DELEGATION — A WAY OVER THE CONSTITUTIONAL HURDLE

It is generally well recognized at the present day that if Canada is to provide for her citizens the measure of social security which is being demanded in the post-war era, the issue of Dominion-Provincial relations is one which it is impossible to shelve any longer. The situation must be taken in hand if we are not to be faced with the prospect of a recurrence of the economic conditions of the thirties — probably in an intensified form. The provision of an effective national post-war programme of social security depends on Canada’s developing a national system of public welfare services, which, in its turn, must necessarily involve collective action affecting the whole range of the life of the community. Canada, at present, presents poor material for this: a so-called nation, lacking even a national consciousness; a people having achieved union, without any semblance of unity; a Dominion whose inter-provincial disharmony is an effective bar to the community of aim and purpose necessary for any collective planning. As though to intensify the problem, we are saddled with a constitution made almost for another world, a constitution in which the distribution of powers and responsibilities was designed to fit the economic and social pattern of 1867 — when Canada was a nation of sparsely settled provinces with a predominantly rural economy and an individualistic outlook — an age in which it was impossible to foresee the sweeping economic and social changes which have since come about.

A given distribution of functions at any one time cannot but fail to meet the requirements of a changing world. The result would be complete stagnation, with the government paralyzed, were it not for what Montesquieu calls “the necessary movement of things.” In Canada, a country in which the American doctrine of judicial review of legislation has been adopted, the “necessary movement of things” must come, if at all, from the
judiciary. "If a constitution is rigid," says Viscount Bryce, "flexibility must be supplied from the minds of the judges." In the United States, a more or less progressive interpretation has been given to the constitution by the Supreme Court, thus allowing it a flexibility and capacity for growth to meet the needs of an ever changing society. In Canada, however, the body charged with interpreting its constitution, the Judicial Committee of the Privy Council, has, with one or two honourable exceptions, paid no heed to the inadequacy of the constitution to meet the crying needs of the present day, interpreting the British North America Act, not as a constitution, but as an ordinary everyday statute—according to the strict rules of statutory interpretation, refusing to extend its operation to new matters, uncontemplated when the Act was drafted. As the late Lord Atkin said as late as 1937, "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." True, Lord Watson, in 1896, found a legal loophole in the existence of the Peace, Order and Good Government clause of section 91, which could have been used to enable the Act to fit changing conditions. "Some matters," he said, "in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion," thus clearly recognizing that what was once local and provincial may, through changes in the social structure and needs of the society, become of general interest and national importance, coming thereby under Dominion control by virtue of the Peace, Order and Good Government clause. However, this idea has been explained away by the Privy Council throughout the years, until after the crop of judgments in 1937 on the "New Deal", no one would seriously contend that these words of Lord Watson's have any practical value whatever. Apparently it is now only war, famine, or drink, which can possibly affect the body politic of the Dominion.

4 See 15 Canadian Bar Review at p. 456; 4 University of Toronto Law Journal, at p. 63.
We must therefore face the fact that although the provision of essential services has now attained a national problem, and can be organized efficiently only on a national basis—since disparities in these services produce serious reactions on the general welfare and national unity of the country—yet the British North America Act, with its burden of Privy Council decisions on top of it, constitute an effective barrier to such organization—a legal hurdle, which so far has not been successfully vaulted. Can we find a way of doing so now? The urgency of the problem need hardly be stressed: “Canada’s present and prospective economic condition makes it clear that we can neither continue to afford a friction of waste of conflicting policies, nor the greater loss due to paralysis of policy arising from a possibly obsolete division of governmental responsibility and powers,” said the Rowell-Sirois Commission in its report.5

Amendment of the British North America Act itself would provide the solution to all our difficulties; unfortunately for us, however, it contains within itself no provision for its own amendment. It took four years to amend it in one small particular, so as to give the Dominion parliament the power with regard to Unemployment Insurance. At this rate of change we might envisage a comprehensive programme of social security perhaps during the last decade of this century. Nor is this all. The Unemployment Insurance amendment was recognized, throughout the whole Dominion as vitally necessary (i.e. all the Provinces were in agreement), but it is unlikely that the same degree of unanimity will be accorded to many other proposals for change, while any thoroughgoing overhaul of the Act itself will meet with the bitterest resistance from certain quarters.

