process. Where before there were no time limits and a dispute could, in an extreme case, take as long as 12 years to wend through the process[43], now only 15 months would elapse between the request for consultations and the decision of the GATT Council to adopt a Panel's report[44]. In addition, arbitration was added as a possible alternative dispute settlement process to the traditional model[45].

Previous reforms had taken place within the GATT. The formal structure established by the *GATT Agreement* was streamlined by the actual practices of the dispute settlement mechanism. The following are examples of some of the reforms previously undertaken by the GATT.

A first area of reform was the selection of panelists. The problem stemmed « not from finding international trade specialists » but from « finding enough panelists of any kind, qualified, acceptable to the parties and within a reasonable period of time »[46]. This problem was further multiplied by the increase in GATT litigation[47]. This created delays in the appointment of panels[48] and backlogged the settlement of the dispute.

To overcome this difficulty, the GATT developed a list of available qualified panelists. The panelists would « preferably be governmental[49] » and the « citizens of the countries who were in dispute would not be members of the panel[50] » Further, the panelists would « sit in their individual capacity and not as representatives of their government[51] ». The panel would be nominated within 30 days of the complaint to the GATT Council[52]. In addition, once the panelists have been selected the governments in dispute would have 7 days to raise compelling reasons to oppose their nominations[53].

The GATT was very uncomfortable with its dispute settlement process. This was due to the loose temporary structure of the GATT which

42. J.-G. Castel, *loc. cit.*, note 19, 844, citing the *Ministerial Declaration* of 1988 MTN.TNC/7 (MIN), 9 December 1988, pp. 26-33.
43. R.E. Hudec, *loc. cit.*, note 30, 1444.
44. J.-G. Castel, *loc. cit.*, note 19, 847.
45. *Id.*, 845.
46. R.E. Hudec, *loc. cit.*, note 30, 1465.
47. *Ibid.*
48. *Ibid.*
49. *1979 Understanding*, *supra*, note 28, para. 13.
50. *Id.*, para. 11.
51. *Id.*, para. 14.
52. *Id.*, para. 11.
53. *Id.*, para. 11.

favoured a diplomatic resolution to the dispute rather than an adjudication by an international body[54]. There were fears that if the GATT became an international police force of tariffs and trade, the organization itself would be rejected and fail[55]. In response to those fears, the determinations of the panels, were according to Robert Hudec, for the first 30 years, not very helpful, imprecise and ultracautious[56].

As the role of the GATT increased and became more predominant, it became more legalistic in its panel findings[57]. This was in response to demands from Member States which wanted comprehensive, impartial and focused determinations by the Panels. A Panel finding which stated that there was a dispute between X and Y country and that they should negotiate a resolution to the dispute was not very useful. Instead the « rise to legalism » brought panel determinations which were sufficiently comprehensive and detailed that they could actually be applied by the Member States as the basis of resolving the dispute[58].

While it seems that the GATT dispute settlement process has had its short comings, the fact that it has responded to these criticisms and reformed itself speaks to the flexible and adaptable nature of the organization. With the regular scheduled Rounds of Negotiations, the GATT is able to address its problem areas and reform them.

The GATT has institutionalized communication between the disputing parties. By forcing the governments to consult each other before proceeding to the formation of a panel, the GATT ensures that the parties start seeking a solution early in the dispute settlement process. Further, prior to the panel stage, the parties must agree in proceeding to the GATT dispute settlement process and in the selection of panelists. While the parties may have difficulties in resolving the actual dispute, the process is structured in such a way that they must continue to communicate with each other. In addition, during the panel submissions, the respective governments continue to communicate. While they may not be talking to each other, they are talking at each other and in this way are working towards a settlement. When the panel report is produced, the disputing parties have an objective third party which has attempted to encapsulate the dispute and propose a workable alternative solution. Here the report becomes the basis of more negotiations which ultimately resolve the dispute.

54. R.E. Hudec, *loc. cit.*, note 30, 1469.
55. *Ibid.*
56. *Id.*, 1470.
57. *Id.*, 1471.
58. *Id.*, 1472.

In addition to facilitating communication, the GATT dispute settlement dynamics increases the pressure on the disputing Member States to resolve the impass. It would be an oversight to disregard the potential power of a panel finding which has been adopted by the GATT Council. If a negotiated settlement is not forthcoming, the Member State which is found in violation of its GATT obligations will be forced to implement the panel findings. The implementation of a third party's determination may not best address the particular situation of the states in dispute. As such the findings, or the potential threat of findings, are sources of pressure on the disputing parties to negotiate a settlement which is based on a mutual compromise. Hence pressure to negotiate a settlement between Member States increases as the dispute settlement process progresses.

Since the GATT dispute settlement model is keyed on negotiations, it forces governments to approach the dispute with a flexible perspective. While there will be the traditional pre-negotiating posturing and the post-negotiation claims of victory, the actual negotiations are a mutual give and take, the result of which is generally acceptable to both parties[59]. In this way there is an inter-linkage of issues which are discussed and settled in the search for a mutual compromise. Hence the Member State with the most economic levers runs the lesser risk in a GATT dispute settlement negotiations as the impact of one concession will be minuscule compaired to the relative cost which would be imposed on the smaller undiversified economy of another Member State.

