THE CONSTITUTIONALITY OF CONDITIONAL GRANT LEGISLATION

Since 1912, the federal government has made numerous conditional grants to the provincial governments in aid of such objects as agriculture, highways, vocational training, health and welfare. For the most part, these grants-in-aid are made by federal legislation authorizing the money to be spent provided the provinces agree to fulfill certain conditions. Such grants are said to be conditional and the condition may and often does touch upon a matter within the exclusive jurisdiction of the provincial legislatures. The question has been raised as to whether such grants-in-aid are constitutionally valid, as they appear to be a device by which the federal government is able to usurp certain legislative functions reserved exclusively to the provinces by the British North America Act. The question to be dealt with in this paper is the extent to which the federal government can, if at all, deal with a matter within provincial competence, by means of a conditional grant.

There is no doubt that the government may make such a grant to any province provided the power being exercised is either a specific power of the federal government or can be justified as being ancilliary to some such power of the federal government. Similarly, if the power upon which the grant is based is within the federal government's concurrent powers, there can be no doubt that such legislation is valid. At this point perhaps it should be noted that it was within the area of concurrent jurisdiction where the Federal Government first made use of the conditional subsidy. The first conditional subsidies in 1912 and 1913 related to agriculture, which Section 95 of the British North America Act reserves to concurrent jurisdiction. But these are not examples of the problems posed by this paper. The problem with which I will deal is whether a grant given in aid of an object which clearly falls within exclusive provincial jurisdiction can be constitutional.

The crux of the problem is whether the federal enabling act, which provides for the grant to be made provided certain conditions are met by the province, is valid federal legislation within the scope of the British North America Act. To date there appears to have been only one case, the *Unemployment and Social Insurance Reference*,[1] which has dealt with the problem. The confusing dictum of that case has left us little further ahead. At page 366 Lord Atkin said —

1. 1937 A.C. 355.

> "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 Section 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 colorable device or a pretense. *If in 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."[2]

The first thing to note about this statement is that it is purely *obiter* as the passage quoted goes further than necessary to decide the case. But assuming that this is a correct statement of the law, does this decision have any effect on conditional grant legislation? Does it, for example, restrict the spending power of the federal government to spending for federal purposes? Until this decision and even today there exists a body of opinion which holds that the spending power of Parliament is very wide and that it may even spend its revenue within the area of exclusive provincial jurisdiction.

Does this decision necessarily contradict this point of view? In my opinion it does not. One must look at the context in which the statement was made in order to determine its true significance. The legislation with which the case was concerned was not conditional grant legislation. It was, rather, an act by which the Parliament of Canada set up an insurance scheme to compensate unemployed persons. Dues were to be collected from employers on behalf of employees throughout the provinces of Canada and persons unemployed were to receive compensation. All this was done through the agencies of the federal government. The provincial governments were not directly involved. Prior to making the statement quoted above, the court had rejected the argument that the collection of dues from an employer on behalf of an employee, was a form of tax and, therefore, had held that the way in which the government had raised its revenue was *ultra vires* the Dominion. It then went on in the passage referred to, to say that in any event, had the collection of dues been held to be a form of taxation within federal jurisdiction, this did not necessarily mean that the legislation disposing of it would be *intra vires* since it was still possible that such legislation could affect the classes of subjects enumerated within Section 92 and so would be *ultra vires*. One cannot dispute this point as stated.

2. 1937 A.C. 355 at 366; the italics are mine.

But did this decision go further than this and place a real restriction on the federal spending power itself? I think not. The decision in no way implies that federal spending *per se* is restricted. In fact, quite the contrary, the decision affirms —

> "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 (can) not as a general proposition be denied . . ."

