DIVISION OF LEGISLATIVE POWERS UNDER THE BRITISH NORTH AMERICA ACT — THE CASE FOR FULLY CONCURRENT POWERS

After his most capable discussion of the contemporary trend in federal-provincial relations, Professor Paul W. Fox concludes: " . . . one might review the trend in the current phase of Canadian affairs and noting the gravitation in power towards the provinces, attempt to devise elastic policies to fit the situation. To my way of thinking, this means giving the provinces greater fiscal resources to meet their present needs and also extending to them a more significant role in determining national policies that affect the provinces – in short, expanding co-operative federalism even further. In the process it is inevitable that certain provinces will have 'special (or particular) status' in certain regards, not necessarily in the same respects but in the matters that are of particular concern to them. Actually, we have always had a measure of 'special status' in the operation of Canadian federalism. The Atlantic provinces, for example, have received special fiscal grants; Quebec has had protection of its linguistic and religious differences; The West enjoyed special freight rates; and Ontario has had the benefit of a national tariff. I cannot see why we should now try to reverse the traditional pragmatic policies applied throughout the history of Canadian federalism, particularly when contemporary events require an even greater measure of their application. *Let us make whatever arrangements are necessary with each province to satisfy its interests and to maintain some semblance of overall cohesion without worrying about uniformity.* What does it matter how odd the pattern of Canadian federalism is, so long as the components are reasonably satisfied and there is a measure of justice for all? . . . In conclusion, then, what I propose is a policy that could be called pragmatic, flexible federalism. How this would be applied in detail is a subject for another paper." (Emphasis supplied.)[1] The paper that follows serves as an expansion on the thoughts of Professor Fox only insofar as the division of powers under the British North America Act[2] are concerned. With the particular aim of advancing the proposal that both Federal and Provincial Governments in Canada ought to have legislative powers in all fields with one or the other having the paramount right to legislate, this writer will discuss the present system of exclusiveness and its shortcomings, examine the situation as it exists in other federal jurisdictions, propose

1. "Regionalism and Confederation," in **Ontario Advisory Committee on Confederation: Background Papers and Reports**, Vol. 2 (Toronto: Queen's Printer, 1970), p. 26.
2. 1867, 30 Vict., c. 3.

for consideration the doctrine of full concurrency and consider the problems that might arise under a constitution that has not given exclusive power to either level of government.

THE PRESENT

Although this paper does not purport to be a comprehensive study of the division of powers between the two levels of government, it will be necessary, however, to have a basic understanding of the operative effect of sections 91 and 92 of the British North America Act in order to fully appreciate the ramifications of the proposed changes.

The system of distribution of powers between the two levels of Governments in Canada has often been referred to as the "compartimental system" for the British North America Act is based on a division that gives to either level of government the exclusive right to pass laws in particular fields. In its most general sense, it was intended that the Act allow the Central Government power to legislate in respect of matters of national concern and the Provinces were to be responsible for passing laws respecting local concerns. With the exceptions of Agriculture (section 95), Old Age Pensions (section 94A) and Immigration (section 95), which are concurrent by virtue of the Act, this exclusive power still exists today and notwithstanding the diversity of judicial approach in constitutional decisions the one certain interpretive process is the inevitable attempt by the Court to compartimentalize the particular piece of legislation as falling within the exclusive jurisdiction of either level of government. Thus, when considering the validity of any piece of legislation the Court must determine whether or not the particular government passing the law was competent by virtue of sections 91 and 92 of the Act to "enter the field." In the case of a provincial enactment the general rule is to look directly to section 92 for provincial jurisdiction and if it cannot be found there the legislation is *ultra-vires;* however, merely finding authorization for the statute in section 92 does not guarantee its validity, for section 91 might empower the federal government to legislate in the area and this will necessitate further consideration by the Court. However, if the statute in question has been passed by the federal government, it will be upheld if shown to fall within one of the heads of jurisdiction allotted to it in section 91, unless there is a clash with some class in section 92.[3]

By and large, then, at least as far as the British North America Act is concerned, Canada has not opted for concurrency of jurisdiction

3. Cf. Hon. V. C. MacDonald, "**Constitutional Law: Validity of Provincial Legislation**" (Halifax: 1951), p. 3: "The Method of Inquiry."

