

OCM

DOMINION - PROVINCIAL CONFERENCE

Opinions on Constitutional Law

No. 2. Delegation of Legislative Powers by and to the Dominion Parliament.

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by Tuck*

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DELEGATION OF LEGISLATIVE POWERS
BY AND TO THE DOMINION PARLIAMENT

1. Introduction

The Dominion Parliament by virtue of Section 94 of the B.N.A. Act has a nebulous power to "make provision for the uniformity of all or any of the laws relative to property and civil rights" in the Provinces, subject to the adoption of such provision by the Provinces in question.

It also has by virtue of Section 95 power to make laws in relation to Agriculture and Immigration in any of or all of the Provinces which is concurrent with power possessed by the Provinces to legislate on these subjects in the absence of, or consistently with, such Dominion legislation.

By Section 92 (10)(c) the Dominion has power by its own legislative declaration "to clothe itself with jurisdiction - exclusive jurisdiction - in respect of subjects over which, in the absence of such action by Parliament, exclusive jurisdiction is and would remain in the Provinces". (Per Duff J in Reference re Waterpowers (1929) S.C.R. at 220.)

In relation to all other subject matters legislative jurisdiction, as between Dominion and Provinces, is mutually exclusive and the line of division is permanent.

"At the present time although the law is not entirely clear, it seems that delegation of legislative power either by the Dominion to a Province, or by a Province to the Dominion is invalid" (Sirois Commission Report, Book II, p. 72)

It is to be noted that such cases as deal with the point, by way of dicta or decision, uphold this view; and that it is probably sound to say with Lord Watson that "we must get rid of the idea that either one or other of them (i.e., the Dominion or a Province) can enlarge the jurisdiction of the other or surrender jurisdiction". (See Corry in Appendix 7 at pp 40-1)

At all events there is no decision affirming the validity of such a transfer of jurisdiction. To put it another way, there is very substantial doubt as to whether such delegation is competent to either the Dominion or the Provinces, and this doubt can be allayed only by referring the question to the Courts (a process which does not always yield clear answers) or by way of constitutional amendment.

The Sirois Commission expressly avoided any attempt to deal with the appropriate method of amendment; but confined itself to recommending specific amendments designed to effect a better distribution of legislative power as to particular topics. It did conclude however, that one general amendment was necessary, namely, one enabling the Dominion and a Province to effect a permanent or temporary delegation of any of its powers to the other as a device providing for a necessary degree of flexibility, greater perhaps than possible by the device

of constitutional amendment.

2. Recommendations of Sirois Commission and Reasons Therefor.

The Commission recommended with regard to the particular subjects of fisheries (page 59) marketing of natural products (page 56), ~~and~~ old age pensions (page 32) and the implementation of international labour conventions (page 48) that improvement might be secured by delegation of jurisdiction.

These were to be merely particular instances of the exercise of ^a general "power of delegation" which should form part of Canadian federal relations". (page 274)

Inasmuch as the introduction of such a general power of delegation would enable the Dominion and Provinces to readjust the existing boundaries of jurisdiction freely it would authorize constitutional changes by consent which might far exceed those possible under a formal amending procedure.

Accordingly, as to this most important and sweeping of all the recommendations in the field of constitutional change, it is desirable to set ^{out} ~~up~~ the reasoning of the Commission in considerable detail.

Under the heading "Delegation of Powers" the Commission at pp 72-3) said:

"One of the difficulties inherent in any federal system is the rigidity which marks the division

of jurisdiction between the central and local governments. For obvious reason constitutional amendments in a federal state are made more difficult than is usual in unitary states.

Under our terms of reference we do not feel called upon to make any recommendations as to methods by which the British North America Act should be amended While we have recommended that constitutional changes should be made, we feel that it should be left to the Dominion and the provinces to work out the method whereby acceptable changes should be brought about. We desire merely to emphasize the necessity that some procedure for constitutional change should be evolved.

We think that the introduction of a measure of flexibility in the Canadian federal system should be considered. A number of provinces may on occasion be willing and may even actively desire the Dominion to assume responsibility for a function which is beyond its constitutional powers. The Dominion may itself be willing to assume the function but be unable to do so until public opinion has developed to the extent of permitting a constitutional amendment to be made. On the other hand, the Dominion may be alone entitled to perform functions which, under modern conditions, it may be more appropriate for the provinces to perform and certain of the provinces may be anxious to assume such responsibility. In several submissions to us, it was suggested that it would be desirable to allow a province to delegate power over a subject to the Dominion, provided that the Dominion was willing to accept the delegation, and conversely that there might be delegation of power by the Dominion to a province. The effect of such delegation would be that the delegating authority would divest itself, at least for a limited period, of the power as completely as if it had been assigned to the other authority in the British North America Act

To establish definitely a power of delegation which is sufficiently wide, amendment of the British North America Act would be required. Such an amendment should cover both the power to delegate jurisdiction and the power to receive jurisdiction by delegation. Such a power of delegation should apply to the whole field of legislative power for both the province and the Dominion including legislative power received by way of amendment or delegation.

