

WHY WE ARE OVER-GOVERNED

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I. *Introduction.*

Canada is a ship with watertight compartments. These watertight compartments are an essential part of her structure. That at least was the opinion of Lord Atkin of the Privy Council in 1937.¹

The compartments are the classes of subjects assigned to the provincial legislatures and the federal Parliament. They are watertight because federal and provincial powers are exclusive. Parliament cannot legislate in relation to matters coming within the classes of subjects assigned to the provinces. Nor can the provincial legislatures pass laws in relation to matters coming within the classes of subjects assigned to Parliament.

But the bulkheads of the Canadian ship of state have sprung large leaks. There is an intermingling of federal and provincial jurisdictions. If separation of federal and provincial powers were part of the original structure of Canada, it is no longer part of her present structure. Canada, to a large measure, has two levels of government with concurrent powers. Canadian federalism represents more a duplication of responsibilities than a division of responsibilities.

II. *Residual Power.*

The first breach in the wall of exclusivity occurred as early as 1896. Parliament cannot attract to itself jurisdiction over any matter simply by passing a law that applies to the whole of the country or to every Canadian. Nor can a province attract to itself jurisdiction over any matter simply by passing a law that applies only to a particular person or to a particular locality.² The Privy

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¹ *Reference re Weekly Rest in Industrial Undertaking: Act*, [1937] 1 W.W.R. 299, at p. 312 (P.C.).

² See Burton J.A. in *Re Local Option Act* (1891), 18 O.A.R. 572, at p. 589.

Council, while accepting the general principle, in 1896 introduced an exception to it when it held that a province could legislate locally on a matter coming within the federal residuary power.

In the *Local Prohibition* case³ the province of Ontario had passed legislation giving localities throughout the province the option of prohibiting the sale of liquor. Parliament had previously passed a local option liquor prohibition law and the Privy Council had held the law to be within the powers of Parliament.⁴ The 1896 Judicial Committee nonetheless held that the Ontario law was within the power of the provincial legislature. If local option liquor prohibition were a matter coming within any of the federal enumerated powers, the provincial law could not stand.⁵ Because it was within the federal residual power, the provincial law and the federal law could subsist concurrently.

The Supreme Court of Canada, in *Johannesson v. West St. Paul*,⁶ held *ultra vires* a provincial law in relation to a subject matter, aeronautics, within the federal residuary power. In so holding the court did not disagree with the decision of the *Local Prohibition* case. The court emphasized the distinctive nature of aeronautics. The field of legislation was incapable of division in any practical way.⁷ It was impossible to separate intra-provincial flying from inter-provincial flying. The location and regulation of airports, dealt with by the provincial law, could not be separated from aerial navigation as a whole.⁸ It was impossible to separate the flying in the air from the taking off and landing on the ground.⁹ Since the *Johannesson* case was decided, an Ontario High Court judge,¹⁰ after referring to the *Local Prohibition* case, said that the federal general power was only to be used to declare a federal law *intra vires*. It was not available to hold a provincial law *ultra vires*.

III. Ancillary Legislation.

When the Privy Council, in 1907,¹¹ asserted the existence of a common domain, it did not refer to the *Local Prohibition* case,

³ *A.-G. for Ontario v. A.-G. for Canada*, [1896] A.C. 348.

⁴ *Russell v. The Queen* (1882), 7 App. Cas. 829.

⁵ *Supra*, footnote 3, at p. 365.

⁶ [1952] 1 S.C.R. 292.

⁷ *Ibid.*, per Locke J., at p. 327.

⁸ *Ibid.*, per Kellock J., at p. 314.

⁹ *Ibid.*, per Estey J., at p. 319.

¹⁰ *R. v. Lake Ontario Cement* (1973), 35 D.L.R. (3d) 109, at p. 117, per O'Driscoll J.

¹¹ *Grand Trunk Ry v. A.-G. for Canada*, [1907] A.C. 65.

or the residuary power. It referred to the *Voluntary Assignments* case¹² and *Tennant v. Union Bank of Canada*.¹³ These two cases set forth the doctrines of ancillary legislation and trenching.

Legislation squarely within the powers of one level of government may require ancillary provisions for the purpose of preventing the scheme of the legislation from being defeated. It may be necessary for this purpose to deal with matters which would otherwise be within the competence of the other level of government.

In the *Voluntary Assignments* case, the question before the Judicial Committee of the Privy Council was whether a provincial provision giving precedence to an assignment for the general benefit of creditors ahead of all judgments not completely executed by payment was *intra vires*. The Committee held that federal bankruptcy legislation, if it existed, might have had to deal with the effect of executions to prevent the scheme of bankruptcy legislation from being defeated. If there were federal bankruptcy legislation dealing with the effect of executions, provincial law could not interfere with it. But a province could pass a law on the effect of executions when there was no federal bankruptcy law in existence.

It would have been possible for the Privy Council, in the *Voluntary Assignments* case, to have reached the same decision without using the language of ancillary legislation. The Judicial Committee could have said that a law in relation to the effect of bankruptcy on unexecuted judgments came squarely under the bankruptcy power, or was a direct dealing with a matter within the bankruptcy power. The Supreme Court, in *Nykorak v. A.-G. of Can.*,¹⁴ refused to use the language of ancillary legislation to uphold contested federal legislation. In that case a motorist who injured a soldier was sued by the Crown for damages suffered from loss of the services of the soldier. Federal law deemed soldiers to be servants of the Crown. The motorist claimed that the federal law, because it imposed liability on members of the public, was not within federal powers. The court held that the contested federal legislation was squarely under the federal defence power,¹⁵ a direct dealing with a matter within the defence power.¹⁶

¹² *A.-G. for Ont. v. A.-G. for Can.*, [1894] A.C. 189.

¹³ [1894] A.C. 31.

¹⁴ [1962] S.C.R. 331.

¹⁵ *Ibid.*, per Judson J., at p. 335.

¹⁶ *Ibid.*, per Locke J., at p. 337.

