CHAPTER IX

THE CONSTITUTION TO-DAY

In an earlier chapter the significant decisions on the meaning of the British North America Act given by the Privy Council before 1896 were briefly considered and their bearing on the future interpretation of the constitution was pointed out.\(^1\) Between 1896 and the present the Privy Council has decided well over one hundred cases which involved the interpretation of various provisions of the British North America Act. Some of these cases dealt with matters of very minor importance but the vast majority of them have been woven into the texture of the constitution. An accurate and complete statement of what the constitution is at the present day must analyze these cases, considering the scope of the decisions and the qualifications, express or implied, imposed by later decisions on earlier ones. Such a minute examination is beyond the scope of this Report and would involve a lengthy excursion into constitutional niceties, of interest mainly to specialists.

But the interpretations of the Privy Council have marked out the limits of the legislative power of the Dominion and the provinces. Among other things, they have determined the scope of provincial taxing powers. In these ways the decisions of the Privy Council have fixed both the responsibility for carrying out new functions which it is considered desirable for governments to undertake and the limits of the revenue sources available to the province for financing its activities. In working within this framework to meet mounting demands for governmental action, many new aspects of Dominion-provincial relations have emerged. The interpretation of the constitution in relation to twentieth century demands has helped to shape the present financial relationships between the Dominion and the provinces and has led to the adoption of several expedients involving co-operative action by the Dominion and the provinces. These co-operative ventures have, in turn, complicated the relationships which the Commission is required, by its terms of reference, to examine.

Accordingly, a survey of the constitutional development is necessary for the understanding of present problems. It is also important to see how the provinces and the Dominion were forced into these co-operative ventures and to appreciate the inherent difficulties which they involve. A short survey of constitutional developments cannot hope to deal adequately with many constitutional complexities. An attempt to state briefly how the constitution allocates responsibility for dealing with the problems which absorb the attention of legislatures today must speak in general terms without exhaustive reference to the legal decisions in which these matters have been explained. It cannot state all the qualifications to which any general proposition is subject nor grapple with the obscurities which still undoubtedly exist. What follows is a summary of those aspects of the constitution relevant to the inquiry conducted by the Commission and not a full exposition of constitutional law.

The Restrictive Interpretation of Section 91

In its interpretation of the British North America Act in the last forty years, the Privy Council has adhered to the general rule of construction laid down by Lord Watson in the Local Prohibition Case\(^2\) in 1896 which accorded Dominion legislation under the enumerated heads of section 91 primacy over the provincial powers set out in section 92 but denied this primacy to the general clause of section 91 which gave the Dominion power to make laws for the "peace, order and good government of Canada". This rule of construction, coupled with a broad interpretation of the general expression "property and civil rights in the province", contained in section 92, has given a narrow application to the so-called residuary clause in section 91. Accordingly, with rare exceptions, if a proposed piece of Dominion legislation does not fall within the specific enumerations of section 91, it is beyond the enacting power of the Dominion and within the powers of the separate provinces. That is to say, most of the novel legislation of our day, which is not of a type actually contemplated and expressly provided for by the framers of the British North America Act, must be enacted, if at all, by the provinces. There is much truth, as well as some exaggeration, in the contention that the "property and civil rights" clause has become the real residuary clause of the constitution.

\(^1\) See pp. 30 ff.

\(^2\) See p. 38 for a discussion of this case.
The Dominion power under section 91 (2) "regulation of trade and commerce" has received a restricted interpretation, improving on the limitations suggested in Citizens’ Insurance Company v. Parsons in 1882 until, in 1925, the Privy Council questioned whether it was operative at all as an independent source of legislative power. More recent decisions show that it has some scope but the narrow meaning given to it limits severely the power which it confers on the Dominion to regulate economic life.

The trend of interpretation, therefore, has been favourable to provincial power. However, between 1930 and 1932, the Privy Council handed down several decisions upholding Dominion legislation in a manner which seemed to involve qualifications on some of their earlier pronouncements and, at the same time, to countenance freer and looser interpretation of the British North America Act than had hitherto been adopted. Some regarded these decisions as marking a reversal of the trend of decision and a new emphasis on the scope and magnitude of Dominion powers. But this reversal of trend by the Privy Council, if reversal it was, turned out to be merely temporary, as its adverse decision in 1937 on a number of Dominion measures, commonly known as the Bennett “New Deal”, clearly showed.

These decisions of 1937 scarcely came as a surprise but they served to underline again the wide scope of provincial powers and responsibilities in modern economic and social legislation. When related to the limitations on the taxing powers of the provinces under the British North America Act and the wide disparities in the yield of revenue sources in the different provinces, they placed the crisis which had been gathering in Canadian public finance in clear relief. In a sense, it may be said that these decisions framed the Commission’s terms of reference and it is both appropriate and revealing that this discussion of the constitutional position today should revolve around them. With some reference to earlier decisions on particular points, a discussion of these cases illustrates the division of legislative power between the provinces and the Dominion in relation to the urgent issues of the present day.

In 1936 the constitutional validity of eight Dominion enactments was referred to the Privy Council and their decisions on them were rendered early in 1937. The validity of two of these statutes was upheld in full, and of one of them, in part. These three statutes are not highly important for our purposes and they need not be discussed in detail. But the nature and the fate of the remaining five require careful consideration.