We have thus arrived at a constitutional impasse; we are faced with a situation which must be taken in hand, but which no one seems to know how to handle, with the consequent post-war prospect in Canada of a series of cataclysmic convulsions leading nowhither. A Dominion-Provincial conference looms somewhere in the future, but no one—except the Prime Minister—knows when that will be, and he tells us that even he does not know! In the meantime, with the prospect thus before us of the continued existence of the British North America Act, can we not possibly find a device for circumventing the (so far) impassable legal border to progress—for vaulting the constitutional hurdle? Can we not possibly give the Dominion adequate jurisdiction to perform whatever functions are assigned

5 Book 1, p. 201.
to it, even if these functions are beyond its present constitutional powers? In a monograph prepared for the Rowell-Sirois Commission, Professor Corry argues strongly that this must be done at the legislative level, since "if co-operation on the legislative level falters, it embarrasses the whole activity on the administrative level." Various legislative devices have at times been used, in an attempt to achieve that necessary degree of co-operation between the Dominion and the Provinces, which will at once satisfy the interpretation of the British North America Act, and result in a practicable working solution, satisfactory both to the Dominion and the Provinces.

One method which has been attempted by the Dominion and Provinces in concert is the dividing up of the particular field to be covered, each authority legislating over that portion which is within its own sphere of legislative competence. Such joint legislation would seem perfectly legitimate, but unfortunately the Privy Council—that flaw-finding body—ruthlessly applied its pruning fork when it was attempted during the thirties. The Natural Products Marketing Act was passed by the Dominion in 1935, and each of the Provinces passed a Provincial Marketing Act expressly to dovetail with the Federal Act. In the Reference re Natural Products Marketing Act,\(^6\) the Dominion Act was held to be invalid. Lord Atkin suggested that satisfactory results might be achieved by co-operation, but added that the legislation would have to be very carefully framed, neither party leaving its own sphere and encroaching upon the other. Apparently, though the legislation in question was carefully framed, it was not (according to his Lordship), framed carefully enough. The hope for co-operation therefore seems a slender one if it can only be achieved by such hairsplitting accuracy in both Dominion and Provincial legislation.

Another much-used device is to make the legislation dependent upon the fulfilment of a condition for its very existence. Frequent resort has been had to such "conditional legislation". It may involve the giving of a discretion to another body, within certain limits, for bringing the act into force, so that a Province can decide whether or not to admit a Dominion act, and vice-versa. The legislative authority of either the Dominion or a Province has, of course, absolute power to impose conditions upon its own legislation, but, as Professor Corry points out,\(^7\)

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\(^6\) "Difficulties of Divided Jurisdiction"—a supplementary study for the Royal Commission on Dominion-Provincial Relations, at p. 13.

\(^6a\) [1937] A.C. 377.