and indeed has been statutorily limited to the three heads already mentioned. But, it has been said, "concurrency is not confined to that explicitly recognized in Agriculture, Immigration and Pensions. That is just the tip of an iceberg."[4] Although the analogy is perhaps overstated it certainly is the case that the common law has found it necessary to see beyond the rigid categorization of the Act, and when the piece of legislation cannot be neatly placed into one of the enumerated heads, the Court's task becomes somewhat more complex. Often, the enactment will have more than one "aspect" to it so that it seems to validly fall within sections 91 and 92; "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."[5] It then becomes the task of the Court to decide whether or not the legislation has a dominant aspect or if, in fact, neither feature outweighs the other; if there is a dominant feature, the legislation will be *intra vires* only if enacted by the government who is vested with exclusive jurisdiction to legislate on matters respecting that feature. If, however, the aspects of the legislation are held to be equivalent both levels of government will be competent to enact laws with respect to the aspect over which they have exclusive jurisdiction; such is the case when the pieces of legislation in question are not in conflict or if there is only one piece of legislation in the field. If the Court is confronted with a dual aspect situation and existing provincial and federal enactments are in conflict with one another, the federal enactment overrides that of the Province; in the words of Lord Dunedin " . . . if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."[6] It remains to consider, then, how it is decided that there is in fact conflict. A more detailed discussion of the conflict situation and "occupancy of the field" generally appears later in this paper and suffice to note at this point that, "provincial legislation may operate if there is no federal legislation in the field or if the provincial legislation is merely supplemental to federal legislation that is in the field. Duplicative provincial legislation may operate concurrently only when inseverably connected with supplemental provincial legislation, otherwise duplicative provincial legislation is suspended and inoperative. Repugnant provincial legislation is always suspended and inoperative. These are the implications of the doctrine of Dominion paramountcy developed by the courts."[7]

4. Professor William R. Lederman in **Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada**, Issue No. 6, p. 11 (October 27, 1970).
5. **Hodge v. The Queen** (1883) 9 A.C. 117 (Lord FitzGerald at p. 130).
6. **G. T. Rlwy. Co. of Canada v. A. G. of Canada** [1907] A.C. 65 at 68.
7. Professor William R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," in Lederman (ed.), **The Courts and the Canadian Constitution** (Toronto: McClelland and Stewart Ltd., 1964), p. 218.

It might be of interest to point out in examining the current state of affairs that Professor W. R. Lederman has noted two trends respecting concurrency in the Supreme Court of Canada; firstly, that the number of fields recognized as concurrent is on the increase and, secondly, that the Court is anxious, once a dual-aspect has been found, to "permit Federal and Provincial statutes to live together in that field."[8]

IS THERE REALLY NEED FOR CHANGE?

Too often constitutional reformists are accused of advocating change for its own sake, and admittedly a strong case can be made for changing the existing division of powers without having to entirely discard the British North America Act. It has already been pointed out that the problems associated with exclusive jurisdiction have been recognized by the Courts and the result has been a trend toward widening the scope of concurrency. The issue now becomes whether or not the present difficulties truly warrant sweeping change, or if, in fact, we ought to allow the Courts to continue developing the field as was noted in the trends mentioned above.[9]

Criticism of the existing distribution of jurisdiction ranges from total rejection of the doctrine of exclusiveness[10] to mild discontent favouring slow change.[11] O'Hearn, in *Peace, Order and Good Government*[12] considers whether or not the problem is of such a nature as to warrant immediate and comprehensive change.

> " . . . why should it be important and even urgent to get rid of the principle of exclusiveness? Firstly, of course, if the law and the facts do not agree, the law suffers contempt. But even if they agree more fully than we are prepared to admit, it is necessary to eliminate the principle because it imposes a very restrictive and nonsensical rule of interpretation on the constitution.
>
> . . . . . .
>
> The first effect of exclusiveness is to impede the legislation of one body although there is no enactment of the other body to clash with it. A consequential effect of this principle is the excessive subtlety with which the various heads of power are considered. Where an act of parliament is being considered merely in the connotations of a general formula and not in contrast to the enactment of a competing authority, the process tends to general, vague, and hypothetical tests such as the perennial one for the 'pith and substance' of the act. No judicial tests give more free play to the personal and political prejudices of the courts or, for that matter, to the metaphysical perplexities inherent in such an approach.

8. Professor William R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada," in Crepeau and Macpherson (eds.), **The Future of Canadian Federalism** (Toronto: University Press, 1965), p. 104.
9. Ibid.
10. See e.g. Professor R. Dale Gibson, **"Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada,"** Issue #7, p. 32 (October 29, 1970); Mr. Justice Peter J. T. O'Hearn, **Peace, Order and Good Government,** (Toronto: The MacMillan Co.) 1964, Chapter 16.
11. See e.g. supra footnote #4 at p. 28.
12. Supra footnote #10.

> Another annoying effect of exclusiveness is to bar delegation of powers between the governments.
>
> . . . . .
>
> Is there any reason to retain the exclusive nature of the powers? It is a very rare case where it can be said vehemently and with confidence that the worth-while arguments are all on one side, but this is one of them. There is absolutely no value in keeping the word, or the concept, in the law of the confederation. It is a snare, a delusion, a scandal, a completely unncessary and futile intrusion."[13]

There are many who take exception to O'Hearn's eagerness for a "fresh-start" in the area of legislative powers.[14] Such reaction is ill-founded. O'Hearn's proposals for reform are, in fact, not revolutionary at all; rather they would merely accelerate the trends that Lederman suggests already exist. There is obviously a reason for the current trends – they are developing to meet a shortcoming inherent in the British North America Act – and O'Hearn's merciless attack against the drafting the British North America Act, or at least it should be obvious status quo was bound to frighten those who are inclined to slow change.

