

# Instruments of Flexibility in the Federal System

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## I. INTRODUCTION

At this point in the materials, you might feel that the provisions relating to the distribution of powers have been interpreted by the courts in a manner that either denies the federal government the authority necessary to deal with important issues of public policy or imposes unjustified constraints on the provinces in dealing with issues of significance to them. However, it is important to be aware that the emphasis in the casebook is on the jurisdiction of federal and provincial governments to enact regulatory laws—or what some might call “command and control” legislation.

Before coming to any firm conclusions about the balance of power in the Canadian federal system, one should look beyond the “regulatory” jurisdiction of the federal and provincial governments to a number of policy instruments that have been used to alter the formal distribution of functions and the policy responsibilities of each level of government in many areas. These instruments include taxation, the spending power, public ownership, interdelegation, and intergovernmental agreements. In the materials that follow, you will see that the courts have placed few legal constraints on the use of these instruments, with the result that the actual distribution of functions is quite different from what we have studied so far.

At times, these instruments have permitted significant centralization of some functions. But more recently, with federal attempts to respond to both fiscal pressures and Quebecers’ demands for constitutional change, the federal role has been reduced in many policy areas. For example, as we will see, the spending power has been used both as means of centralization and decentralization.

Although the instruments we discuss below have been important in reshaping the Canadian Constitution, they do not reallocate regulatory jurisdiction over policy areas and, as a consequence, are always subject to legislative repeal. Only a constitutional amendment can securely shift the boundaries of federal and provincial regulatory jurisdiction. Amendment is dealt with in a separate chapter at the end of this book: see Chapter 26, Amending the Constitution.

## II. THE SPENDING POWER

### Keith G Banting, “The Past Speaks to the Future: Lessons from the Postwar Social Union”

in Harvey Lazar, ed, *Non-Constitutional Renewal*

(Kingston, Ont: Institute of Intergovernmental Relations, 1998) at 39

#### *Introduction*

During the postwar years, Canadians built their own version of the welfare state, establishing a new social contract between citizens and the state. This process was underway throughout the western world, as all countries experienced similar pressures to protect citizens from the social insecurities inherent in industrial society. Canada, however, faced the additional challenge of fashioning its social programs in the context of a federal state and society divided along linguistic and regional lines. Constructing the welfare state therefore also involved building what would now be called a *social union*, a set of understandings about the balance between federal and provincial social programs, and a set of intergovernmental arrangements to give those understandings life.

The postwar generation had to decide whether there would be a *pan-Canadian* welfare state or a series of distinctive *provincial* welfare states. The social union that emerged in those years was a compromise between these two poles. The system was significantly more decentralized than that in many other federal systems, including countries such as Australia and the United States, but it did incorporate critical pan-Canadian dimensions. Major social programs operated across the country as a whole and established a set of social benefits that Canadians held in common, irrespective of the region in which they lived. . . .

In the postwar social union, the pan-Canadian elements of the welfare state were associated strongly with the role of the federal government. As the political and economic strength of the federal government has declined in recent years, and as our constitutional tensions have grown, the original social union has come under strain. Increasingly, Canadians are being forced back to first principles in social debate. What is the appropriate balance between pan-Canadianism and regional diversity in the construction of the welfare state? If pan-Canadianism is an important value, are there mechanisms other than federal power through which it can be sustained? . . .

#### *Federal Instruments*

The federal government utilized three critical policy instruments in developing pan-Canadian social programs: the provision of benefits directly to citizens, federal shared-cost programs in areas of provincial jurisdiction, and equalization grants to poorer provinces.

#### *Direct Federal Programs*

Although it is sometimes argued casually that social policy generally is a provincial responsibility, the federal government's own jurisdiction in social policy is substantial, especially in the area of income security. During the middle decades of this century, three formal amendments to the constitutional division of powers gave the federal government complete authority over Unemployment Insurance, and substantial authority in the area

of pensions. In addition, under the doctrine of the spending power, the federal government claimed an untrammeled right to make payments to individuals, institutions or other governments for any purpose, and argued that such transfers do not represent an invasion of provincial jurisdiction as long as they do not constitute regulation of the sector. Finally, the federal role in taxation constitutes a powerful instrument in redistributive policies, especially with the development of a fuller array of refundable tax credits and benefits.

On these constitutional footings, the federal government developed a significant direct presence in social policy. In 1940, it introduced Unemployment Insurance, which was later complemented by training and other labour market programs. The federal government also established two universal programs: Family Allowances (1944) which were paid to all families with dependent children; and Old Age Security (1951), which provided a basic pension to all elderly Canadians. In the mid-1960s, the federal government enriched pensions with two additional programs: the Canada Pension Plan, a contributory plan providing earnings-related pensions, and the Guaranteed Income Supplement, an income-tested benefit for the elderly poor. Finally, a Spouse's Allowance for younger spouses of pensioners was added in 1975.

These initiatives established a direct federal presence in the lives of Canadians, and made Ottawa the dominant government in income security. Provincial governments delivered Workers' Compensation and social assistance programs; and Quebec chose to operate its own Quebec Pension Plan, which is closely aligned with the Canada Pension Plan operating throughout the rest of the country. Nevertheless, the federal role was dominant. ... [T]he federal government paid out between 70 to 80 percent of all income security dollars directly to Canadians for the entire period from the late 1950s to the early 1990s. ...

### *Shared-Cost Programs*

In other parts of the welfare state, the constitution and political realities pointed to provincial responsibility and delivery. In such areas as health care, social assistance and postsecondary education, the federal government therefore relied on the spending power to make shared-cost grants to provincial governments. Under these programs, Ottawa provided substantial financial support to any province mounting a program that met conditions or standards specified in federal legislation. In this way, the federal government stimulated the expansion of key social services, and established a common framework for program design from coast to coast.

The pan-Canadian nature of these programs turned to a significant degree on the terms and conditions attached to federal funding, especially in their developmental stages. The level of specificity in shared-cost programs varied considerably, both over time and from program to program. For example, some of the early shared-cost programs, such as the categorical social assistance programs that were the precursors to the Canada Assistance Plan, did establish relatively detailed conditions, including maximum shareable benefit levels. However, provincial resistance, especially from Quebec, changed that practice, and federal conditions became less detailed. Nevertheless, the federal conditions that were attached to shared-cost programs were important in giving broad shape to provincial programs. ...