\(^7\) Ibid., pp. 37 ff.
at some point this becomes delegation of power, and the line between condition and delegation is very difficult to draw. In the United States, the constitution of which is based upon the rigid separation of powers, this difficulty has been far more strikingly demonstrated than in Canada. Congress provides that certain administrative findings of fact, involving the exercise of a certain amount of discretion, shall be a pre-requisite to the operation of its statutory command. Within what limits must the exercise of this judgment be confined? How far can such administrative discretion extend before it can be said to encroach upon the legislative territory, and so become an unconstitutional delegation of legislative powers? The answer to this question may have far-reaching consequences — as is amply demonstrated by the fate of the National Industrial Recovery Act at the hands of the Supreme Court in two famous cases of the thirties. In both these cases, the Court assumed the strictest attitude, ruling unconstitutional certain authorizations to the President, in the first case, to prohibit the transportation in inter-state and foreign commerce, of petroleum produced or withdrawn from storage in excess of the amount permitted by any state, and in the second, to approve “codes of fair competition”. The first of these judgments was certainly not unanimous, Cardozo J. dissenting strongly, and drawing a distinction between a “choice within limits, as to the occasion, but not as to means”, and a “roving commission to inquire into the evils and then, upon discovering them, to do anything he pleases”. The same unrelenting treatment was accorded in 1936 to the Bituminous Coal Conservation Act of 1935, in the famous Carter case. Subsequently, however, a change is apparent in the attitude of the Court, which veers over towards a more lenient interpretation. The Carter case was distinguished in 1938 in a case involving the Tobacco Inspection Act, though the line of distinction seems a fine one. The Agricultural Adjustment Act of 1938, providing for an administrative scheme to keep too much tobacco from being grown, and giving to the Secretary of Agriculture certain powers of proclaiming a national marketing quota, was held intra vire. Two months later, the Schechter case was distinguished, when

9 He conurred, however, in the second.
11 See footnote 10.
14 See footnote 8.
the Court ruled valid an Act\textsuperscript{15} conferring power on the Secretary of Agriculture to establish marketing conditions in milk, and issue orders to effectuate the policy of the Act, which orders became effective if approved by the handlers or if two thirds of the producers in the marketing area favoured it,\textsuperscript{16} although Roberts J. and two other justices dissented in this case and in the case immediately following\textsuperscript{17} (which dealt with the validity of one of the orders under the Act), being of the opinion that the Act constituted an unconstitutional delegation of legislative powers. Reed J., who delivered the opinion of the court, seemed to forget the \textit{Carter} case\textsuperscript{18} entirely. In 1940, the Court found no difficulty in upholding the validity of the Bituminous Coal Conservation Act of 1937\textsuperscript{19} under which the Commission might fix maximum prices in the public interest to protect the consumer against “unreasonably high prices”, and in holding that the Fair Labour Standards Act of 1938, which authorized the Administrator and committees appointed by him to classify industries and fix minimum wages, was not an unconstitutional delegation of legislative powers.\textsuperscript{20} Similarly in 1941, section 9b of the National Labour Relations Act, allowing the Board to decide the unit appropriate for collective bargaining, was held intra vire\textsuperscript{21}. In 1943, certain regulations, adopted by the Federal Communications Commission under the Federal Communications Act, as being “in the public interest”, were contested. It was contended that such a standard (“in the public interest”) was so vague and indefinite as to create an unconstitutional delegation of legislative authority, but short shrift was given to this allegation by the Supreme Court.\textsuperscript{22} This was not, said Frankfurter J., a mere general reference to public welfare without any standard to guide determinations. “The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.”\textsuperscript{23} But no attempt is made by the Court to define precisely the standard in question. Again, in the same year, an executive order—curfew—promulgated by the Commander in Chief, and later ratified by Congress, was under review. Although no particular standard was established in terms by

\textsuperscript{15}Agricultural Marketing Act 1937.
\textsuperscript{16}\textit{U.S. v. Rock Royal Co-operative} (1939), 307 U.S. 533.
\textsuperscript{17}\textit{Hood v. U.S.} (1939), 307 U.S. 588.
\textsuperscript{18}See footnote 10.
\textsuperscript{19}\textit{Sunshine Coal Company v. Adkins} (1940), 310 U.S. 381.
\textsuperscript{20}\textit{Opp Cotton Mills v. Administrator} (1940), 312 U.S. 126.
\textsuperscript{21}\textit{Pittsburgh Plate Glass v. Board} (1941), 313 U.S. 146. (The dissenting opinion of Stone J., with which the Chief Justice and Roberts J. concurred, is on a different point altogether.)
\textsuperscript{23}\textit{Ibid.}, at p. 226.
the Act, nor were findings required to be made as a pre-requisite to any order, yet, said Stone C.J., Congress had given its approval to a certain standard—the necessity of protecting military resources against espionage and sabotage. The Court recognized that legislative power was, by the Constitution, exclusively vested in Congress, but added that even so, Congress was not precluded "from resorting to the aid of executive or administrative officers in determining by findings whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy." This was not, therefore, an unlawful delegation by Congress of its legislative power.

