Case and Comment

CONSTITUTIONAL LAW — DELEGATION — APPROACH OF SUPREME COURT OF CANADA TO THE B. N. A. ACT. — The unanimous opinion of the Supreme Court of Canada in *Attorney-General of Nova Scotia* v. *Attorney-General of Canada et al.*[1] has meted out to the nascent constitutional doctrine of "delegation" the identical summary fate given to the peace, order and good government clause by the Judicial Committee of the Privy Council. There is a distressing similarity in the two processes: each doctrine offered a means whereby the "water tight compartments"[2] established by sections 91 and 92 might be breached, with a consequent closer integration of the nation's legislative machinery to current needs. More distressing, however, is the disposition revealed by the Supreme Court to follow, in its new rôle as the final arbiter of Canadian constitutional questions, the restrictive pattern established by its predecessor, the Judicial Committee.

The device of delegation of legislative power from Dominion to province and vice-versa has been advocated by commentators as a method through which the two legislative authorities in Canada could, by co-operation, achieve a balance equated to the circumstances of 1950, rather than be confined to a balance arbitrarily tied down to the dictates of the year 1867.[3]

The question of inter-governmental delegation came before the Supreme Court in this manner. On August 28th, 1947, the Attorney-General introduced in the Nova Scotia House of Assembly Bill No. 136, and the bill was read a first time and ordered to be read a second time upon a future day. This ended the action on the bill in so far as the House of Assembly was concerned. The Lieutenant-Governor in Council on the recommendation of the Attorney-General acting under the authority of chapter 226 of the Revised Statutes of Nova Scotia, 1923, referred the ques-

[1] [1950] 4 D.L.R. 369.

[2] *A.-G. Can.* v. *A.-G. Ont.*, [1937] 1 D.L.R. 673, at p. 684 (J.C.P.C.).

[3] See, for example, Shannon, Delegated Legislation (1928), 6 Can. Bar Rev. 245; Wahn, Note (1936), 14 Can. Bar Rev. 353; Tuck, Delegation: A Way Over the Constitutional Hurdle (1945), 23 Can. Bar Rev. 79.

tion of the constitutional validity of the proposed legislation to the Supreme Court of Nova Scotia, sitting *en banc*.

Bill No. 136 is as follows:

> Be it enacted by the Governor and Assembly as follows:
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> 1. This Act may be cited as The Delegation of Legislative Jurisdiction Act.
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> 2. The Governor in Council may, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of The British North America Act, 1867, exclusively within the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in force, have the same effect as if enacted by this Legislature.
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> 3. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, under the provisions of The British North America Act, 1867, exclusively within the legislative jurisdiction of such Parliament, the Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all the provisions of any Act in relation to a matter relating to employment in force in this Province to any such industry, work or undertaking.
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> 4. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to the raising of a Revenue for Provincial Purposes by the imposing of a retail sales tax of the nature of indirect taxation, the Governor in Council while such delegation is in force, may impose such a tax of such amount not exceeding three per cent (3%) of the retail price as he deems necessary, in respect of any commodity to which such delegation extends and may make regulations providing for the method of collecting any such tax.
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> 5. This Act shall come into force on, from and after, but not before, such day as the Governor in Council orders and declares by proclamation.

The reference to the Nova Scotia court took the form of six questions as to the constitutional validity of the bill. The majority of the Nova Scotia Supreme Court, with Doull J. dissenting, was of the opinion that the entire bill was invalid on constitutional grounds.[4] On appeal to the Supreme Court of Canada the majority opinion was affirmed unanimously.

The principal majority opinion in the provincial court was rendered by Chisholm C. J. and his views were in large measure adopted in the Supreme Court of Canada. The central approach is that the power to delegate must, if it exists at all, be found in

[4] *Re Bill 136 in the Nova Scotia Legislature, 1947*, [1948] 4 D.L.R. 1.

the British North America Act. There is no express power, can there be an implied one? The learned judge holds that such an implication could only be made if the British Parliament had intended to give the power, and, "if the British Parliament intended to give such power, it is difficult to believe that it would not use express language to confer so novel and far-reaching a power". The circle is now complete, in order that there be an implied power it must be an express power; with deference it is suggested that the equation of implied powers to express powers appears to involve a begging of the question.

The Chief Justice continued his examination of the B.N.A. Act; an analysis of existing circumstances, including an excursion into American and Swiss constitutional law,[5] led him to the belief that the framers of the constitution had not even considered the possibility of delegation.

The presence of the word "exclusively" in section 92 of the B.N.A. Act is seized upon by the Chief Justice as a further ground for the rejection of any implied power of delegation. The use of this word, in his opinion, clearly indicates that a settled line of demarcation between the jurisdiction of the two types of legislative authority was intended. It is submitted that this word does not militate against delegation, for, as Doull J. pointed out, there is no restriction forbidding parliament or the legislature from making use of any agency to carry out its functions. In other words, if the Dominion were to delegate a certain measure of its legislative control to a province, that would not divest the Dominion of its exclusive power, since the provincial legislature would be acting as a mere agent.

Finally, the Chief Justice sought to establish that the delegation which had already been granted judicial sanction was of a different type from that envisaged in the proposed bill. He stated that legislative bodies have always had the power to delegate their authority to subordinate units — in other words, the delegation in depth principle — but that this must be distinguished from the proposed lateral delegation to an independent and co-ordinate legislative body.