Alternatively, the Judicial Committee could have said that a federal law about executions was valid in the aspect of bankruptcy, that it was, in pith and substance, a law coming within bankruptcy, and that a provincial law about executions was valid in the aspect of voluntary assignments, and that it was, in pith and substance, a law coming within property and civil rights.

Even if the Judicial Committee need not have relied on the language of ancillary legislation in the *Voluntary Assignments* case, once the doctrine of ancillary legislation was set out, it was expanded and used to support the validity of laws that could not have been supported on any other basis. The test became not, is the law necessary to prevent the scheme of the legislation from being defeated, but, is there a rational functional connection between what is admittedly good and what is challenged?

In *Zacks v. Zacks*¹⁷ a court that had previously granted a divorce decree ordered, in confirmation of the court registrar's recommendation, that the husband pay the wife maintenance. The court acted under the authority given to it by federal law to award maintenance on the granting of a divorce decree. The husband claimed that the federal law about maintenance was beyond its powers. The courts had held that maintenance is a matter that comes within the classes of subjects assigned to the provinces.¹⁸ The Supreme Court of Canada nonetheless held in the *Zacks* case that, because there was a rational functional connection between maintenance and divorce, Parliament could legislate in relation to maintenance at the time of divorce.

Though the *Voluntary Assignments* decision could have been supported by talk of aspect, it would be wrong, in general, to say that talk of ancillary legislation is just another way of describing the dual aspect situation. For the two are quite different.¹⁹ If legislation is valid as ancillary then that legislation may be enacted whether by Parliament or by the legislatures. If a matter has both a federal and a provincial aspect, it is not open to both jurisdictions to enact the same piece of legislation.²⁰ The talk of aspect divides a matter and allocates the parts between jurisdictions. Though trade has both federal and provincial aspects,²¹ Parliament cannot

¹⁷ [1973] S.C.R. 891, (1973), 35 D.L.R. (3d) 420.

¹⁸ [1938] S.C.R. 398, at p. 419.

¹⁹ W. R. Lederman, *The Courts and the Canadian Constitution* (1964), p. 197. *Contra* Laskin, *Canadian Constitutional Law* (4th ed. rev., 1973), by A.S. Abel, p. 20.

²⁰ See Laskin, *op. cit.*, *ibid.*, p. 115.

²¹ *Hodge v. The Queen* (1883), 9 App. Cas. 117.

legislate in relation to intra-provincial trade, and the legislatures cannot legislate in relation to inter-provincial trade. However, because maintenance is ancillary to divorce, both Parliament and the legislatures can enact a law giving a divorce court jurisdiction to award maintenance.

IV. *Trenching.*

Of the two supports to the notion of the common domain referred to in the *Grand Trunk Railway* case,²² the ancillary doctrine and the trenching doctrines, by far the more remarkable is the trenching doctrine. The ancillary doctrine says that a law in relation to a matter coming within a subject assigned to one level of government, though it does not, by itself, come within a subject assigned to the other level of government, is, nonetheless, valid legislation of the other level when part of a general law coming within a subject assigned to the other level. The trenching doctrine says that a law standing by itself may come within both a federal subject and a provincial subject. The federal domain is cut out of the provincial domain. It is not determined in the abstract. It is determined by what legislation Parliament enacts.

In *Tennant v. Union Bank of Canada*²³ a creditor of an insolvent firm sued a bank that had taken possession of lumber, previously owned and stored by the insolvent firm. The bank claimed title to the lumber by virtue of a warehouse receipt given by the insolvent firm. By provincial law a custodian of goods who was also the owner of the goods could grant a warehouse receipt only where the owner was by trade a custodian. The insolvent firm was not by trade a custodian. By federal law a custodian-owner could grant a warehouse receipt to a bank even though the owner was not a custodian by trade. The Privy Council held that the federal law stating that the receipt was valid was *intra vires* Parliament and that the bank was entitled to the lumber.

The Judicial Committee acknowledged that a law with respect to warehouse receipts related to property and civil rights. If Parliament were debarred from trenching upon property and civil rights, the federal law would be invalid. But it would be impossible for Parliament to exercise the powers granted to it without affecting property and civil rights. If Parliament could trench on property and civil rights, the federal law stood.

²² *Supra*, footnote 11.

²³ *Supra*, footnote 13.

The *Tennant* decision, like the *Voluntary Assignments* decision, could have been supported on other grounds. The subject matter of the federal law, warehouse receipts taken by banks, was different from the subject matter of the provincial law, warehouse receipts in general. Or at least, it is the same subject matter from different aspects. Parliament could not have passed the provincial law, nor the provincial legislature the federal law. There is a difference between saying that a law affects property and civil rights, which the federal law did, and saying that a law is a law in relation to a subject matter coming within property and civil rights, which the federal law was not.

However, like the language of ancillary legislation, once the language of trenching was articulated it was used to support laws that could not have been supported otherwise. The trenching doctrine was used to justify, in the *Tennant* case, federal legislation, but it gave the impression that the federal domain existed by subtraction from a larger provincial authority, leaving a competence to the province where there was no federal legislation.²⁴ When trenching was used to justify provincial legislation it became an independent basis of validity.

In *Validity of s. 92 (4) of the Vehicles Act, 1957 (Sask.)*²⁵ the Supreme Court of Canada held, on a reference from the Saskatchewan government, that a provincial law giving a board power to suspend a driver's licence if the driver refused a breathalyzer test was within provincial powers. Parliament, in the exercise of its power over criminal procedure, might have trenched upon the right of a provincial legislature to create a legal obligation to give a sample.²⁶ Because it did not so trench, the provincial law stood.

V. Inconsistency.

If there is a common domain, there should be a broad test of conflict. The worst of all possible situations, in terms of avoiding government duplication, is the existence of a large common domain and a narrow test of inconsistency. Yet, this is the case in Canada.

Australian constitutional law presents a striking contrast with Canadian constitutional law. In Canada the courts have developed the legislated exclusiveness of the British North America Act into a

²⁴ See Laskin J. in *Cardinal v. A.-G. of Alta* (1974), 40 D.L.R. (3d) 553, at p. 570 (S.C.C.).