An examination and comparison of these cases will show how well nigh impossible it is to draw any rigid dividing line defining in what circumstances a procedure adopted by the legislature for bringing its provisions into force becomes actual delegation of the very legislative power possessed by it. In certain circumstances, if the standard laid down is hazy, the procedural safeguards may keep the Act within the intra vires zone—the procedural safeguards being nothing more than the confining within limits of the discretionary power. The real question which must be answered is whether the standards have been adequately defined, and in most cases it will be found that the court, while addressing itself ostensibly to that question, will, in reality, answer another—and much more important—question, viz. whether it is a desirable thing or not to bring the Act into being, and when a court does this, it is, itself, necessarily usurping the legislative function.

In Canada, we have had a number of instances of such "conditional legislation", examples of which are the Canada Temperance Act of 1878, some portions of which did not come into force until a majority of the electors in certain districts had presented a petition to that effect, the Local Prohibition Act of Ontario in 1896, the prohibitions of which were not to be in force until locally adopted by a particular locality, the

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25 Ibid., at p. 102.
26 Prof. John Willis, in Delegatus non potest delegare, 21 Canadian Bar Review 257, attempts a demarcation of the boundary as follows: "If, however, the authority (granting the discretion) "exercises such a substantial degree of control over the actual exercises of the discretion so entrusted that it can be said to direct its own mind to it, there is, in law, no ‘delegation’.”
Dominion Lord's Day Act of 1904, prohibiting Sunday excursions, "except as provided by any Provincial act now or hereafter in force". A subsequent Act of the legislature of Manitoba in 1923, making such excursions on Sundays lawful was held *intra vires* by the Privy Council. It could be argued on the one hand that this latter piece of Dominion legislation was purely conditional legislation—allowing excursions on Sundays only if the Province adopted such a rule, or on the other hand, that it was delegation, authorizing a Province to repeal the Dominion legislation. The courts, however, were not forced to draw any such hairsplitting distinctions, since the Canadian constitution is not based on any rigid separation of powers, but is supposed to be similar in principle to that of the United Kingdom, and consequently the question whether these acts constituted a delegation of legislative power was of no practical interest from the point of view of their constitutionality. It is only comparatively recently that the constitutionality of delegation has been questioned, and that which was at one time a certainty has now been made to seem a matter of doubt. Before discussing this, one further legislative device should be noted.

The so-called "enabling legislation" has been used where it has been found impossible, in framing legislation, to make a clear line of demarcation up to which both Dominion and Provinces can go, but beyond which neither must step. It has been found particularly useful in regulating agricultural marketing products. The Province enacts that those parts of the Dominion legislation which are *ultra vires* Dominion powers shall form part of the law of the Province. Since, however, this might often lead to delay in the necessary Provincial adjustments (nine in number) every time the Dominion passed legislation, enabling legislation for future changes was introduced, the Provincial Act adopting not only the already existent Dominion legislation as its own, but also any legislation which the Dominion might pass from time to time, thus allowing certain activities which normally fall within the Provincial sphere to be subject to regulation by the Dominion. The question arises—is this "legislation by reference", or "delegated legislation"? Where is the line to be drawn? In *R. v. Zaslavsky* in 1935, (the case