The obvious criticism of the compartimental theory of law making power is its inflexibility. It surely must have been obvious to those now that the majority of legislative fields at one time or another have both their local and national nature. No constitution should sink to the point that it impedes the passage of good legislation and such is the current ramification of our doctrine of exclusiveness. Professor R. Dale Gibson has illustrated how either level of government may find itself in a predicament if the problem upon which they seek to legislate appears to have a dual aspect, or if the area seems to fall directly within one of the enumerated heads allotted to the other level of government.[15] Consider the situation where a province has a significant number of Indians with special problems in the field of education or social services. Some, as soon as they hear the word "Indian" in connection with provincial legislation, shy away claiming that section 91 (24) of the Act gives the federal government exclusive jurisdiction to pass laws respecting Indians. Notwithstanding the argument that the province should go ahead and pass the statute on the basis of its dual-aspect, the fact still remains that the doctrine of exclusiveness provides those against the passage of the bill with yet another argument. There is no logic to support a division of powers that, in effect, makes law-making a cat-and-mouse game. The constitution must, in one way or another, give concrete authority to pass laws without either level of government having to rely on guess work.

---

13. Supra footnote #10 at p. 133-4.
14. See e.g. Professor William R. Lederman, Book Review of O'Hearn's **Peace, Order and Good Government** in (1965), 43 C.B.R. at p. 669.
15. Supra footnote #10 at page 33.

The Orderly Payment of Debts Act of the various provinces, Gibson continues, is yet another example of how useful provincial legislation has been thwarted. Here, a simplified personal bankruptcy scheme for poor people in heavy debt was declared unconstitutional by the courts on the ground that 'bankruptcy' is within the exclusive jurisdiction of the central government.[16]

There are countless other examples of complaint based on the inflexibility of the compartimental theory. British Columbia, for example, seems to be particularly concerned with at least three areas, namely off-shore rights, marketing legislation and labor disputes.[17] It seems that the key to many of the provincial legislative problems is one of an inflexible division and although the provinces are not unanimous in their suggested methods of how we ought to rid our present British North America Act of its rigidity they seem to agree that sections 91 and 92 are in need of immediate reform.

Enough ammunition has been released to show that change of some kind is imperative. It remains to consider, then, how other countries have introduced flexibility into their constitution and whose example, if any, Canada ought to follow.

OTHER FEDERAL JURISDICTIONS

Although by no means an exhaustive study of all federal jurisdictions the information that follows on the Constitutions of Nigeria, Australia, India and Germany will assist Canada in considering how she ought to introduce a degree of flexibility into her constitution.

In Nigeria, by virtue of section 64 of their Constitution, the federal Parliament is given power to make laws for the peace, order and good government of Nigeria (other than the Federal territory) with respect to any matter in the Legislative Lists and for the peace, order and good government of the Federal territory with respect to *any* matter. As well as there being a Legislative List setting out the areas over which the central government has jurisdiction there is a Concurrent List of 28 enumerated matters upon which either legislature may pass laws. "The division of Legislative powers between the Region and the centre reflects the federal character of the Nigerian Constitution. Within its allotted field of legislative competence the Regional Government is independent of the Federal Government. The Regional Government can pass laws on matters enumerated on the concurrent list *as well as residual subjects;* but in case of conflict between the Regional and

16. **Validity of the Orderly Payment of Debts Act, 1959,** [1960] S.C.R. 571.
17. See "Confederation of Tomorrow Conference Proceedings," Toronto, 1967 at pages 131-134.

Federal law on the same subject the latter prevails,"[18] by virtue of section 64 (4) (5) of the Constitution (emphasis supplied). Currently, then, the powers of the central government are enumerated (basically dealing with Defence, External Affairs, External Finances and other matters of an obvious national nature) and a Concurrent List annexed to the Constitution enumerates the subjects upon which both may legislate; the Regions may not legislate on matters falling under the Legislative List. The Nigerian scheme therefore differs from the Canadian division of powers in two important ways; firstly, the residual power is given to the Regional Governments (as is the case in the United States) and secondly the areas of concurrent jurisdiction are greater in number than in Canada. Although the constitution of Nigeria has not yet been exhaustively interpreted by the Courts it appears that already there is some anticipation that the central Government will be too weak. It seems their hope is that federal paramountcy in conflict situations will reinforce the central Government.[19]