²⁵ [1958] S.C.R. 608.

²⁶ *Ibid.*, at p. 613.

partial concurrency. In Australia, the states and the Commonwealth, with exceptions,²⁷ are given, by the constitution,²⁸ concurrent powers. The courts have developed the legislated concurrency into a system of exclusivity.

Once the Commonwealth has legislated in a field with an intent to cover the field, the field becomes the exclusive domain of the Commonwealth. All state legislation in the field becomes ineffective. Even if state and Commonwealth statutes are operationally compatible, the state laws are inoperative once the Commonwealth has indicated an intention to cover the field.

In *O'Sullivan v. Noarlunga Meat Ltd.*,²⁹ Commonwealth law required a meat export slaughterhouse to be registered, and state law required it to be licensed. Counsel for the state argued that Commonwealth and state law could work side by side. The criteria for state licensing were different from and not incompatible with the criteria for Commonwealth registration. The Privy Council, nonetheless, held that because the Commonwealth had shown an intention to cover the field of law in relation to the regulation of meat export slaughterhouses, the state law was inoperative.

In Canada, legislation by Parliament on a matter in the common domain does not give Parliament exclusive jurisdiction over the field of the legislation. The provincial legislation in relation to a matter on which Parliament has already passed a law, remains effective provided that there is no operational incompatibility between the federal law and provincial law. The fact that Parliament has indicated an intent to cover the field is irrelevant.

In *O'Grady v. Sparling*³⁰ a provincial law penalizing careless driving was allowed to stand with a federal law penalizing negligent driving. Though both laws were in the same field, they were not operationally incompatible. The two laws could live together and operate concurrently. According to the Supreme Court of Canada that was enough to allow the provincial law to be effective.

Since an Australian state law cannot operate when there is a Commonwealth law in the field showing a Commonwealth

²⁷ Ss 52, 90 of Commonwealth of Australia Constitution 1900, 63 & 64 Vict., c. 12.

²⁸ *Ibid.*, s. 12.

²⁹ [1957] A.C. 1.

³⁰ [1960] S.C.R. 804, (1960), 128 C.C.C. 1, 25 D.L.R. (2d) 145.

intent to cover the field, *a fortiori* an Australian state law cannot operate when it is identical to a Commonwealth law. Canadian law, on the other hand, does not allow a federal Act to render an identical provincial law ineffective. In *Hume v. Palmer*³¹ both Commonwealth and state law required that, when two steamships are crossing, the vessel which has the other on her starboard side should keep out of the way. The Australian Court of Appeal quashed a conviction under the state law. In *Smith v. The Queen*³² both federal and provincial law penalized the fraudulent circulation of a share prospectus. The Supreme Court of Canada quashed an order prohibiting a magistrate from hearing a charge that the provincial law had been violated. Because the purposes of the federal and provincial laws were different, the federal purpose being to prohibit an act and the provincial purpose being to regulate the security business, both laws remained operative.

With the *Smith* and *O'Grady* decisions the Canadian flood-gates of concurrency opened. The provincial offence of leaving the scene of an accident was allowed to co-exist with the federal offence of leaving the scene of an accident with intent to escape liability.³³ A provincial statute prohibiting loitering was allowed to continue with a federal statute prohibiting loitering and obstructing.³⁴ A provincial law that penalized acts of real estate fraud not punishable under federal law was held effective.³⁵ A city anti-noise by-law, passed under authority of provincial law was held operative, despite the existence of a federal law prohibiting a disturbance.³⁶ A provincial law prohibiting the use of all trading stamps was held effective despite federal law prohibiting non-redeemable trading stamps.³⁷ The courts refused to declare inoperative a provincial law prohibiting disorderly conduct in licensed premises despite the existence of federal law prohibiting disorderly conduct.³⁸ A provincial law punishing child neglect was allowed to continue side by side with a federal law imposing a duty on a parent to provide necessaries to his child.³⁹ The enacting of a federal offence of dangerous driving did not

³¹ (1926), 38 C.L.R. 441.

³² [1960] S.C.R. 776.

³³ *Stephens v. R.*, [1960] S.C.R. 823.

³⁴ *R. v. Persky* (1968), 1 D.L.R. (3d) 36 (B.C.).

³⁵ *R. v. Buzunis* (1972), 26 D.L.R. (3d) 502 (Man. C.A.).

³⁶ *R. v. Young* (1974), 42 D.L.R. (3d) 622 (Ont. C.A.).

³⁷ *R. v. Fleming* (1962), 38 W.W.R. 513 (Alta.).

³⁸ *R. v. Skagstead* (1963), 46 W.W.R. 154 (Man. C.A.).

³⁹ *Chief v. Sutton* (1963), 46 W.W.R. 57 (Man. Q.B.).

prevent the continuing effectiveness of the provincial offence of careless driving.⁴⁰

The Supreme Court of Canada has been so determined to avoid interpreting federal and provincial statutes as being in conflict that it has rejected the general principle that a prohibition implies a permission of what is not prohibited. To reach this result, the court has applied the Australian doctrine of covering the field, but applied it in an unusual way. It has said that where there is a federal attempt to cover the field, a federal prohibition implies permission of what is not prohibited. Any provincial prohibition of what Parliament did not prohibit is displaced. Where there is no federal attempt to cover the field, a federal prohibition does not imply permission. A provincial prohibition of activity that Parliament did not prohibit remains effective .

In *Ross v. Registrar of Motor Vehicles*⁴¹ the accused was convicted of impaired driving under the Criminal Code and prohibited from driving for a period of six months except during working hours. Because of the conviction his driving licence was automatically suspended under provincial law. Thus, the provincial law prohibited what the federal law did not prohibit. The driver could choose not to drive. If he wanted to drive, he was being told by one jurisdiction, the federal, that it was not illegal for him to do so, and by another jurisdiction, the provincial, that it was.⁴² The Supreme Court of Canada held, following *O'Grady v. Sparling*⁴³ and *R. v. Boisjoly*,⁴⁴ that the federal prohibition did not imply a federal permission. If federal law purported to deal generally with the right to drive a motor vehicle after conviction for certain offences, the permission would have been implied. Because Parliament did not purport to cover the field, there was no implicit federal permission in conflict with the express provincial prohibition.