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31 See the preamble to the British North America Act 1867. A supreme example of an office in England which defies the principle of the separation of powers is that of the Lord Chancellor, which combines the offices of head of the Judiciary, Speaker of the Upper House, and a member of the Cabinet, all in one individual.
usually cited in support of the argument against this kind of device), the Saskatchewan legislature had attempted to legalize those portions of the federal Live Stock and Products Act which were ultra vires the Dominion, and had enacted that these provisions should have the force of law in the Province until repealed by the Dominion Parliament. The Saskatchewan Court of Appeal, in a two to one judgment, Martin J.A. (as he then was) dissenting, ruled this invalid. Haultain C.J. gave the majority decision, in the first place on a point of construction; and from his judgment we can infer that had the intention been merely "to enact by reference certain, or rather uncertain, provisions of the Federal Act and regulations which might be found to be within the exclusive jurisdiction of the Provincial legislature", it would have passed muster. It is respectfully submitted that this is precisely what the legislation did. However, the majority of the court thought otherwise. "In my opinion, said Haultain C.J., "the section does not admit of that construction. . . . There is no suggestion of legislation by incorporation or reference . . . simply an attempt ex post facto to give jurisdiction to Parliament which it does not possess." Apparently, then, legislation by reference is perfectly constitutional, but no attempt is made to define it. The learned Chief Justice merely states that this is not legislation by reference, but does not give the slightest indication as to why it is not, or what he considers to be the essential difference between the two, with the result that we are still left in deep doubt as to where the line should be drawn. Martin J.A. (with whom we respectfully agree) took the opposite view entirely: "I cannot conclude that the legislature of the Province . . . surrendered its jurisdiction to the Dominion Parliament." In the second place, Haultain C.J. denied that the Province had any power whatsoever to subject provisions of a Provincial Act to repeal by the Dominion Parliament. This was, in his view, enlarging the latter's jurisdiction. It may be respectfully questioned, however, whether this Provincial Act was anything more than a piece of legislation subject to a condition subsequent. Would there have been any difference between this and a Provincial Act stating "These provisions shall remain in force unless and until the Imperial Parliament shall pass an act allowing all ungraded eggs into England free of duty, in which case the said provisions shall automatically cease to have the force of law"?

33 Ibid., at pp. 789-90.
34 Ibid., at p. 797.
Would anyone contend that this was "enlarging the power of the Imperial Parliament at the expense of the Province"?

R. v. Zaslavsky was followed a year later in Alberta,35 and in Manitoba,36 while in the following year,37 the Alberta Supreme Court ruled invalid the Alberta Reduction and Settlement of Debts Act, partly on the ground that it involved an unconstitutional delegation of legislative authority. The offending section in this respect was s. 12, which empowered the Lieutenant Governor in Council to declare that any kind or description of debt was a debt to which the Act did not apply. "It is apparent," said Harvey C.J.A.,38 "that the authority to make regulations in order to make legislation enacted by the legislature completely effective is quite a different thing from authority to make an independent enactment."

In these recent cases, we see a most determined attempt being made by the judges to distinguish between conditional legislation, or legislation by reference, on the one hand, and delegation of legislative power on the other, so as to include the former two in our governmental scheme, but to exclude the latter. Is this necessary? Assuming for the moment that R. v. Zaslavsky and the other Canadian cases cited above involved incontrovertibly a delegation of legislative power such as would be disallowed in the United States almost without comment—is this open to objection in Canada? It is apparent that resort to delegation—as between the Dominion and Provinces—might help us to surmount our constitutional difficulties, and the question as to whether or not it is constitutional therefore becomes of great moment. Professor Corry39 concludes that it is an open question whether legislative power can be delegated. Others (including the Sirois Commission) suggest that such delegation may be invalid. However, they base their conclusion on R. v. Zaslavsky40 and the other two Provincial cases following it41 and on an unreported dictum of Lord Watson in Canadian Pacific Railway Company v. Notre Dame de Bonsecours.42 They do not address themselves to the question as to whether these Canadian cases were rightly decided, and this question still awaits authoritative information by the Supreme Court or Privy Council, as apparently what informa-

38 Ibid., at p. 369.
40 See footnote 32.
41 See footnotes 35 and 36.
tion there is, is insufficient to convince the Provincial courts of its binding character. What is this information?

