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THE INTERACTION OF FEDERAL AND PROVINCIAL LAWS

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Although the Canadian "ship of state . . . still retains the watertight compartments which are an essential part of her original structure"[1] it does not follow that the two compartments cannot be joined to carry the same cargo. Federal statutes and provincial statutes can be made to work together to achieve a single social objective. But the way is not an easy one. As Lord Atkin said in *A.G. for British Columbia* v. *A.G. of Canada*, in rejecting an early attempt at co-operation:[2]

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

Early attempts at federal-provincial co-operation failed, but legislative co-operation has now been achieved by the employment of

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1 *A.G. of Canada* v. *A.G. for Ontario*, [1937] A.C. 326, at p. 354.

2 [1937] A.C. 377, at p. 389.

one or more of three techniques, namely, delegation of statutory powers by Parliament to provincially-constituted offices or entities, and two types of legislation by reference, namely, the incorporation in a federal statute of the fact of the existence of a provincial law, and incorporation of the text or substance of a provincial law.[3]

I. *Delegation.*

It has long been established that Parliament or a provincial legislature may delegate legislative power to subordinate authorities. In *Hodge* v. *The Queen*[4] it was argued that the legislature of Ontario had no authority to delegate to licence commissioners power to pass resolutions regulating taverns and to impose penalties for infractions. Sir Barnes Peacock rejected the argument, saying that the British North America Act conferred on a provincial legislature,

> ... authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or as the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.[5]

Unlimited authority may be conferred, even to the extent of amending or repealing a statute.[6] And Parliament may authorize a subordinate authority to sub-delegate legislative power; the maxim *delegatus non potest delegare* has no application.[7]

Can Parliament delegate legislative power to an office or entity (other than the federal executive) not of its own creation?

In *Valin* v. *Langlois*[8] it was held that Parliament could confer authority and impose a duty upon a provincial court in connection with contested elections under the Dominion Controverted Elections Act.[9] Although that case dealt with courts and judicial power,

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[3] For an additional discussion of this subject, and administrative co-operation, see G. V. LaForest, Delegation of Legislative Power in Canada (1957), 21 McGill L.J. 131.

[4] (1884), 9 A.C. 117.

[5] *Ibid.*, at p. 132.

[6] *In re Gray* (1918), 57 S.C.R. 150.

[7] *Reference re Chemicals*, [1943] S.C.R. 1.

[8] (1879), 3 S.C.R. 1.

[9] S.C., 1874, c. 10.

the principle, as will appear below, has been applied to the bestowal of statutory powers generally on provincially-constituted offices and entities.

Can Parliament delegate legislative power to a provincial legislature? During the argument in *C.P.R.* v. *Notre Dame de Bonsecours*[10] Lord Watson is reported to have said:

> The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.

The question "Why not?" was not answered. In *R.* v. *Zaslavsky*[11] and *R.* v. *Brodsky*[12] the legislatures were denied authority to delegate legislative power to Parliament, on the strength of Lord Watson's remarks, but no reasons were given.

The issue of inter-delegation between Parliament and the legislatures was squarely raised in *A.G. for Nova Scotia* v. *A.G. of Canada*[13] on a reference by the government of Nova Scotia to the Supreme Court of Nova Scotia. That court held that a proposed scheme of delegation between Parliament and the Nova Scotia legislature was *ultra vires*. An appeal was taken to the Supreme Court of Canada, and that court was unanimous in dismissing the appeal.

In order to find the legal foundation for the proposition that inter-delegation between Parliament and the legislatures is not possible it is necessary to look searchingly at each judgment.

Chief Justice Rinfret's main argument seems to have been that:[14]

> The country is entitled to insist that legislation adopted under s. 91 [of the British North America Act (1867), 30 & 31 Vic., c. 3 (U.K.)] 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.

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[10] [1899] A.C. 367, as reported by Lefroy in Canadian Federal System (1913), p. 70, note 10(a).

[11] [1935] 2 W.W.R. 34, 64 C.C.C. 106.

[12] [1936] 1 W.W.R. 177.

[13] [1951] S.C.R. 31, [1950] 4 D.L.R. 369, hereafter referred to as the *Nova Scotia Delegation* case. For a commentary on this case before the decision of the Supreme Court of Canada on appeal, see F. R. Scott, in (1948), 26 Can. Bar Rev. 984.

[14] *Ibid.*, at pp. 371-372 (D.L.R.).

He does not indicate the source in the British North America Act of this entitlement "to insist". Logically this argument would lead to the conclusion that Parliament may not delegate even to the Governor in Council. Later, he says that:[15]

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

The argument that the word "exclusively" merely "indicates" a settled line of demarcation is not exactly overwhelming, but, as we shall see, he is on the right track.