The minority in the *O'Grady* case argued that Parliament, because it made punishable criminal negligence in the operation of a motor vehicle, by necessary implication said that lesser degrees and kinds of negligence in the operation of a motor vehicle were not punishable. The provincial offence of careless driving was in conflict with this implied federal law, and in-

⁴⁰ *Mann v. The Queen*, [1966] S.C.R. 238, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

⁴¹ (1973), 42 D.L.R. (3d) 68.

⁴² See P.G. Barton (1975), 53 Can. Bar. Rev. 80, at p. 86.

⁴³ *Supra*, footnote 30.

⁴⁴ [1972] S.C.R. 42, (1971), 5 C.C.C. (2d) 309, 23 D.L.R. (3d) 190.

operative.⁴⁵ The majority in *Ross* concluded that the majority in *O'Grady* had decided that Parliament did not implicitly permit conduct which did not come within the description of the federal offence.⁴⁶

However, the majority in *O'Grady* held that the difference between criminal negligence in the operation of a motor vehicle and careless driving was a difference in kind and not a difference in degree.⁴⁷ The court in that case may have decided that Parliament did not implicitly permit conduct different in kind from that which came with the description of a federal offence. The court did not decide that Parliament did not implicitly permit conduct different in degree from that which came within a federal offence. It remained open for the court in *Ross* to decide that Parliament did implicitly permit driving while suspended by punishing driving while prohibited. To reach this decision, the court need only have found that driving while prohibited was different in degree, but not different in kind from driving while suspended.

In *R. v. Boisjoly* the court did hold that the oath not prohibited in that case was nonetheless, not permitted. However, the permission in question was not an implied permission. It was a legislated permission. The court held that when permission is legislated, a measure of exception to the permission is implied. That holding did not contradict the principle that a legislated prohibition implies a permission. On the contrary, the court affirmed that principle, saying that it was "generally correct to assert that all that is not prohibited by law is permitted".⁴⁸ The case applied that principle to the converse situation, where permission, rather than prohibition, was legislated.

In *Ross*, if Parliament had legislated permission to drive when not suspended, there could, following *Boisjoly*, be no implied permission to drive when suspended. In the absence of such express parliamentary permission, the *Boisjoly* case did not prevent the application of the principle that an express prohibition implies a permission.

In Australia, a Commonwealth prohibition will imply a permission where the Commonwealth law covers the field within which the prohibition comes. However, the absence of an attempt

⁴⁵ *Supra*, footnote 30, at p. 821 (S.C.R.).

⁴⁶ *Supra*, footnote 41, at p. 81.

⁴⁷ *Supra*, footnote 30, at p. 809 (S.C.R.).

⁴⁸ *Supra*, footnote 44, at p. 45 (S.C.R.).

to cover the field does not remove the implication. A Commonwealth prohibition can still imply a permission even where the field is not covered.

Commonwealth law, in *Clyde Engineering Co. Ltd v. Cowburn*⁴⁹ prohibited ordinary working hours, for wages of £5 12s 6d, from exceeding forty-eight hours. State law required workers to be paid £5 12s 6d for forty-four hours work. The High Court of Australia held that the state law was inoperative. Mr. Justice Isaacs reasoned⁵⁰ that the state law was inoperative for two independent reasons. Firstly, the field, inter-state industrial disputes, was covered by Commonwealth law. Secondly, even if the field had not been covered, the detailed provisions of Commonwealth and state law were inconsistent. The federal prohibition against an employer requiring work for more than forty-eight hours for £5 12s 6d carried with it the implied permission to require work of forty-eight hours for £5 12s 6d. This implied Commonwealth permission was in conflict with the state law.

VI. *Inter-provincial Matters.*

Concurrent powers are an invitation to government duplication. When both levels of government have power over the same subject matter, there is always the possibility that both levels will use the power. But concurrent powers do not require duplication. If there is a demand for a law, like the local option liquor prohibition law, throughout the country, it could be legislated by each province, or by Parliament. It is not necessary for both Parliament and the legislatures to pass a local option prohibition law for the country to be effectively covered, for the problem to be effectively dealt with.

A doctrine that more than just invites legislative activity at both levels, but actually requires it, is the doctrine of inter-provincial matters. The British North America Act divides up jurisdiction by scope as well as by subject matter. For the subjects over which the legislatures have power, the provinces cannot legislate both from an inter-provincial aspect and an intra-provincial aspect. Not only can one province not pass a law wider in scope than its boundaries, but all the provinces acting together cannot cover the field in a subject assigned to them. The inter-provincial aspect of matters assigned to the provinces is within the exclusive jurisdiction of Parliament. Comprehensive legislation requires both the legislatures and Parliament to act.

⁴⁹ (1926), 37 C.L.R. 466.

⁵⁰ *Ibid.*, at pp. 489-494.

Regulation of trade in a particular commodity is within exclusive provincial jurisdiction.⁵¹ Nonetheless, legislation concerning inter-provincial trade in a particular commodity must be passed by Parliament. In *Murphy v. C.P.R.*⁵² a common carrier refused to transport grain from one province to another in defiance of its common law duty. The carrier argued that federal law prevented it from performing its common law duty. The person requesting shipment claimed that Parliament had no power to pass such a law. The Supreme Court of Canada held that the carrier was justified in refusing. Each province was powerless to control the export of grain from that province.⁵³ Only Parliament could control the export of grain from one province to another province.

