In the world of today, any federal system needs in considerable measure to be a co-operative federalism. In Canada, for example, we have seen increasing necessity for agreements or understandings between the federal government and provincial governments concerning specified uses of their respective powers and resources on many matters. These agreements or understandings take many forms, operate in many ways and occur at every official level—specifically at the legislative, ministerial or civil service levels, or some combination of them. Such co-operation has been and is going on to a surprising degree.

But the success of these co-operative measures is not just a matter of a sufficient upsurge of good will in Ottawa and the provincial capitals. At times the life or death of particular ministries may be at stake, and in any event hard bargaining is frequently to be expected. Such bargaining necessarily takes place against the background of basic definition provided by the federal constitution. There must be initial definition of the powers and resources of each government in the federation before there can be bargains or agreements among them about what each government is to do or refrain from doing with its respective powers and resources. Co-operation and mutual good will we certainly need, but no amount of them will do away with the absolute necessity for a primary authoritative distribution of powers and resources in our federal constitutional document. At present this is the British North America Act, and, unless and until it is amended or replaced, its present scheme sets the basic framework within which co-operative measures between governments in Canada must be undertaken. So the text of the federal constitution is of continuing importance, but of course this point should not be pressed to ex-
tremes. Changing the wording of the constitution in this or that respect, for example, or even rewriting it wholesale, would not be a cure-all for everything that may be wrong in Canada. On the other hand, the opposite extreme should also be avoided—this is the idea that the text of the federal constitution, whatever it may be, really means little or nothing in the ongoing life and government of the country. Here the concept seems to be that the constitutional text is just a façade which can be made to give a legitimate front to any arrangements whatever arrived at among those in power for the moment in the political life of Canada and the Provinces.

As usual, the truth does not lie at either of these extremes. Much change and adjustment can be brought about by official agreement and practice, and it is essential to flexibility and efficiency of federal processes of government in the modern state that this should be so. Nevertheless, the text of the federal constitution as authoritatively interpreted in the courts remains very important.¹ It tells us who can act in any event. In other words, constitutionally it must always be possible in a federal country to ask and answer the question—What happens if the federal and provincial governments do not agree about a particular measure of co-operative action? Then which government and legislative body has power to do what? And even though federal-provincial agreement on some matter may come at the end of difficult negotiations, the question and answer just referred to will have influenced the result because the answer is a primary element in defining the bargaining power of the federal government on the one hand and the provincial governments on the other. Professor Peter H. Russell has made these points very well in the following passage from the introduction to his Leading Constitutional Decisions.²

Politicians and administrators have certainly been more conspicuous than judges in the post-war evolution of Canadian federalism. This so-called “co-operative federalism” of the post-war period has been much less a litigious struggle between Ottawa and the provinces to defend and expand their own enclaves of power than a matter of political compromise and administrative pragmatism. While granting all this, we must still guard against dismissing too categorically the importance of the constitutional text and its application by the courts. In any of the issues that arise in federal-provincial relations, those who are re-

¹ Concerning the importance of judicial interpretation, see W. R. Lederman, The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada (The Integrity of the Process of Interpretation) in Crépeau and MacPherson (eds), The Future of Canadian Federalism (1965), pp. 91-112.

² The Carleton Library, No. 23 (Toronto, 1965), pp. xxvi and xxvii.
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... responsible for working out the policies and strategies of the governments involved, no matter how pragmatic and flexible they may appear to be in dealing with the division of powers, must always operate on the basis of some assessment of the constitutional power which could be found to sustain the positions they wish to assume. In making these calculations, they will be guided by their awareness of previous constitutional cases and their anticipation of how alternative legislative and administrative schemes would fare if challenged in the courts. The number of major issues that are settled in court should not be regarded as the sole measure of the significance of judicial review. Just as important, but far more difficult to measure, is the extent to which judicial decisions, past, present, and future, enter into the considerations of the principal agents in the decision-making process.

Personally, I would emphasize the importance of authoritative judicial interpretation somewhat more than Professor Russell does, but essentially we seem to be in agreement.

One example of the relation of basic constitutional definition to bargaining power can be seen in the history of federal-provincial taxation agreements. There have been several federal-provincial conferences to settle these agreements from time to time, but on each occasion the federal government seems to have made the essential decisions and proposals, thus setting what the terms of the agreement were to be if there was to be agreement at all. The Provinces, particularly the economically weaker ones, have in the main found themselves in a "take-it-or-leave-it" position respecting the federal proposals. (I make no judgment at this point whether this is a good or bad thing; I am merely saying it has in fact been the pattern.) The question arises then—Why has the federal government been able to make its views prevail in these situations? No doubt many factors are at work, but the most important one is simply that, under the federal constitution, the federal taxing power is a much more potent instrument than is the taxing power of a Province. The latter must be direct and is confined territorially to a subject in the Province. The federal taxing power is not limited as to type and takes for its territorial base the whole of Canada, thus matching in jurisdiction the national or inter-provincial operations of many tax payers, particularly corporate ones. Thus, at least in the fields of personal and corporate income, the federal government is able to operate a taxation system that is both more effective and more fair than are the taxation systems of the respective Provinces operating independently. The federal and provincial taxpayers are the same persons or corporations, and they are very sensitive to considerations of effectiveness and fair-
ness and also to the inconvenience and expense of multiple income tax returns.

A contrasting example with the same lesson is provided by the story of the Canada and Quebec pension plans. In 1951, for the first time and so far for the only time in Canadian constitutional jurisprudence, a principle of provincial paramountcy in a concurrent field was expressed when the British North America Act was amended to allow the federal Parliament to make laws relating to old age pensions. Section 94A (as later added to in a respect not relevant here) reads as follows:

The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

The original Canada Pension Plan as proposed by the federal government differed in basic ways from the Quebec Pension Plan as proposed by the Quebec government. It will be recalled for instance that the latter was a fully-funded plan providing large sums for investment while the former was not. The Lesage government was able to insist on the scheme of the Quebec Pension Plan for Quebec to the exclusion of the Canada Pension Plan primarily because of the principle of provincial paramountcy in this respect, in section 94A of the British North America Act. Constitutionally this gave them the last word in any event for Quebec. Accordingly, to achieve the necessary degree of uniformity across the country, the federal government and the governments of the other Provinces accepted a revised Canada Pension Plan that was in harmony with the Quebec Pension Plan. I do not like section 94A, but I have no doubt about what it means or what its influence has been. Anyway, this illustrates the delicacy and importance of paramountcy issues in our constitutional law, a subject to be analysed in more detail at a later point in this essay.