Four judges—Kerwin, Taschereau, Rand and Estey JJ.—merely relied on the *Bonsecours* case and other decisions, without giving any reasons of their own, and therefore shed no light on the legal basis for their conclusions.

Mr. Justice Kellock explains why inter-delegation is not permissible:[16]

> Under the statute the powers committed to Parliament and to the provincial Legislatures respectively are, as already stated, exclusive. If therefore, Parliament, for example, were to purport to authorize a provincial Legislature to exercise legislative jurisdiction assigned exclusively to the former, any exercise of such authority by the latter would in fact be an attempt "to make laws" in relation to a matter assigned exclusively to Parliament, and *consequently prohibited to the provincial Legislature.*

Mr. Justice Fauteux bases his conclusion on the same ground:[17]

> Had it been the intention of the Imperial Parliament to give to one legislative body the right to delegate to the other, the word "exclusively" in both sections would have been omitted. *In the context, this word is without object unless it is to debar one legislative body from exercising any kind of legislative authority with respect to matters within the jurisdiction of the other.*

It is clear from this decision that the reason why inter-delegation between Parliament and the legislatures is impossible is that there is a constitutional prohibition against it. Without the word "exclusively" section 91 of the British North America Act would confer full legislative power in relation to the enumerated

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[15] *Ibid.*, at p. 372 (D.L.R.).

[16] *Ibid.*, at p. 387 (D.L.R.), italics mine.

[17] *Ibid.*, at p. 394 (D.L.R.), italics mine.

subjects, and would undoubtedly authorize delegation of legislative power to any instrumentality, including a provincial legislature. The word "exclusively" can add no further powers and, as Fauteux J. points out, its only function can be to deny power to the legislatures to legislate with respect to section 91 subjects, just as that word in section 92 denies power to Parliament to legislate with respect to section 92 subjects.[18]

Not long after the *Nova Scotia Delegation* case the Supreme Court of Canada in *P.E.I. Potato Marketing Board* v. *H. B. Willis Inc.*[19] held that Parliament could delegate power to a marketing board established by a provincial legislature.

Are these two decisions in conflict? Does the *Willis* case erode the *Nova Scotia Delegation* case?[20]

The key to understanding the *Willis* case is *Valin* v. *Langlois*.[21] Chief Justice Rinfret said that:[22]

> Ever since *Valin* v. *Langlois*... the principle has been consistently admitted that it was competent for Parliament to employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority....

As authority for these words he cites Lord Atkin in *Proprietary Articles Trade Association* v. *A.G. of Canada*.[23]

In other words, Parliament can choose any persons or bodies it wishes to carry out its laws and confer on them capacity and power to do so. Why, then, not a provincial legislature? The answer is simply that there is a constitutional prohibition against selecting a provincial legislature, but not against selecting any other instrumentality.

It might strike some as an anomoly that delegation to a provincial legislature is prohibited, whereas delegation to a pro-

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[18] "The main point to be extracted from the *Nova Scotia Delegation* case is that the B.N.A. Act, in conferring powers exclusively and separately on Parliament and on provincial legislatures, must be read as forbidding the exercise by one of them of any powers of the other even by revocable delegation." Per Professor B. Laskin (as he then was) in a commentary on *A.G. for Ontario* v. *Scott* (1956), 1 D.L.R. (2d) 433, in (1956), 34 Can. Bar Rev. 215, at p. 221.

[19] [1952] 4 D.L.R. 146.

[20] As suggested by M. Fairweather in The Attitude of the Supreme Court of Canada Toward Delegation: Coughlin v. Ontario's Highway Transport Board (1970), 5 U.B.C. L. Rev. 43.

[21] *Supra*, footnote 3.

[22] *Supra*, footnote 19, at p. 149.

[23] [1931] A.C. 310, at p. 327.

vincially-constituted board is not. But if that is what the consitution prohibits and permits, there is no anomaly.

The distinction between the legislative and executive branches of government must be kept in mind. Acts of Parliament or of the legislatures frequently create entities such as boards, commissions and corporations, and confer power on them. These creatures may or may not be agents of the executive, that is, the Crown, or the Government as is sometimes said; but an agent of the Crown or the Government is not an agent of Parliament or a provincial legislature. Legislative bodies do not have agents. The National Capital Commission is an agent of the Crown; not of Parliament. The Canada Council is an "agency" or "creature" of Parliament but it is not an agent either of the Crown or of Parliament. The relationship of principal and agent does not exist between the Prince Edward Island legislature and the Prince Edward Island Potato Marketing Board, and it is not correct to say that a grant of power to the latter is the same thing as a grant to the former.[24] If the latter were an agent of the provincial Crown, then its acts would be acts of the Crown—not acts of the legislature.