Again, torts is a matter within exclusive provincial jurisdiction.⁵⁴ Yet, legislation in relation to inter-provincial torts must be passed by Parliament. In *Interprovincial Cooperatives Ltd and Dryden Chemicals Ltd v. The Queen (Manitoba)*⁵⁵ the Manitoba government, as statutory assignee of Manitoba fishermen, sued operators of plants in Ontario and Saskatchewan causing pollution. The operators were liable by Manitoba statute law, but exempt from liability by Ontario and Saskatchewan statute law. Mr. Justice Pigeon, with whom Martland and Beetz JJ. agreed, at the Supreme Court of Canada level, took the point that neither the Manitoba law imposing liability nor the Ontario and Saskatchewan laws exempting from liability were operative. Since the matter before the court, an act in one province, water pollution, causing damage in another province, was an inter-provincial matter, only Parliament could pass a law on the matter. Pigeon J. referred to the division of the trade power in setting out the division of the torts power.⁵⁶

VII. *Anticipatory Adoption by Reference.*

Nothing would have more effectively negated the notion of exclusivity than the existence of a power to delegate. Powers could not really be considered to be exclusive if they could be delegated. But the courts have held that inter-delegation is not

⁵¹ See *Alberta Insurance Reference* case, [1916] 1 A.C. 588, at p. 596.

⁵² [1958] S.C.R. 626.

⁵³ *Ibid.*, per Locke J., at p. 633.

⁵⁴ S. 92 (13) of British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

⁵⁵ (1975), 53 D.L.R. (3d) 321.

⁵⁶ *Ibid.*, at p. 357.

possible. Parliament cannot delegate its powers to the legislatures. The legislatures cannot delegate their power to Parliament.⁵⁷

Delegation, if it had been allowed, would at least have avoided government duplication. It would have permitted one level of government to abandon a field and leave it to the other. Delegation, if it had been rigorously forbidden, would have kept each jurisdiction within its proper sphere. The present law is half-way between these two positions. Something resembling delegation is permitted, but the delegating jurisdiction is required to maintain its legislative presence.

Near delegation is permitted where there is anticipatory adoption by reference or where there is a conditional legislation. The principle of anticipatory adoption by reference allows one jurisdiction to adopt the laws of another jurisdiction not only as they exist at the time of the adoption, but as they may be thereafter. This anticipatory adoption is permissible where the adopting level gives its government power to exempt those within its jurisdiction from the legislation of the level being adopted.

In *Coughlin v. Ontario Highway Transport Board*⁵⁸ Parliament had passed a law allowing provincial transport boards to issue licences to operate extra-provincial undertakings on the same terms and conditions as licences for local undertakings. A person granted an operating licence for extra-provincial transport applied for an order prohibiting a provincial board from reviewing the grant. Counsel for the licensee argued that only considerations contained in federal law could be applied to review the grant. The Supreme Court of Canada held, Ritchie and Martland JJ. dissenting, that there was no delegation. The anticipatory adoption by Parliament of provincial law was valid. Parliament had given the cabinet power to exempt any person or undertaking from the requirements of the adopted provincial law.

With anticipatory adoption of provincial law in a field of competence, the adopting level does not abandon such field. The adopting level may still pass laws in this field. Though federal law in relation to inter-provincial transport undertakings has adopted provincial law in relation to intra-provincial transport undertakings, Parliament nonetheless continues to legislate in relation to inter-provincial transport undertakings. Provincial law

⁵⁷ *A.-G. of N.S. v. A.-G. of Can.*, [1951] S.C.R. 31.

⁵⁸ [1968] S.C.R. 569, (1968), 68 D.L.R. (2d) 384.

gives their boards power to grant or continue transport licences if the public convenience will be promoted.⁵⁹ Federal law gives a federal board power to disallow the acquisition of an inter-provincial transport undertaking if the acquisition is prejudicial to the public interest.⁶⁰

VIII. *Conditional Legislation.*

The other kind of near delegation permitted is conditional legislation. Parliament may make the coming into operation of its own legislation conditional upon the passing of provincial legislation. It may provide for its own legislation ceasing to be operative upon the passing of provincial legislation. When Parliament provides for its own legislation being effective only upon the passing of a provincial Act, it is not delegating its legislative power. When it provides for its legislation ceasing to be effective upon the passing of a provincial Act, it is not delegating a power to repeal its own legislation. It is merely setting out a condition of fact that limits the scope of its own legislation.

In *Lord's Day Alliance v. A.-G. of B.C.*⁶¹ proposed British Columbia legislation gave the City of Vancouver power to legalize Sunday sports. Federal law provided that Sunday sports were illegal, except when permitted by provincial law. The Supreme Court of Canada held that the provincial law was effective to give the city the power to render the federal law inoperative. The federal law did not delegate the power to repeal the federal prohibition to the province. All the federal law did was to provide for a condition of fact, provincial legislation, to limit its own legislation.⁶² The scope of the federal prohibition was limited by Parliament, not by the legislature.⁶³

Provincial law may not only limit the scope of federal legislation. It can also extend the scope of federal legislation. It can do more than cease to make effective federal law that would have been effective in the absence of provincial law. It can also bring into effect federal law that would have been ineffective without the existence of provincial law.

⁵⁹ See, e.g., s. 263 (2) of the Highway Traffic Act, R.S.M., 1970, c. H60.

⁶⁰ National Transportation Act, R.S.C., 1970, c. N-17, s. 27(4)(b).

⁶¹ [1959] S.C.R. 497, (1959), 123 C.C.C. 81, 19 D.L.R. (2d) 97.

⁶² *Ibid.*, per Rand J., at p. 510 (S.C.R.).

⁶³ *Ibid.*, per Locke J., at p. 511 (S.C.R.).

In *Jones v. A.-G. of Can.*⁶⁴ federal law permitted criminal trials in a province wholly in French, or wholly in English, at the discretion of the trial judge, provided the province legislated a similar permission for civil trials. New Brunswick legislation allowed civil trials in any language at the discretion of the trial judge. The Supreme Court of Canada held that the federal law was not an unconstitutional delegation of its own powers. The principle of the *Lord's Day* case applied.⁶⁵ The effect of the New Brunswick law was to make the federal law operative in New Brunswick and give New Brunswick judges in criminal trials the discretion to conduct criminal trials wholly in French or wholly in English.

