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CONSTITUTIONAL CONFERENCE
CONTINUING COMMITTEE OF OFFICIALS

WORKING PAPER
SUBMITTED BY THE GOVERNMENT OF
NEW BRUNSWICK

ON
"A SUGGESTED APPROACH TO A
DISCUSSION OF THE
DISTRIBUTION OF POWERS"



I. Explanatory Introduction.

The Government of New Brunswick has already submitted in its first paper on the Distribution of Powers, an outline of the underlying problems in determining a valid approach or approaches to any re-consideration of the distribution of powers. That paper emphasized the geo-political, historical and constitutional framework, the role of judicial interpretation and the immense experience already existing in the political, legal and administrative relationships among the eleven governments concerned. It concluded that it would not be possible to ignore this large background of ongoing experience in any search for an approach that would do justice to these realities, at the same time as there is an effort to do justice to the new claims that have given rise to the concern for this constitutional review. Symbols, functions, history and doctrine have intermeshed into a web of power and resiliency. But that cloak, although seamless, was not timeless and could not imprison the imagination seeking answers for today and tomorrow.

The paper also emphasized the difficulties with respect to any oversimplified "functionalism" as a test of determining "who" should do "what" since it was pointed out that there were various competing values within the concept of functionalism itself -- and that cost and efficiency were not the only guides to effectiveness. Moreover, any approach to a re-consideration of the distribution of powers must take into account what in several cases have become deep differences among some governments as to the nature of a workable and modern federalism for contemporary Canada and the longer future. For reasons that are therefore made explicit in the first New Brunswick paper, any attempt to select priorities of subject matter -- apart from those priorities insisted upon by the first ministers themselves -- requires some general view of the actual state today of the distribution of powers, that is, where they stand in fact and in law.

At the same time, it is not possible to have the process of constitutional review held up for this longer and larger view of the whole distribution of powers question. For meanwhile, some governments are ready to proceed with specific areas, not only the Federal government in the area of general economic policy and the redistribution of income but some provinces have suggested priorities of their own. It would be desirable, therefore, to proceed with those subjects in which a good deal of preparation has been expended, particularly the federal proposals, for in addition to its readiness to put these forward, they have a signal priority claim of their own because of the importance of the subject, while this suggested subject also follows quite systematically from some of the emerging consensus on the taxing and spending powers where substantial progress in the discussions has been achieved.

For these reasons, the Government of New Brunswick would urge a two-part parallel program for the COO, namely, the opening of discussion of the Federal proposals on economic policy and redistribution of income as well as any other subject for which other provinces are now ready with proposals. But there should be put into motion, at the same time, the New Brunswick proposals which follow that would result in due course in an overall view of the "powers" question. Only when such a general view is obtained of the operational nature of the present system of all the powers concerned will it be possible to ask certain fundamental questions about their possible place or redistribution in any future constitution. Indeed, these "testing" questions themselves must be phrased in such a way as to take into account the very reasons that have given rise to the present constitutional debate. And while no one can be free from some bias in phrasing such questions, nevertheless it is the view of the Government of New Brunswick that certain "tests" about the powers of both levels of governments can be formulated in

such a way as to provide a possible measure for the validity of arguments for and against the re-structuring of any part of the present system.

This paper, therefore, will attempt to suggest an analytical format approximating a "functional structure" within which all or most of the present powers, as interpreted by the Courts, or as effectively operated in the administrative and political dealings of the governments, can be viewed as a totality. After such an outline, to be presented below, four testing questions may be asked:

1. What powers are symbolically or otherwise necessary, as a matter of image or form and related areas, for the needs of the federal government and any or all of the provincial governments as we know them today or see them tomorrow?
2. What are the minimum powers required to render present and future federal and provincial governments viable as systems of government, serving their essential needs if they are to function successfully in their respective capacities?
3. What powers inevitably are overlapping, co-operative or shared because of their very nature and operation, in the present federal system and possibly or probably in any foreseeable system?
4. What powers, therefore, can be regarded as "negotiable" and conversely what powers can be regarded as essentially "non-negotiable" viewed from the aspect of maintaining the integrity and effectiveness of each level of government today and for the future? (This question, of course, is related to Nos. 2 and 3 above.)

II. An Approach to Analyzing the Distribution of Powers.

It is no simple task to structure a general portrait of the distribution of powers today because it is not simply a matter of setting out certain relevant portions of the British North America Act since the Courts have had their say in many areas concerning these provisions; and even more difficult is it to incorporate in such a systematic statement those customs and conventions of the Constitution which do not take either legislative or judicial form, but are instead part of the political process of our general system of government and given "constitutional" status by their broad acceptance and durability. Finally, there is the administrative (or political) relationships among the eleven governments which have created certain de facto practices (eg. shared-cost programs) amounting almost to constitutional "practice" or having effects directly or indirectly upon the power systems concerned often to the point where they become perhaps as important as the established legislative, judicial or customary rules involved.

All of these factors not only must be considered in structuring a quick review of the present status of powers, but that very structure itself will often have to be examined with some sense of caution because there is a certain fluidity in the political action or judicial interpretive processes which cannot assure very much absoluteness or finality to be attributed to today's -- in contrast with tomorrow's -- understanding, and operation, of the powers concerned. Courts change and programs change and their effects, particularly the latter, have to be included in any calculation of the elements of such a review.

Indeed, a political decision about the spending power, for example, and a growing view about its scope and possible limitation held either by the federal or several of the provincial governments, may be as significant as the judicial decisions which themselves are subject to changing patterns of interpretation in the course of constitutional evolution under the hand of the Supreme Court of Canada (or its successor).