Three of the remaining five enactments, the Weekly Day of Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act, established, as their titles indicate, nation-wide standards for minimum wages and maximum hours of weekly work. They were enacted by Parliament pursuant to obligations assumed by the Dominion under conventions of the International Labour Organization and were, thus, in substance, in fulfillment of treaty obligations of Canada. All three were held by the Privy Council to affect “Property and Civil Rights in the Province” and, therefore, to be beyond the powers of the Dominion Parliament to enact.

Apart from the fact that the decision on these statutes denied the power of the Dominion to set up nation-wide standards of labour legislation, it established two general propositions of great significance. First, it interpreted section 132 of the British North America Act which empowers the Dominion Parliament to implement “the Obligations of Canada or of any Province thereof, as Part of the British Empire, toward Foreign Countries arising under Treaties between the Empire and such Foreign Countries.” It held that the power of the Dominion under section 132 applies only to “British Empire treaties” negotiated by the Imperial Executive where the treaty obligations involved are assumed by Canada as part of the British Empire. In international treaties which the Dominion negotiates in its own right as an independent political unit, the power of the Dominion to implement the treaty by legislation depends entirely on whether the subject matter of the treaty falls within section 91 or section 92. That is to say, in view of the broad interpretation given to section 92, there are a number of matters on which

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1. See pp. 32-34 for these suggested limitations.
6. For a full discussion of these decisions, see the symposium by a number of leading constitutional authorities in [1937] 15 Canadian Bar Review, 401-497.
the Dominion cannot give effect to treaties which it alone has power to negotiate. The second proposition established by this decision is also involved in the decision on another of these statutes, the Employment and Social Insurance Act, and can be most conveniently discussed along with it.

The Employment and Social Insurance Act provided for a nation-wide system of unemployment insurance in specified industries to be supported, in part, by compulsory contributions of employers and employees and, in part, by contributions from the Federal Government. Such a scheme, the Privy Council held, was beyond the powers of the Federal Parliament to enact because it affected "Property and Civil Rights in the Province".\(^{12}\)

The argument that unemployment was a national evil, justifying national action under the "peace, order and good government" clause of section 91 was met by reference to a line of decisions holding that this clause of section 91 conferred on the Dominion an emergency power only.

In the interval between 1896 and 1937, Lord Watson's remark in the Local Prohibition Case that "some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation . . . " under the general clause of section 91 had been explained in several cases. In substance, these cases had decided that, during the stress of a severe crisis like the War of 1914-18, the Dominion Parliament had power to fix the prices of commodities and to regulate comprehensively other aspects of Canadian economic life under the "peace, order and good government" clause\(^ {13}\) but that as soon as the crisis was overcome, the power to impose such regulations evaporated.\(^ {14}\) Other decisions had emphasized the emergency nature of the general clause of section 91.\(^ {15}\) The two decisions of 1937 now being reviewed made it finally clear that this general power was operative only in temporary and overwhelming emergencies such as war, pestilence or famine.\(^ {16}\)

The Canadian dilemma over social legislation was thus sharply outlined. The constitution forbids the Dominion to establish uniform labour legislation of general application and, despite the unrestricted taxing powers of the Dominion, the possibility of framing any contributory social insurance scheme of nation-wide extent which could be validly enacted by the Dominion, is open to the gravest doubt.

Temporary evils of great magnitude may be grappled with by Dominion legislation under the general clause of section 91 but an enduring and deep-rooted social malaise, which requires the mobilizing of efforts on a nation-wide scale to deal with it, is beyond the power of the Dominion unless it is comprised in the enumerated heads of section 91. Generally, therefore, the power to deal with these pressing social questions rests with the provinces. But this makes it very difficult to secure the uniformity of standards which are desirable in many kinds of social legislation. Moreover, the provinces are limited in their access to revenues by the financial settlement of 1867 (and in practice by Dominion taxation in the same fields) and many of them are unable to carry the financial burden involved.

Of course, these difficulties had been encountered in practice long before the Privy Council decisions of 1937. Over a period of twenty-five years, several attempts have been made to overcome them by the method of Dominion conditional grants of financial assistance to the provinces. In various matters where uniform governmental action was deemed desirable in the national interest, the Dominion has made grants available to the provinces for special purposes on condition that the province undertake the work and maintain certain standards, designed to secure a fair degree of uniformity across the country.\(^ {17}\) The Dominion has tried to secure sufficient control over the administration of the particular activity by the provinces to enforce the maintenance of the desired standards. This has involved very substantial efforts in administrative co-operation between the provinces and the Dominion. The results obtained from this co-operation are far from reassuring.\(^ {18}\) The experience gained from these efforts will be discussed later.

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\(^{14}\) In re Board of Commerce Act, [1922] 1 A.C. 191.

\(^{15}\) E.g., see Toronto Electric Commissioners v. Snider, [1925] A.C. 396 at p. 412.

\(^{16}\) Under normal conditions, only a few matters of minor importance, not significant for present purposes, have been held to come within the scope of the general power in s. 91. For a list of these, see Plixton, Canadian Constitutional Decisions of the Judicial Committee, 1940-1952, p. XXXII. (All important constitutional decisions in this period are included in this volume.)

\(^{17}\) For an account of these grants see Wilfrid Eggleston and C. T. Kraft, Dominion- Provincial Subsidies and Grants (mimeographed), pp. 35f. The constitutional validity of such grants is not entirely beyond doubt. Attorney-General of Canada v. Attorney-General of Ontario, [1937] A.C. 355 at p. 366.