3.3 Learning from the GATT in Canada

These criticisms and advantages of the GATT must be compared to the structure in the *Beer Marketing Agreement* which has adopted a similar dispute settlement process[60].

When a dispute arises, the disputing parties must mutually agree not only to form a panel, but also to appoint three acceptable panelists. Given the problems encountered by the GATT in the selection of panelists, perhaps the governments which are parties to the agreement should establish a list of qualified, acceptable, and available candidates. Without this type of information the formation of a Panel will be delayed as the parties attempting to resolve the dispute are searching for panelists.

The Panel's mandate in making a determination is unclear. Is it to make a simple determination stating that a party to the agreement is in violation of the agreement ? Or is it to suggest, comprehensively a way of

59. J. Carter, « Principles of Negotiation », (1986) 23 *Stan. J. of Int'l L.* 1.
60. See section on the *Beer Marketing Agreement*, *supra*, s. 2.

remedying the violation of the agreement ? As seen with the GATT, the dispute settlement process went from imprecise determinations of violations to a legalistic analysis which formed the basis of a negotiated agreement between the Member States. Perhaps the mandate of the Panel should be clarified.

The proposal is silent concerning the time periods for each stage of the process. How long should the provinces consult among themselves before proceeding to the formation of a Panel ? How long does the Panel have to make its findings ? No guidance can be found in the Agreement to answer these questions. This could lead to protracted dispute settlement as was found by the GATT in the DISC case[61].

There are no alternative dispute settlement procedures available to the parties of the Agreement. At the GATT, the parties can either submit themselves to the Panel or opt for arbitration. This option is not available in the Agreement.

However, by adopting the GATT dispute settlement model the *Beer Marketing Agreement* will benefit from a flexible process which encourages communication between governments which are party to the agreement. This communication will facilitate negotiations and, it is hoped, will settle the dispute.

How well would the GATT dispute settlement model operate within Canada ? The principal question concerns the ability of provinces to negotiate.

As previously discussed the pressure to negotiate at the GATT is the fear of being imposed a settlement to the dispute by a third party. This acts as a stimulus to negotiate as the Member States would usually prefer to settle the dispute by a mutual compromise rather than be forced to implement a GATT finding. Finally, the imposition of retaliatory action by the Member States acts as the highest form of pressure to negotiate. How well will this be transplanted in Canada ? How effective will this be considering that the agreement only covers one industry (beer) while the GATT covers trade in general ?

Can the GATT dispute settlement process transplanted into the Canadian economic context act as a pressure on the provinces to negotiate with each other. Hypothetically, if New Brunswick complains about the beer marketing practices of the Province of Quebec, what can New Brunswick offer in the negotiations to settle the dispute? If the dispute is unresolved and proceeds to a withdrawal of New Brunswick benefits to

61. R.E. HUDEC, *loc. cit.*, note 30.

Quebec manufacturers, will this make much difference to Quebec which could be described as the second largest market in Canada ? Further, will the withdrawal of benefits make any difference since the manufacturers of beer in Quebec are the same companies as the manufacturers of beer in Ontario against which New Brunswick has not withdrawn its benefits ? One has to wonder how effective the GATT type dispute settlement mechanism will operate given the economic disparities in Canada and the dynamics of imposing a dispute settlement mechanism over one industry which is dominated by two or three companies. At best, the inclusion of the GATT dispute settlement process will stimulate some negotiations and perhaps be the basis of a political settlement of the trade dispute.

4. Arbitration

It appears that the *Intergovernmental Agreement on Beer Marketing Practices*, while being inspired by the GATT dispute settlement process, has sought to settle disputes by arbitration. The similarities drawn from the GATT are the subrogation by the provincial governments of the producer's claim[62], the consultation process before the formation of a panel[63], and the suspension of equivalent concessions in the event of non-compliance with the panel's findings[64]. However it could be submitted that the panel determination process is a departure from the existing GATT model and adopts an arbitration procedure. *Black's Law Dictionary* defines arbitration as :

> The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard[65].

If we analyse this definition against the actual text of the *Agreement* we see :

(3) Failing a resolution of the issue, the parties involved will establish a panel of not more than three (3) neutral and qualified people acceptable to these parties.

(4) The Panel will make a determination of the case and report its findings to the parties involved.

(5) If a party does not implement the Panel determination[66]...

62. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(1) ; J.-G. CASTEL, *loc. cit.*, note 19, 836.
63. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(2) ; GATT, *supra*, note 23, art. XXIII.1.
64. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(5) *in fine* ; GATT, *supra*, note 23, art. XXIII.2.
65. H.C. BLACK, *Black's Law Dictionnary*, 5ᵉ éd. St-Paul, West Pub, 1979.
66. *Intergovernmental* [illegible]

We thus see a modification from the GATT model : where in the GATT the parties must petition the GATT Council for the formation of a Panel[67], the Agreement specifies that the parties in dispute will decide the formation of the Panel themselves[68] ; where at the GATT, the Panel reports its findings to the GATT Council[69], in the Agreement the Panel reports directly to the parties in dispute[70]. On the face of it these modifications would not in themselves lead to defining the process as arbitration. However, the executory nature of the Panel's determination[71] appears to fall into the above definition requiring that the parties « agree in advance to abide by the arbitrator's award[72] ». When the executory nature of the Panel's determination is combined with the above modifications it forms a convincing argument that the intent of the *Agreement* is to proceed by arbitration.

If in fact the dispute settlement process in the *Agreement* is arbitration, it is perhaps possible to have the Panel's determination (arbitral award) adopted by the superior court of the province party to the dispute. The effect of the adoption is to transform the arbitral award into a judgment of the court. Such a judgment is a key element in forcing the government to act as « The government will not ignore a decision of the court[73] » and « It is the duty of the Crown and of every branch of the Executive to abide by and obey the law[74] ».

However, the problem remains in the adoption of the arbitral award in another jurisdiction. Once the arbitral award has been adopted by the superior court of the complaining province[75] it may not be recognized by the impugned province's superior court. This problem could be resolved according to principles of conflicts of laws. In the recent Supreme Court of Canada judgment of *De Savoye* v. *Morguard Investments*[76], it was found that a final judgment in one province should not be treated as a foreign judgment in another province's court, given the federal structure of the Canadian constitution[77]. Moreover, this adoption of the arbitral award

67. *1979 Understanding*, *supra*, note 28, para. 10.
68. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(3).
69. *1979 Understanding*, *supra*, note 28, para. 16.
70. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(4).
71. *Id.*, s. 11(5).
72. H.C. Black, *op. cit.*, note 65.
73. *Prince Edward Island* v. *Canada*, (1978) 1 F.C. 533 (A.D.), 559.
74. *Eastern Trust Company* v. *McKenzie, Mann and Co. Ltd.*, (1915) A.C. 750 (P.C.), 759.
75. Who would of course have a vested interest in having a determination against the impugned province executed.
76. *De Savoye* v. *Morguard Investments Ltd.*, (1990) 52 B.C.L.R. (2d) 160 (S.C.C.), 180.
77. This general statement of the court was subject to the condition that the court rendering the original judgment had correctly and conveniently exercised its jurisdiction *De Savoye* v. *Morguard Investments Ltd.*, *supra*, note 76, 181.

could be further facilitated by the use of either the *Reciprocal Enforcement of Judgements Act* or the United Nations Model Law on International Commercial Arbitration.

The *Reciprocal Enforcement of Judgments Act*[78] is not a viable alternative since the Act does not apply to judgments against the Crown and because Quebec does not have a reciprocal enforcement of judgments agreement with the other jurisdictions in Canada.

The International Commercial Arbitration Acts, which adopt the United Nations Model Law on International Commercial Arbitration are found in every Canadian jurisdiction[79] and are also problematic. Such Acts, in all Canadian jurisdictions save Quebec, limit the jurisdiction for judicial adoption to disputes stemming from « commercial legal relationships, whether in contract or not ». The arbitration provisions of the Quebec *Code*

78. British Columbia — *Court order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 30-41.
Alberta — *Reciprocal Enforcement of Judgments Act*, R.S.A. 1980, c. R-6.
Saskatchewan — *Reciprocal Enforcement of Judgments Act*, R.S.S. 1978, c. R-3.
Manitoba — *Reciprocal Enforcement of Judgments Act*, R.S.M. 1987, c. J-20
Ontario — *Reciprocal Enforcement of Judgements Act*, R.S.O. 1990, c. R.5.
New Brunswick — *Reciprocal Enforcement of Judgments Act*, R.S.N.B. 1973, c. R-3.
Prince Edward Island — *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6.
Nova Scotia — *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1986, c. 388.
Newfoundland — *Reciprocal Enforcement of Judgments Act*, R.S.N.F. 1970, c. 327.
79. British Columbia — *International Commercial Arbitration Act*, S.B.C. 1986, c. 14.
Alberta — *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6.
Saskatchewan — *International Commercial Arbitration Act*, S.S. 1988-89, c. 10.2.
Manitoba — *International Commercial Arbitration Act*, R.S.M. 1988, c. L-151.
Ontario — *International Commercial Arbitration Act*, S.O. 1988, c. 30.
Quebec — *Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.
New Brunswick — *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2.
Prince Edward Island — *International Commercial Arbitration Act*, R.S.P.E.I. 1989, c. I-5.
Nova Scotia — *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234.
Newfoundland — *International Commercial Arbitration Act*, S.N. 1986, c. 45.
Yukon Territory — *International Commercial Arbitration Act*, R.S.Y. 1986, c. 70.
Northwest Territory — *International Commercial Arbitration Act*, S.N.W.T. 1986, c. 6.
Canada — *International Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17.

of Civil Procedure[80] place no limitations concerning the subject matter of an arbital sentence. A dispute arising from the *Intergovernmental Agreement on Beer Marketing Practices* would be at its root commercial since the process is commenced by a complaint from a beer producer who is denied access to a market. However, given that the producer's complaint is subrogated by the provincial government, the argument could be maintained that the commercial aspect of the dispute has been put aside in favour of political dispute weakening the commercial aspect to the point of denying the courts the jurisdiction to adopt the arbitral sentence.