Subsequently, however, the learned Judge said —

> ". . . 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."[3]

By this latter statement, the learned Judge was undoubtedly referring to the type of legislation before the Court. Certainly it is true that merely because the federal government has raised money by a valid form of taxation does not necessarily mean the legislation by which it is spent will be likewise *intra vires*. That is, even if the raising of dues from employers on behalf of employees had been a valid exercise of federal taxation powers, the fact that the legislation which disposed of it was in pith and substance an insurance act made it invalid as affecting property and civil rights within the province. But to extend the decision so far as to say that it prohibits spending for provincial purposes is an unjustified inference from the facts. It does not say that federal funds cannot be expended for provincial purposes but only that if the legislation authorizing such an expenditure is in pith and substance legislation invading or encroaching upon the provincial field, it will be invalid. This is self evident and to hold otherwise would ". . . afford the Dominion an easy passage into the provincial domain."[4] The Employment and Social Insurance Act fell because it was, in pith and substance ". . . an act affecting the civil rights of employers and employees in each province."[5] and not because the spending power of Parliament is limited to spending within federal jurisdiction.

While it has now been determined that the Employment and Social Insurance Reference has not restricted the federal spending power *per se*, it still remains to be considered whether or not the federal spending power is in fact, restricted to the realm of Section 91. The Quebec Royal Commission[6] on constitutional problems of 1956 raised several objections to the view that the federal spending power is unlimited. The first objection that the

3. (1937) A.C. 366.
4. (1937) A.C. 366.
5. (1937) A.C. 365.
6. Tremblay Report 1956 p. 217.

Employment and Social Insurance Reference decided that the federal spending power could not be exercised as regards matters coming within the exclusive control of the provinces has already been dealt with.

The second objection was that —

> ". . . those who claim that the federal Parliament can dispose of its funds as it sees fit . . . appear to us to have a false concept of spending. They consider it as a subject of legislation as if it were simply a legal operation. However, the word "expenditure" is a lay term which comprises two juridical operations; first, the creation of an obligation to pay a certain sum of money and, secondly, the fulfillment of this obligation by the payment of the sum of money . . . if the obligation is one relating to a matter reserved to the legislative competence of the province, the law which gives rise to it, or under whose terms the obligation will arise, must necessarily be a law relating to a matter reserved to the legislative competence of the province and, therefore, unconstitutional. How can the fulfillment of an illegal obligation be legal".[7]

I would agree with the above statement in part only. What I think is being said is that spending is not really a subject of legislation, but really an ancilliary feature to legislation which in fact has some other purpose, in addition to mere spending. An example of this would be federal moneys expended for the establishment of national schools. The primary purpose of such legislation is the creation of national schools and the spending function is merely ancillary. In fact, I would submit that this is the real basis of the *Employment* and *Social Insurance Reference* decision. The court is saying that if the spending function is merely incidental to legislation which is unconstitutional for some other reason i.e. it invades property and civil rights, then the whole of the legislation falls. The reason is not because the federal government lacked the capacity to spend for a provincial object. But further to this, I would submit that spending *per se* can be the primary subject of legislation, e.g. the purpose of legislation can be the making of a gift. If in pith and substance the object of the legislation is to dispose of public property then spending in itself can be the subject of legislation. It is submitted that the conditional grant is in essence an exercise of the federal government's power to spend.

The most cogent argument of the Royal Commission would appear to be that the very enumeration of powers as laid down in the constitution impliedly excludes the federal government spending from these areas in which the province has exclusive jurisdiction.

---

7. Tremblay Report 1956 p. 217.

The only explicit provisions of the constitution that confer upon the federal government power to transfer money to the province are the sections providing for what are known as the statutory subsidies which were unconditional grants to the provinces.

It is perhaps possible, however, to justify the federal government's power to spend for provincial purposes on the basis of its general power to deal with the public debt and property in Section 91 (1A). Section 91 (1A) endows Parliament with full discretionary authority to dispose of the public assets of the Dominion. Is not the essence of conditional grant legislation the disposition of Dominion property?

Frank Scott has denied that federal spending is limited to areas of federal jurisdiction on still other grounds. He finds authority inherent in the prerogative power of the crown.