Much the same ground is covered in the opinions handed down from the Supreme Court of Canada. Several of the learned judges, however, buttress their conclusions with additional arguments and these must be examined. Rand J. momentarily

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[5] As to the value of these factors, see F. R. Scott, Note (1948), 26 Can. Bar Rev. 984, at p. 986.

abandons statutory interpretation and strikes at the heart of the matter in this passage:

> In the generality of actual delegation to its own agencies, Parliament, recognising 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.[6]

The same point of view is reflected in the words of Rinfret C. J.: "In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them".[7] The contention is that the people of Canada have a right to expect that the members they send to the federal and provincial houses will exercise their deliberations and powers within the respective legislative field of each authority.

Rand J. examined the opposite side of the coin and discovered that not only could the federal and provincial governments not delegate to each other, but also that neither had the capacity to accept any such purported delegation. This conclusion is based on the premise that "delegation implies subordination",[8] and the reasoning takes this form: the "sovereignty within limits" doctrine of *Hodge* v. *The Queen*[9] establishes that both the federal and provincial governments possess equal sovereignty within their respective fields — therefore there is no superior-subordinate relationship and they cannot accept delegation one from the other.

These two arguments deserve further scrutiny. At first blush the idea that the voting public has a right to expect that each legislative body will deliberate exclusively within its traditional field seems overwhelmingly convincing. It has the appealing aspect of laying aside artificial considerations and grappling with the fundamentals of the problem. It is perfectly true that the members elected to Parliament are entrusted with the performance of certain legislative functions, but, can it be said that they are derelict in their duty if they consider that a particular legislative problem might be handled more effectively by a local legislature? Parliament would have exercised its discretion and discharged its functions, and the fact that it has employed the

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[6] [1950] 4 D.L.R. 369, at p. 385.
[7] *Ibid.*, at p. 372.
[8] *Ibid.*, at p. 386.
[9] (1883), 9 App. Cas. 117.

agency of a provincial legislature, as the most effective method in the circumstances, does not appear to involve any violation of the rights or expectations of the people of Canada. The second theory advanced by Rand J., that the equal status of federal and provincial legislatures acts as a bar to delegation, has no such claim to realism. Instead, it seems to partake of abstraction and conceptualism. The learned judge seems unable to escape from the thrall of the concept "delegation implies subordination" and its logical sequiturs. But is the chain of logic as inevitable and remorseless as he claims? The principle, first enunciated in *Hodge* v. *The Queen*,[10] that provincial and federal legislatures are equally sovereign within their respective jurisdictions, is now so well established as to admit of no doubt. But the equality of status declared by the Privy Council is a constitutional equality. Does it necessarily follow that this equality, and the type of superior-subordinate relationship required by delegation, are mutually exclusive?

To answer this, it is first necessary to perceive what the act of delegation involves and what it does not involve. Visible in the opinions of both courts is a marked tendency to confuse delegation of power with complete abdication of power.[11] Abdication necessitates the complete relinquishing of the particular power and it is admitted that any attempt so to abdicate would be held to be unconstitutional.[12] The concessions made by a delegating authority are by no means so far-reaching: "It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its power 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."[13]

The position then is this, that the delegating body does not relinquish any of its powers but merely elects to exercise them through an agency and, consequently, that it has the right to revoke and withdraw these powers from the delegate at any time. This is the superior-subordinate relationship demanded by the act of delegation, and it is submitted that it is a type of relationship entirely outside the scope of the constitutional equality doctrine.

In fact, there is no conflict between the two concepts, they

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[10] *Ibid.*

[11] See, for example, Taschereau J. at p. 381: "it has never been held that the Parliament of Canada or any of the legislatures can abdicate their powers".

[12] *Re Gray* (1918), 42 D.L.R. 1.

[13] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at p. 132.

relate to entirely different situations and can exist side by side. For example, let us say that the province of Nova Scotia has elected to delegate certain of its legislative powers to the Dominion Parliament. In so far as its own jurisdiction is concerned the sovereignty of Parliament is intact, it has gained nothing and lost nothing in this regard. The only consequence is this: the Dominion Parliament, not in its rôle as a Dominion Parliament, but as an agent pro tem of the Nova Scotia Assembly, and acting in a matter entirely outside its own legislative jurisdiction, has assumed a certain position with regard to the provincial legislature. That body, from the nature of the act of delegation, has the power to withdraw and revoke its concessions to Parliament, and this is all the superior-subordinate relationship required.

Can it be said that there is anything repugnant to the doctrine of constitutional equality in this? I think not. So long as it be remembered that the respective areas of jurisdiction remain the same, and that Parliament (or a provincial legislature in the reverse situation) would be acting not in its capacity as Parliament, but as an agent of the province exercising a provincial power, then each concept must be granted a separate and contemporaneous existence. It is submitted that constitutional subordination and the subordination involved in delegation cannot be equated.[14]

The attitude of the Supreme Court is, however, much more susceptible to criticism than any of the individual arguments it propounds. The issue of delegation came before the bench completely free from any binding authority, with a consequent opportunity on the part of the court to choose either one of two approaches. One approach, which would reject the doctrine, leads to an even more rigid and inflexible demarcation of legislative power; the other would loosen the fetters imposed by the Privy Council and permit Canadian legislative machinery to return to the spirit of 1867 — to operate in harmony with the current situation. It is a matter of regret that the Supreme Court elected to follow the narrow confines of the former, especially since compelling legal considerations would point to the latter.

To indicate the path that the Supreme Court might have, and it is submitted should have, followed it will be necessary to revert briefly to the dissenting opinion of Doull J. in the Nova Scotia court. The learned judge relies on two central propositions.

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[14] Rand J. deals with this point very summarily at p. 386: "Subordination, as so considered, is constitutional subordination and not that implied in the relation of delegate". One is tempted to ask, simply, Why?