\(^{18}\) For a discussion of the working of the administrative relationships involved in these grants, see Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, Ch. VI; cf. Eggleston and Kraft, op. cit.
Although the exact scope of the phrase "regulation of trade and commerce" is not yet clear, it is settled that it does not cover the regulation of purely provincial trades, businesses and business transactions. Power to establish such regulations belongs exclusively to the provinces. On the other hand, it is equally clear that the provinces have no power to regulate interprovincial and export trade. The Privy Council ruling of 1937 holding the Dominion Natural Products Marketing Act invalid emphasized again the fact that the power to regulate economic life is divided between the provinces and the Dominion, and that neither one can encroach upon the sphere of the other.

It should be pointed out by way of caution, however, that the Dominion, relying on other heads of section 91, has a considerable power of economic regulation. It has some power of control over the operations of companies with Dominion charters which are, in substance, its own creatures and, therefore, in some degree, subject to its supervision. By use of its power to declare local works to be for the general advantage of Canada, it has been able to exercise effective control over the grain trade. As was confirmed by the Privy Council in one of the references concerning the social legislation of 1935 which is not specifically discussed here, the Dominion Parliament, under its power to enact the criminal law, has power to prohibit economic practices (e.g. certain kinds of trade combinations), provided the courts are satisfied that Parliament has acted in good faith in stigmatizing them as criminal offences and is not "using the criminal law as a pretence or pretext" to encroach upon provincial powers. Under other specific powers, the Dominion has extensive control over banks and monetary matters, bankruptcy, railway and air transportation, shipping and interprovincial communications. In other fields and other circum-

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22 In re Board of Commerce Act, [1922] 1 A.C. 191.
stances, however, it cannot go beyond regulation of the interprovincial and international manifestations of business activity.

While the desirability of the sweeping kind of regulation contemplated by the Natural Products Marketing Act is the subject of considerable controversy, the pronouncement of its invalidity by the Privy Council confirmed earlier doubts about the validity of several much less drastic Dominion measures relating to marketing, which were generally agreed to be desirable. Several Dominion statutes had set up compulsory grading legislation on a nation-wide scale for a variety of natural products. From time to time, most of the provinces had sought to cure any possible constitutional defects of these Dominion enactments by enabling legislation designed to authorize the Dominion to impose its grading regulations on purely provincial transactions. In 1935 and 1936, several provincial Courts of Appeal held that this enabling provincial legislation, in the form in which it came before them, was invalid, being an unconstitutional delegation of power to the Dominion.

The delegation of power by a province to the Dominion and vice versa would be a useful device for overcoming, in practice, the difficulties which arise from the division between the provinces and the Dominion of legislative power over many complex economic activities. Unified control and administration in the hands of a single government is sometimes desirable but it is very doubtful whether, as the constitution stands at present, the delegation of legislative power to a single authority is constitutionally possible.

Such a power of delegation would give the constitution a flexibility which might be very desirable. With the present degree of economic integration on a national scale, it is extremely difficult for either the Dominion or a province to frame legislation which will deal separately and effectively with the local or with the interprovincial aspects of business activity, as the case may be. When natural products are assembled for national or international markets and the manufacturing and distributive trades operate on a nation-wide or international scale, most of the large important trades and businesses are engaged at the same moment in both intra-provincial and extra-provincial activities. These activities are so inter-twined that it is difficult to isolate purely interprovincial activities so as to apply provincial regulations to them and equally difficult to select the interprovincial activities and foreign activities which are subject solely to federal regulation.

For example, the grading of natural products, in order to serve its purpose, should be done when the product passes from the producer into the hands of the dealer, but it is frequently impossible at that stage to tell whether the particular lot of produce is destined for intra-provincial or for interprovincial or export trade and, therefore, impossible to say whether provincial or federal regulations should be applied. In the absence of a power to delegate legislative authority and control to a single government in such situations, the only alternative where comprehensive regulation seems desirable is a scheme of joint Dominion and provincial legislation and administration. For reasons which are noted later, such schemes have inherent weaknesses which can be avoided by delegation of legislative power to a single authority.

Several situations have arisen where regulation is admittedly necessary but the constitution divides the power of regulation between the provinces and the Dominion. The case of the marketing of natural products has already been noted. The fact that the ownership of inland fisheries goes with the public domain to the provinces while the Dominion has the ownership of the seacoast fisheries and the full power of regulation over all fisheries has caused some confusion. The Dominion has power to enact compulsory legislation concerning industrial disputes in industries over which it has a comprehensive general power of regulation, such as interprovincial railways. The provinces have power generally to legislate respecting industrial disputes and, therefore, situations may arise where two or more governments are concerned in the settlement of a dispute. In each of these cases, efforts have been made in the past to surmount the difficulties by delegation of power but they are now either embarrassed or being abandoned owing to the dubious constitutionality of the device.

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30 For an account of the nature of this provincial legislation, see Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, pp. 13-16.
32 For a discussion of the constitutional validity of the delegation of legislative power, see Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, p. 37ff.
Power to regulate the financial practices of insurance companies does not belong exclusively either to the Dominion or to the provinces. The Dominion has power to regulate companies with a Dominion charter. The Dominion also exercises supervision over British and foreign insurance companies doing business in Canada. The constitutionality of this practice is not beyond doubt. On the other hand, the provinces have the power to regulate the activities of all insurance companies carrying on business within the province. As a result, separate and overlapping systems of Dominion and provincial supervision have grown up causing duplication of government machinery and unnecessary expense and inconvenience to insurance companies.