### ***Equalization Grants***

Federal equalization grants to poorer provinces constituted the third instrument that sustained pan-Canadianism. These grants were designed to enable the seven poorer provinces to provide average levels of public services without having to resort to above-average levels of taxation. Equalization grants have always been unconditional, and in theory could be used to reduce provincial taxes rather than enhance provincial programs. In practice, however, the equalizing of fiscal capacity among provincial governments led to a more common level of public services generally across the country than would have been possible if provinces had to rely on their own revenues alone.

### **NOTE: SHARED-COST PROGRAMS**

In the extract above, Banting refers to the ability of the federal government to spend in areas outside its jurisdiction. This power is known as the federal spending power (which we refer to simply as the “spending power,” not to be confused with the power of provincial governments to spend in areas of federal jurisdiction, recognized by the Supreme Court in *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950). As Banting notes, the spending power has been used in connection with three kinds of programs—direct federal programs, equalization grants, and shared-cost programs. Our focus in this note is on the last of these three.

The dominant legal instrument for the exercise of the spending power has been the shared-cost statute. However, the design of the programs created by these statutes may vary along a number of different dimensions. Indeed, much of the politics of social policy revolves around these issues of design. Historically, the level of the grant was set on a shared-cost basis, with the federal and provincial government providing a fixed percentage of funds (typically, 50–50). However, in recent years, the federal government has instead relied on a system of block grants, which are set at a level that is not tied to program expenditures. Closely related to the level of federal grants is the form of the federal transfer. Again, there has been a shift over time, from direct cash transfers to a mix of cash transfers and tax points—that is, a percentage of federal tax revenue. Finally, most shared-cost program grants come with conditions—for example, the prohibition on residency requirements for the receipt of social assistance in the *Canada Health Transfer, Canada Social Transfer and Wait Times Reduction Transfer Regulations* (SOR/2004-62) and the various conditions on the delivery of medical care set out in the *Canada Health Act*, RSC 1985, c C-6 (CHA), both discussed below. However, this need not be the case—for example, equalization grants are unconditional.

In the area of health insurance, the central pieces of legislation were the *Hospital Insurance and Diagnostic Services Act*, SC 1957, c 28, covering in-patient and out-patient hospital services; the 1966 *Medical Care Act*, SC 1966-67, c 64, covering non-hospital-based physician services; and, finally, the 1984 *Canada Health Act*, RSC 1985, c C-6, which consolidated and replaced the earlier two statutes and is still in force. The *Canada Health Act* requires provincial health plans to meet five national standards in order to qualify for federal funding:

1. accessibility (“reasonable access to health care without financial or other barriers”),
2. comprehensiveness (coverage of all medically necessary hospital and medical services),
3. universality (coverage of all residents of a province after three months’ residency),

4. portability (coverage when temporarily absent from the province), and
5. non-profit public administration.

As well, the Act contains specific bans on extra-billing by physicians and user charges by other providers—for example, hospitals—for insured services. The Act contains enforcement machinery for provincial non-compliance, imposing mandatory deductions for violations of the bans on extra-billing and user charges, and vesting a discretion in the federal Cabinet to withhold funds from provinces in breach of the five national standards, after consultation with the province in question. For a detailed discussion of these standards, see Sujit Choudhry, "The Enforcement of the Canada Health Act" (1996) 41 McGill LJ 461.

On the income assistance side, the central piece of legislation was the *Canada Assistance Plan*, SC 1966-67, c 45 (CAP), enacted in 1966, but since repealed, as explained below. The CAP contained a series of national standards for provincial social assistance programs. Central among these was the requirement that provinces provide financial aid or other assistance to "any person in need," in an amount that met the "basic requirements" of that person. Other conditions required that there be no minimum residency requirement for the receipt of social assistance, and that provincial law provide for a right of appeal from decisions regarding social assistance. There was and is no shared-cost statute specifically directed at post-secondary education.

During the first wave of federal policy activism that created the social union, federal transfers for health insurance and social assistance were funded on a 50–50 basis. However, these arrangements have been altered in stages, in response to growing fiscal pressures on the federal government. In the health care context, this shift is described as follows:

The story of declining federal funding began in 1977, with the shift away from 50/50 cost-sharing to a block grant (the Established Programs Financing or EPF Grant) consisting of a mixture of cash and tax points, with the cash component tied to an escalator based on growth in per capita Gross National Product (GNP). In 1982, the escalator was applied to the entire EPF entitlement, not just the cash component, making the EPF cash transfer strictly residual. The escalator was then eliminated in stages, first in 1986 (when it was reduced to GNP less 2 per cent), then in 1990 (when the EPF per capita transfer was frozen).

See Sujit Choudhry, "Bill 11, the Canada Health Act, and the Social Union: The Need for Institutions" (2000) 38 Osgoode Hall LJ 39 at 62.

A similar story can be told about federal transfers for social assistance. First came the so-called cap on CAP. Until 1990, the federal government paid half the costs of social assistance in the provinces. In the 1990 budget, it unilaterally announced a 5 percent ceiling on the growth of payments to the three "have" provinces: Alberta, British Columbia, and Ontario. Coupled with a recession that increased the numbers on the welfare rolls, the province of Ontario was particularly hard hit, with the federal share of social assistance costs dropping from 50 percent to 28 percent in 1992-93, a reduction of \$1.7 billion.

These trends culminated in the creation of the Canada Health and Social Transfer (CHST) in 1995 (by the *Budget Implementation Act*, SC 1995, c 17, Part V, especially ss 13 to 23.2). The CHST was a new global block grant, consisting of a mix of cash transfers and tax points to cover post-secondary education, medicare, and social assistance, that replaced both the EPF and CAP. Because it was a block grant that was not tied to actual program expenditures, it marked the final break with the shared-cost approach to federal shared-cost programs. The cash component of the CHST for 1996-97 was set at \$14.7 billion, a \$4.2 billion reduction

from the 1995–96 total for transfers under the EPF and CAP (\$18.5 billion). Moreover, as a quid pro quo for reduced federal funding, the CHST eliminated all national standards in the CAP for social assistance programs, except for the prohibition on residency requirements. However, the national standards of the CHA remained.

In 2004, the CHST was split into the Canada Health Transfer (CHT) and Canada Social Transfer (CST) to provide greater accountability and transparency for federal health funding.