Before proceeding any further, let us attempt to state what exactly delegation is, since our initial definition will determine our conclusions. First of all, let us state the case negatively. Delegation is not—as many legal authorities often assume it is—the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor (or delegator). It is extremely important to grasp the implications of this, for much confusion of thought has unfortunately resulted from assuming that delegation involves, or may involve, the complete abdication or abrogation of a power. This, it will be realized, is absolutely precluded by our definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative; the ultimate power always remains in the delegator, and has therefore not been renounced. With this definition in mind, let us proceed to a consideration of the problem in the context of the British North America Act.

The Act itself says absolutely nothing about the delegation of powers; and in the leading case of Hodge v. R., in 1883, the Privy Council very definitely ruled that the maxim “delegatus non potest delegare” did not apply to the Canadian legislatures. “They are in no sense delegates of or acting under any mandate from the Imperial Parliament”, said the Judicial Committee. Their powers were not exercised as agents of the Imperial Parliament, but were full powers, and within s. 92, the local legislature was supreme, the implication from this being that it could delegate to any extent it pleased. This is a clear pronouncement of the law by our highest judicial tribunal; yet the question of the constitutionality of delegation has been constantly raised since that time. Professor Willis attributes this to the fact that “the un-Canadian doctrine of the separation of powers (or something

43 “Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. . . . It is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights.”—Willis J. in Huth v. Clarke: (1890), 25 Q.B.D. 391, 395; cited by Prof. Willis in the article referred to above (see footnote 26).
44 (1883), 9 App. Cas. 117.
45 Ibid., at p. 132.
very like it) has actually crept into Canadian constitutional law behind a judicial smoke screen." Professor Willis’ conclusion seems rather in line with Professor Corry’s — that the cases have produced uncertainty as to whether there is any constitutional prohibition against delegation. But these ‘cases producing uncertainty’ are evidently those of the Provincial courts, to which we have referred above; on the other hand, dicta of the Lords of the Privy Council and judges of the Supreme Court of Canada are definitely in favour of delegation (as will be shown below). Perhaps, therefore, Professor Willis is a trifle pessimistic, although we must acknowledge that it is impossible to prophesy what will be the future action of the Board. As one of the greatest constitutional authorities has said, “The ways of the Judicial Committee are as hard to find out as those of a man with a maid, which apparently baffled Solomon even with all his wide experience.” It is true that the accusation of abdication has often been levelled at delegation. Lord Haldane raised the point in Re the Initiative and Referendum Act, in an obiter dictum, when he saw a difference between “seeking the assistance of subordinate agencies” (which was legal), and “creating and endowing with its own capacity a new legislative power not created by the Act to which it” (the legislature) “owes its existence” (which is illegal), but he made no attempt to explain precisely what the difference was.

Moreover, it should again be pointed out that the definition of delegation precludes a legislature from “endowing another with its own capacity”. As Duff J. said in Re Gray in 1918, “There is no attempt to substitute the executive for Parliament in the sense of disturbing the existing balance of constitutional authority. . . . . The powers granted could at any time be revoked and anything done under them nullified by Parliament, which Parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction.” In that case, the Dominion War Measures Act, a most sweeping measure, transferring the legislative authority to the executive for the duration of the first World War, was declared intra vires by the Supreme Court of Canada.