By way of summary then, the constitution as it stands today divides the power of regulating economic activity between the provinces and the Dominion. A great deal of the business activity of today is national in its scope and cannot be easily divided into intra-provincial and extra-provincial aspects for the purpose of regulation which may seem desirable. The delegation of legislative power by a province to the Dominion and vice versa, which would make possible a unified authority without any drastic amendments of the constitution increasing the power of the Dominion, is of doubtful constitutionality. Furthermore, the present division of legislative power under the constitution throws the main burden of modern social legislation on the provinces. The support of such legislation has become one of the heaviest financial charges which governments are obliged to meet. The division of taxing powers which gives the Dominion unlimited access to sources of revenue and restricts the provinces to a limited number of sources is discussed elsewhere. The scope of the provincial power of taxation as explained by Privy Council must be considered briefly here.

Interpretation of Provincial Taxing Powers

Section 92 (2) gives the provinces power to levy "direct taxation within the province". Also, under section 92 (9) "shop, saloon, tavern, auctioneer and other licences" may be imposed for the purpose of raising revenue. The scope of section 92 (9) is not yet entirely clear. It is not entirely certain whether indirect as well as direct taxation is authorized under this head nor whether licences may be imposed on any kind of business activity or only on a limited genus of which those specifically mentioned are examples. It is not highly important for purposes of this chapter because the great source of provincial revenues is direct taxation under section 92 (2). But if our recommendations (made in Book II) for the transfer of taxes are implemented, it would be very important that the scope of the power to raise revenue by licence fees should be clearly defined.

In an earlier chapter the criterion of direct taxation adopted by the Privy Council was discussed. The rule laid down in the case of Bank of Toronto v. Lambe in 1887 that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it" has been explained and amplified in later decisions. In substance, it has been held that a provincial legislature, in levying a tax, must intend the natural consequences of its action and, therefore, "it is the nature and general tendency of the tax and not its incidence in particular or special cases" which determine whether it is a direct tax within the power of the provinces to levy. Accordingly, if in the normal course of events, the burden of the tax is likely to be shifted to others by the person who is required to pay it, the tax is indirect.

The result of the application of this rule has been almost entirely to prevent provincial taxation on industrial production and wholesale turnover and to limit the productivity of provincial taxation by restricting it, in the main, to levies on the ultimate consumer. A percentage tax on the gross revenues of mining enterprises is an indirect tax. So is a tax payable by the first purchasers of fuel-oil after its manufacture or importation. So also is a tax levied on sales of grain for future delivery. On the other hand, a tax payable by the consumer of fuel-oil according to the quantity consumed is a direct tax. Thus the familiar

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36 Dominion legislation affecting these companies was held ultra vires by the Privy Council in 1932. See Attorney-General of Quebec v. Attorney-General of Canada [1932] A.C. 41. Following this decision, Parliament amended the legislation and the courts have not yet passed on it in its amended form.
38 See Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, Chapter II. For further discussion and recommendations, see Book II, Sec. A, Ch. IV, Pt. 4.
39 See pp. 40-46.
40 See Kennedy and Wells, Law of the Taxing Power in Canada, Chapters V and VI.
41 See pp. 40-46.
gasoline tax and the retail sales taxes found in some provinces are direct taxes within the power of the provinces because, by making the retailer the agent of the government for purposes of collection, they are deemed to be levied directly on the consumer who cannot naturally and easily shift the burden of them to others.

Fortunately for the yield of provincial taxation, the provinces have been able to go beyond taxes on consumption in the corporation taxes and succession duties. The validity of a corporation tax as a direct tax was upheld in 1887. A province has power to levy a tax on any corporation which is exercising its powers within the province. The so-called succession duties which, in most provinces, are, in part, probate duties, are, in part, probate duties levied on property as such and in part, legacy duties levied on the transmission of property from the deceased to beneficiaries are validly imposed by the provinces under certain conditions.

A probate duty is a direct tax but the provinces, being restricted to taxation "within the province", can levy only on that portion of the property of the deceased which is found within the province. A legacy tax, or succession duty proper, satisfies the test of "direct taxation within the province" when levied on beneficiaries domiciled or resident in the province in respect of the transmission of property to them by virtue of the law of the province. Under certain conditions, the province, by taxing the transmission of the property to a beneficiary domiciled or resident within the province rather than the property itself, is able to impose, in substance, a tax upon "movable" property situated outside the province.

Under certain circumstances, provincial succession duty can reach property in another province. With two exceptions, all the provinces do extend their succession duties to property in other provinces. At the same time, they all levy a probate duty on property situated in the province. Thus estates of deceased persons are subjected to the inequity of double tax whenever "movable" property belonging to the estate is found in more than one province.

Long efforts by the provinces to eliminate double taxation of estates by agreement have broken down completely under the stress of the depression.

**Disallowance of Provincial Legislation**

Before concluding this review of the constitution as it works today, it is necessary to refer to the present status of the federal power of disallowing provincial statutes. Although the scope of this power given by the British North America Act is legally unlimited, except as to time, it has been recognized from the beginning that it should be used with circumspection and in accordance with some guiding principles. The principles relied on by the Dominion Government in the exercise of disallowance have varied from time to time and it is, therefore, impossible to state them with precision. There has been no such consistent and unbroken practice as would be necessary to establish a constitutional, or conventional, limitation on the exercise of the power. There is reason for thinking that it will not again be used as freely as it was during the first thirty years of Confederation but this cannot be stated with finality.