The text of our constitution then does set the basic terms that provide definition and context for the various forms of intergovernmental co-operation that have developed in the field of Canadian federal-provincial relations. But before going on to more detail concerning this, a few words may be useful about the nature of constitutions in general and of federal constitutions in particular. Woodrow Wilson said that "The State is a people organized for

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*British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.) as added to by British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.).*
law within a definite territory." There are many types of such organization, but in any case one finds the primary organizational ideas of a particular modern state in its fundamental constitutional law. Here are the doctrines, principles and procedures that are the first things of community organization for the making and applying of laws. If one asks—Where is it that sovereignty or supremacy rests in the modern state?—the answer is that these primary doctrines, principles and procedures of the constitution are themselves supreme. It is fundamental to "The Rule of Law" that in the end such enduring ideas are supreme, and not particular official persons in office at particular times. All official persons are under the law; none are above it. It is these basic constitutional ideas that attract the long-run loyalty of citizens of the State. Now it is true that ideas must live in the minds of people, but the basic ideas of the constitution endure through generations because they are the focus of acceptance and loyalty over long periods of time. In this real sense they have objectivity and are not just subjective to particular persons at a particular time. The point has been made with great clarity by the Swedish jurist Olivecrona.4

The machinery of the state is run by an ever changing multitude of persons, acting as monarchs, presidents, heads and members of the government, members of parliament, and so on. In general not one of these persons has even the faintest idea that the law should consist of his commands. Everyone of them finds in existence the rules which are called the law and are on the whole enforced. He can only bring about a change in some part of the law. The bulk of it existed before him and will continue to govern the life of the country when he is gone.

Further it is to be noted that the law givers in general attain their positions and exercise their power by means of the rules of law. The monarch owes his place to the rules of the constitution concerning the succession to the throne, the head of the government has been appointed by the monarch, the members of parliament have been legally elected, and so on. It makes no sense to pretend that the rules which carry these people to their position are their own commands.

We may now ask—What is the characteristic first principle of a federal constitution? It is an original distribution by subjects of primary legislative powers between provincial or state governments on the one hand and a central government on the other. It means the territorial sub-division of the country to give a number of states or provinces, and also an original distribution by subjects of legislative powers between the central government in respect of the whole national territory on the one hand and the several sub-regional governments for their respective fractions of the national territory.

4 Law as Fact (1939), pp. 32-33.
territory on the other hand. This division of law-making powers by territorial sub-divisions and subjects means that the respective state governments and the central government develop in certain respects a peculiar involvement with and dependance on one another. In Canadian terms this leads to certain measures of inter-governmental co-operation in the field of federal-provincial relations. It is vital to realize that the conditions underlying these measures are in the main peculiar to a full-fledged federal system, so that we do not have here just another species of international relations.

To speak in more detail, the point is this. Independent countries like France and Britain can meet their needs for co-operation by international treaties or less formal agreements between their governments. But France and Britain are mutually exclusive as to territory and bodies of citizens, and each government for its own population and territory has the full range of legislative powers. This is not so between the federal government and the provincial governments of Canada. In the Canadian federation, Province by Province, the federal government and the respective provincial governments are responsible for the same territories and the same populations. The only separation is in the realm of ideas, the division of law-making powers by subjects between the federal government on the one hand and the provincial governments on the other. *Note that these conditions all differ from those obtaining between governments of independent countries in international relations.* The federal and provincial governments have joint responsibility for the same territories and populations, but each is limited to its own list of subjects of power for the purpose. Ideally the federal and provincial lists of powers should be crystal clear and mutually exclusive. But, as we shall see later, such perfection is not attainable in power-distribution systems and the exigencies of imperfection are the roots of many of the problems of federal-provincial relations. In any event, it should be quite clear that federal governmental institutions in Canada are *not* just a sort of Canadian United Nations Organization (or United Provinces Organization) created by the Provinces and dependant for continued existence on the collective sufferance of the Provinces. Where federal subjects of power are concerned, provincial sub-division boundaries simply disappear and the federal government operates as a matter of original constitutional right in the whole of Canadian territory. Likewise the provincial governments operate concerning provincial subjects of power as a matter of orginal constitutional right in their respec-

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tive sub-divisions of the national territory. In total operation this provides a system of government for the whole of the Canadian people and territory on all legislative subjects, a system that is vastly superior to anything possible by agreement between independent countries under the present régime of international law. Specifically, under the Canadian federal constitution, where intergovernmental co-operative measures are desirable in federal-provincial relations, both federal and provincial ministers and legislators are under the salutary political pressures of the need to respond to the wishes of the same electoral bodies of citizens in the same territory. Moreover, if an agreed solution for some problem situation in federal-provincial relations is not forthcoming, our federal constitution makes provision in several ways for a national solution by federal legislation in any event, if the need is sufficiently urgent. Accordingly, a federal constitution like ours compared to the régime of international law provides much more effective pressure for governments to reach agreement in the first place, and in addition often provides an alternative of over-all (national) legislative action in the absence of agreement, an alternative the like of which is altogether missing between governments of independent countries under the régime of international law. The proposal that the Province of Quebec should become an “Associate State” of the rest of Canada is nothing more nor less than a proposal to destroy the Canadian federal constitution in favour of the greatly inferior sort of thing that is possible in the way of intergovernmental arrangements between independent States under international law. There is no essential constitutional difference between the proposal for an Associate State and complete separation.