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48 [1919] A.C. 935, 945. The Act was held ultra vires on the ground that it interfered with the office of the Lieutenant-Governor.
49 (1918), 42 D.L.R. 1, 12. (The underlining is mine.)
The portion of Duff J.'s judgment quoted above was read with approval by Martin C.J.B.C., in 1937, when, in *Re Natural Products Marketing (B.C.) Act*, he declared it intra vires for the Province to confer administrative powers on boards set up by the Governor General to establish marketing schemes under the British Columbia Marketing Act. A part of his judgment is worth noting — on the subject of delegation: "The British statute book abounds with examples of it, and the consideration for several days of our early and late 'statute book' discloses such a surprising number of delegations to various persons and bodies in all sorts of subject matters that it would take several pages to enumerate them, and it would also bring about a constitutional debacle to invalidate them." This judgment of Martin C.J.B.C. was expressly approved by the Privy Council in *Shannon v. Lower Mainland Dairy Products Board*. Lord Atkin, who delivered the opinion of the Judicial Committee, made a pronouncement on delegation which should finally set at rest any doubts on the matter. He was replying to the objection that the Provincial Legislature had no constitutional power to delegate. "This objection," he says, "appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere, the Provincial Legislature is as supreme as any other parliament; and it is unnecessary to try to enumerate the innumerable occasions on which the legislatures, Provincial, Dominion, and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act. Martin C.J.B.C. appears to have disposed of this objection very satisfactorily in his judgment on the Reference, and their Lordships find no occasion to add to what he there said."

Lastly, we have the momentous decision of the Supreme Court of Canada in *Reference re Regulation (Chemicals) Under War Measures Act*, which held intra vires regulations by Order in Council appointing a Controller, under the War Measures Act, and also orders of the appointed Controller, although parliamentary control was thereby rendered merely nominal. "The final responsibility for the acts of the executive rests upon Parliament," said Duff C.J. "Parliament abandons none of its

51 Ibid., at p. 310.
powers, none of its control over the executive, legal or constitutional.\textsuperscript{54} Similarly Rinfret J. pointed out that the subordinate agency remained directly responsible to Parliament, and depended for its existence on the will of Parliament. "The Act constitutes a devolution of the legislative power of Parliament, and within the prescribed limits it can legislate as Parliament itself could. Therefore it can delegate its powers, whether legislative or administrative."\textsuperscript{55}

This decision means that Parliament or the legislature of a Province may "delegate in depth"\textsuperscript{56} to the limits of their respective powers, so long as Parliament or the legislature retains the ability to withdraw the delegated authority. It should be appreciated that it must retain that ability if it continues to exist—since it is inherent in its powers, indeed the essence of its very existence. As Anglin J. said in the Gray case,\textsuperscript{57} "A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered."

It is clear from the above that nothing has been said or done to detract from the authority of Hodge v. R.\textsuperscript{58} The conclusion is inevitable, therefore, that delegation is perfectly constitutional, since the legislature does not abandon its powers, but retains the ultimate responsibility for the acts of its delegates. As the Privy Council pointed out in the Hodge case itself, a legislature so delegating does not efface itself, but "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."\textsuperscript{59} The judgment continues: "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."\textsuperscript{60} It follows from this that the legislature should be unlimited in its choice of persons or bodies to whom it wishes to entrust such authority.\textsuperscript{61} It should be able to nominate whom it pleases—whether it be a Provincial board, the Lieutenant-Governor in Council, the Governor General in Council, or a Committee of expert economists from Great