As we have remarked earlier, the Dominion made very extensive use of the power of disallowance between 1887 and 1896. Not only was provincial legislation disallowed on the grounds that it was ultra vires or in conflict with Imperial or Dominion interests or policies. Provincial legislation might also be struck down on a ground which had great potential scope, namely, that it was inequitable and unjust. From 1896 to 1911, the Dominion Government consistently disavowed this last ground as a sufficient reason for exercise of the power. After 1911, there was a tendency to reaffirm the propriety of disallowing provincial legislation which the Dominion Government thought to be inequitable and unjust but this ground was actually relied upon in two cases only, arising in 1918 and 1922.

The power of disallowance was in complete abeyance from 1924 until 1937 when it was used against a number of Alberta statutes. Again in 1938 and in 1939, Alberta legislation was disallowed. Apart from showing that the power of disallowance has not become generally obsolete, the recent use of it does not throw any new light on its scope. Most of the eight Alberta statutes disallowed since 1937 were invasions of the federal field of legislation, conflicting with the interests and policies of the Dominion. However, among the reasons given for disallowance of two of these statutes, specific
reference was made to the injustice of the confiscations which they proposed and to their discriminatory character.

Thus it is quite impossible to regard disallowance on grounds of inequity and injustice as obsolete.\(^5\) It is true that in declining to disallow the so-called Padlock Law of Quebec in 1938 the Government disclaimed any intention to review the policy of provincial legislatures acting within their own field of competence. It is also true that in the Alberta cases, the distinct ground of interference with Dominion policy and interests was available in each case and relied on. But the only inference to be drawn from the recital of the unjust, confiscatory and discriminatory character of legislation is that these qualities are relevant to the use of the power. Nevertheless, the whole trend indicates a lessening use of the power. Up to 1900, 72 provincial acts were disallowed while only 35 have been disallowed since that time.\(^6\) It seems unlikely that disallowance on grounds of inequity and injustice will ever resume the importance it had prior to 1896.

It must be remembered also that in 1867, the world had had little experience of widespread democratic suffrage and much thought was expended on finding ways to prevent legislatures from abusing their powers. In that temper of affairs, whatever may have been the special reasons for inserting the power in the Canadian constitution, there is little wonder that it was extensively exercised. As time went on, confidence in the self-restraint of democratic legislatures increased and willingness to accept their measures with resignation also grew. In other words, the principle of legislative sovereignty is more fully accepted now than it was in 1867. The decisions of the Privy Council that the provincial legislatures are sovereign in their own sphere have operated to secure for them also the benefit of this acceptance. Consequently, the trend towards a narrower use of the power is likely to be sustained, although it is impossible to say that a different policy would not be adopted in special circumstances.

Difficulties of Divided Jurisdiction

At two points in particular, the division of legislative powers has led to attempts at close co-operation between the Dominion and the provinces. First, where the financial resources of the provincial governments are not commensurate with their legislative powers and consequent responsibilities for maintaining desired social services, the Dominion has made money grants to the provinces to assist in the maintenance of such services. Hoping to ensure the nation-wide maintenance of certain minimum standards in the assisted services, the Dominion imposes certain conditions on the grant and conducts a periodic inspection of the service given by the province. Hoping to hold the provinces to careful stewardship of funds which they do not themselves raise, the Dominion supplements its inspection activities with a detailed audit of provincial expenditures. Agreements as to the conditions on which the provinces are to undertake and the Dominion is to assist such services must be made at the political level. Federal officials are constantly investigating specific activities of provincial officials at the administrative level. Disagreements at either level may prejudice Dominion-provincial relations.

Second, in the field of economic regulation, where legislative power is divided, the Dominion and the provinces have made some attempts at co-operation, particularly in establishing nation-wide regulations for the grading of agricultural products. At first a device was used which, in substance, amounted to a delegation of power by the provinces to the Dominion enabling the Dominion to impose grading regulations on all transactions. However, after doubts arose as to the constitutionality of this practice, the provinces began to meet the problem by enacting the Dominion grades and regulations as provincial legislation and appointing Dominion inspectors and officials to act as provincial officials. Whereas the device of delegation was a very simple arrangement for unifying the administration of grading regulations in the hands of a single government, the new method involves the continuous co-operation of ten legislatures and ten governments in joint administration, making necessary a higher degree of sustained harmony and agreement.

These co-operative ventures are opening a new chapter in Dominion-provincial relations. A certain minimum of co-operation is always necessary if separate governments are to share in governing the same area and the same people. The original purpose of the constitution was to set up a sharp division of powers enabling each government to manage separately without interference the affairs allotted to it and to reduce all intergovernmental difficulties to a question of power and legal competence. Because different governments were

\(^5\) In the reference re Power of Disallowance and Power of Reservation, [1939] 2 D.L.R. 8, the Supreme Court of Canada held that the only limitation was the time limit fixed by the British North America Act.

\(^6\) Memorandum on Dominion Power of Disallowance of Provincial Legislation, Department of Justice, Ottawa, 1937.
likely to disagree from time to time about the extent of their respective powers, such questions are always referred to the courts for their final determination as independent and impartial bodies. The co-operation required between governments in these circumstances was mainly of a negative character; each should abstain from interfering with the others.

But Dominion and provincial governments are now embarked on the joint administration of projects which require positive and constructive co-operation if they are to be carried out efficiently. Two separate governments, neither one of which has any authority over the other, must agree on objectives, on the means of reaching them, and on the daily application of these means to new situations. However, there are always a number of issues on which the interests of the Dominion and those of the separate provinces do not run side by side. These differences in interest lead to disagreements which cannot be solved by appeals to the courts because they do not involve questions of formal constitutional power at all. They are disagreements about matters which the constitution intended that the appropriate government should handle separately in its own way.