There is nothing new in the idea that an individual, a group of individuals or a corporation can receive powers from two different sources. An outstanding example is the Royal Canadian Mounted Police Force. That Force is a federal Force exercising powers throughout Canada under federal statutes; in eight provinces it is also a provincial police force exercising powers under provincial statutes. There are many federal statutes under which powers are conferred on provincial officials (for instance, Food and Drugs Act,[25] Game Export Act,[26] Migratory Birds Convention Act,[27] Fisheries Act,[28] Explosives Act[29]).

The chief criticism that has been made of the *Willis* decision is that the statute there in question does indirectly what cannot be done directly.[30]

This argument is, first of all, defective in logic. If Parliament cannot delegate to a legislature, it does not follow that Parliament

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[24] This seems to have been the basis of J. B. Ballem's argument in (1951), 29 Can. Bar Rev. 79.

[25] R.S.C., 1970, c. F-27.

[26] R.S.C., 1970, c. G-1, as am.

[27] R.S.C., 1970, c. M-12, as am.

[28] R.S.C., 1970, c. F-14, as am.

[29] R.S.C., 1970, c. E-15.

[30] See, *e.g.*, J. B. Ballem in (1952), 30 Can. Bar Rev. 1050, at p. 1058.

cannot delegate to a provincial board. The provincial board is not the legislature or an agent of the legislature. The corporation of the city of Ottawa is not the legislature of Ontario or an agent of the legislature, and there is no reason why Parliament could not, for example, delegate power to the city of Ottawa to regulate navigation on the Rideau Canal within city limits; that the legislatures have exclusive jurisdiction and control over municipal institutions is irrelevant. The legislature could not control or direct the exercise of this federal power. Legislatures can speak only by statutes and if in the example cited the legislature were to attempt by statute to regulate the exercise of this legislative power received from Parliament, that statute would be *ultra vires* as being in relation to federal property or navigation and shipping.

The application of the maxim "you cannot do that indirectly which you are prohibited from doing directly" to the *Willis* case is also legally unsound. The maxim is not law. It is only a statement in summary form of a result arrived at by the application of principles other than the maxim.

The maxim was cited by Lord Halsbury in *Madden* v. *Nelson and Fort Sheppard Railway Company*.[31] A British Columbia statute to the effect that a Dominion railway company should be responsible for cattle injured or killed on its railway unless it erected proper fences was held *ultra vires*. Lord Halsbury cited but did not apply the maxim for the reason that in his view the preamble indicated that this legislation was a direct attempt to compel the railway companies to fence their lines. Lord Halsbury no doubt alluded to the maxim because the statute did not in so many words require the railways to fence, but chose to do it in a roundabout way by imposing absolute liability.

The maxim was also cited in *A.G. for Saskatchewan* v. *A.G. for Canada*.[32] A Saskatchewan Farm Security Act provided for the reduction of principal on mortgages in the event of crop failure. The reduction was to be four per cent or the interest rate, whichever was the greater. The Act was declared *ultra vires* on the ground that in "pith and substance" it was legislation in relation to interest. Since interest is a subject-matter within the exclusive jurisdiction of Parliament, the legislature could not enact a law "directly" reducing interest; nor, by reason of the well-established rule in constitutional law, could the legislature enact the same law in an "indirect" way. What the maxim meant in this case

[31] [1899] A.C. 626, at pp. 627-628.

[32] [1949] A.C. 110, at p. 124.

was simply that the statute, although not in the form of interest legislation, in reality was in relation to interest.

The same principle in the other direction was applied in *A.G. for Ontario* v. *Reciprocal Insurers*.[33] Parliament had enacted an Insurance Act requiring insurance companies to obtain a licence from the Minister. The statute was held *ultra vires*. Parliament then enacted a new Insurance Act under which the obtaining of a licence was voluntary; but an amendment to the Criminal Code made at the same time made it an offence to carry on the business of insurance without a licence under the Insurance Act. The Privy Council held the legislation colourable and therefore *ultra vires*. Although the new legislation was in form criminal law it was in "pith and substance" legislation to regulate the business of insurance—the same law as the original Insurance Act. Though the maxim could have been cited here, it was not.

It is obvious that the "direct-indirect" maxim is simply the "pith and substance" rule, and means only that if a law in form falls under section 91 but in pith and substance is legislation in relation to a subject enumerated in section 92 it is *ultra vires*.

When it is said that "you cannot do *that* indirectly which you cannot do directly" what is the *that*? This *that* must be *the same law* and not merely the same social objective. In the insurance case, not only was the social objective in both the direct and indirect legislation the same, but the *law* was the same.

The maxim does not mean that if a social objective cannot be achieved by a particular law in relation to one subject, it cannot be achieved by another and different law in relation to another subject. Parliament cannot regulate traffic on provincial highways, but Parliament can make it a crime for a person to drive while impaired or, in the interests of public safety, to prohibit driving in excess of a prescribed rate. Parliament cannot regulate contracts but Parliament can prohibit agreements in restraint of trade. Parliament cannot impose compulsory grades and standards, but can establish national marks and regulate their use. Parliament cannot regulate local buying and selling, but in order to protect public health and to prevent fraud, it can prohibit manufacture and sale.