\textsuperscript{54} Ibid., at p. 255.
\textsuperscript{55} Ibid., at p. 261.
\textsuperscript{56} Bora Laskin in 1943 Canadian Bar Review 148.
\textsuperscript{57} (1918), 42 D.L.R. 1.
\textsuperscript{58} (1888), 9 App. Cas. 117.
\textsuperscript{59} Ibid., at p. 132.
\textsuperscript{60} Ibid.
\textsuperscript{61} "If the Dominion have regulated power over any class of subjects, it may exercise such power through any agency selected by itself."—per Riddell J. in Manitoba Free Press v. Fort Frances Pulp and Paper Company, [1923] 3 D.L.R. 199—affirmed by the Privy Council, [1923] A.C. 695.
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Britain, or even the Dominion Parliament. After all, the word "delegate" means little more than an agent, and once it is determined that a body may lawfully appoint an agent, it is difficult to see why that body should be circumscribed in its choice of such agent. There seems to be nothing in the Privy Council reports against the constitutionality of such freedom of choice (except the unreported dictum of Lord Watson referred to above). Moreover, there is ample authority in the Privy Council and Supreme Court of Canada dicta to justify this conclusion. In the Hodge case, the Privy Council laid down that within the limits set by s. 92 of the British North America Act" the local legislature is supreme; and has the same authority as the Imperial Parliament . . . . to confide to a . . . . body of its own creation authority to make by-laws or resolutions . . . . with the object of carrying the enactment into operation and effect." Lord Atkin, in the Shannon case, says that "within its appointed sphere, the Provincial legislature is as supreme as any other parliament." Again, Rinfret J. says, in the Regulation (Chemicals) case, "The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could."

Now it is well known that the Imperial Parliament may, by legislation, give to any body of its own choosing the power to modify or add to a given act of Parliament (the legality of all English statutory rules and orders derives from this). If, therefore, the Provincial legislature or the Dominion Parliament has "the same authority as the Imperial Parliament" within its sphere of operation set by the British North America Act, it follows that a Provincial legislature should be able, by delegation, to entrust to the Dominion — or any other agent of its own choosing — the exercise of a power conferred on the Province by the British North America Act, and vice versa. We agree with the conclusion reached by R. W. Shannon — "If, as under the War Measures Act, it" (the Dominion) "can bestow such a power upon the Governor in Council, why may it not do so where the depository of the power is a Provincial legislature? There seems no basis of principle upon which any distinction can be supported." 

63 See footnote 42.
64 (1883), 9 App. Cas. 117, 182. (The underlining is mine.)
65 See supra. (The underlining is mine.)
66 [1943] 1 D.L.R. 248, 251. See supra. (The underlining is mine.)
67 6 Canadian Bar Review 245, 251. The foregoing is only consistent with what was stated in the preamble to the British North America Act: " . . . one Dominion . . . with a constitution similar in principle to that of the United Kingdom."
From the foregoing it will be seen that the decisions in *R. v. Zaslavsky*,68 and the provincial cases following in its wake,69 run counter to judicial authority in our highest tribunals — the Supreme Court of Canada and the Judicial Committee of the Privy Council, and as such, are incorrectly decided. They proceed, moreover, on a misconception of what delegation really involves. "Delegation," said Lord Coleridge C.J.,70 "does not imply a denudation of power and authority. . . . . The word 'delegation' implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given." In the *Zaslavsky* case,71 for example, the provincial statute in question could have been repealed at any time by the provincial legislature, thus revoking the authority which it had delegated. The provincial legislature thus remained master in its own house — how, therefore, can it possibly be argued that the legislation in question constituted an "abdication" or "surrender" of the powers of the province? As Martin J.A. said in his dissenting judgment, "I cannot conclude that the legislature of the Province . . . surrendered its jurisdiction to the Dominion Parliament; on the contrary, it seems to me that the enactment constitutes an assertion of jurisdiction."72

It is submitted, therefore, that these cases should not be followed for the future. Our conclusion — based both on principle and on judicial decisions and pronouncements of the highest authority — is that there is no valid constitutional objection to Dominion-Provincial or Provincial-Dominion delegation of powers. In the present critical situation in which Canada finds herself, with the crucial economic issues of the post-war era looming ahead — issues which will have to be faced and resolved without delay — it may well be that in the power of delegation will be found a way of surmounting the constitutional obstacles which at present bar the way to social progress. It can only be hoped that the Privy Council will maintain the attitude towards this question which it has so far displayed, and thus leave this real, workable, and effective instrument of government in the hands of those in Canada who resolutely face the future.

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69 See footnotes 35, 36, and 37.