The first step is to define clearly the act of delegation itself: "legislation by delegation occurs when the body which has power to legislate, grants power to some other body to enact certain legislation in the place and stead of the granting body". Thus it can be seen that such delegation does not have the finality of an abdication, and is really nothing more than the act of the delegating body acting through its appointed agent.

Having thus delimited the implications of delegation, Doull J. proceeds to apply it to the constitutional framework. He takes as his starting point the undoubted constitutional premise that the Dominion and provincial legislatures possess between them the totality of legislative power in Canada, and together have fallen heir to the legislative supremacy of the British Parliament. The legal powers of the British Parliament being absolutely unlimited and the Dominion and provincial powers, when acting in concert, being equal to the powers of the British Parliament, how is it possible, he asks, that the power of delegation *inter se* does not exist in these bodies? The issue then is simply this: granted that absolute sovereignty exists in Canadian legislatures, is there anything which can override the natural attribute of this sovereignty to delegate in any way?

The answer is implicit in the majority opinions: this sovereignty cannot operate repugnantly to the provisions of the written constitution, the B. N. A. Act, and, more particularly, it cannot be exercised in a manner that would break down the legislative compartments of section 91 and section 92.

I contend that this argument, in turn, should fall before two further considerations. The first, already outlined, is that delegation does not, in theory, change the distribution of legislative powers but rather merely affects the manner in which it is exercised. The second consideration would seem to follow along the line of the interpretation of the B. N. A. Act itself.

Too often in the past the effectiveness of Canadian government has been impaired by a judicial refusal to grant the B.N.A. Act the stature of a constitutional document rather than a mere statutory enactment. The Privy Council did not succeed in establishing a consistent general approach to the Act. "The Privy Council's approach to the Act has fluctuated from one of literalism to one of liberalism and back again to literalism."[15] Originally, the approach was laid down in *Lambe's* case: "by the same methods of construction and exposition which they [courts of law] apply

[15] V. C. MacDonald, Constitutional Interpretation and Extrinsic Evidence (1939), 17 Can. Bar Rev. 77, at p. 78.

to other statutes".[16] This restrictive approach was rejected by the Privy Council in 1930 with the enunciation of the famous "living tree" doctrine, which called for a liberal interpretation of the Act geared to its rôle as the constitution of a developing country.[17] This promise that the Canadian constitution might finally acquire some of the necessary elements of dynamism and vitality was cut short by the "New Deal" decisions of 1937 as the Privy Council reverted to the literal and narrow approach.[18]

In the present case the Canadian Supreme Court has unmistakably demonstrated that it will follow the restricted interpretative process, and will reject the approach that would treat the B. N. A. Act as a living constitution. It would seem that the selection of the former approach was the determining factor in this case: the B. N. A. Act is silent on the matter of delegation. Then, if it is treated on this narrow basis of an ordinary statute, it is reasonably easy to say that there can be no implication of such a power.

If, however, the B. N. A. Act is to be treated as the living constitution of a developing and mature country, then it seems demonstrably clear that, coupled with the argument of sovereignty put forth by Doull J., the power so to delegate should be implied.

The writer is uncomfortably aware that these thoughts, in view of the circumstances, must seem like mere cavil at something which is already gone beyond any recall. Yet it is hoped that they might serve to indicate that the Supreme Court, in its new eminence, has shown every evidence of following in the restricted path of the Privy Council. Many coals have been heaped on the Privy Council over the past eighty-three years for its narrow view of the Canadian constitution and high hopes were entertained in many quarters that the Supreme Court would inject a dynamic note into the structure. It is a matter of regret that the Supreme Court has launched its new career by such a definite rejection of all elements that might lead to a better integrated and adjusted constitutional structure.

JOHN B. BALLEM*

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[16] *Bank of Toronto* v. *Lamb* (1887), 12 App. Cas 575, at p. 579.
[17] *Edwards* v. *A. G. for Canada*, [1930] A.C. 124.
[18] See, V. C. MacDonald, *op. cit.*; also (1937), 15 Can. Bar Rev. 393-507.

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TAXATION—SALES TAX—PENALTIES FOR FAILURE TO PAY TAX.—The cases of *The King* v. *Pacific Bedding Co. Ltd.*[1] and *The King* v. *Angel et al.*,[2] if they do nothing else, should assist in publicizing some exceedingly inequitable aspects of the Excise Tax Act.[3] Angel and two others carried on business in partnership as Pacific Bedding Company until October 31st, 1947, after which date the business was taken over by a limited company, Pacific Bedding Co. Ltd. Apparently the business failed to keep proper books and records and an assessment was made by the Minister under section 113(8)[4] against the partners for the period before incorporation and against the company for the subsequent period. Actions were then brought under authority of section 111(1)[5] in the Vancouver police court for penalties for non-payment of the tax. At the trial of the partners Angel was convicted, according to the Exchequer Court report, and the other two defendants acquitted.[6] The amount of the tax owing was included in Angel's fine, as required by section 111(1). Owing to a technical deficiency in the evidence, the company was acquitted and the acquittal confirmed by the British Columbia Court of Appeal.[7]

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[1] (1950, 50 D.T.C. para. 87-089 (p. 5339).

[2] (1950), 50 D.T.C. para. 87-090 (p. 5343).

[3] R.S.C., 1927, c.179, as amended.