The statute considered in the *Willis* case is simply legislation in relation to interprovincial and international trade, and to apply the maxim to the *Willis* case is to say that because Parliament

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[33] [1924] A.C. 328.

cannot delegate legislative power to a legislature it cannot exercise its trade and commerce power. That is as illogical as to say that if you cannot drive directly from Ottawa to North Bay because the bridge over an intervening river is washed out, you cannot go via Algonquin Park, even if the road is clear.

If Parliament were to enact a statute establishing a Board consisting of the persons who for the time being are the members of the Ontario legislature, and granting it power to regulate inter-provincial trade by regulations made with the consent of the lieutenant-governor, present at a meeting of the "Board", *that* would be doing indirectly what cannot be done directly. In such a case, the so-called "Board" would actually be the legislature. But that is not the *Willis* case. In the *Willis* case, Parliament did directly what it can do directly, namely, grant to a Board regulatory powers in inter-provincial and international trade.

II. *Legislation by Reference— Type I.*

Provincial legislation can be incorporated in federal legislation in two ways. One way is to make the operation of the federal statute contingent on the existence of a provincial statute; only the fact of the existence of a provincial statute is incorporated. The second way is to adopt the text or substance of a provincial statute in relation to a provincial subject as the federal law in relation to a federal subject.

The Importation of Intoxicating Liquors Act,[34] does both. It prohibits transportation of intoxicating liquor into any province except such as has been purchased on behalf of the government of the province, and "province" is defined as a province "in which there is for the time being in force an Act giving the government of the province, or any board, commission, officer or other governmental agency control over the sale of intoxicating liquors therein". This is incorporation only of the fact of the existence of a provincial law.

The Act also defines "intoxicating liquor" as meaning "any liquor that is, by the law of the province for the time being in force, deemed to be intoxicating liquor . . .".[35] This incorporates the text of provincial statutes; the provincial definitions of intoxicating liquor for the purposes of provincial statutes now are also the definitions of intoxicating liquor for the purposes of a federal statute.

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[34] R.S.C., 1970, c. I-4.

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

A leading decision on type I referential legislation is the statute considered in *Lord's Day Alliance* v. *A.G. for Manitoba*,[36] although it is not too easy to recognize it as such, or to distinguish it from delegation. To assist in understanding the principle applied in that decision it is helpful to invent a clearer situation.

Let us imagine the situation where there is collective bargaining legislation of the modern type in only two provinces. Let us suppose further that the federal government is disturbed over frequent strikes in public utility enterprises in the country. Parliament has no jurisdiction over local utilities and could not establish a labour code providing for collective agreements, collective bargaining, or prohibition of strikes during the currency of a collective agreement or until the completion of the process of bargaining and conciliation. In these circumstances the government might, as the next best thing, decide on an amendment to the Criminal Code prohibiting strikes and lockouts in essential industries. That would undoubtedly be valid criminal law. But, because two provinces have effective labour legislation that is considered adequate to control industrial disputes satisfactorily, the government decides to exempt those provinces from the new penal provisions of the Criminal Code, not by naming them, but by describing their legislation.

A statute is now enacted by Parliament making strikes and lockouts in essential industries an offence, but containing a further provision to the effect that the new law does not apply in any province where there is in force a provincial labour relations Act of the kind described. The scope of the federal Act is now limited by reference to the existence of a provincial law. If a third province now enacts a labour relations Act of the kind described, it would automatically fall within the exemption, thus reducing further the scope of the federal Act. This third province would not be exercising any power received from Parliament; it would simply be exercising a power it possesses under section 92, which it can exercise quite apart from the federal Act and apart from any effect it might have on the geographical ambit of the federal Act. It would not be exercising a delegated power; the federal statute would not be a delegating statute.

There is in the Criminal Code a provision very much like this. Lotteries are prohibited, but lotteries conducted by provincial governments are outside the prohibition if they are conducted in accordance with a provincial statute. This again is not delegation.

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[36] [1925] A.C. 384.

In the absence of the prohibition a legislature could regulate lotteries as being property and civil rights. Under the Code, lotteries by provincial governments are excluded from the prohibition and are therefore permitted; a statute regulating such lotteries is therefore in relation to property and civil rights and not to the criminal law.

The statutes considered in *Lord's Day Alliance* v. *A.G. for Manitoba* were the federal Lord's Day Act[37] and the Manitoba Lord's Day Act.[38] The federal statute contained a provision making it unlawful to conduct Sunday excursions where a fee was charged "except as provided by any provincial Act or law now or hereafter in force". The Manitoba statute provided that "it shall be lawful for any person or corporation on the Lord's Day, to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the province".