In Australia the central Government derives its legislative powers from the enumerated heads under section 51 of The Commonwealth of Australia Constitution Act of 1900. The list includes, as one would expect, similar fields of jurisdiction to those of Canada or Nigeria, i.e. those of a national nature. As well, each state has its own constitution; thus the state's power to legislate is left as expressed in their own constitution and "the effect is to make Commonwealth powers predominant and to leave the States with the undefined residue of governmental power. But most of the express Commonwealth *Legislative* powers are given as *concurrent* with those of the States, so that in such cases the mere grant of the Commonwealth power or the mere making of a Commonwealth law does not obliterate State power or invalidate State law on the same subject."[20] It should be noted that unlike Canada, the federal list of powers is not an exclusive one (with the exception of several heads so designated). However, "in a sense all Commonwealth powers are exclusive because they can be exercised as to the whole of Australia, whereas State powers are confined within their territorial boundaries; but the notion of concurrent powers is used by reference to the relation between the law of a particular State and Commonwealth laws operating in that State."[21] As well, unlike Canada but like Nigeria, the residue of power is vested in the State.

The Indian constitution contains three lists designating the power

18. Odumosu, **The Nigerian Constitution** (Lagos: African Universities Press) 1963, pp. 271-2.
19. Ibid at p. 165.
20. Sawer, **Australian Federalism in the Courts**, (Melbourne Univ. Press) 1967, p. 16.
21. Ibid.

to legislate – Union, State and Concurrent. The lists included in the Indian constitution are noticeably longer and more specific than others already examined, and it has been predicted that the detail of the lists may make the need for judicial interpretation less frequent.[22]

Of the three lists the State List is the most restricted. Sen points out[23] three considerations regarding the State List – first, that, like Canada, the residue of power is left with the central government; second, all matters allotted to the State are of a regional nature; and third, "the grant of power in relation to the State List is expressly controlled by the grant of power in regard to the Union and Concurrent Lists so that the scope of the items in the State List is necessarily restricted by the various matters enumerated in the Union and Concurrent Lists (Article 246, Clause (3))."[24]

Insofar as the Concurrent List is concerned, four rules have developed with regard to the exercise of legislative powers by either level – firstly, the State may legislate on any matter in the list unless the Union has legislated on the same subject; secondly, a State law is invalid to the extent of its inconsistency with Union law except where the Union law is prior in date and the State law has been enacted with the assent of the President; thirdly, if there is no inconsistency both laws may stand; and fourthly, if State law has been entirely supervised by a Union law, the Union then takes exclusive jurisdiction.[25] Briefly then, the Indian federation resembles Canada's division except for the length and detail of the lists and the express enumeration of many more concurrent heads.

The situation in the German federation adds little assistance beyond what we have seen in federal jurisdictions. Suffice to note that the Constitution provides for exclusive powers of both the central and local legislatures and has, as well, a list of concurrent matters. "German constitutions have always carefully distinguished between the legislative powers of the federal parliament and those of the Länder (local). In this respect they differentiate among "exclusive" law-making powers of federation or member units, their "concurrent" legislative authority, and the power of the federation to legislate "principles" (leaving implementation to the Länder). As a result, the German constitutions have always reflected the relative strength of the Länder vis-a-vis the federation."[26]

22. Sen, **A Comparative Study of the Indian Constitution**, (New Delhi: ARORA Printers) 1960, pp. 154-5.
23. Ibid at p. 161.
24. Ibid.
25. Ibid at p. 162.
26. Holburn, **German Constitutional Documents Since 1871** (New York: Praeger Publishers), 1970 at p. 77.

Conspicuously missing from the above discussion is the Constitution of the United States. Its omission indicates that their distribution of powers will not be of significant assistance to readers when deciding if in fact a concurrent distribution will work in Canada.

THE CORE PROPOSAL

The proposal does away with the notion of exclusive jurisdiction and substitutes for the compartimental theory the more flexible principle of concurrent jurisdiction in all areas. Before setting out the suggested amendment in more detail it might be of value to examine some of the possibilities that flow from the acceptance of complete concurrency.

The suggestion is not novel and much ground work has been laid in O'Hearn's *Peace, Order and Good Government.*[27] O'Hearn's complaints with the existing division have already been set out and after his emphatic rejection of the doctrine of exclusiveness he proposes new Legislative Lists for both federal and provincial governments;[28] he does not distribute jurisdiction—that is wide open—he distributes priority or paramountcy. He does this by express enumeration, and it is designed to work in the following manner:

> "In the case of a federal act, if it is made in relation to a matter within a class of subjects enumerated in Section 1 of the Article (federal paramountcy), it will prevail over any provincial enactment. If not in relation to such a matter it must be measured in respect to Section 2. If it is made in relation to a matter within an enumerated class of subjects in Section 2, it must give way if there is any conflicting provincial act in relation to that matter. And if it is not made in relation to such a matter but yet clashes with provincial legislation made in relation to matters dealt with in Section 2, it must yield; otherwise, however, it will be paramount.
> On the other hand, in the case of a provincial act, if it is made in relation to a matter within the classes of Section 2, it will prevail over federal enactments except such as are paramount by virtue of Section 1. But provincial legislation otherwise is always subordinate to federal law."[29]