> "These simple but significant powers exist in our constitutional law though no mention of them can be found in the British North America Acts. They derive from doctrines of Royal Prerogative and the common law."[8]

Prime Minister Louis St. Laurent also,

> ". . . spoke of the authority of the federal government to spend moneys on subjects within the legislative jurisdiction of the province as an exercise of the royal prerogative to apply public funds to matters that would be of value to the national development or to the welfare of the nation as a whole."[9]

The Province of Quebec even wielded its prerogative powers on one occasion by making a grant to a University outside the province of Quebec.[10]

If we can assume, therefore, that Parliament can spend its revenue even for provincial purposes, what effect does this have on the constitutionality of the conditional grant? It would appear that the ". . . Crown is a person capable of making gifts or contracts like any other person, to whomsoever it chooses to benefit . . ."[11] At the same time, however, it would appear equally clear from the *Employment and Social Insurance Reference* that if the legislation "affected" the classes of subjects enumerated in Section 92 it would still be *ultra vires*. It would seem that conditional grant legislation does not generally "affect" the classes of subjects reserved exclusively to the province. It is essentially an exercise of the federal government's discretionary right to dispose of its property as it sees fit. Let us take the hypothetical example of

8. 1955 McGill L.J. p. 6
9. D. V. Smiley, Conditional Grant and Canadian Federalism p. 23.
10. Ibid. p. 24.
11. 1955 McGill L.J. p. 6.

a federal grant to the province conditional upon the establishment of a special curriculum. Can it be said that this is an act which "affects" education in the Province and therefore is *ultra vires* the powers of the federal government. In my opinion it can not. Here the act is really an exercise of the government's right to deal with its property as it sees fit. It can hardly be said to be legislating in the provincial field. There is a vast distinction between legislating in the provincial field and making a gift to the province.

> "The crown is a person capable of making gifts . . . like any other person, to whomsoever it chooses to benefit . . . Moreover the crown may attach conditions to the gift, failure to observe which will cause its discontinuance."[12]

This would clearly indicate that it is within the power of the government to spend its revenues as it sees fit. At the same time, there would appear to be no conflict with the *Employment and Social Insurance Reference* case since in my opinion this cannot be said to be legislation "affecting" the legislative jurisdiction of the province. Such an enabling act by the federal parliament does not purport to deal operatively with the matter of provincial concern. By its legislation it merely makes available funds which the province, if it is willing to comply with the conditions which are set up, is free to accept. The enabling act does not purport to make a substantive change in the provincial law i.e. it has not altered the curriculum of a single province — only the provincial legislature can do that. The mere fact that the act refers to education does not alter this. It is in pith and substance an act dealing with spending. If it does affect education it does so only incidentally. If the courts should, however, hold that the act did affect education in the province, it would appear to be an overlapping jurisdiction with the federal spending power and, therefore, still within federal competence.

While in my opinion, the conditional grant is *intra vires*, it would still appear strange that in view of all the controversy that has surrounded it, that it has never been directly challenged in the courts. The simple reason appears to be that,

> ". . . the provincial governments . . . do not want to challenge it. Federal spending supports so much of the established political, social and economic structure that prudent men hesitate to take steps that might wipe it out."[13]

The conditional grant has proved to be a great boon to modern Canadian government. It ensures a higher degree of uniformity

12. 1955 McGill L.J. p. 6.
13. Smiley, D. V. Ibid p. 23.

of legislation across the nation. The inherent nature of our constitution requires an increasing co-operation between the federal government and provinces, if standards of treatment for Canadians are to be equalized.

The conditional grant has done much to overcome "the constitutional impasse of the 1930's". By means of the conditional grant there has been a dramatic redistribution of federal and provincial powers without the use of the formal amending process which by its nature is both slow and cumbersome. The conditional grant has made for greater flexibility in our constitution. It has, without doubt, made possible for better or for worse, the fore-stalling of a formal re-arrangement of the distribution of power under the constitution.

But the effects of the conditional grant have not all been useful. In 1919 Ernest Lapointe objected to the conditional grant in the House of Commons.