[4] S. 113 (8) — Where a person has, during any period, in the opinion of the Minister, failed to keep records or books of account as required by subsection one of this section, the Minister may assess

(a) the taxes or sums that he was required, by or pursuant to this Act, to pay or collect in, or in respect of, that period, or

(b) the amount of stamps he was required, by or pursuant to this Act, to affix or cancel in, or in respect of, that period,

and the taxes, sums or amounts so assessed shall be deemed to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

[5] S. 111 (1) — Every person who, being required, by or pursuant to this Act, to pay or collect taxes or other sums, or to affix or cancel stamps, fails to do so as required is guilty of an offence and, in addition to any other penalty or liability imposed by law for such failure, is liable on summary conviction to a penalty of not less than

(a) the aggregate of twenty-five dollars and an amount equal to the tax or other sum that he should have paid or collected or the amount of stamps that he should have affixed or cancelled, as the case may be,

and not exceeding

(b) the aggregate of one thousand dollars and an amount equal to the aforesaid tax or other sum or aforesaid amounts of stamps, as the case may be,

and in default of payment thereof to imprisonment for a term of not less than thirty days and not more than twelve months. 1947, c.60, s.20.

[6] This portion of the report is obscure. The usual practice in these matters is to withdraw the charges against the other partners when one pleads guilty or is convicted.

[7] *Rex* v. *Pacific Bedding Co. Ltd.*, [1949] 2 W.W.R. 575. The Court of Appeal held that the mere production of a document signed by the Minister alleging that a firm had failed to keep proper books and records, and making an assessment, was insufficient evidence upon which to base a conviction.

The Crown then brought actions, under section 108(1),[8] in the Exchequer Court against the partners and against the limited company for the assessed tax. Cameron J. gave judgment for the Crown in both actions, pointing out that the previous actions under section 111(1) were not for payment of the tax but for penalties for alleged violation of the act. The mere fact that the penalty includes an amount equal to the amount of the tax owing and that this amount is paid into the Consolidated Revenue Fund[9] is irrelevant. His Lordship expressed the matter very clearly when he stated:

> The proceedings in the Police Court at Vancouver were for the recovery of penalties incurred for violation of the Excise Tax Act and that Court had jurisdiction to hear the matter by reason of the provisions of section 108(2)(b) of the Act. The taxes now claimed could not have been recovered in the proceedings in the Police Court, but only in the Exchequer Court, or in any other Court of competent jurisdiction (section 108(1)) or by proceedings under section 108(4). It is the case that in proceedings in the Police Court the penalties assessed for a non-payment of taxes could include an amount equal to the unpaid taxes, but section 109(2) makes it abundantly clear that even if the penalties assessed included an amount equal to the unpaid tax, the taxpayer is not absolved from liability to pay the taxes which are properly due.[10]

Following this decision, the act was amended in 1949 by adding subsections 8 and 9 to section 108.

[8] S. 108 (1) — All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

[9] S. 109(1).

[10] 50 D.T.C. at p. 5341.

S. 108 (2) — Every penalty incurred for any violation of the provisions of this Act may be sued for and recovered

(a) in the Exchequer Court of Canada or any court of competent jurisdiction; or

(b) by summary conviction under the provisions of the Criminal Code relating thereto.

S. 108 (4) — Any amount payable in respect of taxes, interest and penalties under Parts XI to XV inclusive remaining unpaid, whether in whole or in part after fifteen days from the date of sending by registered mail of a notice of arrears addressed to the taxpayer, may be certified by the Commissioner of Excise and on the production to the Exchequer Court of Canada or judge thereof or such officer as the Court or judge thereof may direct, the certificate shall be registered in the said Court and shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for the recovery of a debt of the amount specified in the certificate, including penalties to date of payment as provided for in Parts XI to XV inclusive of this Act and entered upon the date of such registration, and all reasonable costs and charges attendant upon the registration of such certificate shall be recoverable in like manner as if they were part of such judgment.

S. 109(2) — Where a penalty calculated by reference to the amount of the tax that should have been paid or collected or the amount of stamps

This case underlines the decision of the Ontario Court of Appeal in *In re Cohen*,[11] in which the court, without giving written reasons, dismissed an appeal from an order of Urquhart J., sitting in bankruptcy. Urquhart J. had refused an application for a stay of proceedings in the magistrates' court against a bankrupt for failure to pay sales tax. Since the writer was present at the hearings of the *Cohen* case, he can testify that the Court of Appeal considered that the proceedings under section 111(1) were without prejudice to the Crown's civil claim for the tax due (in this case its claim to rank as a creditor in the bankruptcy). Henderson J.A. made it quite clear that there was nothing to prevent the Crown from recovering the amount of the tax more than once.[12]

It seems unfortunate that, as the law stands, no other decision is possible. What was obviously intended as an expeditious method of collecting arrears of sales tax has become an engine of punishment of an extraordinarily excessive nature. In the ordinary case, where the arrears of tax are paid before the prosecution under section 111(1) is heard, the Crown asks for a fine which does not include the amount of the tax.[13] Moreover, by virtue of section 109 (2)[14] the Minister may direct that the portion of the penalty that is calculated by reference to the amount of the tax which should have been paid be applied on account of the tax. This is the normal procedure under the act and reinforces the view that section 111 (1) provides merely for a summary method of tax collection. It is only when this section is not applied that injustice arises.

In a typical case of failure to pay sales tax, *A*, *B* and *C*, carrying on business as *A* and Co., are jointly charged under section 111(1) with failure to pay sales tax. They plead guilty, arguing in mitigation of the penalty that they were overdrawn at their bank

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that should have been affixed or cancelled is imposed and recovered under or pursuant to this Act, the Minister may direct that the amount thereof or any portion thereof be applied on account of the tax that should have been paid or collected or the indebtedness arising out of the failure to affix or cancel the stamps. 1947.