### THE SPENDING POWER AND THE CONSTITUTION

The spending power has been central to the growth, development, and politics of post-war Canada. However, its constitutional foundations are unclear. The existence of the spending power was announced by Lord Atkin in the *Unemployment Insurance Reference* (*AG Canada v AG Ontario (The Employment and Social Insurance Act)*), [1937] AC 355 (PC), excerpted in Chapter 6, The 1930s: The Depression and the New Deal, in the following famous passage:

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

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

This brief passage has given rise to a host of interpretive questions. First and foremost is the constitutional source of the spending power. The spending power is not mentioned in s 91 of the *Constitution Act, 1867*. Commentators have suggested a variety of sources for the spending power: s 91A (federal jurisdiction over the public debt and property), s 91(3) (taxation), and s 106, the authority to make payments out of the Consolidated Revenue Fund. Others have turned to the royal prerogative, or even the legal rule that the Crown possesses the powers of a private person, including the power to spend its moneys as it chooses.

But there are other questions as well. In the Supreme Court of Canada's judgment in *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c 48)* (the *Unemployment Insurance Reference*), [1936] SCR 427, Kerwin J supported the ability of the federal government to spend in areas out of its jurisdiction by making a distinction between spending and "coercive" forms of regulation on the ground that the recipient of a grant, including one with conditions, is free to "decline the gift or to

accept it subject to such conditions.” Scholars have questioned the cogency of this distinction, however, given that the Constitution allocates jurisdiction on the basis of subject matter, not on the basis of policy instrument (a point made by the Privy Council in the *Labour Conventions* case in the context of treaties: see *AG Canada v AG Ontario (Labour Conventions)*, [1937] AC 326 (PC), excerpted in Chapter 6.

Another issue is whether the spending power is subject to any justiciable limits. For example, is federal legislation enacted with the purpose of regulating an area of provincial regulatory jurisdiction *ultra vires*? Alternatively, can the degree of impact of a federal spending statute on areas of provincial jurisdiction rise to such a level as to take that statute out of federal jurisdiction? Lord Atkin’s judgment clearly contemplated both kinds of limits on the exercise of the federal spending power.

In most areas of constitutional law, subsequent jurisprudence would be available to answer these questions. However, the spending power is an exception. Consider the following observation:

In the years after the New Deal, the question of the division of powers in relation to social policy almost never came before the Supreme Court. Thus, although handed down over six decades ago, the *UI Reference* decisions are still the leading judgments in the area. The contrast with other areas of public policy is striking. In the post-war period, the Court pronounced on the division of powers in a broad variety of policy contexts—including agricultural marketing, natural resources, inflation controls, the environment and broadcasting, making social policy conspicuous by its absence from the Court’s docket. The silence of the Court on social policy is all the more unusual because jurisdictional questions often ended up before the Supreme Court because of intense federal–provincial conflict. In the social policy arena, disputes over the source and scope of federal involvement have been the norm and have often been framed in jurisdictional terms, and yet the courts have rarely been given an opportunity to elaborate upon and clarify the Privy Council’s holdings. By contrast, federal–provincial conflicts that raised fundamental questions about the Canadian constitutional order, such as the patriation of the Constitution and the potential secession of Quebec have landed before the Court.

Why did social policy not give rise to litigation under the division of powers? Although federal–provincial relations in this area were often acrimonious, in the end, both the federal and provincial governments likely concluded that the potential costs of a litigation strategy outweighed the potential benefits. The federal government, for example, has consistently asserted the federal spending power as a plenary power that allows it to spend in areas of provincial jurisdiction without constitutional limitation. The risk of bringing the spending power before the courts, however, was that a ruling might have imposed some limits on that power, for example, by holding that extremely intrusive conditions might amount to an unconstitutional attempt regulate matters in provincial jurisdiction. The provinces other than Quebec faced a similar dilemma. Given the existence of vertical fiscal imbalance, they did not oppose the federal spending power in principle, but wanted federal transfers to be unconditional. A court pronouncement, though, might have had the effect of legitimizing intrusive federal conditions. Even Quebec, which opposed even unconditional federal transfers, opted not to litigate, likely because it seemed exceedingly unlikely that its consistent demand—a right to opt-out with compensation—would not be granted by the Court. Not surprisingly, the cases in which the division of powers and social policy was litigated were brought by private parties. The first social policy case brought by a government did not come before the Supreme Court until 1990.

See Sujit Choudhry, “Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy” (2002) 52 UTLJ 163 at 198–99 (footnotes omitted).

As sparse as it is, subsequent case law appears to have departed from some of the limits imposed on the spending power by Lord Atkin. The focus of these cases has been on whether *conditions* attached to grants amount to a federal attempt to legislate in areas of provincial jurisdiction. In *Winterhaven Stables Limited v Canada (Attorney General)*, 1988 ABCA 334, leave to appeal to SCC refused (1989), 95 AR 236, the Alberta Court of Appeal considered a constitutional challenge brought by a taxpayer to a number of statutes, including the CAP (since repealed) and the *Federal–Provincial Fiscal Arrangements and Established Programs Financing Act*, 1977, SC 1976-77, c 10 (which established funding arrangements for the *Canada Health Act*, and has also since been repealed). The court rejected the challenge. The court conceded that “the consequence [of legislation authorizing conditional grants to the provinces] is to impose considerable pressure on the provinces to pass complementary legislation or otherwise comply with the conditions of the allocation,” and stated that conditions could be attached to grants “so long as the conditions do not amount in fact to a regulation or control of a matter outside of federal authority,” thereby suggesting that the effects of some conditions on provincial areas of responsibility could be so significant as to render the federal law *ultra vires*. But the court also stated that “questions of constitutional validity under ss 91 and 92 are not resolved by looking at the ultimate probable effect.”

The issue was also commented on by the Supreme Court in *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, discussed further below. In that case, the Supreme Court addressed an argument raised by Manitoba that the cap on CAP was unconstitutional because it intruded on provincial jurisdiction. The court rightly noted that this argument was a challenge to the constitutionality of the CAP itself. It rejected Manitoba’s submission, stating that the simple fact that a federal spending statute “impacts upon [a] constitutional interest” outside of federal jurisdiction was “not enough to find that a statute encroaches upon the jurisdiction of the other level of government.” This statement suggests that the effects of federal spending statutes are constitutionally irrelevant. Moreover, both judgments appeared to assume that the spending power may be deliberately directed at matters lying within provincial jurisdiction. If this is true, then the *Canada Assistance Plan Reference* may have overruled the *Unemployment Insurance Reference*. However, the court referred to the *Unemployment Insurance Reference* decision in the *Canada Assistance Plan Reference*, leaving the matter uncertain.