> "It is not fair for the Parliament of Canada to interfere in matters reserved exclusively to provincial jurisdiction even by way of giving a subsidy under certain conditions. My Honorable Friend says, and the bill states, that there should be agreements between the minister and the different governments before the grant is made. Now, if one of the provinces fails to reach an agreement with the minister, that province will not get anything but the citizens of that province will be taxed to pay for education in another province, which should be paid for altogether by the citizens of that second province."[14]

What Mr. Lapointe says is, without doubt, true. But, at the same time, must we not also consider that any federal spending might have the same effect — even federal spending within its own area of competence? Is it not possible for the federal government to spend one hundred million dollars on agriculture in Prince Edward Island and nothing in the rest of the country? While this may be a valid argument against the conditional grant, it is by no means crucial. It does, however, raise a related objection to the conditional grant. The economic and political pressures in a province may be so strong as to force the provincial government to accept a grant which they would otherwise reject. Perhaps, the province's theoretical right to reject the federal offer of aid is in practise nullified to a large extent.

The conditional grant legislation has the effect, to a large extent, of transferring policy making decisions from the provinces to Ottawa. If Ottawa decided that a particular program is desirable the provinces are placed in a position of deciding whether they are going to participate or not. Their status as legislators is reduced. Their own provincial priorities can be greatly disrupted.

14. June 20, 1919, Debates of House of Commons.

This disadvantage can, however, be reduced immeasurably by long term consultation and co-operation between the federal and provincial governments.

One of the major apprehensions as far as conditional grant legislation is concerned is that the federal government may really reduce the provincial governments to ratifying bodies. Not only may the legislation be forced on the provinces by social and economic pressures, but the federal government may make its conditions too restrictive. The ultimate extreme would come when the federal government actually drafted the exact terms of the act which would subsequently be ratified by the legislature. It is certainly undesirable that the federal government should make the conditions too restrictive. The federal government should lay down only broad conditions leaving the legislature more than just the bare details to complete. Gouin and Claxton in their article[15] expressed the view that if the federal government's enabling legislation was too restrictive it might be held to be unconstitutional on the ground that it was operative legislation i.e. legislation "affecting" the subjects enumerated in Section 92. It might be argued that such legislation still was not operative because it did not, in itself, make any substantive change in the provincial law. In any event, it would be a desirable policy for the federal government to refrain from making the conditions upon which the money is made available too restrictive.

Without a doubt the conditional grant has weakened the federal principle. It seems to have been a one way street with the provincial governments surrendering power to the federal government without in return being compensated by acquiring influence over federal matters. But one must not exaggerate the potential of the conditional grant as a device by which the federal government can achieve indirectly that which is constitutionally impossible for it to achieve directly. D. V. Smiley, has noted that there are three important limitations on the spending power. To begin with, he says, the province has the overriding power to reject the federal offer of aid. If it chooses to do so, the federal initiative is snuffed out. He refers to the hypothetical situation where Ottawa might decree that federal grants are not to be paid on behalf of any hospital where the matron is not a registered nurse. But, at the same time, it would not be within the jurisdiction of the federal government to make it a federal offence to operate a hospital where the matron was not a registered nurse. Smiley goes on to say, that the conditional grant is not a very

15. Legislative Expedients, King's Printer 1939, p. 22-3.

effective device for extending federal influence in the regulatory field. It is rather, in situations involving service activities, that the conditional grant can have its greatest impact and this is especially so, where the service is a relatively costly one.[16]

Also, the federal government is left to achieve its objective through administrative agencies other than its own. Thus the relationship between Ottawa and these agencies becomes one of collaboration rather than of administrative superior and subordinate.

In conclusion it might be said that in spite of the difficulties and disadvantages which the conditional grant, because of its nature, entails, it is a device particularly suitable to a federal constitution. It is inevitable that such a constitution, not only because of changing conditions but because of its inherent nature, will fail to continue to provide a proper distribution of legislative jurisdiction. The conditional grant is one way in which these difficulties can be overcome expeditiously and with a minimum of disruption. It provides a means of avoiding a tardy formal redistribution of power by means of a constitutional amendment. It provides a quick and effective remedy for urgent problems. It may even point the way to a lasting solution. "That this scheme may be criticized as circuitous must be admitted. But some circuitousness is inevitable in Federalism."[17]

KEN HANSSEN.*

16. The Conditional Grant and Canadian Federalism, p. 26.
17. Maxwell, J. A., Federal Subsidies To The Provincial Governments In Canada, p. 256.
*Student, Faculty of Law, University of Manitoba.