Once the doctrine of full concurrency has been accepted, the reformist must come to grips with the allocation of paramountcy and residual power. One might opt for O'Hearn's suggestion wherein both levels of government are given areas upon which their legislation will be paramount and the residue of power is left with the central government. Alternatively, and as some federal jurisdictions have done, one might leave the residuary power with the local legislators. A third possibility exists vis-a-vis the residue; maintaining concurrency, with paramountcy in matters of "local concern" given to the province and

27. Supra footnote 10.
28. Ibid at p. 41.
29. Ibid at p. 135.

leaving to the central government paramount power in "national matters." It is submitted that the latter suggestion has most merit, for it introduces flexibility without weakening the union.

As well, a case can be made for doing away with express enumeration entirely. It has been pointed out that the ramification of the compartimental theory may be twofold; firstly, such confinement is inflexible and secondly, in at least one jurisdiction[30] it is the hope that detailed enumeration will lead to certainty. There is no doubt that both flexibility and certainty are of cardinal importance and, in fact, the guiding principle for the reform herein. The issue becomes is it possible for these principles to live together? It is submitted that whereas detailed enumeration will not provide the needed flexibility, no enumeration at all will leave the governments in a position of uncertainty. Consider a constitution that allows the central government to pass laws "in relation to matters of national concern" and restricts the provinces to "localized issues." The simplicity is appealing in that it seems to represent everything a federal system seeks to provide – local laws for local issues and national laws for Canada-wide problems. However, closer consideration reveals that such a proposal would lead to even more constitutional litigation than we have now, for one level of government could always challenge the other's legislation on the interpretation of "local" or "national" nature. The system that appeared attractive for its simplicity would fall for that very reason.

The proposal must be an integration of the above noted possibilities. The constitution suggested will, insofar as residual powers are concerned, leave the federal government with "primary" powers in matters of national concern and the provinces with such powers in relation to local matters. (In this context and henceforth the term *"primary"* shall refer to legislation enacted by the level of government possessing paramount powers in the field and *"secondary"* shall refer to legislation of the other level of government). The volume of litigation in this area is small enough that we need not fear an influx in that regard and the mere possibility of resorting to the courts as constitutional arbitors in some areas must not frighten the reformist; indeed the introduction of judicial interpretation in a few key areas will provide the constitution with additional flexibility.

We have, therefore, a constitution that allows either level of government to enact laws on any matter – this power is available to the primary level at any time and to the secondary level when the field is not occupied. Residual power is also concurrent. If O'Hearn's proposal

30. Supra footnote 22.

was accepted there would be a need for express enumeration for one level only – such is not the case if we leave the residual power as concurrent. Thus, there would be express enumeration for both levels, and these matters could be set out in some detail. There would be no need for a concurrent list, for unlike other federal jurisdictions all matters are concurrent. Although it is not the purpose of this paper to enumerate the allocation of paramountcy it is worth noting that because of the notion of concurrent jurisdiction the enumeration will only become important in cases of conflicting laws.

It would only take a child moments to realize that merely securing permission to buy is ineffectual without the necessary funds that make the exercise of such power meaningful. It is trite to note that transfer of power alone is of no use to the Provinces – both levels of government must be empowered to raise and spend money so that they may carry out their legislative responsibilities.

By virtue of the proposed amendment the power to tax and spend will parallel the power to pass laws. Whenever one level of government enacts a valid piece of legislation, coupled with this power will be the power to raise and spend money *in order to facilitate that scheme.* The power to tax and spend would remain as long as the legislation stood, i.e. until repealed if enacted as primary legislation or until a conflict situation arose in the case of secondary legislation.

As obvious as the need for fiscal power is the problem of economic disparity between provinces. For example, Premier J. R. Smallwood has emphatically pointed out[31] that his province (Newfoundland) could not possibly be satisfied with the mere allocation to it of full powers of taxation – you cannot get blood out of a stone! Surely one value of a federal system must be to minimize regional disparity. On this point, O'Hearn has proposed that:

> "4. In the case of any Provincial Government that by prudent and efficient use of its Powers to tax and to borrow is yet unable to provide the public services of the Province according to the average standard enjoyed by Canadians, the Government of Canada shall pay to the Government of the Province in each year an amount sufficient to enable the Province, using its powers to tax and borrow prudently and efficiently, to provide its public services at that standard. Payments so made shall be excluded, however, in determining the standard."[32]

He recognizes the inherent problems in the use of words such as "average standard" and says merely that "it is perhaps a delusion to hope that the idea of section 4 can be expressed in simple terms . . . It

31. "Constitutional Conference Proceedings February 1969" (Ottawa: Queen's Printer, 1969) pp. 172-3.