I have faith these things will not happen and that we can work out justice for all our people, including the French-Canadians, while preserving the essentials of a federal constitution. We simply cannot afford in the modern world, to revert to lower from higher forms of government. Indeed, so far as Canada is concerned, I would go further. Only by preserving the essentials of a federal constitution in Canada can we work out justice for all our people.

Earlier I said that the main separation between the federal government on the one hand and the provincial government on the other was in the realm of ideas—the division or distribution of

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8 For example, the federal general power in the opening words of section 91 of the British North America Act, and the doctrine of Dominion paramountcy in the event of conflict between federal and provincial statutes in a concurrent field.
law-making powers by subjects. If the federal and provincial lists of powers could be effectively clear, complete and mutually exclusive in all circumstances, each would tend to his own business and the need for federal-provincial co-operative measures would be at a minimum. But this is just not the situation in real life. Inevitably the lists of categories have conflicting and overlapping features, the reasons for which were well explained in 1940 in the Rowell-Sirois Report.⁷

No amount of care in phrasing the division of powers in a federal scheme will prevent difficulty when the division comes to be applied to the variety and complexity of social relationships. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mechanical application of the division of powers. There is nothing in human affairs which corresponds to the neat logical divisions found in the constitution. Therefore, attempts to exercise the powers allotted by the constitution frequently raise questions as to its meaning in relation to particular circumstances.

In more technical language, the point can be put this way. Nearly all laws or legislative schemes have a multiplicity of features, characteristics or aspects by which they may be classified in a number of different ways, and hence potentialities of cross-classification between the various categories of the federal and provincial lists are ever present. The more complex the statute, the greater the number of logical possibilities in this regard. So, in the case of a particular law challenged for validity, one aspect of it will point to a federal category of power with logical plausibility, but, with equal logical plausibility another aspect points to a provincial category of power. Or, one can say the same thing another way. The respective federal and provincial classes of laws often overlap one another as general concepts in many important respects, and thus compete, so to speak, through this partial coincidence of categories to control the statutes to be classified. The courts have had to face these problems because of their final responsibility to interpret the federal distribution of powers, and have developed the all-pervasive aspect theory of interpretation to meet the situation. “Subjects which in one aspect and for one purpose fall within Section 92, may in another aspect and for another purpose fall within Section 91.”⁸

In the course of judicial decisions on the British North America Act, the judges have basically done one of two things. First they

⁷ Report of The Royal Commission on Dominion-Provincial Relations (1940), Book 1, p. 31.

⁸ Hodge v. The Queen (1883-84), 9 A.C. 117, at p. 130.
have attempted to define mutually exclusive spheres for federal and provincial powers, and they have had considerable though partial success in doing this. But, where mutual exclusion did not seem feasible or proper, the courts have implied concurrency of federal and provincial power in the overlapping area, with the result that either or both authorities have been permitted to legislate, provided in the latter event that their statutes did not in some way conflict one with the other in the common area. In the event of conflict, the judicial doctrine of dominion paramountcy is to the effect that federal legislation prevails and provincial legislation is suspended or inoperative. The interpretative course followed then might be summed up as follows—mutual exclusion if feasible but concurrency where necessary.

An example of the mutually exclusive result is offered by the Inter-Provincial Bus Lines case of 1954. Here the Judicial Committee of the Privy Council held that the power to regulate inter-provincial or international motor vehicle enterprises carrying goods or persons across boundaries was exclusively federal, whereas the power to regulate such enterprises when they operated only within the boundaries of a single Province was exclusively provincial. The former were connecting undertakings (a federal responsibility), the latter were local undertakings (a provincial responsibility).

By contrast, the Unconscionable Transactions Relief Act of the Province of Ontario was upheld as valid by a judicial finding of concurrency in the field of interest charges. This statute provides that, if in all the circumstances the cost of a loan is excessive and the transaction harsh and unconscionable, the court may order the contract reformed so as to make its terms fair and reasonable. Clearly this statute concerns the whole range of undue influence in contract (with excessive interest just one of several possible “undue” elements) and so logically falls within the provincial category of “Property and Civil Rights” under the British North America Act. Also, it is equally obvious that insofar as it deals with interest charges it falls within the federal category of “Interest” under the British North America Act. Thus the statute in question has both its federal and its provincial aspects, and its

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18 1867, 30-31 Vict., c. 3 (U.K.).
13 Ibid.
validity depends, under the present system of interpretation, on determining whether one of these aspects is primary, or whether the two aspects are equivalent in their relative importance in accordance with the social and economic responsibilities of both levels of government. If the federal aspect of interest is primary, then only the federal Parliament can enact a law dealing with interest in this way, and the provincial statute falls because it deals with interest as well as other things. On the other hand, if the provincial aspect of interest, as part of the whole picture of undue influence in contract, is of equivalent importance to the federal concern with interest, then the provincial statute stands in its entirety, unless there is actually inconsistent federal legislation on interest—and the Supreme Court of Canada found this not to be so in the Ontario case. In other words, the Province is responsible for general undue influence laws in contract, and no such law is complete unless it includes remedies concerning undue interest rates as well as other facets of undue influence. Hence the judicial finding that, in this context, there is a provincial power to deal with interest concurrent with the federal power. Incidentally the decision on the Ontario Unconscionable Transactions Relief Act has very important implications—it has opened the way for the Provinces to enact comprehensive schemes for the protection of consumers generally, which some of them are now doing.

In any event, the point for present purposes is that the conditions governing federal-provincial co-operation differ to some extent, depending on whether one is talking of co-operation concerning mutually exclusive fields of power or concurrent fields of power. In either case, of course, there may simply be federal-provincial agreement that each will exercise its own powers for itself, but in a particular way that complements and does not frustrate the operation of legislation of the other. So far as form is concerned, this is no doubt the simplest type of federal-provincial co-operation. Indeed this is all that is formally necessary to effect co-operation in a concurrent field, but more of this later. In relation to exclusive fields of power, there is a further consideration, that of the delegation of legislative powers between the federal government on the one hand and provincial governments on the other.