Accordingly, if the co-operative projects are to be continued, the governments involved must be their own arbitrators. Arbitration conducted solely by the interested parties leads to delay and sometimes to deadlock which is ruinous to administrative efficiency. It always leads in the end to a compromise. While compromise is inherent in the political process, it is rarely conducive to good administration. The evolution of political policies within the framework of the constitution is leading to joint activity between the Dominion and the provinces. This contrasts sharply with the original conception of federalism as a clear-cut division of powers to be exercised separately, and experience indicates that it is injurious both to sound public finance and to efficient administration. The problems raised by joint administration of activities where jurisdiction is divided between the provinces and Dominion may now be pointed out. The first step in any scheme of co-operation must generally be taken by the legislatures concerned. As indicated above, the divided legislative powers over the subject-matter in question could be pooled by one legislature delegating its share of power to the other if the constitutionality of such an expedient had not been rendered doubtful by the courts. If it were constitutionally possible and the province or Dominion, as the case may be, were willing to delegate its powers in the specific instance, the act of delegation would complete the co-operation required. The legislature receiving the powers could then establish its regulations and provide for their enforcement just as if the entire matter had originally been within its jurisdiction. In such a case, no joint administration by province and Dominion would be involved and as long as the legislature delegating its powers was satisfied with the results obtained, through vicarious use of its powers, no further action by it would be required.

In the past, the Dominion and provincial legislatures have had no serious difficulty in agreeing on this kind of co-operation. Nation-wide schemes for the compulsory grading of natural products under the administration of the Dominion Government were set up and the provinces purported to extend the Dominion Industrial Disputes Investigation Act to disputes entirely within the jurisdiction of the provinces by essentially similar devices. The administration of the legislation was placed in the hands of a single government and the difficulty arising out of the division of legislative power over the subject matter was surmounted. The constitutionality of this procedure was, however, challenged by the courts in 1935. As a result, the provinces have begun to abandon this method in favour of a more complicated one which escapes the constitutional difficulty but which involves joint administration. The new device requires that the province should enact legislation in substantially identical terms with that of the Dominion but covering intra-provincial as distinct from inter-provincial and export transactions. To be specific, in legislation providing for the compulsory grading of natural products, the province enacts the Dominion grades and regulations for enforcement and then appoints the Dominion graders and inspectors as provincial officials to enforce the provincial as well as the federal legislation.

Close and continuous co-operation is necessary for success under this device. Any needed revision in the detailed regulations or definition of grades must be made by both the provincial and Dominion authorities concerned. They must be able to agree on the need for change and the exact nature of the change required. Moreover, the graders and

55 The extent and nature of these co-operative schemes are discussed in Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, pp. 13-16.
56 Ibid., pp. 20-21.
inspectors are now subject to the control of two masters, the Dominion and provincial departments concerned. The intention, of course, is to leave the initiative and the general control of administration of grading legislation to the Dominion and thus far in the limited experience of the new device, this has been the practice. However, it can only be a matter of time until it is discovered that the principles of responsible government are being flouted when provincial legislation is administered by officials who get all their instructions from Ottawa. Administration will then become joint in substance as well as in form.\(^57\)

Thus far, activities jointly administered by the Dominion and a province have not been of any significant magnitude or duration in Canada. As already remarked, however, the present division of legislative power and the present trend towards greater governmental regulation are rapidly leading in that direction. Although direct Canadian experience of joint administration is not available for assessing its probable efficiency, an appeal can be made to twenty years of experience in the administration of conditional grants in Canada. It has already been pointed out that, in the conditional grants made by the Dominion to the provinces to assist specific services, the Dominion attempts, by supervision and inspection of the provincial administration, to ensure that the grant is being properly applied to the purposes for which it was given. This involves a form of co-operation approaching joint administration and raises most of the problems involved in it. Before considering the manner in which conditional grants have worked in Canada, it is important to state some general considerations bearing upon all co-operative efforts in administration by separate governments.

It is clear that failure of Dominion and provincial government departments to pull together in such co-operative ventures will have disastrous effects upon administration. The purpose of all administration, whether in government departments or in private enterprise, is to get something done, to unify the efforts of the personnel in reaching objectives laid down beforehand. One of the principal differences between government and business is that the objectives and policy of government, in democratic states, at any rate, are generally arrived at as a result of bargaining and compromise among a wide variety of interests concerned. But once a policy is agreed upon, it is a maxim of all good administration that concerted effort in pursuit of the policy should not be frustrated by a multitude of counsel on the best means of arriving at it.

In business, unity of effort is secured by having a single manager responsible for administration as a whole. The Constitution of the United States aimed to reach the same result by concentrating all executive authority in the hands of the President. In the cabinet system of government, the conventions requiring unanimity and imposing collective responsibility are designed to secure a similar co-ordination of all administrative action.

Where the Dominion and the provinces co-operate in the execution of a single policy, there is no single authority which can impose its will and decide what daily action shall be taken in pursuit of objectives. The Dominion and the provinces occupy exclusive spheres of power in which no one can over-ride the others. If unity and harmony of administration are to be maintained, it must be through voluntary agreement between Dominion and provincial personnel on the best means of advancing the policy. And this agreement must be reached without delay and without serious compromise watering down the vigour of the measures employed.

It is one thing to get a legislature willing, at a single moment of time, to delegate some portion of its powers. Once the act of delegation is complete, it is not likely to reconsider its action until administration by the authority to whom the power was delegated becomes highly unsatisfactory. It is a quite different matter, however, to get sustained unanimity on the minitiae of administration from day to day. There are two main reasons for thinking it likely to break down from time to time.