[11] 29 C.B.R. 163, affirming 29 C.B.R. 111.

[12] The same view was expressed by Rose, Magistrate, in *Rex* v. *Smith* (1947), 89 C.C.C. 397 (Alta.), in connection with a prosecution for failure to affix stamps, and by Macdonell Co. Ct. J. in *Rex* v. *Gold and Smith* (1938), 20 C.B.R. 133, 71 C.C.C. 395, varying 19 C.B.R. 304, 70 C.C.C. 382 (Ont.), a prosecution under s. 111(1).

[13] I am advised that in Quebec, and possibly in some other provinces, a different practice is followed. There the magistrate imposes a fine which includes the amount of the tax that has been paid, but this additional amount is not collected again. The net effect is, of course, the same.

[14] The court's right to impose the additional penalty, where the accused pays his arrears after the information is laid, is undisputed, but there is some question as to the law where he pays his arrears late, but before the information; see *Rex* v. *Freedman* (1946), 54 Man. R. 177, 86 C.C.C. 310, *Rex* v. *Smith* (*supra*).

and that the bank simply refused to honour their cheques. There is nothing to prevent the court from imposing fines of $25 to $1,000, plus the whole amount of the tax owing, on *each* of the partners. The Crown may then proceed in the Exchequer Court under section 108(1) and collect the amount of the tax a fourth time. That this extreme penalty has not been more frequently invoked speaks more for the restraint of departmental officials than for the wisdom of Parliament in enacting such provisions.

The excessive penalty imposed in the *Pacific Bedding* case contrasts strangely with that imposed by section 112(8) and (9) of the Income Tax Act[15] for failure to remit tax deducted from an employee's wages or salary. These are trust funds which clearly belong to the Crown from the moment they are deducted; sales tax collected by a licensed manufacturer or wholesaler, however, may be used in his business until the end of the month following its receipt; his is a mere liability to account for a debt. Failure to pay sales tax is therefore a much less serious offence than failure to remit income tax deductions, but is treated as being of equal gravity.

When bankruptcy intervenes the problem of sales tax liability becomes acute, as was made clear by the *Cohen* case. To return to our example, *A*, *B* and *C*, carrying on business as *A* and Co., fail to pay November sales tax before December 31st. If they go bankrupt on January 2nd, the Crown will claim in the bankruptcy and will receive its proper share of the assets. This will not, however, prevent the Crown from proceeding under section 111(1) against the bankrupt partners, who are admittedly without assets, and harassing them with the threat of imprisonment until they raise the money — a glaring example of imprisonment for debt!

If the partners had been wiser they might have arranged to go bankrupt on December 30th, before the November return was due. Providing previous returns had been filed and paid, they can

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[15] S. 112(8) (1948, c. 52) — Any person who has failed to deduct or withhold any amount as required by this Act or a regulation is liable to pay to His Majesty

(a) if the amount should have been deducted or withheld under subsection (1) of section 44 from an amount that has been paid to a person resident in Canada, 10% of the amount that should have been deducted or withheld, and

(b) in any other case, the whole amount that should have been deducted or withheld, together with interest thereon at the rate of 10% per annum.

S. 112 (9) — Every person who has failed to remit an amount deducted or withheld as required by this Act or a regulation is liable to a penalty of 10% of that amount or $10.00, whichever is the greater, in addition to the amount itself, together with interest on the amount at the rate of 10% per annum.

be guilty of no offence in failing to file a November return, for this becomes the trustee's duty. Having committed no offence, they cannot be prosecuted under section 111(1) and the Crown will be obliged to look to the bankrupt estate alone for the tax due.[16]

A matter has come to the writer's personal attention which further illustrates the unsatisfactory state of section 111(1). If *A*, *B* and *C* sell their business to *A* and Co., Ltd. under an agreement for the assumption of all liabilities of the old partnership, including those for sales tax, and if the company later goes bankrupt, owing sales tax, there seems to be nothing to prevent the Crown from allocating the payments made by the company on account of the partners' liability to the credit of the company, and considering the partners as still indebted to the Crown. In this way the Crown will be able to proceed under section 111(1) against the partners. If the partners are bankrupt too, because certain liabilities owing at the time of the taking over of the business by the company remain unpaid, they may be harassed as Cohen was harassed until payment is made.

The position of the inactive partner is particularly hazardous under the Excise Tax Act. If the active partners fail to pay sales tax, through negligence, fraud or mere inability to pay, not merely will the inactive partner be civilly liable for the debt but he will also be criminally responsible under section 111(1) and will perhaps be compelled to pay the tax twice over. It is not a system which does credit to the government of Canada or to the able and courteous officials who administer the act. Part of the blame must also rest upon the legal profession, whose lack of interest in the sales tax, as compared with its glamorous sister, the income tax, has contributed to this state of affairs.

It is also worth noting that Cameron J. considered that the assessment made by the Minister under the authority of section 113(8) and evidenced by the documents referred to in section 108 (8) and (9) was prima facie evidence that the amount claimed was payable. Since he referred to the recent judgment of Kelly D.J. in *The King* v. *Allison*,[17] it is surprising that he did not mention the fact that Kelly D.J. had held that this assessment was an administrative function and that the court could not look behind the documents referred to in section 108(8) and (9).[18]

[16] See *Rex* v. *Gold and Smith, supra*, where charges were laid for alleged offences committed both before and after the bankruptcy.

[17] [1950] Ex. C.R. 269, 50 D.T.C. para. 87-080 (p. 5259), [1950] C.T.C. 159

[18] The same view was expressed in *Rex* v. *Bierwith*, [1944] 2 W.W.R. 560 (Man.), where the decision was also based on the *Noxzema* case.