The inter-governmental delegation that concerns the Canadian federal system has taken two forms which, for lack of better terms, might be designated as legislative and administrative. The legislative type involves the federal Parliament attempting to delegate
directly to a provincial legislature power to make laws respecting some portion of an exclusive federal category of power, or vice versa. The administrative type of inter-governmental delegation involves the federal Parliament attempting to invest provincial officials with power and responsibility to apply federal laws, and this may at times include wide regulation-making powers for the provincial officials in part of an exclusive federal legislative field. As in the case of direct legislative delegation, administrative delegation may also be attempted between a provincial legislature and federal officials. The Supreme Court of Canada has ruled that legislative delegation is invalid and that administrative delegation is valid. This difference in result has its difficulties because, when wide regulation-making power is given, for example, by the federal Parliament to a provincial board or commission, it is difficult to see much distinction between legislative and administrative delegation. Nevertheless, it will be argued here that the distinction is a valuable one though it does have its gray areas.

First, as to legislative delegation, the leading authority is the *Nova Scotia Inter-delegation* case\(^ {14} \) in the Supreme Court of Canada in 1950. In this case the proposed Delegation of Legislative Jurisdiction Act of the Province of Nova Scotia had been referred as Bill 136 to the Supreme Court of Nova Scotia, which held it to be *ultra vires* of the Province. Appeal was taken to the Supreme Court of Canada which unanimously affirmed the decision of the Supreme Court of Nova Scotia *en banc*. Chief Justice Rinfret described the terms of Bill 136 as follows:\(^ {15} \)

By virtue of this Bill, if it should come into force, by proclamation, as therein provided, the Lieutenant-Governor in Council, may 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 s. 92 of the *B.N.A. Act*, exclusively within the jurisdiction of the Legislature of Nova Scotia. It provided that any laws so made by the Parliament of Canada shall, while such delegation is in force, have the same effect as if enacted by the Legislature.

The Bill also provides that if and when the Parliament of Canada shall have delegated to the Legislature of the Province of Nova Scotia 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 *B.N.A. Act*, exclusively within the legislative jurisdiction of such Parliament, the Lieutenant-Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all of the provisions of any Act in relation


\(^ {15} \) Ibid., at pp. 370-371.
to a matter relating to employment in force in the Province of Nova Scotia to any such industry, work, or undertaking.

Finally, the Bill enacts that if and when the Parliament of Canada shall have delegated to the Legislature of the Province of Nova Scotia 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 Lieutenant-Governor in Council, while such delegation is in force, may impose such a tax of such amount not exceeding 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.

This certainly raised the essential issues squarely, and the reasons of the judges for their negative decision are best given in their own words.

Chief Justice Rinfret: 16

The constitution of Canada does not belong either to Parliament, or to the Legislatures: it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by s. 91 and that each Province can legislate exclusively on the subject-matters referred to it by s. 92. The country is entitled to insist that legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in s. 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.

Mr. Justice Taschereau: 17

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

Mr. Justice Rand made the same points in a somewhat different way. The relationship of delegation involves subordination of the delegate to the delegating body, and so is simply not an appropriate

16 Ibid., at pp. 371-372.  
17 Ibid., at p. 382.
relationship between the federal Parliament on the one hand and the provincial legislatures on the other. They are primary and co-ordinate legislative bodies under the constitution.\textsuperscript{18}

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

In other words, handing over a plenary and primary legislative discretion in this manner, even on a bilateral basis subject to revocation, is not really delegation at all, it is amendment of the federal constitution, however partial or temporary such amendment may be. And in any event, as Mr. Justice Rand further pointed out, the practical possibilities of revocation by the “delegating” body are severely limited.\textsuperscript{20}

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

So much for legislative delegation—it is a necessary implication of our federal constitution that primary legislative powers cannot be traded or transferred, even with consent on both sides, between the federal Parliament and a provincial legislature.\textsuperscript{20}

In spite of this strong stand against inter-governmental delegation at the primary legislative level, the Supreme Court of Canada soon made it clear, in the \textit{Prince Edward Island Potato}

\begin{itemize}
  \item[{\textsuperscript{18}}] Ibid., at p. 386.
  \item[{\textsuperscript{20}}] Ibid., at p. 387.
\end{itemize}

\textsuperscript{19} This is subject to the exception to be found in section 94 of the British North America Act in favour of the federal Parliament at the expense of the legislatures of the common law provinces. Section 94 allows no revocation once the step has been taken of passing provincial powers to the federal Parliament—perhaps this is one reason why it has never been used. In any event, its presence in the British North America Act implies that there is to be no other way of transferring primary legislative powers by bilateral consent under the British North America Act. The Supreme Court of Canada in the \textit{Nova Scotia} case noted and approved this implication.
Board case of 1952,\(^{21}\) that delegation to officials of the other government at the subordinate levels of the administration of laws and regulation-making was a different matter and was valid. The Legislature of Prince Edward Island had by statute provided for a Potato Marketing Board of provincially appointed persons empowered to make rules for the marketing within Prince Edward Island of potatoes produced there, the board itself to be the sole marketing authority. This was valid legislation, being concerned with the intra-provincial marketing of local produce. Meanwhile, the *Federal Agricultural Products Marketing Act* of 1949,\(^ {22}\) dealing with the federal subject of interprovincial and export marketing of agricultural products, provided as follows:

2(1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The Governor in Council made an order delegating this power respecting Prince Edward Island Potatoes to the provincial Board and the Supreme Court of Canada held the delegation to be valid and operative. As Mr. Justice Taschereau put it:\(^ {23}\)

The Supreme Court of Prince Edward Island relied upon *A.-G. N.S. v. A.-G. Can.,* [1950] 4 D.L.R. 369, [1951] S.C.R. 31, to answer in the negative, but I do not think that that case supports the view that has been adopted. The judgment merely decided that neither Parliament nor the Legislatures can delegate powers to each other so as to change the distribution of powers provided for in ss. 91 and 92 of the *B.N.A. Act.* Here the issue is entirely different. The federal legislation does not confer any additional powers to the Legislature but vests in a group of persons certain powers to be exercised in the inter-provincial and export field. It is immaterial that the same persons be empowered by the Legislature to control and regulate the marketing of natural products within the Province. It is true that the Board is a creature of the Lieutenant-Governor in Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada: *Valin v. Langlois,* 5 App. Cas. 115.