It is no criticism of higher government officials to say that they generally like to extend the sphere of their authority. Like everyone else, the energetic official must try to express his personality in his work. He must try to prove the correctness of his ideas by putting them into practice and, in this way, prove himself to his superiors. Quite naturally, he wants credit for successful administration and he, therefore, cannot acquiesce in methods and practices which he thinks are prejudicial to it. In the nature of things, there are forces making for rivalry between Dominion and provincial officials who are co-operating in joint administration. Honest differences of opinion quite unconnected with personal ambitions are often sufficient to bring them into disagreement. Sooner or later, the incompatibility of their ideas or their ambitions are likely to lead to different views on
administration. Such rivalries and differences of opinion have prejudiced Dominion-provincial co-operation in many instances in the past. They are to be found between officials within a single government where it is only the unified control of administration in the hands of the cabinet which prevents them from seriously impeding administration. Officials testify to their existence by saying that success in Dominion-provincial co-operation in administration depends entirely upon "personalities".60

Secondly, in joint administration the officials in the provincial department concerned are responsible through the minister to the provincial legislature, while the federal department is likewise responsible to Parliament. Politics and administration are closely linked by the cabinet system. The Government of the Dominion and the government of a province, as is well known, may be at odds over some question of policy. On occasion there are genuine conflicts of interest between the Dominion as a whole and one or more provinces. Moreover, where active administration affects the interests of particular persons or groups, representations are made by them to the government of the day, which is sometimes constrained, as a result, to intervene in administration on political grounds. Thus there will be a tendency for joint administration to get entangled in political issues. Where both Dominion and provincial politicians have access to administration, there will be constant danger of Dominion-provincial political friction being transmitted to areas of joint administration.60

There is no occasion to be critical of political differences between the Dominion and a particular province. It is the duty of a provincial legislature and government to pursue the interests of the province as they conceive them to be, just as it is the duty of Parliament and the Dominion Government to push forward what they believe to be the national interest. These apparent conflicts of interest can scarcely be avoided. But they should be fought out in the political arena and not permitted to engage one another in the sphere of administration where they will destroy vigour and efficiency.

In the United States the cabinet system of government is not used and members of the legislature cannot intervene in daily administration. Thus administration is, in a considerable measure, insulated from politics. Accordingly, joint administration of projects by federal and state governments escapes one of the serious difficulties to which it is exposed in Canada. It is dangerous therefore to argue from experience in this field in the United States.

These general considerations do not apply with equal force to all kinds of joint activity. In activities which can be largely reduced to a number of routine operations and which do not have to wrestle constantly with new situations and new problems, the danger of differences between officials is considerably less. The same is true of activities which consist mainly in the application of scientific standards. To some extent, the discipline of science compensates for the lack of a discipline imposed by a single superior and the recondite nature of the problems which arise tends to withdraw the activity from the intrusion of political differences between the provinces and the Dominion.

Limitations of Conditional Grants

On the whole, however, these general considerations suggest that joint administration by Dominion and provinces is not likely to be very satisfactory. The history of the administration of conditional grants in Canada points in the same direction. From 1912 on, the Dominion has made grants of money to the provinces for specific purposes on specified conditions. Grants for assisting agricultural instruction, highway development, technical education and control of venereal disease have expired and have not been renewed. Grants for employment offices, old age pensions and unemployment relief are still being made. The activities being assisted are in each case within the constitutional power of the provinces and accordingly they are administered primarily by the provinces. As indicated earlier, the Dominion agrees to give financial aid to a provincial service provided the province spends equivalent or specified sums on it and maintains certain standards in the service rendered. Thus it is necessary for the Dominion and the province to agree upon the standard and the means of reaching it. The agreement is embodied in a set of regulations which are to govern administration and the claim of the province to Dominion financial assistance depends on the observance of these regulations. In an attempt to ensure careful application and substantial observance of the regulations, the Dominion Government audits provincial expenditures on the assisted service and, where feasible, measures performance against the standard by supervision and inspection.61

60 See Corry, op. cit., pp. 9-10.
61 Ibid., pp. 17-18, 54-55.
655—17

61 See Corry, op. cit., pp. 28-36, for a discussion of the administration of conditional grants.
Such administration is, in a sense, joint. Dominion auditors and inspectors check provincial accounts and the actions of provincial officials, while provincial officials are obliged to get the approval of federal officials if there is to be no interruption in payments of the federal grant. Disagreements between the two sets of officials involved cause delay and confusion and lower the efficiency of administration. We are convinced that, on the whole, the administration of the services assisted by these conditional grants has fallen far short of reasonably good administration. The basic reasons for this failure are the two set out above in general criticism of joint administration.

To decide whether particular payments have been properly made or whether provincial performance comes up to the agreed standard, it is necessary to interpret the regulations which define the conditions on which federal assistance is granted. Dominion and provincial officials frequently disagree about the meaning of the regulations. General rules are never entirely clear in their application to particular cases and most of the disagreements are genuine honest differences of opinion as to how the activity should be carried on in cases where the regulations are not entirely clear. It is true that the disagreements arise in a relatively few cases but since there is no single superior authority to resolve them; they are enough to cause delay, and may generate friction which spreads through the administration, and generally reduces efficiency.