The « commercial legal relationship » limitation of the International Commercial Arbitration Acts, can be avoided by the utilization of the Arbitration Acts[81] which similarly provides for the adoption of arbitral sentences on application to a superior court, but without any set limitations. However, this may not prove to be an adequate approach since the Crown is not uniformly bound by the Arbitration Acts[82]. This must be compared with the *International Commercial Arbitration Act* which binds the Crown in all Canadian jurisdictions[83].

80. *Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.

81.

British Columbia	*Arbitration Act*, R.S.B.C. 1979, c. 18.
Alberta	*Arbitration Act*, R.S.A. 1980, c. A-43.
Saskatchewan	*Arbitration Act*, R.S.S. 1980, c. A-24.
Manitoba	*Arbitration Act*, R.S.M. 1987, c. A-120.
Ontario	*Arbitration Act*, R.S.O. 1990, c. A-24.
Quebec	*Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.
New Brunswick	*Arbitration Act*, C.S.N.B. 1987, c. A-10.
Prince Edward Island	*Arbitration Act*, R.S.P.E.I. 1988, c. A-16.
Nova Scotia	*Arbitration Act*, R.S.N.S. 1989, c. 19.
Newfoundland	*Arbitration Act*, S.N. 1985, c. 8.

82. Each jurisdiction's *Arbitration Acts* set out the Crowns status :

Crown is bound	Crown is conditionnally bound	Crown is not bound
Quebec	Nova Scotia	Newfoundland
Ontario	New Brunswick	Saskatchewan
Manitoba	Prince Edward Island	Alberta
Brisith Columbia*		

* British Columbia's *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14(1), reverses the Common Law presumption that grants the Crown immunity in the absence of the legislation explicitly binding the Crown.

83.

British Columbia	*International Commercial Arbitration Act*, S.B.C. 1986, c. 14.
Alberta	*International Commercial Arbitration Act*, S.A. 1986, c. I-6.6, s. 11.
Saskatchewan	*International Commercial Arbitration Act*, S.S. 1988-89, c. 10.2, s. 10(1).
Manitoba	*International Commercial Arbitration Act*, R.S.M. 1988, c. L-151, s. 11(1).
Ontario	*International Commercial Arbitration Act*, S.O. 1988, c.30, s. 12.
Quebec	*Code of Civil Procedure*, R.S.Q. 1989, c. C-25, s. 94.
New Brunswick	*International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2, s. 11.
Prince Edward Island	*International Commercial Arbitration Act*, R.S.P.E.I. 1989, c. I-5, s. 11(1).
Nova Scotia	*International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, s. 12(1).
Newfoundland	*International Commercial Arbitration Act*, S.N. 1986, c. 45, s. 12.
Yukon Territory	*International Commercial Arbitration Act*, R.S.Y. 1986, c. 70.
Northwest Territory	*International Commercial Arbitration Act*, S.N.W.T. 1986, c. 6, s. 11(1).
Canada	*International Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17, s. 10.

To enforce a panel's determination stemming from the *Intergovernmental Agreement on Beer Marketing Practices* through arbitration will require either uniform amendments to either the Arbitration Acts in order that the Crown be bound in all jurisdictions, or to the International Commercial Arbitration Acts to expand the jurisdiction beyond matters charaterized as « commercial legal relationships ».

Conclusion

The dispute settlement mechanism found in the *Intergovernmental Agreement on Beer Marketing Practices*, since it is partially inspired from the GATT, should seek to learn from the GATT's experience and incorporate those reforms[84]. While there are those who would be hesitant to re-open the negotiations of the *Agreement*, a procedural clarification of the dispute settlement mechanism could be contained in a protocole of understanding annexed to the *Agreement*.

Such a protocole would incorporate the obligation on the parties to the *Agreement* to establish a criteria of selection and a list of acceptable panelists who could be drawn upon to constitute a panel. The criteria would establish the preferable attributes of candidates placed on the list of acceptable panelists. Such a list would facilitate the formation of the Panel as the parties would have agreed in advance, to the Panelist charged with making a determination concerning the dispute.

84. A contrary opinion is expressed by Robert Hudec in his recent book concerning the GATT. He suggest's that a strong commitment to a trade agreement with a flexable conflict resolution approach and not rigourous procedures in a dispute settlement mechanism are the keys to a successful implementation of the trade agreement, R.E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2e éd., Salem, Butterworth Legal Publications, 1990, p. 296.