Thus, a means was found to combine in the hands of one regulatory body control over the whole marketing process of an agricul-


\(^{22}\) S.C., 1949, c. 16.

\(^{23}\) *Supra,* footnote 21, at p. 163.
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tural product within and beyond the Province of production—a
desirable result much sought after for years in constitutional prac-
tice.

Advantage was quickly taken of this new-found device in
another field. The federal government, though it had vindicated
its exclusive jurisdiction over inter-provincial and international
commercial motor vehicle enterprises in the Winner case of 1954,24
decided none the less that it was not prepared to undertake such
regulation. Accordingly the federal Parliament passed the Motor
Vehicle Transport Act of 1954,25 which contained the following
provisions:

**Operation of Undertaking**

3(1) Where in any province a licence is by the law of the province
required for the operation of a local undertaking, no person shall
operate an extra-provincial undertaking in that province unless he holds
a licence issued under the authority of this Act.

(2) The provincial transport board in each province may in its dis-
cretion issue a licence to a person to operate an extra-provincial under-
taking into or through the province upon the like terms and conditions
and in the like manner as if the extra-provincial undertaking operated
in the province were a local undertaking.

**Tariffs and Tolls**

4. Where in any province tariffs and tolls to be charged by a local
carrier for local transport are determined or regulated by the provincial
transport board, the tariffs and tolls to be charged by a federal carrier
for extra-provincial transport in that province may in the discretion of
the provincial transport board be determined and regulated by the
provincial transport board in the like manner and subject to the like
terms and conditions as if the extra-provincial transport in that province
were local transport.

**General**

5. The Governor in Council may exempt any person or the whole or
any part of an extra-provincial undertaking or any extra-provincial
transport from all or any of the provisions of this Act.

All Provinces eventually took up this offer of delegation, most
of them right away, so that effective control of interprovincial and
international commercial motor vehicle carriers passed to the pro-
vincial Motor Vehicle Boards, Province by Province. It should be
recalled that such a Board is composed of provincially-appointed
and paid officials who get their policy instructions from the rele-
vant provincial statutes and possibly from a provincial minister
or the provincial cabinet, depending on the terms on which the

24 Supra, footnote 10. 25 S.C., 1953-54, c. 59.
particular Province has constituted its board. We came pretty close here to ten sets of laws for interprovincial and international commercial motor vehicle carriers, the very thing that Mr. Justice Taschereau pin-pointed as objectionable in the *Nova Scotia Inter-delegation* case. Apparently the present federal government has doubts about the wisdom of what was done in 1954, because the new National Transportation Act of this year (1967)⁵⁵ provides machinery whereby a committee of the Canadian Transport Commission, called the Motor Vehicle Transport Committee, could take over the regulation of all extra-provincial commercial highway transportation enterprises, though the steps to do so have not been taken yet. No doubt the federal government intends to move in this direction. But no doubt also certain political and commercial vested interests have developed in the state of the several provincial sets of regulations under the delegation of the Federal Motor Vehicle Transport Act of 1954, and we will soon see how strong these are. Mr. Justice Rand’s point about the difficulty of revoking a delegated law-making power may soon be put to the test.

Yet, the delegation in the Federal Motor Vehicle Transport Act of 1954 was subject to some limitations. While a provincial board could withhold a licence to operate altogether from an extra-provincial motor vehicle carrier, if it did grant a licence it could not then discriminate against the extra-provincial carrier by comparison with intra-provincial carriers. Moreover, under section 5, an extra-provincial carrier could be exempted from control of the provincial board by a federal order in council. Note also that the regulation-making power delegated to the provincial board is confined to the one narrow subject of extra-provincial commercial motor vehicle enterprises, so that, all in all, it is characteristically subordinate and not primary law-making power. Nevertheless we are certainly here in the gray zone where just about as much harm to essential national powers can be done by a federal delegation of subordinate regulation-making powers to a body of provincial officials as by a federal delegation of primary legislative powers to a provincial legislature. One thing is clear from the terms of the British North America Act, that all integrated inter-provincial and international forms of transportation and communication were to be exclusively subject to the jurisdiction of the federal Parliament.

Yet, in spite of the foregoing considerations, the administrative type of inter-governmental delegation has been widely used in our

⁵⁵S.C., 1966-67, c. 69.
constitutional practice and has brought valuable and indispensable elements of flexibility to our federal system. Indeed, some of it is called for by the very terms of the British North America Act itself. For example the federal Parliament is charged by section 91(27) with the making of criminal law, both substantive and procedural, whereas each provincial legislature is charged by section 92(14) with arranging for "The Administration of Justice in the Province". Accordingly, ever since 1867, provincial Attorneys-General and the permanent officials of their departments, including the Crown Attorneys, have administered the federal Criminal Code in their respective Provinces. Moreover, most of the criminal trials under the Criminal Code of Canada are conducted by provincially-appointed magistrates who are given their authority in this respect by the procedural section of the Criminal Code of Canada. Furthermore, while Ontario and Quebec provide their own police forces so that in these two provinces provincial police officers enforce the federal Criminal Code, the situation differs in the other eight Provinces. In them the provincial governments, by contract with the federal government, employ the Royal Canadian Mounted Police for enforcing provincial as well as federal offences in their respective territories. There are of course other examples of useful administrative delegations, but space does not permit their exposition here.

Before attempting an opinion on the merits of legislative or administrative delegation in our federal system, there is one further development to note. Part II of the Fulton-Favreau Bill for amendment of the Canadian constitution purported to establish a new procedure for direct inter-governmental delegation at the primary legislative level that would, if put into effect, reverse to an important extent the decision in the Nova Scotia Inter-delegation case. For one or two of the Provinces at least, this was apparently very important in inducing the agreement of 1964 on the formula as a whole. Briefly, the Fulton-Favreau Bill's draft delegation sections were to this effect. The federal Parliament could enact a statute concerning the provincial subjects of prisons, local works and undertakings, property and civil rights and matters of a merely local or private nature in the Province, provided that:

The Amendment of the Constitution of Canada (Ottawa, 1965), a White Paper issued under the authority of the Honourable Guy Favreau, Minister of Justice. Appendix 3 contains the text of the so-called Fulton-Favreau Bill or Formula.