The federal statute has all the appearances of a statute delegating legislative power to provincial legislatures to make exceptions to a federal offence. The Privy Council, however, held that the Manitoba statute was valid, and found it unnecessary to consider delegation.

The test to be applied, according to Lord Blanesburgh, is "whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all".[39] To this question, he said, no other than an affirmative answer can be given. "Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things had not previously been prohibited."[40] This decision can be explained only on the ground that the scope of the federal prohibition was restricted by reference to the existence of a provincial statute, as in the labour relations example given above.

There can be no doubt that Parliament could reduce the ambit of its own legislation by reference to provincial legislation existing at the time the federal legislation is enacted. Lord

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[37] R.S.C., 1906, c. 153.

[38] R.S.M., 1913, c. 119, as am. S.M., 1923, c. 25.

[39] *Supra*, footnote 36, at p. 392.

[40] *Ibid.*

Blanesburgh considered that statutes subsequently enacted can have the same effect.

This decision is indeed shaky on two grounds. First, the form is delegation. The words "except as provided by any provincial Act or law now or hereafter in force" clearly invite the legislatures to make exceptions to a criminal offence. If a prohibitory statute said "except as provided by order of the Governor in Council" those words would undoubtedly be construed as conferring legislative power to make exceptions.

Secondly, there is a difference between statutes in existence and future statutes. The future provincial statute must be read in its whole context, which now includes the federal statute. That fact is relevant in determining the object or purpose, or the pith and substance of the provincial Act. Even if it is one that the province could enact apart from the federal statute, it might not in this context be in relation to any of the enumerated heads of section 92. There must be a second question, namely, under what head of section 92 does the provincial statute fall?

As to this, Lord Blanesburgh said that legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law and "might aptly enough be described as a matter affecting 'civil rights in the Province' or as one of 'a merely local nature in the Province' ".[41]

Lord Blanesburgh was hard put to find some purpose or object of the Manitoba statute that could not be said to be to make an exception to the criminal law. Existing by itself the Manitoba statute hardly makes any more sense than would a statute saying it shall be lawful for every person to go for a walk after dinner. The best that Lord Blanesburgh could come up with was this:[42]

> Nor would such permission necessarily be otiose. The border-line between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not the other.

But is that not defining what is not a crime? In the lottery provisions referred to, the exemption is stated by Parliament and

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[41] *Ibid.* [42] *Ibid.*

not the legislatures, as in this case. Existing alone, the Manitoba statute could only be regarded as a moral pronouncement—those who conduct or go on Sunday excursions for a fee are not sinners in the eyes of the legislature. Legislatures do not normally deliver sermons.

In the labour relations example given above the provincial legislation, whether enacted before or after the federal statute, would have a clear legislative purpose referable to section 92. Similarly, the definitions of intoxicating liquor referred to in the Intoxicating Liquors Act have an independent purpose in a valid provincial statute.

There has probably been too much emphasis on the permissive character of the provincial legislation in this case. The fact of the existence of provincial legislation may be incorporated in federal legislation even if it is not permissive. The permissive character of the Manitoba legislation goes only to establish that it is not criminal law. But, as suggested above, it could be in relation to criminal law even if it is permissive. If the Criminal Code were to provide that "Except as provided by any provincial Act, everyone who is a party to a seditious conspiracy is guilty of an indictable offence", surely a permissive statute thereafter enacted by a provincial legislature would be criminal law pure and simple, for it would have no purpose other than to make an exception to a criminal offence.

Notwithstanding the weaknesses in the decision in the *Lord's Day Alliance* v. *A.G. for Manitoba*, the principle applied there is clear. Parliament may make the operation of its own legislation dependant on the existence of valid provincial legislation, whether enacted before or after the federal law.

The question was again considered by the Supreme Court of Canada in *Lord's Day Alliance* v. *A.G. of British Columbia*,[48] which was decided after the *Nova Scotia Delegation* case. The Privy Council decision in the Manitoba case was followed, but the reasoning is somewhat clearer. Kerwin C.J. said that the provincial legislation "governs the conduct of people on Sunday and does not create an offence against the criminal law. It follows that the permissive legislation here in question falls within Heads 13 or 16 of section 92 of the British North America Act and is,

[48] [1959] S.C.R. 497.

therefore, within the power of the provincial legislature".[44] Rand J. stated the principle clearly when he said:[45]

> The idea of delegation arises from a misconception of the operation of s. 6. The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a provincial enactment of the appropriate character, the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

III. *Legislation by Reference—Type II.*

The King v. *Walton*[46] is an illustration of the incorporation by one jurisdiction of the text or substance of the statutes of another jurisdiction. The Criminal Code provided that:

> Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any Province of Canada, shall be duly qualified to serve as such juror in criminal cases in that Province.