In addition, the protocole would clarify the mandate of the Panel. In the present text of the *Agreement*, it is unclear whether the Panel is to simply accuse a party of having violated the *Agreement* or if the Panel is mandated to comprehensively analyse the violations of the *Agreement* and to suggest possible alternatives which could rectify the situation. While the parties are free to choose the role which they want the panel to adopt, a comprehensive approach would stimulate a greater understanding of the economic and industrial dynamics involved and lead to long term recommendations rather than short term stop-gap measures.

Finally the protocole would establish a time table setting out maximum time delays for the different steps of the dispute settlement mechanism. One possibility would be to give the parties 30 days to negotiate a settlement, failing which the parties would proceed to a panel which would be formed within 7 days. The Panel would then have 90 days to conduct their hearings and report their determination to the parties in dispute. The impugned party would then benefit from 60 days to implement the panel's determination. The whole process would take 6 months. These forced delays would act as a form of pressure on the parties to negotiate a settlement.

Aside from the shortcomings of the dispute settlement process which can be addressed through a protocole, the larger question concerning the efficacy of the GATT dispute settlement process within the Canadian context needs to be addressed. We are sceptical with regard to the impact that the dispute settlement process can have when it is applied only to the beer industry which is dominated by two or three major players which operate in most provinces of Canada. The withdrawal of equivalent concessions between two disputing provinces will have no impact on the beer industry which operates in a third province and can have unobstructed access to the disputing provinces via that third province.

To overcome this limited impact, the *Beer Marketing Practices Agreement* could be incorporated into a larger multi-sectorial agreement. A multi-sectorial agreement would reduce the trade barriers over a wide range of goods and industries. This would end the two company domination found in the beer industry. Moreover, this would permit the linkage of issues in the dispute settlement process creating a greater area for manoeuvre in the negotiations.

The multi-sectorial agreement could possibly entail a gradual transfer of provincial regulatory powers to the federal government. The removal of trade barriers between the provinces, would perhaps force some industries to restructure themselves from a provincial structure to regional/interprovincial structures. A classic example would be the beer industry. Currently, as discussed above, the beer sold in one province is, because of a trade barrier, brewed in that province. When the trade barriers are removed, the beer industry will more than likely restructure itself from provincial brewers to regional brewers serving several provinces' needs from one brewery. Chances are, that an aspect of this will involve trade over provincial boundaries, and that aspect will consequently fall under the federal government's 91(2) interprovincial trade jurisdiction[85]. This potential loss of provincial power is confirmed by both Privy Council[86] and Supreme Court of Canada[87] decisions stating, in the interpretation of section 91(2) of the *Constitution Act, 1867*, that extra-provincial trade was the exclusive jurisdiction of the Federal government since the provincial jurisdiction was limited to the regulation of local matters. This is not to say that the provinces will lose their regulatory jurisdiction concerning the sale of beer within the province but rather that the federal government, within its existing regulatory jurisdiction concerning inter-provincial trade, will play an augmented role in the beer industry. The provinces will thus have been stripped of an aspect of its regulatory jurisdiction, to the benefit of the federal government. This is an undeniable aspect of the reduction of interprovincial trade barriers. However the significant difference between a sectorial agreement limited to an industry and a multi-sectorial agreement, is that while both agreements involve a transfer of an aspect of provincial regulatory powers, the sectorial agreement does so on a piecemeal basis, leaving the remainder of the provincial regulatory jurisdiction unaddressed by the agreement, intact for the provincial governments. This must be compared to the multi-sectorial agreement which would have the indirect effect, given the expansiveness of such an agreement, and the importance of the industries involved, of a larger transfer of provincial regulatory powers.

As an alternative to the multi-sectorial agreement, the *Beer Marketing Practices Agreement* could be substantially strengthened in its impact by drawing on the arbitration aspect of its procedure. As stated earlier, it is our submission that the procedure could be characterized as arbitration. If in fact this is an arbitration process, the arbitral award could be adopted by the courts as a judgment if the laws of all the provinces party to the *Agreement* were uniform. The International Commercial Arbitration Acts could be amended to re-define the court's jurisdiction to adopt an arbitral

85. The federal government would strengthen its control over an aspect of the national economy as goods and services would flow freely between provinces and would be characterized as interprovincial trade and be subject to section 91(2) of the *Constitution Act, 1867*, 30 & 31 Vict., (U.K.), c. 3.

86. *Citizens Insurance* v. *Parsons*, (1881) 7 A.C. 96 (P.C.).

87. *Dominion Stores* v. *The Queen*, [1980] 1 S.C.R. 844.

award beyond the current limitation of « commercial legal relationship ». In the alternative, the Arbitration Acts of those provinces which do not bind the Crown could be amended so as to find the Crown bound, and a arbitral award could be adopted against the government.

In the final analysis we must ask ourselves, « Do we want this dispute settlement process to work ? ». If the answer is yes, the bold first step of establishing a dispute settlement process in the *Intergovernmental Agreement on Beer Marking Practices* may be « much ado about nothing » if the process is not refined beyond its current form. This important first step requires some fine tuning which may make the *Agreement* a powerful initiative in re-defineing the economic order in Canada.