I am in favour of Part I of the Fulton-Favreau Bill as a means of bringing the constitution home. As indicated, though, I am opposed to the delegation proposals in Part II and think they should be dropped.
Likewise, a provincial legislature could enact a statute relating to any subject of Federal power provided that:

(a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and

(b) a similar statute has . . . been enacted by the legislatures of at least three other provinces.

Revocation of these delegations at any time by the delegating legislative body was provided for. Thus the agreement of the federal Parliament and four provincial legislatures would be necessary for a delegation either way under this scheme. The only exception was that there might be fewer than four provincial consents required concerning a provincial delegation to the federal Parliament if seven, eight or nine Provinces said they had no interest in the matter. But, so far as a delegation of federal power to the Provinces was concerned, it was to be mandatory that at least four Provinces should agree and enact “similar” statutes before any of those statutes could have effect.

It is now necessary to attempt some assessment of these various alternatives of inter-governmental delegation. My view is that the decision in the *Nova Scotia* case is correct and that direct bilateral trading or transfer of primary legislative powers between the federal Parliament and a provincial legislature should not be permitted. The substantial reasons for this were given by the judges in that case and typical extracts have already been quoted. It would be all too easy to engage frequently in such delegation under strong but temporary political pressures of the moment, thus creating a patch-work pattern of variations Province by Province in the relative powers and responsibilities of the federal Parliament and the provincial legislatures. This could seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions.28 Not much more can be

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28 Dr. Eugene Forsey has warned of this danger with great force and clarity. See his paper on *The Legislatures and Executives of the Federa*...
Some Forms and Limitations of Co-operative Federalism 427

said for the delegation proposals of Part II of the Fulton-Favreau Bill. They seem to be either dangerous or useless. If the proposed delegation procedures could be worked readily, then the dangers to federal institutions just spoken of are present. If the procedure were to prove unworkable, and it is very complex, then it is a waste of time. Certainly it can have no attraction to those who desire to develop a particular status for Quebec, because the consent of four Provinces would be required for a delegation of federal powers, and where are Quebec's three companions in the circumstances?

The previous remarks refer to the passing of primary and plenary legislative discretions by inter-governmental delegation, but administrative delegation, as the term has been used here, forms quite a contrast. Here we are often concerned only with the application of laws the substance of which has already been determined in the proper legislative forum under the existing distribution of powers—Canadian Parliament or provincial legislature as the case may be. The administration of laws already formulated, that is their interpretation and application to the persons and circumstances contemplated by their terms, still involves at times important discretions, but they are much lesser discretions than the primary legislative discretions exercised when laws are first formulated. Delegation at this administrative level is a proper and useful division of labour in government and does not threaten the situs of or the political accountability for primary legislative discretions in our federal system. Even when regulation-making power is involved for the subordinate delegate body, if that regulation-making power is properly limited, still there is no threat to responsibility for primary legislative discretions under our federal system. The courts have shown more disposition to control regulations of subordinate boards or commissions than to control statutes of Parliament or a provincial legislature.

While it is true, as we have seen in the case of the Motor Vehicle Boards, that a subordinate provincial board might be given a dangerous extent of regulation-making power by the federal Parliament, the courts could insist that this stop short of the sort of thing attempted in the proposed Delegation of Legislative Jurisdiction Act of Nova Scotia, described earlier. To take an extreme hypothetical example, if the federal Parliament proposed to delegate power to make criminal law generally to provincial Criminal
Law Boards composed of provincially appointed officials, surely the courts would find this invalid as a colourable attempt to bring about the objectionable type of direct primary legislative delegation under the guise of administrative delegation. At least where inter-governmental administrative delegations are concerned, the courts should be strict about this and confine permissible regulation-making powers for the delegate body to developing the detail of the legislative scheme in the master statute concerned, which should in these circumstances contain the main standards or guidelines to be followed. Indeed, two master statutes are involved in these cases, one federal and one provincial. Neither should be a mere skeleton statute.

Mention of the two master statutes suggests another possibility that should be noticed as a final point in this consideration of inter-governmental delegation. The subordinate delegate body in such cases could be made up of federal and provincial officials. This seems to be quite within the scope of the precedent set by the Potato Board case. For example, in the field of the sale of company securities, given that part of the field is within exclusive provincial jurisdiction and part within exclusive federal jurisdiction, it would be constitutionally possible to compose a joint board of federal and provincial appointees with delegations of powers to the board that gave it a complete range of control over the sale of securities. Probably this would only work, as a matter of political accountability, if the federal and provincial governments were fully agreed in some detail on the nature of the controls to be exercised. If this were so and was sufficiently expressed in the master statutes, then the board members could no doubt get on harmoniously with the execution of their common tasks regardless of whether they were federal or provincial appointees. In any event, though it is highly speculative whether a joint board would work, it is clear that inter-governmental delegations of many kinds at the levels of administration of laws and subordinate regulation-making bring a very valuable element of flexibility to the Canadian federal system.

While delegation, as in the fields of agricultural marketing and motor vehicle enterprises, has given provincial governments some entry to exclusive federal fields of legislative jurisdiction, the federal government has in the main relied on other techniques to exert an influence in certain exclusive fields of provincial legislative jurisdiction. Conditional grants and federal crown corporations have been used to this end, and may properly be considered as distinct
co-operative forms in the area of federal-provincial relations. What is here involved is the use of federal resources for undertakings that usually fall within provincial powers so far as legislative regulation of that type of undertaking is concerned. In the case of federal conditional grants, the offer of funds and the conditions attached, when accepted by the Province, amount to a federal presence and influence of some sort in a field legislatively provincial. For example, the federal government offered the provincial governments grants of federal money for the construction of the trans-Canada highway in the respective Provinces. Highways have always been considered local works under section 92(10) of the British North America Act. Nevertheless it was federal policy that there should be a trans-Canada highway and that it should measure up to certain standards and dimensions in construction. Accepting Provinces were required to meet these standards and to pay a relatively small proportion of the cost by matching grants from provincial funds. There have been many federal conditional grant programmes, and some are very complex. A detailed examination of them is beyond the scope of this essay, but certain general considerations concerning them require examination.