32. Supra footnote 10 at p. 44.

is apparent that the content of the section will have to be well worked out before it can guarantee these consequences."[33]

Because the present system of conditional grants-in-aid has proved unacceptable to many of the provinces and because the provinces have no *right* to demand unconditional grants the need for immediate reform in this field is apparent. It is obvious, as O'Hearn suggests, that no scheme of equalization will be simple and no matter what system is devised someone will be dissatisfied with it. His proposal has merit. In fact, it is suggested that sections 4 and 5 of Article 8 of his constitution[34] should be integrated in the following manner. Section 5 provides for a *Federal Council* comprised of delegates from each province and federal delegates up to the number of provincial ones – the Council meets at the "call of the chairman of any five delegates." Its purpose is to allocate taxing power but, it is submitted, there is no reason why the Council could not also regulate equalization payments. The only needed change might be to allow the Council to be called together by any *one* province; the section was obviously intended to deal with a national problem and by changing it by allowing for any province to call it together for *equalization discussions only*, both purposes could be served.

The suggestion is easily stated. Now, to consider the scheme's feasibility.

HAVE WE IMPROVED THE SYSTEM – ANCILLIARY CHANGES

Although the alterations fall short of "revolutionary," if accepted as proposed their effect would certainly be significant. Accordingly we must consider what will be lost and what we have gained before passing judgment.

O'Hearn claims that the frustrations accompanying paramountcy "can hardly compare with those inherent in the doctrine of exclusiveness."[36] Lederman is not convinced – "I am simply not persuaded that this is so, and in fact believe that the O'Hearn system might well be more complex, frustrating and productive of federal-provincial collisions than is the present system. The present system actually accomplishes considerable mutual exclusion, and there is some truth in the old saying that good fences make good neighbours."[37] The proposal in this

33. Ibid at pp. 190-1.
34. Ibid at pp. 44-5.
35. Ibid.
36. Ibid at p. 155.
37. Supra footnote 14 at p. 671.

paper leaves the fence (paramountcy); however, the gate is open until closed by the primary level of government in the event they are not satisfied with secondary legislation. Good neighbours recognize the *need* for such a gate. Lederman seems to base his objection on the contention that O'Hearn has accomplished nothing – what he has done, Lederman claims, is to shift the problem area from exclusion (the compartimental problem) to the determination of pith and substance. This is undoubtedly so. But Lederman neglects to evaluate the *totality* of results arising from the notion of concurrency; admittedly it will often be necessary to determine pith and substance (as it now is), *but this will only arise in cases of conflict.* And it is hoped that conflict situations can be minimized by co-operation in two ways; firstly, the secondary legislation will be made known to the primary level before it is passed in order to "feel out " any expected conflict, both existing and future; secondly, it will be required that the primary level give notice to the secondary level before *taking over* an occupied field.[38]

Lederman continues his attack – "The issues of what amounts to conflict in a concurrent field, or occupation of the field by the paramount authority are very difficult issues indeed."[39] Let us not throw out the baby with the bath water – it may be that interpretation of "occupation of the field" is an unfortunate partner to the concurrency principle but that is no reason to discard the whole notion. No new problems have been created, for we already have case law in the area – the result might be more litigation on "what is conflict" but this *will only last* until both levels, and the courts, become accustomed to making such decisions. And recall that the constitution will *require* notice before every major piece of legislation is passed – this need not be a cumbersome process and could be expeditiously facilitated by sending copies of Bills to the corresponding department of the other level prior to their enactment.

It is recognized, however, that even good neighbours with fences and *open* gates will disagree. Accordingly, the "occupied field" problem will exist and may warrant definition within the constitution itself. The problem that must be met is that of "phoney," "negative" or "future" occupation. One of the first objections to the proposal will certainly be that, "all the primary level has to do is immediately occupy the field with 'filler' legislation, and there we are back to exclusiveness." The problem is real – if governmental co-operation breaks down – and must be resolved by definition of "conflict." Lederman has summarized

38. The question of ousting secondary legislation will be discussed later in this paper.
39. Supra footnote 14 at p. 674.

the case law on point most effectively[40] and there seems to be no objections to the decisions vis-à-vis their definition of "conflict." The more difficult issue will be determining whether the primary legislation is substantial. This writer's inclination is to leave that issue to the Courts—the constitution need only provide that the legislation enacted be *bona fide; if* there was competing secondary legislation and the primary level attempted to pass a law merely saying, in effect, that "we occupy the field," this law would be struck down as being insubstantial.

Of course, if there was no secondary legislation in the field, no problem would arise even if the legislation was a phoney occupation.

Is the above suggestion so complex? Indeed not; the type of legislation that will be struck down will be *obviously* insubstantial. If it is not so obvious and seems to be *bona fide* it will stand – surely it is still more flexible than exclusiveness. Remember that there are two distinct problems here; firstly, is the legislation *bona fide,* i.e. substantial (and this is a judicial decision), and secondly, is there genuine conflict (to be determined just as it is now.)