Chronique bibliographique

ETHEL GROFFIER, **Précis de droit international privé québécois**, 4e éd., Cowansville, Éditions Yvon Blais, 1990, 393 pages, ISBN 2-89073-748-9.

Le droit international privé se résume à trois articles et à des poussières dans le *Code civil du Bas-Canada*[1]. La quatrième édition du *Précis de droit international privé québécois* d'Ethel Groffier reflète l'effort du processus législatif d'adapter ces trois articles aux réalités du village planétaire, et depuis la sanction du Livre dixième du *Code civil du Québec*[2] et ses 92 articles, un droit occulte voit enfin le jour.

Après l'introduction traditionnelle qui présente la nature, la définition, les méthodes et les sources du droit international privé, l'ouvrage est divisé en deux parties : premièrement, les conflits de lois et, deuxièmement, la compétence juridictionnelle internationale des tribunaux et l'exécution des jugements étrangers.

Les conflits de lois sont traités en deux titres. En premier lieu sont abordés les principes généraux du droit international privé : la structure, l'interprétation et l'application de la règle de conflit. La discussion de la structure comporte les notions théoriques nécessaires à la compréhension de la méthodologie des règles de conflit telles que les catégories et les facteurs de rattachement, la notion de règle matérielle et de règle d'application immédiate.

Dans l'interprétation de la règle de conflit, l'auteure explique la définition et la méthode de qualification en droit international privé, les difficultés de la qualification et les différentes manifestations de conflits de qualification. De plus, Mme Groffier discute de problèmes que soulèvent les institutions nouvelles et les institutions du droit étranger non encore qualifiées par nos tribunaux locaux, et l'on y trouve des sections portant sur le renvoi, le conflit de lois dans le temps et dans l'espace (« conflit mobile »).

Le chapitre sur l'application de la règle de conflit traite de la preuve de la loi étrangère, de la force probante des écrits étrangers, de la fraude à la loi et de l'exception d'ordre public.

En deuxième lieu, l'auteure du Précis examine les règles de conflit dans leurs manifestations particulières en droit québécois. On y présente les statuts classiques : le statut personnel qui comprend notamment le droit familial et la capacité des personnes physiques et morales ; le statut réel qui traite des biens meubles et immeubles, des testaments et des successions. La fiducie et la faillite ont été ajoutées depuis la dernière édition du Précis.

Le statut des obligations inclut les contrats en général et certains contrats spéciaux : le mandat et l'assurance de même qu'une sous-section portant sur les régimes matrimoniaux. Pour la quatrième édition, Ethel Groffier ajoute au statut des obligations des remarques sur la vente, le contrat de consommation, le contrat de travail et le contrat d'arbitrage. On y traite également de la responsabilité civile et de l'enrichissement sans cause.

Le statut de la procédure comprend les questions de procédure, de prescription, d'entraide judiciaire, de preuve et de trans-

1. C.c., art. 6, 7 et 8.
2. *Code civil du Québec*, L.Q. 1991, c. 64.

Kennett, S.A., *Interjurisdictional Water Resource Management in Canada: A Constitutional Analysis* (LLM Thesis, Queen's University 1989) (Kingston, Ontario: Queen's University, 1989). [Microfiche CTM F53475]

See chapter three: "The Use of Intergovernmental Agreements in Water Resource Management" at 106.
-p.110: "Intergovernmental agreements, then, serve to resolve disputes arising from the distribution of powers, corrdinate policy making in areas of overlap and introduce greater flexibility into the constitutional structure.
-p.110: The role of agreements as non-judicial mechanisms of constitutional adaptation has been widely recognized.
-p.115: (there is no specific head of power in the constitution in relation to water for either level of government, but...) "Provincial Jurisdiction" over water comes from several heads, s.92(5): the management and sale of the public lands belonging to the province; s.92(13) "property and civil rights in the province"; s.92(16): generally all matters of a merely local or private nature in the province; s.92(10): local works and undertakings; s.92(8) municipal institutions in the province. (p.116) "It is universally recognized that these powers give the provinces extensive authority over water within their boundaries"
-p.117: for federal government: s.91(10): navigation and shipping ("but has little applicability to water quality"); s.91(12): sea coast and inland fisheries ("does support regulation of water quality", i.e. Fowler v. the Queen[1980] 2 S.C.R. 213 at 226); the criminal law power s.91(27); peace, order and good government.
-p.120: "the constitution does not confer jurisdiction on the Supreme Court to resolve interjurisdicitional disputes. These are justiciable, therefore, only by virtue of statute".
-p.121: "Broad provincial authority is restricted in some respects by clear, if limited federal powers, notably over navigation and fisheries. While these may be too narrow to support comphrehensive resource management policies, if exercised they ensure federal government input in many areas and grant an effective veto over certain projects. As to interjurisdictional or transboundary waters, uncertainty exists as to the legal basis for interprovincial dispute resolution and the scope for federal intervention....This explains the potential role of intergovernmental agreements."
*-p.123: <u>Canada Water Act</u>, check out the preamble, authorizes the federal government to enter into agreements with the provinces for cooperative management and consultation with respect to "Comprehensive Water Resource Management" (Part I) and "Water Quality Management" (Part II) and it includes guidelines regarding the content of these agreements.
-p.124: "These agreements are a response to the 'recurrent administrative and fiscal problems inherent in a federal state'. While their importance should not be underestimated, their ambition is not to create joint arrangements for multi-use resource management or the resolution of interjurisdictional conflicts". An example of an agreement with a self contained conflict resolution strategy, via arbitration, is the Northern Flood Agreement.
-p.130: "Given this consensus among commentators [i.e. the indivisibility of the crown, cannot contract with oneself]...the technicality of Crown indivisibility does not stand in the way of binding intergovernmental agreements or governments suing each other to determine their respective rights.
-p.131: there are some agreements that have been given special legal status through incorporation into the constitution... "constitutionalization cements the legal obligations created by