Professor G. V. LaForest in his recent treatise on *The Allocation of Taxing Power under the Canadian Constitution* gives the opinion that these grants-in-aid are constitutionally valid and permissible.29 Federal statutes authorizing the grant of money to the provinces on condition that the provinces adopt legislation described in federal statutes, regulations or Dominion-provincial agreements constitute a well-worn route for implementing federal policies. Examples are blind and disabled persons allowances, hospital insurance and the trans-Canada highway arrangements. One of the usual conditions is that the provinces should bear a definite proportion of the costs of the schemes. Since offers of money, especially for social service schemes, are difficult to refuse, the Dominion is thereby able not only to implement its policies by use of its own resources but also to divert the resources of the provinces to these ends as well.

The validity of these schemes has never been tested; thus far neither the provinces nor the Dominion have demonstrated any inclination to refer the matter to the courts, and a private individual would seldom have the standing to question it. However they appear to be valid. Certainly payments to the provinces are constitutionally unobjectionable. Dominion subsidies to the provinces are provided by several constitutional provisions and (though these rest on no firmer foundation than an opinion of the Law Officers of the Crown) by several Dominion statutes. These, it is true, are given free of conditions, but in complying

with the conditions attached to grants the provinces are merely exercising their own legislative powers. Whatever political implications these may have, therefore, it seems very doubtful if their constitutional validity could be successfully challenged.

It should be noted that the federal legislation concerned in these cases makes conditional offers of money, it does not contain compulsory regulations. For example the hospital insurance scheme mentioned is in the permissible category Professor LaForest describes because the compulsory features of it, so far as members of the public are concerned, are found in the provincial legislation of the accepting Provinces. This contrasts with the federal government’s first attempt at an unemployment insurance scheme contained in the Employment and Social Insurance Act of 1935. This federal statute set up a special unemployment insurance fund and purported to require regular contributions thereto from both employees and employers. The Act was held ultra vires of the federal Parliament by the Supreme Court of Canada and the Judicial Committee of the Privy Council. In the latter court, in striking down this statute, Lord Atkin made some general remarks about the nature of the federal spending power.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would

\begin{footnotes}
afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.

The Tremblay Commission of Quebec on the constitution relied on this passage for its claim that federal conditional grants were contrary to the terms and intent of the British North America Act, but most constitutional authorities are not in agreement. The Unemployment Insurance case was not dealing with the federal offer of a conditional grant-in-aid to a Province, it was dealing with a federal statute that itself contained a compulsory all-inclusive public insurance scheme, and must be read subject to these limitations—hence the prevailing opinion that this decision does not invalidate Federal conditional-grant legislation.

Nevertheless, the question should be asked whether conditional grants do not lead to different states of federal-provincial relations with different Provinces, if some accept certain grants while others do not? Does this not confuse political accountability and responsibility for members of the federal Parliament and cabinet? In this connection Professor Donald V. Smiley has made an important point in his treatise on Conditional Grants and Canadian Federalism. Federal conditional grants have not been primarily concerned with legislative regulation, they have been primarily concerned with providing resources for desirable social services, public works and the like. The emphasis is on the use and management of funds belonging to the federal government, and federal policies are thus pursued as a matter of managerial decisions and conditions set by the owner of the necessary funds, because he is the owner. For example, the federal government’s Crown Corporation, Central Mortgage and Housing Corporation, cannot directly impose building codes on the construction industry in the Provinces; such legislative regulation is within provincial jurisdiction. But the corporation can say that it will not lend the federal government’s money to home builders unless its specified construction standards are met. After all private lenders go this far. In any event, federal standards thus make themselves felt through the medium of contracts with builders. No builder can be told that he must meet the

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32 See G. V. LaForest, op. cit., footnote 29, ch. II. See also Donald V. Smiley, Conditional Grants and Canadian Federalism (Toronto, 1963).
Professors Smiley and LaForest upheld the validity of federal conditional grants and review the authorities.
federal standards, but if he is not prepared to do so he does have to borrow his money elsewhere. Accordingly, dislocation of primary legislative power and confusion of the relevant political accountability is not much of an issue so far as conditional grants are concerned. But other matters of great importance to the Provinces are involved. To a considerable extent provincial priorities in the use of provincial revenues and resources are put under federal influence through the need for matching provincial payments in some proportion to qualify for federal grants. Also, the matter of who gets credit for welfare schemes the public wants may well be vital to the political survival of particular provincial or federal governments. Nevertheless, I consider that the advantages of conditional grants greatly outweigh any disadvantages for the federal government and provincial governments. As Professor Smiley has said:  

It is important not to exaggerate the possibility of the federal spending power as a device by which the influence of Ottawa can be extended. There are three limitations in this respect.

First, federal action is nullified if the eligible recipient decides not to accept the conditions under which federal largesse is made available. Thus federal influence can be brought to bear only with the collaboration of others—in the case of the subject-matter of this essay, the provinces. To take a simple example, Ottawa might decree, although it does not, that federal grants are not to be paid on behalf of any hospital where the matron is not a Registered Nurse; it could not make it a federal offence to operate a hospital unless this condition was observed.

Second, the spending power holds few possibilities for extending the influence of the federal government in the regulatory field. One might conceive of an arrangement by which the federal authorities offered to pay a proportion of the costs incurred by provincial labour relations boards on the condition that provincial labour policies were carried out in a particular way; it is impossible to imagine the provinces being willing to accept any such grant. Thus in practice federal influence vis-a-vis the provinces can be enhanced only in those situations involving a service activity, and this influence can of course be most decisive where the function is a relatively costly one.