The difficulty is that in many of the activities assisted by conditional grants it is impossible to find a clear-cut standard which can be applied automatically in measuring performance. Really objective criteria are hard to find in human affairs and where the measuring-rod cannot be applied automatically, it leaves room for difference of opinion. It is inevitable that federal inspecting and auditing officials should be primarily concerned with protecting the Dominion treasury while provincial officials engaged in active administration of the service are concerned with seeing that it meets what they conceive to be the needs for which it was established. Where there is room for difference of opinion, this difference in interest and purpose causes disagreements to emerge.

Federal officials cannot insist directly upon their interpretation of the regulations by giving orders to provincial officials in the field. Provincial officials must take their orders from the provincial government and not from federal auditors and inspectors. Thus disagreements in the field are referred back to higher officials and ministers in Ottawa and in the provincial capitals, and questions of administration become the subject of diplomatic interchange between governments, involving long delays in their settlement. When administrative questions rise to the political level, they tend to become entangled in political issues and to be treated as such. Nowadays Dominion and provincial policy impinge upon one another at many points. When, as a result of this fact, sharp differences emerge between the Dominion and a province, there is grave danger that the difficulties of joint administration will be intensified. The intrusion of politics in administration is always unfortunate but it is doubly so when a single government activity or service is disturbed by both federal and provincial politics.

In pointing generally to the difficulties in the administration of conditional grants, there is danger of creating false impressions. It must be emphasized that the exasperations noted are not found in all provinces nor at all times. If they were, conditional grants would never have survived their launching. But they occur with sufficient frequency to cause waste, friction and delay. Nor are they due to the perversity of officials and politicians. The federal scheme of government was devised precisely because of the lack of complete identity of interest between the whole and the component parts. Where differences of interest exist they become manifest simply through officials and politicians doing their duty. If these differences cut across fields of co-operative activity, they inevitably have a prejudicial effect.

Those who favour conditional grants as a means of overcoming constitutional difficulties are aware of the objection frequently made that governments which spend public money ought to be fixed with full responsibility of raising it. They argue that this objection is overcome and adequate control over provincial administration secured in two ways. In the first place, the grant is made for a particular purpose and the Dominion can define exactly what that purpose is. Then by supervision and inspection, it can determine whether provincial administration complies with the terms of the grant. If not, disallowances and deductions from the grant can be made as a penalty and a warning for the future. Secondly, if this sanction is not effective, the entire grant may be withheld until defects are remedied.

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62 Ibid., pp. 31-33.
63 Ibid., p. 33.
This argument ignores certain stubborn difficulties. In the first place, we have already pointed out that in many of the services assisted by federal grants, it is impossible to devise exact standards for measuring performance. Opinions differ as to what amounts to an earning of the grant and disputes arise. Federal auditors may disallow particular provincial expenditures as not being authorized by the regulations. Because there is generally room for difference of opinion, the province does not normally acquiesce in such action. In resisting a disallowance which it considers unfair, the province feels justified in bringing pressure on the Dominion. As the province is in full control of administration, there are generally a variety of expedients which it can adopt to inconvenience or prejudice the Dominion. Thus the Dominion is obliged to be very chary of disallowing expenditures except in very flagrant cases which, of course, are rare.64

Moreover, in most cases, federal audit of provincial expenditures cannot go to the root of the activity. To determine independently the correctness of all provincial expenditures on an aided activity, it would be necessary to duplicate provincial field staffs. Such duplication of staff cannot, of course, be contemplated and federal audit is generally confined to a review of the documents and vouchers on file. Occasional test investigations by way of sampling are made and complaints of serious abuses investigated. We do not suggest that there is any need to inquire into the honesty of provincial administration but there may be occasions when its vigilance in these assisted activities is not as rigorous as if the province itself raised all the funds expended on them. In any case, federal audit and supervision cannot go to the root of these activities.65

Secondly, the power of the Dominion to withdraw the grant from a province which fails to conduct its administration in accordance with the conditions imposed on the grant can rarely be exercised in practice. The Dominion assists particular provincial services because they further some important national interest. Withdrawal of the grant to discipline a province must be at the expense of the national interest in question. Furthermore, it is a very serious matter to say that a provincial administration is so bad that assistance must be withdrawn. Obviously no Dominion Government could come to that conclusion about a provincial government of its own political stripe. And a Dominion Government would scarcely dare to withdraw a grant from a provincial government of a different political stripe because of repercussions in the province affected.66

Thus the Dominion must always hesitate long before withdrawing a grant. The provinces know this and they are not seriously impressed by threats of such action. The power to withdraw the grant is not an effective sanction except against the most flagrant of abuses. Experience shows that where flagrant abuses have been brought to light, the province in question has hastened to correct them. In the prosaic but much more common cases, where administration is hampered by honest and reasonable differences of opinion, withdrawal of the grant as a means of resolving such differences is out of the question.

On these grounds we are satisfied that, for permanent purposes, the conditional grant, as it works under Canadian conditions, is an inherently unsatisfactory device. It may be used in some special cases and for some limited purposes, as we shall indicate later.67 But in most activities we believe it to be more costly than if the service in question were financed by a single government. It unquestionably leads to delay and to periodic friction between Dominion and provincial governments.

The experience with conditional grants leads us to doubt whether joint administration of activities by the Dominion and a province is ever a satisfactory way of surmounting constitutional difficulties. Where legislative power over a particular subject matter is divided, it is ordinarily desirable that these powers should be pooled under the control of a single government in order to secure unified effort in administration.

64 See Corry, op. cit., pp. 34-35.
65 Ibid., 29-31.
66 Ibid., pp. 34-35.
67 See Book II, Sect. A, Chaps. I and III; Sect. B, Chap. V.