### **NORMATIVE CRITIQUES AND DEFENCES OF THE SPENDING POWER**

Consider the following criticism of the federal spending power by Andrew Petter, “Federalism and the Myth of the Federal Spending Power” (1989) 68 Can Bar Rev 448 at 463-67:

There are many values which find voice in the Canadian Constitution but, in terms of the structure of government, the two most fundamental are federalism and responsible government. Although federalism has many forms, at root it implies a division of legislative and executive responsibilities between two orders of government, neither of which is subordinate to the other. Responsible government is a system of representative democracy in which the head of state acts upon the advice of an executive that, in turn, is directly answerable to a democratically elected legislature. Viewed in light of these constitutional values, the debate over the federal spending power takes on new importance. It becomes a debate not just about constitutional doctrine, but about the integrity of the federal system and the preservation of political accountability in Canadian government.

The underlying rationale for federalism is a belief that while some matters are better decided by the national political community, others should be left to regional political communities. Implicit in this belief is a view that, with respect to certain matters, regional governments can better reflect the political attitudes and aspirations of citizens. It is not hard to see why this might be the case. In a country as large and diverse as Canada, the opinions and priorities of the inhabitants of one region may well differ from those of other regions. A system of regional governments is more likely to be responsive to these regional variations than is a single central government....

The *raison d'être* of the federal spending power (and of conditional grants in particular) is to permit the federal government to use fiscal means to influence decision-making at the provincial level. In other words, it allows national majorities to set priorities and to determine policy within spheres of influence allocated under the Constitution to regional majorities. Thus, both by design and effect, the spending power runs counter to the political purposes of a federal system....

An even more powerful objection to the federal spending power concerns its impact upon responsible government. The organizing principle of responsible government is political accountability: accountability of the executive to the legislature and of the legislature to the electorate. It is this thread of accountability that transforms what would otherwise be a despotic system of government into a democratic one. Yet if a legislature is to be held accountable to the electorate, citizens must have a definite understanding of the scope of that legislature's powers. An electorate that cannot attribute political responsibility to one order of government or the other lacks both the ability to express its political will and the assurance that its will can be translated into action.

By allowing the federal government to use fiscal means to influence provincial policies, the spending power compromises political accountability and thereby weakens the ability of electors to exercise democratic control over government....

Petter then discusses a hypothetical example where a province wishes to impose user fees for health care services on high-income individuals, but does not because of the fiscal penalties that it would face under the *Canada Health Act*, and continues:

Some may argue that the solution is for citizens to favour such a policy to organize at the national rather than the provincial level. ... Even if citizens, by organizing nationally, were able to convince the federal government to endorse their proposal, that government would be forced to rely solely upon fiscal measures to implement the reform. While such measures probably could be structured so as to compel provincial acquiescence with federal requirements, they could not give the federal government direct regulatory control over the policy. Thus the policy, although well conceived at the federal level, could suffer from incompetence or lack of political support on the part of the provincial authorities charged with its administration.

What the above example shows is that the spending power does not simply shift political responsibility from one order of government to the other; it intersperses responsibility between both orders. The result is to require those advocating a particular reform to fight a battle on two fronts. At the same time, it becomes virtually impossible for citizens to determine which order of government to hold accountable for policies that fail or, for that matter, for ones that succeed.

Consider the following defence by Sujit Choudhry of a strong federal role in redistribution, which is one of the policy goals achieved by exercises of the spending power:

To fully grasp the difficulties that the pursuit of redistributive goals poses for a federal state, we must define what those redistributive goals actually are. The goal I focus on here is *vertical equity*. Vertical equity refers to the appropriate stance of governments toward interpersonal economic inequality (however measured) prior to and independent of redistributive policies....

How does vertical equity operate in a federal state? In federations like Canada ... the concern raised by economists is that this goal is quite difficult to achieve.

The seminal work here is Wallace Oates' *Fiscal Federalism* ... . Oates starts by considering how redistribution would work in a highly decentralized federation, in which the federal government did not exercise any of the traditional functions of the public sector, including redistribution. For the purposes of his analysis, he makes a key assumption—"an absence of restrictions on the movements of goods and services" within the federation, i.e. extensive inter-provincial economic mobility. Oates' central claim is that in a decentralized federation, vertical equity, understood as interpersonal redistribution in order to reduce economic inequality, is very difficult to achieve. To understand why, Oates outlines the normative justification for federalism that emerges from the public choice literature, particularly the work of Charles Tiebout.

Tiebout relies on an economic conception of citizenship, which gives principal importance to the satisfaction of citizens' preferences. Tiebout's focus is on citizens' preferences for goods and services provided by governments, and he argues that systems of government can be compared with one another and assessed by their ability to maximize preference satisfaction. His central point is that federalism can be expected to produce a higher degree of preference satisfaction than would a unitary state, in the following way. Suppose each province provides a package of goods and services that varies along a number of different dimensions. As a simplifying device, assume that the two dimensions that matter most are the level or quantity of those goods and services, and the cost of those services. Each province can be uniquely characterized by where it lies on these two dimensions. One province may offer larger quantities per capita of goods and services (e.g. comprehensive health insurance, publicly funded education through to the post-secondary level) and will charge accordingly. Another province may offer a slightly lower quantity of goods and services (e.g. health insurance covering minimal health needs, and no publicly operated higher education system), but will charge less. Tiebout assumes that citizens are mobile, and that they will migrate to the province which offers them the basket of policies which suits them best. Federalism, then, creates a market for mobile citizens, where federal sub-units compete with one another through packages of goods and services they offer their citizens in exchange for fees to finance those services. ...

A complication arises, though, when one considers how provincial governments charge their residents for publicly provided goods and services. Oates sketches two different pricing options: benefit pricing and pricing on the basis of ability to pay. Under benefit pricing, each provincial resident, regardless of income level, would be charged an identical fee to cover the additional costs of offering goods and services to an additional resident of a province. From the vantage point of vertical equity, the principal problem with a flat benefit tax is that it disproportionately burdens the poor. The obvious solution, then, is to price publicly provided goods and services on the basis of ability to pay, so that those with relatively higher incomes pay more for the same goods and services than those with relatively lower incomes. A provincial income tax system would be the simplest mechanism for this sort of pricing.