Third, in most circumstances, the federal government must accomplish its purposes through agencies other than its own administrative instrumentalities. The relation between Ottawa and these agencies is thus one of collaboration rather than of administrative superior and subordinates.

Federal initiative through conditional grants has brought great benefits to Canadians in every Province. Necessary welfare schemes have usually come more quickly, at better standards and in more places than would otherwise have been the case.

Accordingly, federal conditional grants have brought beneficial elements of flexibility to our federal system, elements that do not pose a threat to the essential basis of federal institutions or the autonomy of the Provinces. Each party has real bargaining power under the constitution, and so should be able to take care of itself in the inter-governmental negotiations about the terms of conditional-grant programmes. The federal government has superior revenue-raising and financial power for the reasons given at the beginning of this essay. The provincial governments and legislatures have the essential powers of compulsory legislative regulation that many of these programmes require at some point, as well as some of the revenues.

Furthermore, it seems that the federal government is always going to be in the position of having more revenue than it needs to carry out its direct responsibilities under the constitution. Federal taxing power is more effective and more fair than provincial power, in the types of taxes available and in the territorial extent of the power. Also, to a very significant degree, the federal Parliament needs to keep such taxes as those on corporation and personal income in its own hands as levers for managing the national economy in aid of full employment and prosperity. Finally, only the federal government can effect the net transfers of public funds to the Provinces located in the poorer regions of Canada to help them to improved conditions. And such improvement is one of the basic aims of Confederation. In the face of these considerations, it is no use to say that the revenue-raising capacities of the provincial legislatures and the federal Parliament should be precisely matched to the direct legislative responsibilities of each, by changes in the allocation of taxing powers under the constitution. This simplistic solution is impossible. My view is then that there will always be a surplus of funds in federal hands that should be dispensed to the Provinces in a mixture of conditional and unconditional grants. Conditional grants then, as a form of co-operative federalism, are with us indefinitely. It may be that we have reached a period when there should be more room for provincial influence on the nature of these schemes, and more sympathy at Ottawa for this. The inherent flexibility of this form of co-operative federalism means that new and different arrangements could be developed as the need or desire for them became clear. Better federal-provincial agreements concerning both conditional and unconditional federal grants-in-aid is one of the ways to real constitutional improvement.
So far we have been mainly concerned with forms of federal-provincial co-operation against the background of mutually exclusive federal and provincial powers. But, as indicated earlier, there are certain areas of concurrency in our constitutional law and jurisprudence. Of these some are given expressly in the terms of the British North America Act and others are implied through one of the applications of the aspect theory of interpretation. So far as express concurrency is concerned, Section 95 of the British North America Act provides as follows:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

The issue of paramountcy in the event of conflicting statutes of Canada and a Province is one that must be faced since federal and provincial governments are dealing with the same citizens in the same territory, Province by Province. Section 95 does face the issue and resolves it in favour of the paramountcy of the federal statute. Section 95 is an original section dated from 1867. Section 94A, dating from 1951 and dealing with old age pensions, establishes concurrency on this subject but with a principle of provincial paramountcy expressed for the first and only time in our constitutional law. An example of the implied type of concurrency was given earlier in this essay using the example of the Unconscionable Transactions Relief Act of Ontario and the question of interest charges. So far as implied concurrency is concerned, the doctrine of dominion paramountcy prevails in the event of conflicting federal and provincial statutes.

Our main concern with concurrency of legislative powers here is to see what kind of a background this affords for measures of federal-provincial co-operation. Obviously the principle of dominion paramountcy that obtains in all concurrent subjects except the old age pensions gives the federal government the greater bargaining power for federal-provincial agreements about the division of concurrent fields except for old age pensions. In any event, where powers are concurrent, one does not have to worry about delegations or conditions on grants-in-aid as means of entry to part of the jurisdiction of the other party. The appropriate form of co-operation is simply the straightforward inter-governmental agree-
ment about how each is to use or refrain from using its existing powers in the same field. The most important examples of this are the federal-provincial taxation agreements. Both the federal Parliament and the provincial legislatures have full powers of direct taxation. These have been authoritatively interpreted to be concurrent powers, so that both could tax simultaneously as long as the taxpayer has capacity to pay. So far as personal income is concerned, for example, the Provinces, except for Quebec, have agreed not to collect their own provincial income taxes provided the federal Parliament will levy an income tax on a uniform basis and hand over an agreed proportion of the harvest unconditionally to each participating Province. In the case of Quebec taxpayers, special exemptions from federal tax accomplish much the same result for Quebec. The terms of these agreements are complex, but the form and basis of them are simple. As with all agreements the bargaining power of the parties is important, and the bearing of concurrency and paramountcy on this has already been discussed and exemplified.

We have reviewed some of the more important forms of official federal-provincial co-operation in Canada, and have assessed some of their implications for our federal system. Inevitably and increasingly, federal and provincial governments are involved with one another and dependant on one another. Federal-provincial conferences and major consultations of various kinds go on constantly at all official levels. In 1966 there were almost as many formally scheduled federal-provincial conferences of some kind or other as there were days in the year. On some days of any year there are no doubt more provincial cabinet ministers in Ottawa than federal ministers. Such wide-ranging official co-operative activity is a sign of health and vitality in our federal system. Moreover such co-operative federalism contains important elements of flexibility for meeting some of the needs of change. It provides opportunities for innovation that may help greatly to establish more satisfactory relations between the federal government on the one hand and the provincial governments on the other. In particular, the legitimate forms of co-operative federalism have a continuing role of importance to play in developing a satisfactory relationship between the Parliament and Government of

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38 See G. V. LaForest, *op. cit.*, footnote 29, ch. II, where the authorities are reviewed.
39 The Financial Post for May 21st, 1966, carried a listing of federal-provincial conferences of all types held or to be held in 1966. It covers almost two newsprint pages.
Canada on the one hand, and the Legislature and Government of the Province of Quebec on the other. Nevertheless, these co-operative measures take place and can only take place against the background of basic definition provided by the first principles of our federal constitution. There are essentials here at this fundamental level that must be honoured and preserved if Canada is to continue and to progress as a federal country in her second century.