IX. *Spending.*

The explanation for most government overlapping is spending on objects beyond regulatory jurisdiction. An estimated thirty-two per cent of the federal budget in 1968-69 was spent on matters not within its regulatory jurisdiction.⁶⁶ Parliament "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".⁶⁷ For instance, the federal government may grant funds to schools, though education is within the exclusive jurisdiction of the provinces. The provincial government may make grants for objects that are not within their regulatory jurisdiction. For instance, the provinces may authorize the grant of funds to widows and orphans of British sailors, though they could not pass a law imposing obligations on those widows and orphans.⁶⁸ Although Lord Atkin in the *Unemployment Insurance* reference⁶⁹ expressly supported as valid only those contributions made in the public interest, no expenditure beyond regulatory jurisdiction has ever been questioned by the courts on the ground that it was not in the public interest.

⁶⁴ (1974), 45 D.L.R. (3d) 583.

⁶⁵ *Ibid.*, at p. 590.

⁶⁶ Proceedings of the Joint Committee of the Senate and the House of Commons on the Constitution of Canada, June 16th, 1970, 4:49.

⁶⁷ *A.-G. for Can. v. A.-G. for Ont.*, [1937] A.C. 355, [1937] 1 W.W.R. 312, at p. 315; see, however, the dictum of Lord Atkin at p. 316 and the discussion in P.-E. Trudeau, *Federalism and French Canadians* (1968), p. 86.

⁶⁸ *McMillan v. The City of Winnipeg* (1919), 45 D.L.R. 351 (Man. K.B.).

⁶⁹ *Ibid.*

The spending power is not merely an unconditional granting power. It is also a conditional granting power. The federal government can grant funds on compliance with conditions which, if made obligations, would be within the exclusive jurisdiction of the provinces. For instance, the federal government can grant funds to parents on condition that their children attend school, though Parliament could not pass a law requiring children to attend school.⁷⁰ Similarly, the provinces can grant funds on compliance with conditions which, if made obligations, would be within the exclusive jurisdiction of Parliament.

This spending power is not a contracting power. It is not a power to allow a government to bind itself to spend beyond its regulatory jurisdiction. The federal government or any provincial government may nonetheless commit itself by contract to activities beyond its regulatory jurisdiction. One level of government may engage in operations the regulation of which is within the exclusive legislative jurisdiction of the other level of government. In *Porter v. The Queen*⁷¹ an employee was held not entitled to a return of contributions made by his employer under an annuity contract between the employer and the federal government. The federal government was legally entitled to sell annuities, though the regulation of the insurance business is within the exclusive jurisdiction of the provinces.

President Jackett, in the *Porter* case, argued that if Parliament could apply money raised by taxation for making contributions in the public interest to individuals, corporations or public authorities, it could also "authorize the Crown to enter into contracts with individuals in circumstances that do not necessarily involve the expenditure of money raised by taxation where the dominating reason for the scheme is the public interest". The Government Annuities Act of Canada⁷² authorizing the Crown to enter into annuity contracts, stated, in its preamble, that "it is in the public interest that habits of thrift be promoted and that the people of Canada be encouraged and aided thereto so that provision may be made for old age" and that "it is expedient that further facilities be afforded for the attainment of the said objects".⁷³ Jackett P. pointed out that "Parliament expressly declared that the scheme was in the public interest and there

⁷⁰ *Angers v. M.N.R.*, [1957] Ex. C.R. 83.

⁷¹ [1965] 1 Ex. C.R. 200.

⁷² S.C., 1908, c. 5.

⁷³ Quoted, *supra*, footnote 71, at pp. 207-208.

are no circumstances that would constrain the courts to hold that the declaration was colourable".⁷⁴

The reasoning of Jackett P. suggests that if there were circumstances constraining the court to hold the declaration colourable, or if there were no declaration of public interest, the decision in the *Porter* case might have been different. The President left open the possibility that a law authorizing the Crown to enter into contracts, where the law had no declaration of public interest, or where the law had a colourable declaration, would be *ultra vires*. Because Jackett P. drew an analogy between the contracting power and the spending power, he raised the same possibilities in relation to the spending power as he did in relation to the contracting power. His reasoning left open the question whether a statute that authorizes the Crown to spend on objects beyond Parliament's regulatory jurisdiction is valid, where the statute has no declaration of public interest or where the statute has a colourable declaration of public interest.

The courts have relied on the power of Parliament to legislate in relation to the good government of Canada⁷⁵ or to public property⁷⁶ to hold that Parliament could legislate spending on objects beyond its regulatory jurisdiction. Judges of the Supreme Court of Canada⁷⁷ have relied on the power of the legislatures to impose direct taxation to raise revenue for provincial purposes to suggest that provinces may legislate spending on objects beyond their regulatory jurisdiction. "For provincial purposes" means "for the exclusive disposition of the legislature". It means what the legislature purposes, rather than what the British Parliament purposed in the British North America Act⁷⁸ for the legislature.

Wording that has permitted legislatures and Parliament to spend where they could not regulate has not permitted municipalities to spend where they could not regulate. In *Cluff v. Cameron*⁷⁹ one provincial statutory provision gave every municipal council the power to pass such by-laws and make such regulations

⁷⁴ *Ibid.*, at p. 213.

⁷⁵ *Angers v. M.N.R.*, *supra*, footnote 70, at p. 91.

⁷⁶ *A.-G. for Can. v. A.-G. for Ont.*, *supra*, footnote 67, at p. 315 (W.W.R.), [1936] S.C.R. 427, at pp. 431 and 457.

⁷⁷ Mr. Justice Duff and Mr. Justice Davis, *ibid.*, at p. 434 (S.C.R.).

⁷⁸ *Supra*, footnote 54.

⁷⁹ (1922), 22 O.W.N. 245, *aff'd* (1922-23), 23 O.W.N. 89. See *Ward v. City of Edmonton*, [1932] 3 W.W.R. (Alta), *contra*.

for the wealth, safety, morality and welfare of the inhabitants of the municipality as might be deemed expedient. Another provision gave every council power to pay for expenses incurred in respect to matters pertaining to or affecting the interests of the municipality. The Ontario High Court, affirmed on appeal by the Ontario Court of Appeal, held that neither of these provisions gave the City of Ottawa power to make a grant to a Kiwanis Club safety campaign conducted in part, outside the city limits of Ottawa, beyond the territorial limits of the city's by-law making jurisdiction.