Objection has been taken to the notion of enumeration (even with complete concurrency) because it does not provide for the changes that inevitably arise with time.[41] The objection is valid – the problem has been solved, it is submitted, by introducing the flexibility of concurrent residual powers based on the division between "'national" and "local" matters.

The next objection might be that legislative schemes could easily be frustrated (and the secondary level economically ruined) by the primary level entering the field after the secondary level has invested a considerable sum in a particular project. The problem must be solved by compensation. It has already been stated that the primary level must give notice before entering an occupied field; as well it will be necessary for the primary level to incorporate any existing scheme and *if their entry into the field causes conflict resulting in economic loss to the secondary level,* compensation must be paid.

It was stated earlier that legislating under our current system is often an uncertain venture – what is the pith and substance of the Bill, does it have a dual aspect, or is it within the exclusive jurisdiction of the other level government? We must now decide whether the proposals have aided or merely complicated matters. Firstly, and of most im-

40. Supra footnote 7.

41. See e.g. the discussion between His Honor Peter J. T. O'Hearn and Mr. Allmand in **Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,** Issue No. 1, p. 48 (October 15, 1970).

portance is the fact that there is certainly no guess work at all if the field is unoccupied. The legislation cannot be declared *ultra vires*. Thus, in this case there is certainty. Secondly, when there is primary legislation existing, there is certainty – the secondary level must not enact conflicting legislation. (The question of "do the laws conflict" is, admittedly, only as certain as it is now). Thirdly, the question of "occupied field" is as certain as it is now and once the legislators become familiar with what the Courts consider valid occupation, the problem will have subsided. Simple mathematics, then, shows that the proposal will provide added certainty – we have already concluded that it provides needed flexibility.

To anticipate the problems that are bound to accompany constitutional changes is not an easy task. Perhaps the plausibility of the doctrine of full concurrency can be better understood if applied to a few of the more obvious "trouble" spots.

Consider the controversial field of treaty making power. When the allocation of paramountcy is done, the power to enact primary legislation under this head will no doubt be given to the central government. Once this allocation has been made, two possibilities are open to the primary level; firstly, they may choose to leave things as they are, that is, the treaties that now exist will stand and the provinces will be able to enter into treaties as long as they do not conflict with existing ones; or secondly, the central government may make an attempt to entirely occupy the treaty-making field with, for example, the passage of a "Treaty Act" containing a provision that only treaties entered into pursuant to this Act will be valid. In the first case, the provinces that wish to bind themselves by entering into agreements with foreign countries will have the power to do so. If, however, the legislation occupying the field in the second case is *bona fide* the provinces will have no such power. Again, note that we are not back to exclusiveness, for the provinces under full concurrency do have *jurisdiction* to enter into treaties until the field is occupied. This field is one of particular concern and current interest – it may be the case that special provisions will be required for this head. For example, once a treaty has been validly enacted between, let us say, Quebec and France, can the central government then take over the field? It is unlikely that genuine conflict would arise (for France would not enter into a conflicting treaty with our central government – but it may be the case that under this head, once the primary level is notified of the proposed treaty, and does nothing about it, the secondary legislation will become final. Another possibility in this one field might be to make it a "floating" power by annexing it to all other heads of primary jurisdiction; that is, the prov-

inces could enter into treaties dealing with matters over which they have primary power (for example education, if it was given to them) and the central government could do so with respect to their enumerated heads. Treaty making power requires special attention.

Writers often use the Unconcionable Transactions Relief Act of Ontario[42] as an example of problematic legislation. How would it be treated under a fully concurrent system? Let us assume that interest is primarily federal and contract, provincial. Full concurrency would allow *either* level to enact the Bill provided there was not conflicting legislation – if the field was clear there would be no need to even determine "aspects" for all legislation is valid unless there is a conflict situation. Lederman implies that full concurrency has not aided us in this type of case[43] for in conflict situations one must still search for pith and substance. He has, it is submitted, again neglected the fact that it is *only in conflict situations* that the legislation can be challenged. Even if the problems remain the same in genuine conflict situations, have we not gained by *preventing litigation* in non-conflict cases?

Criminal law, some claim, must be uniform throughout the Dominion. Others feel that often different areas will inevitably encounter different problems and it is better to leave the regulation of criminal activity to the local legislators.[44] Deciding who ought to be given primary jurisdiction in this field is a topic for a paper in itself – this writer favors federal paramountcy. Suppose that such was the case and further, that the Criminal Code contained no provision at all on the question of, for example, abortion. Could the provinces move in and prohibit the practice? The answer lies in whether the Criminal Code, by excluding abortion, has in fact legislated on it – under the present Code, no act is criminal unless prohibited by the Code. Under a fully concurrent system, the provinces would be able to "fill the gaps," so to speak, unless the Code contained a section on the topic of abortion specifically.[45]

It seems then, that the proposal has the following effect – the "fence" that was provided by exclusive jurisdiction has been subtly maintained by forcing the secondary level to confer with the primary level before entering the field. We have, therefore, protection from "invasion" by the secondary level. As well, and most important, we have rebuilt the fence (a fence that Lederman considers useful) with a gate that replaces the rigid doctrine of exclusiveness with concurrency for non-conflicting laws in all areas.