It should also be provided that the act of delegation would only be operative if the legislative unit to which delegation was made signified its willingness to accept it. Provision should also be made permitting delegation to be either in perpetuity or for a definite time limit..... It should also be provided that although an agreement of delegation could not be revoked by the unilateral action of either legislature during the life-time of the agreement, it might be terminated earlier with the consent of both parties expressed by appropriate legislation.

Subject to such restrictions, we can see no reason why a mutual power of delegation between the Dominion and a province should not be permitted on a temporary as well as a permanent basis

Elsewhere in this Report in dealing with certain specific problems of Dominion-provincial relations we have suggested that these problems might be solved in each instance by delegation of jurisdiction. We think that a general power of delegation such as we have discussed, which would allow the transfer of jurisdiction from the Dominion to a province, or from a province to the Dominion subject to the conditions mentioned, would cover all these instances, as well as others. With such a power desirable changes in the constitutional allocation of powers could be effected in respect of one province without the necessity of waiting for such a development of public opinion as would permit of a nation-wide constitutional amendment. A change in jurisdiction might be effected on a temporary basis for one province, which, if it proved successful, might induce other provinces to make similar arrangements, and if unsuccessful need not be a permanent arrangement as would be a constitutional amendment.

The power of delegation would also permit of minor changes in the allocation of functions between the Dominion and certain provinces to suit the peculiar conditions of these provinces In short, a general power of delegation for both the Dominion and the provinces should provide a measure of flexibility which is much needed in our federal system."

3. Some Analogies

(a) Section 94

A somewhat analogous power whereby a change in the otherwise permanent distribution of legislative powers can be effected by joint action of the Dominion and Provinces is conferred by Section 94 of the B.N.A. Act:

"Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof."

It is to be noted (1) that under this section the initial legislation is that of the Dominion; (2) that it is inoperative in a Province until enacted by the Provincial Legislature; and (3) that such action by the Province confers an "unrestricted" power to legislate which, qua that Province, is perpetual.

It is probably for the third of these reasons that the section has been sterile of result as an agency of change in the direction of uniformity of provincial laws.

(b) Australian Precedent

Section 51 of the Commonwealth of Australia Constitution Act provides:

"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to

(xxxvii). Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

This provision has proven ineffective to accomplish the intended transfers or delegations of jurisdiction from the States to the Commonwealth.

"On several occasions agreements have been made, principally at Premiers' Conferences, to submit to the State Parliaments proposals to refer subjects of legislation to the Commonwealth Parliament, with the object of bringing about uniformity. Doubts have been expressed as to the effect of paragraph (xxxvii.) of section 51 of the Constitution --(a) whether reference may be made in general terms, or only in the terms of a special Act; and (b) whether a reference once made may be withdrawn. These doubts have never been tested, as no reference to the Commonwealth Parliament by all the States simultaneously has ever been made." (Report of Royal Commission on Australian Constitution (1929) p. 182.)

A more recent attempt to exercise this method of transfer of jurisdiction to the Commonwealth Parliament by way of "reference" or "Delegation" is relevant to consideration of the technique suggested by the Sirois Commission.

A Constitutional Convention was held in Canberra from November 24 to December 2, 1943, attended by representatives of the State and Federal Parliaments. After some discussion it was unanimously resolved that certain State legislative

powers should be temporarily transferred to the Commonwealth to enable the latter to deal with problems of post-war reconstruction. The resolution of the Convention took the form of a draft bill to be submitted to the Parliaments of the States and which, if passed, would have the effect of referring (i.e., of "delegating") certain matters to the Commonwealth Parliament until five years after Australia ceased to be engaged in hostilities. The Bill, however, was rejected by the majority of the States.

The Commonwealth Parliament subsequently passed an Act to provide for an amendment to the Constitution to enable that Parliament to exercise during the post-war reconstruction period the powers set forth in the uniform bill. This can become effective only if approved on a referendum by a majority of the voters in a majority of the States and by a majority of all the voters in the whole Commonwealth. *Ref requested*

There is thus an Australian precedent for a constitutional provision enabling one unit in a federal state to delegate its express powers to another unit. It is to be noted that the present recommendation goes beyond the recent Australian proposal in that it comprehends a permanent as well as a temporary delegation and a two-way, instead of a one-way, delegation.