intergovernmental agreements. It is, however, rarely used. This is undoubtedly due to the difficulty of constitutional amendment and the routine and administrative nature of most agreements".
-p.133: "governments may be more wiling to adjust powers for reasons of administrative convenience if they are not irrevocably prejudicing their constitutional positions".
*-p.133: "Legal characterization is an interpretive exercise turning on such variable as the formality of the agreement and whether the parties intended to crate legally binding rights and obligations. It is, therefore, sensitive to the particular context. In addition, it is closely linked to the important practical issue of enforceability. Clearly, an agreement must be characterized as giving rise to legal rights before it will be enforced. For intergovernmental agreements, however, enforceability raises some special questions...Generalizing about legal characterization is difficult since few agreements have been litigated and the courts have not confronted the issue directly [Saunders, supra, note 21 at 91]."
-p.134, there is a spectrum of formality, i.e. contractual to informal, see Whyte, supra note 20 at 324.
-p.134: "it should be noted that when an agreement is embodied in a statute, its legal status thereby has an independent basis".
-p.137: "First, the legal status of intergovernmental agreements is largely controlled by the parties who can, by using contractual language, clearly specifying rights and obligations and providing for adjudication, indicate an intention to create legal status to their agreement. A sttement that the agreement is 'political' may also inducate this intention as may provision for non-adjudicative dispute resolution, such as referral to ministers. Second, the subject matter of the agreement may be important. With respect to water agreements, Saunders concludes that those dealing with financing specific projects would generally be accorded legal status but that '[c]haracterization of intergovernmental water agreements becomes somewhat more difficult as we move from cost-shared research or development programs into the area of direct management of the resource'. Broadly worded undertakings addressing regulatory and management issues and providing for interjurisdictional coordination bear little resemblance to the paradigmatic commercial contract and are suggestive of political rather than legal agreements". [See Saunders at 95-96].
-p.138 "Enforceability Between the Parties": a discussion of the confusion of legal rights and obligations in relation to enforceability issues, essentially, just because an agreement gives rise to legal rights and obligations, does not mean necessarily that an agreement may be enforced.
-p.1140: "When an agreement is characterized as capable of being legally binding, and, in the event of a dispute, the parties want to see the arrangement continue and agree to submit to adjudication, there is little doubt that the agreement is enforceable in the first sense...Since the Constitution does not provide for this, the practice adopted by all governments, except Quebec, is to grant jurisdiction over intergovernmental disputes to the Federal Court of Canada by statute", s. 19 of the Federal Court Act. Then appeals to the Federal Court of Appeal and then the SCC.
-p.141: "many of the cost-sharing arrangements would be subject to the Federal Court's jurisdiction, even without a clause...specifying that a particular arrangement is a binding intergovernmental agreement".
-p.141: "arbitration has not played a major role in water agreements" [see Saunders at 113].