It is not the purpose of this brief comment to review the various decisions touching the problem of review of administrative decisions by the courts: they are well known to students and practitioners in the field. It may be worthwhile, however, to point out that the only authority given by Kelly D.J. for his rather startling proposition is the well-known case of *The King* v. *Noxzema Chemical Company of Canada Limited*[19] decided under section 98 of the Special War Revenue Act (now the Excise Tax Act).[20] The *Noxzema* decision was entirely reasonable; none of the factors which would be taken into account by the Minister in determining a fair price under section 98 were susceptible of handling by a court of law. As Kerwin J. pointed out, it would be different perhaps if the Minister were asked to decide what would be a competitive price or a similar question upon which legally admissible evidence could be taken. The reasoning of the *Noxzema* case does not seem to apply to assessments made under section 113(8). If the Minister takes into account irrelevant matters or proceeds on a wrong principle of law, why should the taxpayer not have an opportunity of contesting the assessment in court? The attitude of Cameron J. seems more consistent with equity to the taxpayer.

WOLFE D. GOODMAN*

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STARE DECISIS—FIVE RECENT JUDICIAL COMMENTS.—The yea 1950 has produced dicta in three Canadian and two English cases which should not go unnoticed.[1] In some, it is surprising that the problem of precedent was raised at all. In others, the baldness of the statements rather startles us at this date. In still others, the decisions show a notable desire to give this problem in the common law system some of the elasticity necessary to proper growth, and yet retain the fair measure of the doctrine's value. In addition to these five cases, there is the constitutional decision of Canada's enlarged highest court on the problem of delegation[2]

[19] [1942] S.C.R. 178, [1942] 2 D.L.R. 51, reversing [1941] Ex. C. R. 155.

[20] S. 98 — Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined. 1932-33, c. 50, s. 20.

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[1] *Maltais* v. *C. P. R.*, [1950] 2 W.W.R. 145 (Alta., Egbert J.); *Kelley* v. *C. Nor. Ry.*, [1950] 2 D.L.R. 760 (B.C.C.A.); *Re Cox*, [1950] 2 D.L.R. 449 (Ont., Wells J.); *R.* v. *Taylor*, [1950] 2 All E.R. 170 (C.C.A.); *Re Glass*, [1950] 2 All E.R. 953 (Vaisey J.).

[2] *A.-G. N. S.* v. *A.-G. Canada*, [1950] 4 D.L.R. 369 (S.C.C.).

— a decision in which in its first year as the highest court a new approach and a new pattern of interpretation might have given Canadians the hope that now, with such help from the experience of others as it was thought desirable to draw upon, we could not only mould the future government of this country to meet the needs of the present day but also provide the vision of a great national court helping to shape a forward-looking, vigorous citizenry. The almost "dead-pan" attitude of the members of the Supreme Court, also commented on elsewhere in this issue,[3] leaves one not only wondering whether we shall ever be more than children of the old country taking all-over leads, except for occasional pranks, from mother's apron strings, but also rather shocked that, with one exception, no member of the court appeared to see or realize the importance of the task before the tribunal.

Canadian courts are still troubled with the problem as to how far decisions of the English courts are binding in Canada. We have submitted earlier in this Review[4] that no decision from the Court of Appeal or any co-ordinate or lesser court in England is binding upon Canadian judges. The Manitoba Court of Appeal as recently as 1948 so held.[5] And this submission has nothing whatever to do with the abolition in 1949 of Canadian appeals to the Judicial Committee in London. We still have in 1950, however, a trial judge in Ontario bluntly declaring:

> I do so realizing that the result is not a satisfactory one in the circumstances of this case [charities], but I am bound by the decisions of the Court of Appeal of England in a matter of this sort unless there are contrary decisions of our own Court of Appeal and none have been cited to me nor have I found any.[6]

How long will this thing continue? How long must we tolerate unsatisfactory decisions from our bench because some alien court has decided differently? It may well be that we have no jurisprudence of our own up to 1949. Must we continue to have none? I should like to think of myself as a Canadian, not as a photostat of an Englishman — as a Canadian who is mature enough to respect the thought and decisions of the bench in England (and elsewhere) but who is also alive (a) to the defects which time has shown in some small points, and (b) to the differences of life in Canada. With respect, I can only suggest that Wells J. could not have seen what the Manitoba Court of Appeal said about a similar statement by Williams C. J. K. B. two years ago.[7]

[3] At p. 79. (Locke and Cartwright JJ. did not sit upon this case.)
[4] (1948), 26 Can. Bar Rev. 581; (1949), 27 Can. Bar Rev. 465.
[5] *Safeway Stores Ltd.* v. *Harris*, [1948] 4 D.L.R. 187.
[6] Wells J. in *Re Cox*, [1950] 2 D.L.R. 449, at p. 468.
[7] See *supra*, footnotes 4 and 5.