This is not delegation. The province has exclusive jurisdiction under section 92 of the British North America Act to prescribe the qualifications of jurors in civil cases. Parliament has exclusive jurisdiction to prescribe the qualifications of jurors in criminal cases. The Criminal Code provision merely provided, in effect, that in criminal cases the rules are to be the same as in civil cases; it described the characteristics that qualify a person to be a juror in criminal cases, and to find those characteristics one must go to the provincial law. Parliament could have repeated those very same rules in the Criminal Code *in extenso*; instead, it had incorporated them by reference. That cannot be delegation for the simple reason that the power of the legislature to make its own rules is derived from section 92 of the British North America Act and not from Parliament.

Re Brinklow[47] is an illustration in the other direction. There, an Ontario statute incorporated provisions of the Criminal Code.

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[44] *Ibid.*, at p. 503.

[45] *Ibid.*, at pp. 509-510; followed in *Re Official Languages Act* (1973), 5 N.B.R. (2d) 653, at p. 664; approved S.C.C. in (1974), 7 N.B.R. (2d) 526, at p. 535.

[46] (1906), 11 C.C.C. 204.

[47] [1953] O.W.N. 325.

In answer to the argument that this incorporation was *ultra vires*, Judson J. said:[48]

> Section 3(1) of the Summary Convictions Act reads "Except where inconsistent with this Act, Part XV and sections 1028 ... [*etc.*] ... of the Criminal Code (Canada) as amended or re-enacted from time to time shall apply *mutatis mutandis* to every case to which this Act applies as if the provisions thereof were enacted in and formed part of this Act."
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> This is not a delegation of powers by the provincial Legislature to Parliament. It is an incorporation into provincial legislation of the work of another legislative body to avoid its repetition.

It is to be noted that in these two examples the incorporating statutes expressly incorporate, not only statutes existing at the time of their enactment, but also subsequent enactments. The argument is frequently put forward that the incorporation of subsequent enactments is delegation; this argument will be discussed below.

The distinction between delegated and referential legislation is simply this: in the case of delegated legislation, the delegatee's authority is derived from the delegator; but in the case of referential legislation the authority to enact the incorporated legislation is derived from the constitution and not from the other legislative body. In the *Walton* case, the authority of the legislature is derived from section 92; in the *Brinklow* case the authority of Parliament is derived from section 91.[49]

What evidently disturbs some is that the province can change federal law, and *vice versa*. In a sense it may be true that if one jurisdiction adopts future laws of another jurisdiction the latter can change the laws of the former. But in reality it is not true. In the *Walton* case the federal *law*, in effect, is that the rules for jurors in criminal cases are always to be the same as the rules for jurors in civil cases. That federal law remains unchanged, even if the province amends its laws. In the *Brinklow* case the provincial *law* is that procedure in prosecutions for provincial offences is to be the same as the procedure in summary prosecutions for federal offences. That provincial law remains unchanged, even if the federal law is changed.

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[48] *Ibid.*, at p. 326.

[49] As C. B. Bourne commented in Delegation Between Federal Parliament and Provincial Legislature (1956), 34 Can. Bar Rev. 500, at p. 502: "How can one say that the federal parliament is exercising a delegated power from a provincial legislature when parliament is legislating under the authority of a heading of section 91 that is exclusively its power (for example, under section 91(27)) and when the provincial legislature itself does not have that power? The provincial legislature cannot give what it has not got."

The Food and Drugs Act[50] incorporates the standards prescribed in the British and other pharmacopoeia as standards for drugs for which no standard is prescribed under the Food and Drugs Act. No one would suggest that in adding or changing their standards the compilers of these pharmacopoeia are acting under authority received from the Parliament of Canada or are amending the Canadian Food and Drugs Act.

In *Regina* v. *Glibbery*[51] the Court of Appeal of Ontario considered the regulations made under the Government Property Traffic Act.[52] That Act authorizes the Governor in Council to make regulations for the control of traffic upon federal property. The regulations provided that: "No person shall operate a vehicle on a highway otherwise than in accordance with the laws of the province and municipality in which the highway is situated."[53]

In a prosecution it was argued that the regulations incorporated only laws as they were when the regulations became law; it was contended that if "laws" meant laws as they might be amended from time to time, then there was an unconstitutional and invalid delegation of legislative authority by Parliament to the province. This argument is false in logic. In amending their traffic laws, the province and municipality exercise powers they possess under or by virtue of section 92—not powers they received from Parliament.[54] McGillivray J.A. said:[55]

> There is not here any delegation by Parliament to a Province of legislative power vested in the Dominion alone by the B.N.A. Act and of a kind not vested by the Act in a Province. . . . The power here . . . was not of such a type but was in relation to a matter in which the Province was independently competent. Parliament could validly have

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[50] *Supra*, footnote 25, s. 10(2). And see *A.G. for Ontario* v. *Scott*, *supra*, footnote 18.