-p.142: courts tend to rely on familiar principles of contract law, when asked to interpret meanings in the agreements where the parties want to maintain the agreement, very different from the case of unwilling parties, see below.
*-p.143: "Enforceability Against an Unwilling Party":
-p.144: "It is important to recognize the role of contract law in carrying the effect of these promises into the future. They can be constrasted with agreements having no planning function and designed to facilitate cooperation only so long as the parties consent. AS these latter agreements are understood to be terminated automatically at the instance of either party, they require no legal enforcement mechanism...This arises from the well established principle that legislatures cannot bind their sucessors...The courts have not hesitated to draw the obvious conclusion regarding the enforceability of non-constitutional agreements purporting to bind legislatures".
-p.146: quote from FR.Scott, "The parliament of Canada and the provincial legislatures, being sovereign in their own sphere and incapable of binding their successors, cannot place taxation schemes on any but a 'gentleman's agreement' basis. Despite the concurrent statutes giving effect to the agreements, nobody is really bound in law to maintain them" (at 295).
-p.147 (quoting D.R. Percy, "New Approaches to Inter-Jurisdictional Problems" in B. Sandler, ed., Water Policy for Western Canada: The Issues of the Eighties (Calgary: Unversity of Calgary Press, 1983) 113 at 117): "the apportionment agreement, while bearing all the external appearances of a binding contract, depends for its continuation more on political goodwill than on legal sanctions".
*-p.149 "In conclusion, when one party takes legislative action inconsistent with a non-constitutionalized intergovernmental agreement there is no legal enforcement mechanism available. In this sense, such agreements are never legally binding. This does not mean, however, that such agreements have no legal status before the courts. They may be enforceable in the first sense when parties consent to authorize determinations of their respective rights and obligations. To summarize, some intergovernmental agreements give rise to legal relations but unilateral repudiation is always available as a legally valid excuse for non-performance".
-p.149: "Vulnerability of Agreements to Third Party Attack on Constitutional Grounds".
-p.150: a discussion of interdelegation, i.e. Nova Scotia case., p.151: "this constraint, however, has been largely nullified by other cases permitting administrative interdelegation". First case to do this, P.E.I. Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392, allowed the delegation of federal power over interprovincial and export trade to a marketing board created by the province. Also other cases listed here. A.G. Ontario v. Scott [1956] S.C.R. 137: allowed the incorporation by reference of statutes from other jurisdictions; Coughlin v. Ontario Highway Transport Board [1968] S.C.R. 569 "a statute delegating federal regulatory power over interprovincial transport to provincial regulatory boards and directing that they exercise it in accordance with provincial laws.
-p.152: "On this view, interdelegation is not permitted if the effect is a legislative body enacting laws which would be beyond its power except for the delegation. Hogg, argues, however, that 'it is doubtful whether even this rule can stand in light of the Lord Day's Alliance, a case upholding a federal statute which effectively allowed provincial legislation in the area of criminal law.
-p.153: these forms to allow interdelegation, will shield third party attacks on a constitutional basis.
-p.154 "Third Party Enforcement of Intergovernmental Agreements": whether the agreements can confer rights on third parties. "Contract law principles of privity leave little scope for third

party interference in this way" but Finlay case raised this possibility. In Finaly, issue of standing. He was allowed.
-p.156: "a decision in Finlay's favour did not require a determination of rights arising directly from the agreement. As noted earlier, statute law provides independent legal status". (see finly case at p.632 and 633).
-p.157: "Commentators have suggested, however, that it may herald [finlay] a greater judicial willingness to view intergovernmental agreements in a legalistic light at the behest of third parties".
-p.158: "it seems likely that only when agreements are embodied in statutes will arguments for non-intervention in political bargains be irrelevant".
-p.160: "This conforms with normal principles of privity of contract and suggests that intergovernmental relations can, in most cases, continue under the assumption that agreements will not, absent involvement of the parties, be judicially enforced".
-p.160: "Implications of the legal Perspective on Intergovernmental Agreements":
"The following picture emerges regarding the legal characteristics of intergovernmental agreements. First, some agreements have no legal status either because the parties have made clear their intention not to be legally bound or because the courts will characterize them as political rather than legal. Second, agreements which are capable of supporting legal rights and obligations are enforceable only in the sense that they may be the subject of adjudication with the (explicit or implicit) consent of the parties. Short of constitutionalization, intergovernmental agreements are unenforceable in the stronger sense of giving rise to effective legal remedies to order compliance or assess damages in cases of breach. Third, agreements can be made quite secure from third party attack on constitutional grounds, even when they effectively alter the division of powers by establishing regulatory regimes based on interdelegation and incorporation by reference of legislation. Finally, except where agreements are embodied in statute and other tests for standing are met, there is little danger that third parties will interfere with the consensual and nonlegalistic operation of intergovernmental relations by bringing the parties unwillingly before the courts".
-p.161: check into the Inquiry on Federal Water Policy and MacDonald Commission "Royal Commission on the Economic Union and Development Prospects for Canada, Report, vol. 3 (1985): speakes to the need to give agreements more legal status.
-p.164: "The Canadian Experience with Intergovernmental Water Agreements": ends with the inadequacies of these agreements.

Some references:

- N. Caplan, "Some Factors Affecting the Resolution of a Federal-Provincial Conflict" (1969) 2 Can. J. Pol. Sci. 173.
- M.P. Brown, "Responsiveness Versus Accountability in Collaborative Federalism: The Canadian Experience" (1983) 26 Can. Pub. Admin. 629.
- P.C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307.
- B.Barton, "Cooperative Management of Interprovincial Water Resources" in J.O. Saunders, ed., Managing Natural Resources in a Federal State (Toronto: Carswell, 1986) 235.
- J.D. Whyte, "Issues in Canadian Federal-Provincial Cooperation" in J.O. Saunders, ed., Managing Natural Resources in a Federal State (Toronto: Carswell, 1986) 322.

•J.O. Saunders, Interjurisdictional Issues in Canadian Water Management (Calgary: Canadian Institute of Resources Law, 1988).
•F.R. Scott, "The Constitutional Background of Taxation Agreements" in Essays on the Constitution (Toronto: University of Toronto Press, 1977) 291, or (1955) 2 McGill L.J. 1).