Oates argues, though, that provincial governments are limited in their ability to redistribute interpersonally. The difficulty is the prospect of inter-provincial migration, both of higher and lower income persons. Higher income individuals would have an economic incentive to relocate to provinces where they would pay less for publicly provided goods and services, either because those provinces priced on a benefit basis, or adopted forms of income taxation which were less redistributive. Conversely, lower income individuals would have an incentive to move into provinces that finance services in a manner that least disadvantages low income individuals. The result is a cycle of out-migration and in-migration, whereby the departure of the rich and the arrival of the poor increases the proportion of lower income persons in the province, reduces the per capita provincial tax base, and accordingly requires an increase in the provincial income tax rate in order to provide public goods and services at the original level. Each increase

in income taxes would in turn cause more higher income persons to leave and more poor persons to immigrate. After a point, the decline in the per capita tax base would force provinces to offer a lower level of goods and services. As a consequence, provinces that redistribute will be constrained in their ability to offer goods and services to their residents. Indeed, Oates goes further, and identifies the same dynamic at work in any provincial effort to achieve vertical equity. Thus, if a province wished to achieve a more egalitarian distribution of income than currently existed, it too would create incentives for higher income individuals, who would bear the burden of this policy, to migrate to jurisdictions with less egalitarian income tax policies. The end result would be a more egalitarian distribution of income, but a decline in per capita income.

One solution would be for provinces interested in redistribution to co-ordinate their public policies so as to make unavailable an attractive exit option within the federation for high-income individuals. Provinces might co-ordinate the structure of provincial income tax regimes, and/or might ensure that they provide comparable levels of goods and services to their residents, acting as a cartel to set a price for their goods and services other than the one which would prevail in the absence of co-ordinated action. High-income individuals would lack the incentive to migrate inter-provincially, because they would be unable to escape redistribution. Inter-provincial co-ordination, though, may be ineffectual, because in some circumstances provinces have strong incentives to defect from a co-ordinated regime of redistribution. Provinces will have an incentive to defect when the benefits foregone exceed the benefits of participating in such a regime. The foregone benefit is the additional tax revenue brought in by each additional high-income individual who migrates to a province from another province in response to an inter-provincial redistribution differential. Provinces benefit from the in-migration of each additional high-income individual as long as the tax yield exceeds the marginal cost of providing goods and services to that person. But provinces will only be able to derive that benefit if other provinces do *not* defect, and adhere to the co-ordinated redistribution regime, thereby creating the incentive for high-income persons to migrate.

The difficulty though, is that each province has the same incentive to defect, and to adopt policies that are less redistributive in nature. Moreover, in response to a defection that has already occurred, a province will have an incentive to defect and adopt less redistribution in order to stem the out-migration of high-income individuals, because failing to do so would leave them in a worse off situation than if they did not respond. Thus, given sufficient incentives, rather than co-operate, provinces will compete on the terrain of redistribution. The net result will be lower rates of redistribution than would have occurred were inter-provincial co-ordination to have been successful. In other words, if left to the provinces alone, Canada risks a redistribution race to the bottom.

See Sujit Choudhry, "Recasting Social Canada," above at 219-24.

Choudhry goes on to argue that the prospect of races to the bottom can serve as the basis of federal regulatory jurisdiction over social policy under the national dimensions/national concern branch of POGG. Would the existence of federal regulatory jurisdiction over social policy be an effective response to Petter's concerns?

#### **NOTE: PROPOSED CONSTITUTIONAL AMENDMENTS**

The spending power has been the subject of constitutional discussions on a number of occasions. Quebec governments, in particular, have demanded controls on the federal spending power to prevent encroachments on provincial areas of jurisdiction. But others see the federal spending power as an important mechanism for maintaining a social union with common national standards. The following is a proposal on the reform of the spending power found

in the 1987 Meech Lake Accord and duplicated in the Charlottetown Accord in 1992. It would have added a new s 106A to the *Constitution Act, 1867*, which would have read as follows:

106A(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

This provision raised a series of difficult interpretive questions. One was whether it amounted to an explicit recognition of the ability of the federal government to expend moneys in areas of provincial jurisdiction. The reference to “national shared cost program ... in an area of exclusive provincial jurisdiction” seems to presuppose this. But how can this position be reconciled with s 106A(2)? A host of questions surrounded the opt-out with compensation. What was a “national” program—one that operated in every province, or simply one operated by the federal government in some provinces? Section 106A would have applied, prospectively, only to new shared-cost programs. But would it apply to amendments to, or extensions of, existing programs? What amount of compensation would be “reasonable”: on this point, see similar language in s 41 of the *Constitution Act, 1982*? What is a “program,” and is it different from an “initiative”? What are “national objectives,” and in particular, how are they related to the national standards laid down in the *Canada Health Act*? What would it mean for a provincial program to be “compatible” with national objectives? Need that program employ identical means to pursue the same ends, or would it be sufficient if the program pursued the same objectives, by whatever means?

Although s 106A was never entrenched, the federal government made a promise in the February 1996 Speech from the Throne not to use its spending power to create new shared-cost programs in areas of exclusive provincial jurisdiction without the consent of a majority of the provinces. Provinces choosing not to participate were promised compensation if they established “equivalent or comparable initiatives.”

#### **NOTE: THE ENFORCEMENT OF NATIONAL STANDARDS**

The enforcement of the national standards set out in the *Canada Health Act* has been a flash point of federal–provincial controversy. However, Sujit Choudhry suggests that national standards are largely unenforced:

Let me begin with two facts. The first is that, despite the explicit bans on user charges and extra-billing—which are remarkably specific in a statute otherwise marked by its use of open-ended language—provinces continue to violate these conditions of federal funding. ... Since these conditions are subject to the mandatory enforcement mechanism, the federal government is legally obliged to make deductions in federal transfer payments, and it appears that the federal government complies with the *CHA*. [The data show, however, that the total dollar amounts involved are small.] ...

In stark contrast, the discretionary enforcement mechanism, which attaches itself to the important conditions of universality, comprehensiveness and accessibility, has never been used. Juxtaposed against the active use of the mandatory deductions scheme, a casual observer could reasonably conclude that the federal government is actively monitoring provincial

compliance with the terms of the *CHA*, and has come to the conclusion that provincial plans meet those national standards. Alternatively, one could conclude that instances of non-compliance have been resolved without the need for financial penalties. ...