[51] [1963] 1 O.R. 232.

[52] R.S.C., 1952, c. 324.

[53] P.C. 4076, [1952] S.O.R. 894, s. 6(1).

[54] In a comment Constitutional Law—The Inter-Delegation Doctrine: A Constitutional Paper Tiger? (1969), 47 Can. Bar Rev. 271, K. Lysyk asks this question: "Let us suppose that instead of speaking in terms of delegating authority to make laws (as did the proposed legislation considered in the *Nova Scotia* case), the Nova Scotia legislature simply repealed all provisions of its own Act and substituted a section which purported to incorporate the terms of the federal Act, as the latter might from time to time exist, making the same applicable to all industries, works and undertakings otherwise within the exclusive jurisdiction of the provincial legislature. Would this 'incorporation by reference' be constitutionally sound?" The answer undoubtedly is Yes.

[55] *Supra*, footnote 51, at p. 236.

> spelled out in its own regulations the equivalent of relevant sections of the Highway Traffic Act as they existed from time to time but it was more convenient to include them, as has been done, by reference to contemporary legislation in the Province. There should be no objection to delegation of this type made for a valid Federal purpose to save repetition in its own regulations of valid Provincial legislation.

He calls this type of legislation by reference a type of "delegation", but obviously by this word here he does not mean delegation of the kind considered in the *Nova Scotia Delegation* case. Unlike the statutes considered in the *Walton* and *Brinklow* cases the regulations in the *Glibbery* case did not expressly refer to future laws. McGillivray J., however, held that they intended to and did incorporate future changes. Whether, in the absence of an express provision, a reference includes future laws is therefore a matter of construction in the particular case.

Not only particular statutes but laws generally may be incorporated. Thus, the Crown Liability Act[56] makes the Crown liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable in respect of a tort committed by a servant of the Crown. The liability of the Crown in right of Canada must therefore be determined according to provincial law.

IV. *Delegation and Reference Combined.*

A single statute or section can utilize all three techniques: (1) delegation to provincial entities, (2) incorporation of the fact of the existence of provincial law and (3) incorporation by reference of the text or substance of provincial law.[57]

Sections 3 and 4 of the Motor Vehicle Transport Act[58] provide as follows:

> 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 discretion issue a licence to a person to operate an extra-provincial undertaking 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.

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[56] R.S.C., 1970, c. C-38, as am.

[57] The decisions referred to above have removed all doubts expressed about Parliament's power to delegate to agencies not of its own creation or to adopt future provincial laws. See, *e.g.*, H. E. Read, Is Referential Legislation Worth While (1940), 18 Can. Bar Rev. 416.

[58] R.S.C., 1970, c. M-14.

> 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.

Sub-section (1) of section 3 begins with incorporation of the fact of a provincial law—where in any province a licence is by the law of the province required. The operative part of this sub-section is substantive federal legislation in relation to an extra-provincial work or undertaking. Sub-section (2) of section 3 delegates power to a provincial board to issue the licences under this Act, and then incorporates by reference the substance of the provincial terms and conditions.

Section 4 embodies in the one section all three techniques.

The validity of the Motor Vehicle Transport Act was challenged in *Coughlin* v. *A.G. of Canada*.[59] The delegation argument was raised, but rejected by Cartwright J., who delivered the majority judgment, in these words:[60]

> In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney General for Ontario* v. *Scott*[61] and by the Court of Appeal for Ontario in *Regina* v. *Glibbery*.[62]

The result is that the provincial Board draws its powers from two sources, powers in relation to extra-provincial carriage from Parliament, and powers in relation to local carriage from the legislature. Or, it could be said that there are two Boards consisting of the same persons.[63]

V. *Delegation or Referential.*

A statute incorporating future laws of another jurisdiction must be carefully worded, lest it be struck down as an attempt at delegation.

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[59] [1968] S.C.R. 569. For a commentary on this case and the Motor Vehicle Transport Act see J. B. Ballem in (1954), 32 Can. Bar Rev. 788.

[60] *Ibid.*, at p. 575.

[61] *Supra*, footnote 18.

[62] [1963] 1 O.R. 232.

[63] See *Regina* v. *Smith*, [1972] 1 W.W.R. 382 (S.C.C.).

In *Rex* v. *Zaslavsky*[64] the Saskatchewan Court of Appeal held *ultra vires* a joint federal-provincial grading and marketing scheme.

A federal Livestock and Livestock Products Act[65] purported to authorize the Governor in Council to make regulations respecting the grading, packaging, marking and selling of agricultural products. The Act was general and was not restricted to export or inter-provincial trade. The Saskatchewan Live Stock and Live Stock Products Act[66] contained the following section:

> 2. If and in so far as any provision of an Act of the Parliament of Canada intituled the *Live Stock and Live Stock Products Act*, and the amendments thereof and the regulations thereunder heretofore enacted or made, is within the legislative authority of the province and outside that of the Dominion of Canada, such provision shall have the force of law in Saskatchewan, and unless otherwise enacted by the Legislature of Saskatchewan, shall be and remain in full force and effect therein to all intents and purposes whatsoever, until the same is repealed by the Dominion Parliament or revoked by the Governor General in Council, as the case may be.