42. R.S.O. 1960, C. 410. The Act has both its "interest" and "contract" aspects.
43. Supra footnote 14 at p. 672.
44. Such is the case in the United States.
45. See the comments of Prof. R. Dale Gibson, supra footnote 10 at pp. 20-1.

WILL THE PROPOSAL BE ACCEPTED?

The problems of the present system and the benefits of the proposal are, of course, not guarantees that the provinces and federal government will accept the changes. To this latter end, all change must be geared.

It is an impossible task to predict with any certainty how each level of government will react to the suggestions put forward in this paper. A few observations might aid our prediction.

The views of the province of Quebec must be given special consideration before one can hope to propose change – special consideration not because Quebec's views are to override those of other provinces, but because its demands are often unique and require *separate* attention. Quebec seeks considerably more independence than it now has – it wishes to control certain aspects of foreign policy and has demanded a greater portion of taxes raised within the province. In the *Working Documents of the Constitutional Conference Continuing Committee of Officials* (1968) Quebec indicated its views on the division of powers – whereas they suggested a re-allocation of exclusive heads, the basis for their proposal was flexibility:

> "In the constitution, it would be well to provide elements of flexibility, particularly by recourse to concurrent jurisdiction and delegation of legislative powers. If a federal constitution is to serve for a long time as the fundamental law for so diversified a country as Canada, it is imperative that it contain many elements of flexibility. These elements will in substance make it possible to cope with the greatest possible number of situations, while taking into account the diversity of the interests at stake. We believe that by extending the field of concurrent jurisdiction and making it possible to delegate powers from one area of government to the other it will be easier to conclude practical arrangements based on needs without having repeatedly to amend the country's fundamental law, which must be marked by its stability. Financial compensation machinery should be established so that a constituent state's citizen will not suffer undue hardship from the processes of concurrent jurisdiction or delegated powers."[46]

After enumerating the heads of concurrent jurisdiction, the Quebec delegation continued at page 33:

> "Should a conflict arise, precedence could be given to the legislation of the Union or that of the member-states, depending on the subject matter."

Thus, it appears that Quebec's quest for provincial autonomy and her desire for a flexible constitution may be in line with the suggestions in this paper. So rapid does the tide change, however, that Quebec's views might be quite different by the time this paper is published.

The poorer provinces in Canada may safely be grouped together for the purposes of this discussion. It has already been pointed out that

46. See p. 30.

Newfoundland is concerned, for the most part, with economic survival—[47] such is the case for the Maritimes generally and the Mid-West from time to time. The proposals, insofar as equalization is concerned, will give the provinces a *right* which they do not now have.

Although Alberta's official position vis-a-vis the distribution of power has not yet been clearly set out, in 1969, with the approval of Premier Harry E. Strom, Messrs. Taylor and Dolan of the University of Alberta published a work entitled *The Division of Powers. Inter alia,* the work discussed the merits of increased concurrency, and it appears that the authors were in favor of such a proposal.[48]

It has already been stated that British Columbia favors increasing concurrent jurisdiction in at least some fields.[49]

With the selection of a new premier in Ontario, it is futile to speculate on the position that the province will take in future Conferences.

The above remarks do not represent comprehensive positions. With the changes in government and the economy, it is not surprising that each Conference brings new opinions from the delegates. The proposals above are intended to allow the constitution to bend with the inevitable changes of time.

CONCLUSION

Reformation of a country's constitution is unlike day to day legal reform. Constitutional changes are never implemented with the sole purpose of alleviating a current problem — they must always seek to please all concerned and are, by their very nature, an enduring consequence. It would be foolish, indeed, for Canadians to alter the British North America Act significantly without thorough consideration being given to all of the known alternatives and their ramifications.

In this paper, the writer has put forward for consideration a concept in division of legislative powers quite distinct from the existing one. When such revision is set out, it often seems that it is so complex that it is not a viable alternative to the system to which we have become accustomed. Suggesting significant change means looking closely at the existing set up, and that is like looking at a disassembled automobile. It must not be forgotten that the current division is also a complicated one and no possible alternative to it will be simple. Just as a new pair

47. Supra footnote 31.
48. See pp. 115-119.
49. Supra footnote 17.

of shoes is uncomfortable in the beginning so too will the new constitution be awkward at first.

As was stated earlier in this paper, reform for its own sake is valueless – however, consideration of each and every alternative when some reform is imperative, is academic obligation.

ROBERT M. CARR*

* A recent graduate of the Faculty of Law, University of Manitoba.