Other courts have been puzzled by the position in Canada of decisions of the House of Lords and of the Judicial Committee of the Privy Council, the highest courts of appeal for the United Kingdom and Commonwealth except those parts of the Commonwealth where appeals to the Judicial Committee have been abolished. In 1927, speaking for the Judicial Committee in an appeal from Canada, Lord Dunedin suggested rather dogmatically, in a well-known passage, that Canadian courts were bound by decisions of both bodies:

> . . . where an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.[8]

If we leave aside the questions as to which shall be followed when these two authorities differ[9] and as to whether the binding force of the Board's opinions applies to decisions from all parts of the Commonwealth rather than only to those from the "colony" where the problem is presently raised,[10] there is still a nice question over the applicability of Lord Dunedin's remarks to the Canada of to-day. We are not a colony, but his Lordship was clearly referring in 1927 to Canadian courts as colonial courts. Would a judge in Britain do so to-day? Probably not. But would the decisions bind us to-day, colony or no colony? It has been suggested that the courts in Eire must follow House of Lords decisions rendered before 1922 (when Eire got her own legislature and power to alter her own laws) in view of the constitutional provisions for Eire that the laws in force shall continue until altered by the Eire parliament.[11] Does this apply to decisions of the House of Lords, *qua* Canada, after 1867? And if Judicial Committee decisions after that date are binding, at least up to 1949, it frankly seems unreal and meticulously technical to refuse to

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[8] *Robins* v. *National Trust Co.*, [1927] 2 D.L.R. 97, at p. 100; [1927] A.C. 515, at p. 519.

[9] Cf. Frank Ford J. in *Will* v. *Bk. of Montreal*, [1931] 3 D.L.R. 526, at pp. 535-7 (Alta.); and the obiter of Harvey C.J.A. in *Jeremy* v. *Fontaine*, [1931] 4 D.L.R. 556, at p. 558 (Alta. C.A.).

[10] Cf. Middleton J.A. in *Negro* v. *Pietro's Bread*, [1933] 1 D.L.R. 490, at pp. 494-6; Schroeder J. in *Walsh* v. *Walsh*, [1948] 1 D.L.R. 630, at p. 647. Contra: *Lobb* v. *Rockwood* (1926), 35 Man. R. 499, at p. 503 (C.A.). *A.-G. for B.C.* v. *Col.* (*sub. nom., In re Succession Duty Act: Col.* v. *A.-G. B.C.*), [1934] 3 D.L.R. 488 (B.C.C.A.), is not an authority on this point.

[11] Cf. Note (1950), 66 L.Q.R. 310.

treat House of Lords decisions similarly. The view of Frank Ford J. in *Will* v. *Bank of Montreal*[12] is far more realistic.

We have this problem arising recently first in British Columbia where, in *Kelley* v. *Canadian Northern Railway Co.*,[13] the county court trial judge followed the English lower court decision in *Nichols* v. *Marsland*[14] because it had been approved in a later Privy Council decision and was therefore thought to be binding upon him. The Court of Appeal distinguished the *Nichols* case and did not deal with our problem fully. With respect to the learned county court judge, it would seem that, as Sidney Smith J.A. pointed out, approval of obiter in a lower court case by the Privy Council does not make the main decision in the lower court binding as a decision approved by the Privy Council.[15] The trial judge also, it would appear,[16] declined to follow a more recent decision of the House of Lords because it was of less weight than a Privy Council decision. Again the Court of Appeal declined comment, other than a recital by O'Halloran and Sidney Smith JJ.A. of the facts. But there is an interesting aside by Sidney Smith J.A. which sheds light on the possible attitude of future Canadian courts now that appeals beyond Canada have been abolished. His Lordship says:

> Granted that Privy Council decisions are weightier here (*on account of their hitherto binding nature*) than those of the Lords, *Rickards* v. *Lothian* cannot be regarded as adopting the ruling in *Nichols* v. *Marsland* that is relevant here.[17]

This obviously is not a statement that Privy Council decisions are to be preferred to those of the House of Lords. But it is a clear indication that Privy Council decisions are not considered binding any longer — "their *hitherto* binding nature". This is the first indication of our future course of conduct since the Supreme Court at Ottawa became our final court of last resort. And it is, with respect, submitted that this lead is in the only logical direction for Canadians: legally, jurisprudentially, nationally. May we suggest not only that this view applies to future English decisions (of any court), but also that past decisions of the two high-

[12] *Supra*, footnote 9.
[13] [1950] 2 D.L.R. 760 (B.C.C.A.).
[14] (1876), 2 Ex. D. 1; 46 L.J.Q.B. 174; mentioned in *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42.
[15] [1950] 2 D. L. R. 760, at p. 770.
[16] Cf. Sidney Smith J.A., *ibid.*; O'Halloran J.A., at p. 762. Does the latter suggest that there is something added to the weight of House of Lords decisions by Privy Council approval? Cf. his remarks at pp. 762-3 that the *Grennock* case, [1917] A.C. 556 (H.L.), was subsequently approved by the Privy Council in two cited appeals from Canada.
[17] *Ibid.*, at p. 770. Italics added.

est bodies overseas should now be treated as of the greatest persuasive effect but not as binding authority, right or wrong — if not by all courts, at least by our highest court.

And this leads to the third Canadian decision to be noted — the forthright statement of Egbert J. in *Maltais* v. *C.P.R.*[18] that a decision of the House of Lords is not binding in Canada if inapplicable to circumstances as they exist in Canada. Here his Lordship was merely following the view expressed with respect to the same decision of the House of Lords a year earlier by the Manitoba court in *Anderson* v. *Chasney*.[19] His Lordship's view that the English decision "would undoubtedly be followed" in Canada "if . . . not inapplicable to circumstances" in Canada does not, it is hoped, suggest that it is binding: merely, that the respect given to it is substantial. The inapplicability of circumstances is not the only reason why a few English decisions should not be followed. We may consider some "bad law", nonsensical or unjust. In fact the Manitoba case does not suggest any limitation. Adamson J. A. baldly states:

> While this [House of Lords] case is not binding on this court, it is to be looked at with great respect and followed in so far as the reasoning appeals to Judges in this country, and in so far as it is applicable.[20]

It cannot be said that the actual abolition of appeals to England affected the *Anderson* decision of June 24th, 1949, though the government's pledge to introduce legislation to that effect was public by that date. May we suggest that these decisions from the west reflect a sensible attitude for the future toward English decisions: respect, not blind submission?