The court was unanimous in holding the federal Act *ultra vires* because it attempted to control and regulate sales that begin and end in the Province. As to the provincial statute it was argued that it incorporated by reference the provisions of the federal Act and were *ultra vires*, and was therefore valid. The majority could not construe the statute this way and held it was an attempt, *ex post facto*, to give jurisdiction to Parliament that it does not possess. Martin J.A., who dissented, held the provincial Act valid. He admitted the section was not clear, but he found its intention to be to incorporate sections of the federal Act.

In the *Zaslavsky* case, the apparently intended referential section was so clumsily written that the majority could not construe it as being other than an attempt at delegation and struck it down. The Lord's Day Act section was written in the form of a delegation section and could easily have been struck down. It survived by being construed to be a referential section, which literally it was not.

VI. *Co-operative Federalism.*

One of the problems in a federal state is that a desirable social objective may not be attainable by one jurisdiction acting alone.

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[64] *Supra*, footnote 11.

[65] R.S.C., 1927, c. 20.

[66] R.S.S., 1930, c. 151, s. 2.

An example is a scheme for the marketing of agricultural products. Neither Parliament nor the legislatures can alone enact a complete scheme. Parliament cannot regulate intra-provincial trade[67] and the provinces cannot regulate extra-provincial trade.[68] Some form of co-operative legislation is necessary if the whole area of trade is to be regulated.

The statutes considered in the *Zaslavsky* case represent an early attempt at co-operation.[69] The federal Act purported to cover the whole field, and it was obviously realized that at least insofar as it intended to regulate intra-provincial trade, it might be *ultra vires*. In an attempt to cure the deficiency, some of the provinces enacted statutes designed to give the sterile words of the federal Act the force of law. The attempt was struck down in the *Zaslavsky* case and also in the Manitoba case of *R.* v. *Brodsky*.[70]

The next attempt was made in 1934. Parliament enacted the Natural Products Marketing Act.[71] This Act established a federal Board to regulate the marketing of agricultural products and contemplated co-operation with provincial Boards. The idea was that the provinces would enact marketing legislation confined to local trade, and Parliament would enact marketing legislation in relation to trade over which it had jurisdiction, and there would be inter-delegation of powers between the two Boards. A provincial Act, designed to dove-tail with the federal Act was held valid in *Shannon* v. *Lower Mainland Dairy*,[72] but the federal Act was held *ultra vires* in *A.G. for B.C.* v. *A.G. of Canada*[73] because it went beyond Parliament's jurisdiction. It embraced products if the *principal* market was outside the province of production or if *some part* of the product might be exported. The Privy Council said that there could be no doubt that the Act covered transactions that are completed within the province and have no connection with inter-provincial or export trade, and therefore purported to affect property and civil rights in the province.

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[67] *A.G. for B.C.* v. *A.G. of Canada, supra,* footnote 2.

[68] *Burns Food Ltd* v. *A.G. for Manitoba* (1974), 40 D.L.R. (3d) 731; *A.G. for Manitoba* v. *Manitoba Egg and Poultry Association,* [1971] S.C.R. 689.

[69] For a discussion of early unsuccessful attempts at federal-provincial legislative co-operation, see J. A. Corry, Difficulties of Divided Jurisdiction, appended to the Rowell-Sirois Commission Report, and R. Tuck, Delegation —A Way over the Constitutional Hurdle (1945), 23 Can. Bar Rev. 79.

[70] *Supra,* footnote 12.

[71] S.C., 1934, c. 57.

[72] [1938] A.C. 708.

[73] *Supra,* footnote 2.

> Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade. . . .[74]

The next step was the federal Agricultural Products Marketing Act,[75] considered in the *Willis* case. At that time there was no federal marketing board. The effect of that statute was to make the provincial Board also a federal Board, and to authorize the Governor in Council to grant to the Board an authority that only Parliament could grant, namely, to regulate marketing in interprovincial and export trade. That statute incorporated two of the devices discussed, namely delegation of power and incorporation of provincial law by reference.

Finally, in 1970 Parliament enacted the Farm Products Marketing Agencies Act.[76] It establishes federal marketing agencies in inter-provincial and export trade only, and contemplates inter-delegation between federal and provincial agencies. We are back to 1934, but this time the federal Act is clearly confined to export and inter-provincial trade and is therefore undoubtedly valid.

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[74] *Ibid.*, at p. 387.

[75] S.C., 1949, c. 16.

[76] S.C., 1970-71-72, c. 65.