The ineffectiveness of the Australian provision may well have been due, as the Royal Commission stated, to doubt as to the revocability of a grant of jurisdiction made under it, or

to the apparent absence of power to confer that grant conditionally -- points to be regarded in attempt drafting the amendment suggested by the Sirois Commission.

4. Analysis of Recommendation re Power of Delegation

Under the Recommendation the constitutional amendment must provide for:

- (a) delegation by the Dominion to one or all of the Provinces and by one or all of the Provinces to the Dominion;
- (b) delegation of any power in the field possessed by the delegating body;
- (c) delegation for a specified period or in perpetuity;
- (d) the irrevocability of the delegation during the period specified except with mutual consent;
- (e) the revocability by mutual consent of the delegation for a term of years;
- (f) the delegation and any revocation of it to be by way of legislation;
- (g) ~~(semble)~~ the necessity of a delegated power being accepted by the grantee as well as surrendered by the grantor.

5. Desirable Restrictions on Power of Delegation

The recommendation implies that the Dominion or Province may delegate any or all of its law-making powers whether derived from Sections 91 and 92 or from other jurisdictional sections. Moreover, the recommendation does not specify whether the dele-

gation must relate to a specific power or whether it can be by way of a general or "blanket" enactment.

- A. In view of the extraordinary character of any enactment authorizing the delegation and surrender of legislative jurisdiction contrary to the lines of division set out in the Constitution, it is submitted that power so to do should be confined to Dominion and Provincial heads in Section 91 and 92 alone.
- B. It is submitted that each instrument of delegation should specifically relate to one subject matter of jurisdiction or if relating to a plurality of subject-matters that each one should be stated specifically.
- C. It is submitted that the subject matter to be delegated should be stated in the exact terms of the appropriate head of jurisdiction under which it falls and that no general or omnibus language should be permitted particularly as the courts are likely to construe strictly the amendment authorizing delegation (cf. *Luscar Collieries v McDonald* (1925) S.C.R. 460~~7~~ as to similar points arising in relation to the sovereign power of the Dominion to assume jurisdiction over local works by its own "declaration").
- D. It is submitted that the amendment should be inserted in Part VI of the B.N.A. Act which relates to "Distri-

bution of Legislative Powers".

E. It is submitted that the new jurisdiction section should follow immediately after Section 91 and 92, which relate to the exclusive powers of the Dominion and Provinces; and that in no case should it form part of those sections since it confers power on both Dominion and Provinces to upset the normal distribution made by those sections.

F. It is submitted that the authority of the Dominion should be confined to classes of subjects enumerated in Section 91 so as to leave unaffected its residuary or ultimate authority under the Peace Order and good government clause, particularly as relating to national emergencies.

6. Draft Amendment to B.N.A. Act 1867

The British North America Act, 1867, is amended by inserting after Section 92 thereof the following section:

92A (1) The Parliament of Canada, ~~may~~ from time to time, may make laws referring (or delegating) to one or more Provincial Legislatures its authority to make laws in relation to any particular matter coming within any class

(all a part of?)
or any aspect thereof

of subjects enumerated in Section 91 and any one or more of the Provincial Legislatures named therein may make laws accepting the authority so referred (or delegated).

(2) The Legislature of any Province, from time to time, may make laws referring (or delegating) to the Parliament of Canada its authority to make laws in relation to any particular matter coming within any class of subjects enumerated in Section 92 and the Dominion Parliament may make laws accepting the authority so referred (or delegated).

(3) Upon the making of any law by the Dominion Parliament or by a Provincial Legislature so referring (or delegating) authority in relation to any matter and upon the acceptance thereof by a Provincial Legislature or by the Dominion Parliament respectively the latter shall thereafter have exclusive legislative authority to make laws in relation to the matter so referred (or delegated).

(4) A Law referring (or delegating) authority hereunder shall specify the period of time during which, and the conditions upon which, it shall be, and continue to be, effective and the same shall be accepted, if at all, in the terms so specified.

(5) An authority referred (or delegated) and accepted hereunder shall in all cases be capable of revocation by mutual consent expressed by laws made by the Dominion Parliament and the Provincial Legislature concerned; but shall in no case be capable of revocation by the Dominion Parliament or by a Province ^{alone} except in accordance with the terms upon which that authority was originally referred (or delegated) and accepted.

Note: In deference to the Australian precedent the term "refer" has been used with the term "delegation" as an alternative. It is preferable to use only one of these terms and it is submitted that the term "delegation" has acquired a sufficiently precise meaning as denoting a devaluation or transfer of power to justify its being used alone.

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