A different problem, entirely, is that raised in the two English decisions. How far is the doctrine of *stare decisis* actually applicable, even within one legal hierarchy? In *Rex* v. *Taylor*,[21] the English Court of Criminal Appeal has finally decided categorically that it does not bind itself. This decision really is not new. It is reflected in two earlier decisions of the same court,[22] and is the view held in Canada by courts of criminal appeal.[23] But the reasoning upon which the English court decided that the doctrine does not apply to criminal appeals, thereby allowing it to refuse

[18] [1950] 2 W.W.R. 145, at p. 160 (Alta.).

[19] [1949] 4 D.L.R. 71, at pp. 91, 95. Affirmed, [1950] 4 D.L.R. 223 (S.C.C.), where the court expressly approves the reasoning of Adamson J.A.

[20] *Ibid.*, at p. 95. Coyne J.A. is equally categorical at p. 91: "In any event the case is not binding on this Court and it should not be followed here".

[21] [1950] 2 All E.R. 170 (C.C.A.), overruling *Rex* v. *Treanor*, [1939] 1 All E.R. 330 (C.C.A.).

[22] *Rex* v. *Power* (1919), 14 Cr. App. Rep. 17; *Rex* v. *Norman* (1924), 18 Cr. App. Rep. 81.

[23] *Rex* v. *Hartfeil* (1920), 55 D.L.R. 524 (Alta. C.A.); *Rex* v. *Thompson*,

to follow a much criticized earlier decision, is enlightening. Lord Goddard C. J., speaking for the court of seven judges, says:

> I should like to say one word about the re-consideration of a case by this court. A court of appeal usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords always considers itself bound by its own decisions. In civil matters it is essential in order to preserve the rule of *stare decisis* that that should be so, but this court has to deal with the liberty of the subject and if, on re-consideration, in the opinion of a full court the law has been either mis-applied or misunderstood and a man has been sentenced for an offence, it will be the duty of the court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case, and in the present case the full court of seven judges is unanimously of opinion that *R.* v. *Treanor* . . . was wrongly decided.[24]

Why is it essential to preserve inviolate the rule of *stare decisis?* Why make the House of Lords bind the court of appeal (or the Supreme Court of Canada bind a provincial court of appeal) in civil matters just to preserve the rule of *stare decisis?* And is the liberty of the subject in a *criminal* case any greater than that same liberty in a civil case?[25] Is not the truth to be found in the fact that the concept of *stare decisis* has become too rigid — too convenient an answer for the practitioner — to allow justification or rectification of our rules and our practices? The criminal courts are not running wild overruling one another or themselves — they might even do it a little oftener and no earth-shattering results would be felt. But are they not making of *stare decisis* what it really was at one time — follow decisions of the past unless upon full consideration they are considered essentially bad.

The last case to be mentioned raises this problem in another form: How far is a trial judge in a civil action bound by a decision of one of his brother trial judges? In *Re Glass*,[26] Vaisey J. is reported to have felt "bound" to follow a decision earlier in the year of his brother judge in the Chancery Division in England, Roxburgh J. The actual result in this case did not suffer because of the extended application of the doctrine. Both judges agreed. But had Vaisey J. disagreed with Roxburgh J., surely he would

[1931] 2 D.L.R. 282 (Man. C.A.); *Ex p. Yuen*, [1940] 2 D.L.R. 467 (B.C.C.A); *Rex* v. *Eakins*, [1943] 2 D.L.R. 543 (Ont. C.A.).

[24] [1950] 2 All E.R. 170, at p. 172. The language in the Times Law Reports varies considerably but is essentially the same in result (1950), 66 T.L.R. (part 1) 1182, at p. 1183.

[25] And compare remarks on this case in (1950), 66 L.Q.R. 440-1; (1950), 13 Mod. L. Rev. 417, at pp. 418-9.

[26] [1950] 2 All E.R. 953, at p. 954.

be at liberty in the trial court to refuse to follow, after full consideration, the earlier trial judgment. If not in England, in Canada the practice might appear otherwise.[27]

In result, generally in 1950, we find a certain loosening of the bonds of *stare decisis*, both in the doctrine and in its application to English decisions in Canadian courts. It is not to be thought that this writer would desire to throw the whole doctrine overboard. Nothing of the kind. But some review otherwise than by the legislature is necessary — not only within any one legal hierarchy, but also specifically in the Canadian scene where the daily routine of filling in forms occupies, in one field or another, too much of the time of bench, bar and student. We need to shake ourselves loose from the lethargy that has crept, to a large extent, over the practice of law and the training of lawyers in Canada. Are we interested in anything other than the day to day routine of a practitioner's office? Do we see for the legal profession any place of leadership and true service in the community? Now, in 1951, is a convenient time, with the shackles of the Privy Council thrown off, to justify in the private field our existence as a monopoly and, in the public field, the faith of the men eighty-four years ago who conceived a nation. Are the members of our courts, particularly at Ottawa, alive to the situation — to the opportunity? Or do they merely reflect the practice and training from which they come?

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[27] *E.g.*, Schroeder J. in *Re Noble and Wolfe*, [1948] 4 D.L.R. 123, at p. 133; O.R. 579, at p. 590 (reversed by S.C.C., 1950); *Nat. Trust* v. *Christian Community*, [1940] 4 D.L.R. 767, at pp. 769-73 (also went to S.C.C., 1941).

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