The listing of purposes in municipal charters has not been treated the same way as the listings of federal and provincial subjects in the British North America Act. Municipalities must spend on municipal purposes. "Municipal purposes" means what the legislature purposes for the municipality, not what the municipality purposes for itself. Once those purposes are defined, the courts affix a trust, or quasi trust,⁸⁰ to municipal property and can call the municipality to account for any use inconsistent with those purposes. In *Paterson v. Bowes*⁸¹ the Mayor of Toronto asked the court whether, if the City gave him money for his own private use, the court had jurisdiction to restore the funds to the City. The court held it had such jurisdiction. The purposes of the City were sufficiently well defined by its charter to impress the monies of the City with a trust.

A provincial legislature could, of course, by the appropriate legislation, give a municipality power to spend in an area it could not regulate. However, a legislature intending to give a municipality that power would not realize that intent by giving the municipality power to make by-laws in relation to the good government of the municipality, to the property of the municipality or to the raising of revenue for municipal purposes. The grant of a power to spend beyond regulatory jurisdiction by a legislature to a municipality would have to be a good deal more explicit than that.

The absence of case law holding federal or provincial spending against public interest, or the divergence between the law of spending for municipalities, on the one hand, and the law of spending for the provinces and the federal government, on the other hand, may be explained by what was thought to be a distinction in the law of *locus standi*. Until recently it was held that federal and provincial taxpayers had no status in court

⁸⁰ *Dilworth v. Town of Bala*, [1955] S.C.R. 284, at p. 291.

⁸¹ (1853), 4 Gr. Ch. Rep. 170, at p. 180, per Esten V.C.

to challenge federal and provincial spending. Municipal ratepayers have always had the power to challenge municipal expenditures. In *MacIlreith v. Hart*⁸² the Supreme Court of Canada held that a ratepayer could bring an action on behalf of all ratepayers to recover money illegally paid to a person by the city of Halifax. The city itself did not have to consent to the action, nor did the Attorney General of the province.

The power of ratepayers to restrain *ultra vires* expenditures of municipalities is an exception to the rule that an individual not exceptionally prejudiced by a wrongful violation of a public right has no status to maintain an action restraining the violation. Mr. Justice Duff expressed the view that the exception did not rest on any clearly defined principle and was not to be extended.⁸³ This view was applied to deny taxpayers the right to question possibly illegal federal and provincial expenditures. In *Cowan v. C.B.C.*⁸⁴ a taxpayer was denied status to bring an action for a declaration that the Canadian Broadcasting Corporation, a federal government corporation, was unlawfully spending funds by operating a French radio station in Ontario. The Ontario Court of Appeal held that only the Attorney General of Ontario, as the representative of the public interest, could bring such an action.

A taxpayer was not allowed to bring an action against the federal government or provincial governments to question the possibly illegal expenditure of funds, even though there was no possibility of the matter coming before the courts in any other way. In *Mercer v. A.-G. of Can.*⁸⁵ a taxpayer was not allowed to challenge the federal spending on medicare. Only the provinces could challenge it. No province, however, would, since medicare is a federal-provincial cost sharing programme brought into existence only after federal-provincial agreement.

Recently, in *Thorson v. A.-G. of Can. (No. 2)*⁸⁶ the Supreme Court of Canada expressed disagreement with the view of Mr. Justice Duff and gave permission to a taxpayer to bring an action against the federal government to restrain it from spending money to implement an Act the taxpayer contended was unconstitutional. Though permission was given, the action was never brought. The federal law in question was held *intra vires* in other, subsequent,

⁸² (1907), 39 S.C.R. 657.

⁸³ *Smith v. A.-G. of Ontario*, [1924] S.C.R. 331, at p. 338.

⁸⁴ [1966] 2 O.R. 309.

⁸⁵ (1972), 24 D.L.R. (3d) 758.

⁸⁶ (1974), 43 D.L.R. (3d) 1.

litigation, on a reference.⁸⁷ Because the Act was held *intra vires*, the question of whether expenditure on any object beyond legislative powers was permissible did not arise.

Governments have extended their spending free from the challenge of taxpayers. The dearth of appeal court authority on the law of spending is a reflection of the past inability of the taxpayer to come to court on the issue. The dicta in the Supreme Court of Canada and the Privy Council made in the *Unemployment Insurance Reference*,⁸⁸ on which the Government of Canada has relied to support its spending,⁸⁹ were made without the benefit of argument from an interested party, the taxpayer, and against his interests.

The past absence of the taxpayer may do more than explain why the law is what it is. That absence throws into doubt the soundness of the law. The rule of natural justice, *audi alteram partem*, was violated. Now that the taxpayer need no longer be absent, now that federal law has approached municipal law on the question of standing, federal law may approach municipal law on the question of spending. However, the Supreme Court of Canada did say in the *Thorson* case, *obiter*, that neither the provinces nor the Dominion is limited in expenditure by the considerations that might apply to a municipality.⁹⁰

X. Rigidity and Flexibility.

Powers given are powers used. The existence of concurrent powers has meant the existence of concurrent governments. The federal Royal Commission on Government Organization in 1962⁹¹ took note of the government overlap that had developed. The Commission reported that at least sixteen of the principal federal departments and about as many other agencies were at that time concerned with matters in which provincial governments were interested. There had been a phenomenal growth in intergovernmental points of contact. The result of this growth was a general recognition of the need for avoidance of duplication of services.⁹²

⁸⁷ *Jones v. A.-G. of Can.*, *supra*, footnote 64.

⁸⁸ *Supra*, footnote 67.

⁸⁹ See the speech of Mr. St. Laurent quoted by P.-E. Trudeau, *op. cit.*, footnote 61, p. 85.

⁹⁰ *Supra*, footnote 86, at p. 16.