However, the reports of the auditor general tell a radically different story. The auditor general has examined the enforcement of the *CHA* on three occasions, in 1987, 1990, and 1999. I focus on the last report, because it is by far the most detailed, and because it repeats many of the concerns advanced in the first two. The auditor general indicated in 1999 that there had been numerous instances of non-compliance in the last five years. Six cases were resolved without the use of financial penalties; the report did not provide any details. However, the auditor general noted that there were other cases of non-compliance that had not been resolved. A number of provinces (which the auditor general did not name) contravened the portability condition, which requires that medical services received outside of a province (including outside of the country) by insured persons temporarily absent from that province be reimbursed at the same rate as inside the province. The portability condition was apparently violated by five provinces with respect to treatment received outside of Canada; in addition, one province violated the condition with respect to treatment received in other provinces. The auditor general also stated, without providing any detail, that “[o]ther examples of suspected non-compliance with the comprehensiveness and accessibility criteria have been the subject of considerable discussion between the federal government and the provinces and territories.” These disputes remained unresolved.

The most charitable interpretation of the auditor general’s findings to this point of the report is that the federal government has been aware of the extent of provincial non-compliance, has been able to resolve some but not all disputes through negotiation, and has been reluctant to use the powerful financial levers available to it to secure better compliance. However, the report then went on to state that the federal government was largely unaware of the true extent of provincial non-compliance, because it lacked the required information. ...

[T]he federal government’s non-enforcement of the *CHA*, along with the failure of political actors and the academic community to highlight the federal government’s abdication of its responsibilities, is a national embarrassment. ...

Why the lacklustre federal performance? There would appear to be two reasons why the federal government has failed to aggressively enforce the national conditions spelled out in the *CHA*. The first is a lack of institutional capacity. Information gathering of the kind that is required to gauge provincial compliance with the conditions of accessibility and comprehensiveness, in particular, requires a serious commitment of human and capital resources.

See Sujit Choudry, “Bill 11, the Canada Health Act, and the Social Union: The Need for Institutions,” above at 51–58. In an earlier article, Choudhry concludes:

However, it would be a mistake to reduce the federal government’s neglect of the *CHA* to a lack of resources. The more fundamental problem is a lack of political will. The auditor general’s report made an oblique yet revealing reference to this problem, when it stated that the enforcement of the *CHA* had been tempered by national unity concerns. What the report was referring to was a long history of tense federal–provincial relations surrounding the federal spending power. Particular exercises of the federal spending power have long been regarded as federal impositions by provincial governments (although only one province, Quebec, has ever challenged the constitutionality of federal government expenditures in areas of provincial jurisdiction). The dynamic of fiscal federalism has also been profoundly affected by the dramatic decline in federal transfer payments. ... [T]he legitimacy of the federal enforcement of national standards has been diminished along with its financial involvement. The failure to exercise its

discretionary enforcement power accordingly reflects a loss of legitimacy and political capital on the part of the federal government.

See Sujit Choudry, "The Enforcement of the Canada Health Act," above at 504-5.

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In 1999, the federal government, the nine provinces other than Quebec, and the three territories signed the Social Union Framework Agreement (SUFA). The goal of SUFA was to provide for a normative framework for federal–provincial relations in the social policy arena. The document contains seven articles of varying specificity, ranging from the extremely general (for example, art 1's statement that "Canada's social union should reflect and give expression to the fundamental values of Canadians—equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities to one another") to the fairly specific (for example, art 5's requirement that the federal government "consult with provincial and territorial governments at one year prior to renewal or significant funding changes in existing social transfers to provinces/territories"). Noteworthy is art 6, "Dispute Avoidance and Resolution," which provides for the establishment of dispute settlement machinery for disagreements regarding the interpretation of national standards.

#### **NOTE: FEDERAL TAXATION POWERS**

The federal power to tax in s 91(3) of the *Constitution Act, 1867* is virtually unrestricted, despite the Privy Council's judgment in the *Unemployment Insurance Reference*, excerpted in Chapter 6. Provinces' powers are more circumscribed, because s 92(2) limits them to direct taxation within the province (except with respect to natural resources, where indirect taxation is permitted by s 92A(4)). The meaning of "direct" and "indirect" taxation is explored in *Canadian Industrial Gas and Oil*, [1978] 2 SCR 545, excerpted in Chapter 10, Economic Regulation. Both federal and provincial governments are immune from the taxes of the other level of government in relation to their lands and property because of s 125.

### **III. INTERGOVERNMENTAL AGREEMENTS**

Federal and provincial governments enter into a wide variety of agreements on matters within their authority. Some of these agreements look like detailed contracts, and may cover matters such as the delivery of services or conditions to be satisfied for the receipt of funds. Others are broad statements of political objectives and obligations, such as an agreement by ministers to develop a common approach to educational standards. Because of this range, there is some uncertainty about the role of the courts in enforcing intergovernmental agreements. The most ambitious intergovernmental agreement in recent times is the Agreement on Internal Trade, discussed in Chapter 10.

The following case deals with the enforceability of intergovernmental agreements in a context where the federal government had unilaterally altered its obligations to certain provinces under the CAP.

**Reference Re Canada Assistance Plan (BC)**[1991] 2 SCR 525

[Section 4 of the *Canada Assistance Plan*, RSC 1985, c C-1 authorized the government of Canada to enter into agreements with provincial governments to pay contributions toward their expenditures on social assistance and welfare. Section 5 of the Plan authorized payments to the provinces pursuant to such agreements, and generally authorized contributions amounting to half of the provinces' eligible expenditures. The Plan specified certain conditions for eligibility of provincial expenditures (s 6(2)), but left it to the provinces to decide which programs would be operated and how much money would be spent. Section 8(1) of the Plan provided that agreements would continue in force so long as the relevant provincial law remained in operation, but they could be terminated by consent or on one year's notice from either party (s 8(2)). Agreements could also be amended by consent (s 8(2)). The Plan provided for regulations to govern such things as the calculation of eligible costs (s 9(1)), but regulations affecting the substance of agreements were ineffective unless passed with the consent of any province affected (s 9(2)). The Plan was silent as to the authority of Parliament to amend the Plan.

The government of Canada entered into agreements with each of the provincial governments in 1967. In 1990, the federal government decided to limit its expenditures in order to reduce its budget deficit. Therefore, it decided that payments due to the "have" provinces of Alberta, British Columbia, and Ontario (those that do not receive equalization payments) would grow by no more than five percent for the 1991 and 1992 fiscal years.

The government of British Columbia initiated a reference to the BC Court of Appeal to determine whether the federal government could reduce its contributions in this manner. A majority of that court relied on the doctrine of legitimate expectations to find that the federal government was required to obtain British Columbia's consent to the changes to the agreement.]