Nevertheless, despite these caveats, some specific attempt to outline the present status of all the power systems that regulate the "constitutional" scope and reach of the eleven governments concerned is a necessary enterprise if there is to be a useful perspective from which to make the significant choice not only on the fundamental question of possible redistribution itself but also as to which individual studies and analyses of any of these powers for the purposes of the present review should first be undertaken -- apart from those matters for which the OCO is presently prepared as for example, the Federal proposals.

What follows, therefore, is an outline prepared by the Government of New Brunswick that attempts to suggest a format for analyzing the distribution of powers that operate today. The phrasing of the particular headings is one which attempts to bring together, under given categories, those various powers, in law and in fact, that relate to each other and justify their classification under a common heading accordingly. Two columns should designate the respective federal and provincial powers under each of the headings chosen, followed by comment indicating the "legislative", "judicial", "customary", "conventional" and "operational" sources of the power concerned; while a blank in any column will again indicate the absence of a federal or provincial source of power within the classification.

What immediately follows is, therefore, a suggested form of analyses and presentation of the total structure and content of the powers in operation today at both levels of government -- functionally classified and technically analyzed for a ready view of the whole.

A. THE CLASSIFICATION OF POWERS TO BE ANALYZED.

1. The Organization and Constitution of the Federal and Provincial Governments.
2. The Symbols of Canadian Statehood, Canadian Dualism, National Identity and Provincial Identity.
3. Public Law and the Administration of Justice.
4. Private Law.
5. General Economic Policy.
6. Regional Economic Policy and Equalization of Services.
7. Social Welfare Systems and the Redistribution of Income.
8. Taxation.
9. The Right to Spend.
10. Cities, Municipalities and other Local Structures.
11. Communications -- Railways, Navigation, Telegraph, Telephone, Electronic Media, Highways, Air Transport, etc.
12. Health and Housing.
13. Defence and General Internal Security.
14. Foreign Policy and External Relations.
15. Interprovincial Trade and Commerce.
16. Commercial Transactions.
17. Family Law.
18. Intellectual Property.
19. Crime, Penology, and Related Areas.
20. Citizenship, Domicile, Aliens and Residence and Immigration.
21. Natural Resources.
22. Prices and Price Policy.
23. Wages and Wage Policy.
24. Industrial Relations.
25. Civil Liberties and Related Human Rights Areas.
26. Education and Culture.
27. Languages.
28. Agricultural Policy; and Administration in Developing Food Resources of the Sea and Inland Waters.
29. Native Populations.
30. Residual Powers.
31. Amendment Powers.

These 31 headings in "A" could be classified further into perhaps ten or fifteen main groupings for further analytical simplicity.

B. A SAMPLE ANALYSIS OF EACH CLASS OF POWERS.

The Organization and Constitution of the Federal and Provincial Governments.

FEDERAL

BNA Act 1867 Preamble;

Sections 1-40 inclusive;

Sections 41, 44, 45, 46, 47, 48, 49, 50, 50, 51A, 52, 59, 60, 61, 67, 91(1), 128, 129, 130, 131, 132, 137, 139, 143, 146, 147;

The Third Schedule;

The Statute of Westminster, 1931.

SUMMARY

To the above federal structure (and some of the above sections were meant to be transitional) should be added the customs and conventions of the Constitution with particular reference to the Monarchy; the Office of the Governor General, based now upon the Letters Patent of 1947, etc.; responsible Government; the Royal Prerogative; the management of Parliament and its privileges and related areas. From the aspect of judicial interpretation, there is the doctrine of "paramountcy" and a certain overriding general supremacy of the Federal Government organized for, and acting for, all Canadians. Finally, there are the special powers to admit new provinces either by statute or Order in Council and to fix their boundaries or to change the boundaries of existing provinces (subject to the consent of the legislature concerned).

PROVINCIAL

BNA Act Sections 40, 41, 51, 51A, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 90, 92(1), 128, 129, 130, 133, 134, 135, 136, 137, 138, 139, 140, 144;

The Fourth Schedule.

SUMMARY

In general, the judicial decisions and constitutional practice have defined the limitations with respect to provincial control over the Office of the Lieutenant-Governor. The continuing, if unused, powers of reservation and disallowance were together considerable limits on the "finality" of legislative powers exercised by the Provincial legislatures. The assumption has been made heretofore that the monarchical-responsible government principles of the customs and conventions of the Constitution are as applicable to the Provinces as to the Federal Government itself. The full scope, therefore, of Section 92(1) really has not been fully explored. It is evident that the abolition of, or the changing of the Office of the Lieutenant-Governor or the system of responsible government probably cannot be consistent with the BNA Act as interpreted today.

Once a total view of the powers in effect today and their sources are put down in summary form in the sample in "B" above, it would be possible to apply somewhat more realistically the four questions or tests referred to above, than would be the case without such an analysis and presentation.

It is, therefore, the view of the Government of New Brunswick that, in addition to the general debate over how to approach the distribution of powers (see the first New Brunswick paper), any specific debate on particular powers would be aided immeasurably by some such scheme as outlined above. Such a detailed summary as in "B" might be drafted by the Secretariat or a special task force of experts thus preparing fully for the debate by the COO when it turns to the four tests referred to and applies them to several or all of the classes of matters described above in "A".

Meanwhile, until this study and its presentation is completed, the COO should proceed with its discussion on the Federal and other proposals for which some governments may be ready; and this approach would hasten the unity of these particular debates towards a view of the whole, without waiting for the general study described above to be completed. We would thus have the benefit both of immediate discussion and a later general perspective.