⁹¹ Report (1962), Vol. 3, p. 124.

⁹² *Ibid.*, p. 130.

The Joint Committee of the Senate and House of Commons on the Constitution of Canada, in 1971, reported that it had heard the criticism that the federal role in social legislation led to excessive bureaucracy.⁹³ Despite the phenomenal growth and the excessive bureaucracy, the Joint Committee recommended that the list of concurrent powers be extended. Concurrence allowed for greater flexibility.⁹⁴ It gave provinces the power to supplement national measures through special provisions for regional needs. It gave the central government the right to assure a minimum standard in areas primarily provincial.

An argument in favour of constitutional flexibility is an argument that regards the constitution as a means rather than an end. The end is the legislation to be passed. Exclusivity presents obstacles to the passing of worthwhile legislation. Concurrence makes the passing of useful legislation easier. The end, useful laws, justifies the means, concurrence. In the *Local Prohibition* case,⁹⁵ the judgments, both in the Privy Council and in the Supreme Court of Canada, betrayed an attitude that each locality should have been allowed to take advantage of every opportunity given to prohibit liquor, no matter who was giving the opportunity, whether it was the legislatures or Parliament.

It can just as plausibly be said that exclusiveness prevents the passage of bad laws, or that concurrence makes the passage of bad legislation too easy. A constitution must not be condemned because it makes particular projects more difficult to realize. It must be judged on its own terms.

The values that a federation represents are twofold.⁹⁶ There must be a balance of powers between the federation and the regions. Secondly, the division of powers must allow regions to deal with regional interests and the federation to deal with national interests. Neither of these values is served by allowing both jurisdictions to deal with all interests.

Retaining a system of exclusive powers creates characterization problems. The courts have the difficult task of characterizing every law as being in pith and substance either federal or provin-

⁹³ Report (1971), pp. 43-45.

⁹⁴ See also, Mr. Justice O'Hearn, Proceedings of the Joint Committee, Oct. 15th, 1970, 1:44; Dale Gibson, Proceedings, 7:9-12; Robert Carr, The Case for Fully Concurrent Powers, [1971] Man. L.J. 297.

⁹⁵ *Supra*, footnote 3.

⁹⁶ Howard, Australian Federal Constitutional Law (2nd ed., 1972), p. 133.

cial. However, the characterizations to be made in this area of the law are no more difficult than the decisions to be made in other areas of the law.⁹⁷ A refusal to make these decisions creates even more difficulty for the courts than the difficulty avoided. Though concurrency allows the courts to avoid determining what the pith and substance of a law is, it raises the problem of conflict. With a system of concurrent powers the courts must decide when a field is occupied and when federal and provincial laws are in conflict. Their decisions are as subtle and complex as decisions on pith and substance.⁹⁸

What is more, a refusal to decide on pith and substance is a denial of justice. Both the federal government and the provinces are denied a decision to which at least one is entitled. The two levels of jurisdiction are entitled, by the wording of the British North America Act, to have power over every matter, except for agriculture, old age pensions and supplementary benefits, and immigration,⁹⁹ allocated to one level alone. Concurrency deprives both levels of that allocation.

A system of concurrency, with the present doctrine of federal paramountcy in case of conflict, forces the courts to choose between parallel governments and federal domination. A broad test of conflict, though it would have prevented the federal and provincial governments' developing parallel bureaucracies, would have resulted in federal domination. Provincial autonomy could not have been preserved in the face of expanding concurrency without the narrow test of conflict that now exists.

If concurrency has provided for flexibility, the spending power has caused inflexibility. Federal offers to share costs of programmes federally determined have impelled provinces to embark on these programmes. Provincial priorities have become distorted by federal grants. A province that refuses a federal offer to share the costs of a programme the federal government wishes to promote suffers from the refusal. Its taxpayers are taxed to pay for the federal government's share of the cost in those provinces that do accept the offer.¹⁰⁰

⁹⁷ See, *contra*, W.R. Lederman, (1965), 43 Can. Bar Rev. 669, at p. 672; Proceedings of the Joint Committee, Oct. 27th, 1970, 6:9-10.

⁹⁸ For discussion on this point see Lederman, Carr, Gibson and O'Hearn, *op. cit.*, footnotes 97 and 94.

⁹⁹ B.N.A. Act, *supra*, footnote 54, ss 94A, 95.

¹⁰⁰ Ontario Government Position on the Spending Power, June 3rd, 1969, in Proceedings of the Joint Committee, June 16th, 1970, 4:65.

Even if the federal government gave provinces which refused a federal offer what it would have cost the federal government to implement the programme in the province, as the Constitutional Committee recommended,¹⁰¹ the distortion continues. Once the federal government offers to spend money on a particular programme, each province, even if it receives a compensatory grant should it reject the federal programme, will feel obliged to institute a similiar programme. Federal and provincial governments with overlapping spending powers are encouraged to outbid one another.¹⁰²

Federal grants to individuals and institutions show the same lack of adaptation to the demographic income and regional structure of each province as do federal cost sharing programmes. Allowing the total federal grant in each province to vary amongst programmes or classes of individuals at the determination of the provincial government, as suggested by the Constitutional Committee,¹⁰³ would provide adaptability. But the cost, in government duplication, would be even greater than that now incurred. Under the Committee scheme, the federal government would have to propose a national structure of demographic grants and guaranteed income payments. Then each province would have to determine how that structure should be varied in the province.

XI. *Conclusion.*

The courts have been reluctant to strike down laws *prima facie* in the public interest on the technical ground of their unconstitutionality. It is only after a number of watertight compartments disappear that the seaworthiness of a ship comes into question. It is only after a number of constitutionally questionable laws survive that their cumulative damage to the public interest, by creating government duplication, becomes apparent.

¹⁰¹ Report, *op. cit.*, footnote 93, p. 50.

¹⁰² Proposition submitted by the Government of Quebec, July 1968, in Proceedings, June 16th, 1970, 4:62.

¹⁰³ Report, *op. cit.*, footnote 93, p. 71.