SOPINKA J (Lamer CJ and La Forest, Gonthier, Cory, McLachlin, and Stevenson JJ concurring):

In general, the language of the [*Canada Assistance*] *Plan* is duplicated in the [federal-provincial] Agreement. But the contribution formula, which actually authorizes payments to the provinces, does not appear in the Agreement. It is only in s. 5 of the Plan. Clause 3(1)(a) of the Agreement provides that "Canada agrees ... to pay to the province of British Columbia the contributions or advances ... that Canada is authorized to pay to that province under the Act and the Regulations." That means, of course, the contributions or advances authorized by s. 5 of the Plan, an instrument that is to be construed as subject to amendment. This is the effect of s. 42(1) of the *Interpretation Act* which states:

42(1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

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In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the *Interpretation Act* governs the interpretation of the Plan and all

federal statutes where no contrary intention appears, the matter will be resolved by reference to it.

It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the Plan. To assert the contrary would be to negate the sovereignty of Parliament. This basic fact of our constitutional life was, therefore, present to the minds of the parties when the Plan and Agreement were enacted and concluded. The parties were also aware that an amendment to the Plan would have to be initiated by the government by reason of the provisions of s. 54 of the *Constitution Act, 1867*. If it had been the intention of the parties to arrest this process, one would have expected clear language in the Agreement that the payment formula was frozen. Instead, the payment formula was left out of the Agreement and placed in the statute where it was, by virtue of s. 42, subject to amendment. In these circumstances the natural meaning to be given to the words “authorized to pay … under the Act” in clause 3(1)(a) is that the obligation is to pay what is authorized from time to time. The government was, therefore, not precluded from exercising its powers to introduce legislation in Parliament amending the Plan.

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... The contention is that the Agreement could only be amended in accordance with s. 8. This submission fails to take into account that the Agreement which is subject to the amending formula in s. 8 obliges Canada to pay the amounts which Parliament has authorized Canada to pay pursuant to s. 5 of the Plan. Hence, the payment obligations under the Agreement are subject to change when s. 5 is changed. That provision contains within it its own process of amendment by virtue of the principle of parliamentary sovereignty reflected in s. 42 of the *Interpretation Act*.

If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between governments. Moreover, s. 8 itself contains an amending formula that enables either party to terminate at will. In lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance.

The result of this is that the Government of Canada, in presenting Bill C-69 to Parliament, acted in accordance with the Agreement and otherwise with the law which empowers the Government of Canada to introduce a money bill in Parliament.

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*Appeal allowed.*

## NOTES

1. The exact holding in the *Canada Assistance Plan Reference* is the subject of some dispute. It has been argued, for example, that the judgment stands for one of three propositions:

First, a narrow reading would hold that the agreement did not specify the levels of payment, leaving this matter to federal legislation. Thus, the agreement was not breached, and the question of legal enforceability was not decided. A second, and slightly broader, reading of the

decision would be that the agreement was binding but could be discharged by conflicting legislation. ... Until Parliament or a provincial legislature did enact conflicting legislation, governments would be bound to comply with the terms of the agreement and could be held accountable by a court. The third, and broadest view, however, seems to be that the agreement only created political, not legal, obligations.

See Sujit Choudhry, "The Enforcement of the Canada Health Act," above at 503-4. For a case applying the second reading of the judgment, see *Saskatchewan Egg Producers Marketing Board v Ontario (Min of Agriculture & Food)*, [1993] OJ No 434 (QL) (Gen Div).

2. The issue of the binding nature of intergovernmental agreements has arisen most recently in relation to the 1994 Agreement on Internal Trade, discussed in Chapter 10. Although the Agreement sets out detailed obligations on federal, provincial, and territorial governments, the *Canada Assistance Plan Reference* seems to suggest that a province could refuse to comply with the Agreement or a decision of the dispute settlement process: see further Katherine Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in Michael J Trebilcock & Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: CD Howe, 1995) at 196. For discussion on intergovernmental agreements more generally, see Lara Friedlander, "Constitutionalizing Intergovernmental Agreements" (1994) 4 NJCL 153.

3. In response to the judgment in the *Canada Assistance Plan Reference*, the Charlottetown Accord of 1992 proposed a constitutional amendment to make intergovernmental agreements binding. It read:

126A(1) Where the Government of Canada and the government of one or more provinces or territories enter into an agreement that is approved under this section, no law made by or under the authority of the Parliament of Canada or of any legislature of a province or legislative authority of a territory that is a party to the agreement and has caused it to be approved under this section may amend, revoke or otherwise supersede the agreement while the approval of the agreement remains in force.

(2) An agreement is approved when the Parliament of Canada and the legislature of a province, or the legislative authority of a territory, that is a party thereto have each passed a law that approves the agreement and that includes an express declaration that this section applies in respect of the agreement.

(3) An agreement approved under this section may be amended, revoked or otherwise superseded only in accordance with its terms or by a further agreement approved under this section.

(4) An approval under this section expires no later than five years after it is given, but may be renewed under this section for additional periods not exceeding five years each.

Why does s 126A(4) set a time limit of five years on an approval of an agreement? Would this provision be a useful addition to the Constitution?

4. See *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693, excerpted in Chapter 11, Criminal Law and Procedure, which dealt with the dismantling of a cooperative scheme (related to firearms control) between the federal government and the provinces in circumstances where one province (Quebec) wanted to continue with the scheme on its own and to prevent the destruction of data gathered under the scheme. A majority of the court found that the federal government had no obligation to preserve the data.

#### IV. DELEGATION

Another way in which governments get around the constraints of the distribution of powers is through delegation of functions to the other level of government. Although governments cannot delegate legislative powers directly to one another, various devices allow them to achieve this result by indirect means.

In the *Nova Scotia Interdelegation* case: *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31, the Supreme Court of Canada rejected the argument that the federal Parliament and the provincial legislatures could delegate *legislative* power to one another. The plan of the federal and provincial governments in that case had been to alter their respective legislative authority to regulate employment and indirect taxation in order to establish a public pension scheme. The seven members of the court each wrote reasons rejecting the possibility of legislative delegation. The following quote from Rinfret CJ captures some of the reasons for the conclusion (at 33-34):

The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by the *BNA Act*, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by ss. 91 and 92 of the Act, and these powers must be found in either of these sections.

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

The court has since relaxed this position by permitting extensive delegation between governments through various devices:

1. *administrative delegation*, whereby functions are delegated to an official, minister, or administrative tribunal of the other level of government or to a tribunal created by both levels, as in the *Reference re Agricultural Products Marketing*, discussed in a note in Chapter 10, Economic Regulation, Section II.A;
2. *incorporation by reference* of the laws of the other level of government as they now exist or as they may be amended from time to time (the latter being known as *anticipatory incorporation by reference*); and
3. *conditional legislation*, whereby a law or legislative provision of one government does not come into effect at the other level of government without a certain condition being fulfilled, such as approval by that level's government.

All these devices are used in the case that follows, which was the most dramatic example of the effectiveness of these devices to circumvent the holding in the *Nova Scotia Interdelegation* case.

**Coughlin v Ontario Highway Transport Board**[1968] SCR 569

[The federal Parliament enacted the *Motor Vehicle Transport Act*, SC 1953-54, c 59, which delegated power to provincial highway transport boards to regulate interprovincial trucking, a matter within federal jurisdiction under s 92(10)(a) of the *Constitution Act, 1867*. The Act read:

2. In this Act,

(a) "extra-provincial transport" means the transport of passengers or goods by means of an extra-provincial undertaking;

(b) "extra-provincial undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, connecting a province with any other or others of the provinces, or extending beyond the limits of a province;

• • •

(g) "local undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, not being an extra-provincial undertaking; and

(h) "provincial transport board" means a board, commission or other body or person having under the law of a province authority to control or regulate the operation of a local undertaking.

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

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

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

Coughlin was engaged only in extraprovincial trucking and challenged the constitutionality of the delegation of power to the Ontario Highway Transport Board to issue extra-provincial operating licences. That board was established by the *Public Commercial Vehicles Act*, RSO 1950, c 304, which authorized the board to regulate intraprovincial trucking.]

CARTWRIGHT CJ (Fauteux, Abbott, Judson, and Spence JJ concurring):

[A]s matters stand at present the question whether a person may operate the undertaking of an interprovincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that Legislature and the Regulations passed thereunder as they may exist from time to time.

Mr. Laidlaw argues that in bringing about this result by the enactment of s. 3 of the *Motor Vehicle Transport Act* Parliament has in substance and reality abdicated its power to make laws in relation to the subject of interprovincial motor vehicle carriage and unlawfully delegated that power to the provincial Legislature.

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It is well settled that Parliament may confer upon a provincially constituted board power to regulate a matter within the exclusive jurisdiction of Parliament. On this point it is sufficient to refer to the reasons delivered in the case of *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.* [[1952] 2 SCR 392].

In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the interprovincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intraprovincial carriage. Parliament can at any time terminate the powers of the Board in regard to interprovincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor-General in Council may act under s. 5 of the *Motor Vehicle Transport Act*.

In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney-General for Ontario v. Scott* [[1956] SCR 137] and by the Court of Appeal for Ontario in *R v. Glibbery* [[1963] 1 OR 232].

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RITCHIE J (Martland J concurring) (dissenting):

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In the case of *A.-G. (Ontario) v. Winner* ... [[1954] AC 541], the Privy Council had decided that it was beyond the legislative powers of a Province (New Brunswick) to prohibit the operator of an interprovincial bus line from carrying passengers from points outside the Province to points within the Province and vice versa on the ground that no Province had jurisdiction to legislate in relation to extra-provincial transport. The matter was succinctly stated by Lord Porter at page 580 where he said:

... it is for the Dominion alone to exercise either by Act or by Regulation control over connecting undertakings.

It appears to me to be of more than passing interest to note that the *Motor Vehicle Transport Act* (Can.) was assented to by Parliament almost exactly four months after the decision in the *Winner* case had been rendered by the Privy Council and that three months later, at the request of the Province of Ontario, a proclamation was issued "declaring the said act to be in force in the said province."

It seems to me that if it is to be held that s. 3(2) of the *Motor Vehicle Transport Act* is valid federal legislation, then the effect of the decision in the *Winner* case has been effectively nullified in so far as the province of Ontario is concerned.

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In the case of the *Motor Vehicle Transport Act*, direct authority has been given to the local board in each Province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province," and the manner in which that discretion is to be exercised is not limited to such provincial Regulations as the Governor in Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking." In my view the effect of this legislation is that

the control of the regulation of licensing of a “connecting undertaking,” is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the *Ontario Highway Transport Board Act*, RSO 1960, c. 273, and the *Public Commercial Vehicles Act*, RSO 1960, c. 319.

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There can, in my view, be no objection to Parliament enacting a statute in which existing provincial legislation is incorporated by reference so as to obviate the necessity of reenacting it verbatim, but in providing for the granting of licences to extra-provincial undertakings in the like manner as if they were local undertakings, Parliament must, I think, be taken to have adopted the provisions of the provincial statutes in question as they may be amended from time to time. The result is that the granting of such licences is governed by the *Public Commercial Vehicles Act, supra*, pursuant to s. 16 of which the Lieutenant-Governor in Council may make Regulations

... (q) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, ...

I can only read this as meaning that the licensing Regulations for extra-provincial transport may be governed by decisions made from time to time by the Lieutenant-Governor in Council without any control by, or reference to, the federal authority. This is very different from adopting by reference the language used in a provincial statute and, in my opinion, it means that the control over the regulation of licensing in this field has been left in provincial hands.

It is, of course, true that Parliament can at any time terminate the powers of the provincial Boards to license extra-provincial undertakings, but it seems to me that this would entail repealing s. 3(2) of the *Motor Vehicle Transport Act* and it is the constitutionality of that subsection which is here impugned.

It is also suggested that the Governor-in-Council might exercise control by acting under s. 5 of the *Motor Vehicle Transport Act* ... [quoted above].

... I do not read this latter section as reserving any power to the Governor-in-Council to nullify the effect of s. 3(2) of the Act by exempting all extra-provincial transport from its provisions, and I am therefore of opinion that no control was retained by the federal authority over the unlimited legislative powers which it purported to transfer to the Province by the language employed in s. 3(2) of the Act. Presumably, any person or undertaking exempted by the Governor in Council from the provisions of the Act would be without authority to operate in the Province of Ontario, unless and until provision was made for the granting of a federal licence, but this would in no way affect the powers which s. 3(2) purported to confer on the Board to issue licences to persons or undertakings which had not been so exempted.

In my view, therefore, in enacting the *Motor Vehicle Transport Act*, and particularly s. 3(2) and s. 5 thereof, the Parliament of Canada purported to relinquish all control over a field in which Parliament has exclusive jurisdiction under the *BNA Act*, and left the power to exercise control of the licensing of extra-provincial undertakings to be regulated in such manner as the province might from time to time determine.

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*Appeal dismissed.*

