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CONTINUING COMMITTEE OF OFFICIALS

WORKING PAPER

SUBMITTED BY THE GOVERNMENT OF  
NEW BRUNSWICK

ON

"PROBLEMS OF STUDYING THE DISTRIBUTION  
OF POWERS UNDER THE BRITISH NORTH  
AMERICA ACT - THE SEARCH FOR AN APPROACH"

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## I. Explanatory Introduction

All states, whatever their constitutional structures and administrative arrangements and traditions, of necessity must share political, legislative and other forms of authority among the various institutions of government. Even the simplest unitary model will, at least in democratic societies accustomed to popular and representative forms and systems, contain divisions of authority that are both horizontal and vertical in their patterns. The horizontal involves the classical "separation" of powers which though not amounting to a "distribution" in one sense, is in fact a kind of distribution of state authority on certain very broad 'functional' lines in another sense -- the legislative, the executive and the judicial. Vertically, the structure of power may flow from some center downward through subordinate forms as in cities or regions receiving their authority from some 'sovereign' source -- again most evident in some simple unitary model.

What distinguishes a federal state, however, from the non-federal or unitary type, is that the distribution of powers may seem to involve some actual division of "sovereigns" itself viewed as a corpus or a whole. At the same time these several so called 'sovereigns' then face in their internal constitutional arrangements both the vertical and horizontal structuring of powers as described above.

Of course, much of this internal constitutional description of so-called 'sovereign' components of the federation does not really affect the status of Canada as the sole "sovereign" within, or subject of, the international community and under international law. Canada as a federal state, represented by the Federal Government, is the only legal person able to speak for Canada as a subject of international law, whatever may be the internal constitutional distinctions and whatever may be also certain external features of that problem now under investigation by the present constitutional review.

The significance of this introductory comment is the recognition of certain uniformities that attach to all governmental systems and certain special features that attach to the so-called federal model. Yet even within federal or near-federal systems there are, of course, great variations running from those where, though important legislative authority is vested in components of the federation, primary power is found in the national or federating institutions of government, to the other extreme where residual power may continue to be vested in the components, with the federation bearing only those powers specifically conferred upon it by some original and continuing act of delegation from the member states or provinces to the federation.

There is, moreover, the difference between a discussion about "the distribution of powers" in a political entity that is only about to begin its federal experience in contrast to a country that has had a century of on-going life with a very rich tradition in managing its federalism politically,

administratively and judicially. It might be possible to discuss plans for a new federation from a point of view that may not be possible where very powerful political habits and administrative structures already have long been in existence or have proven their value or have become controversial and require re-examination without necessarily assuming a total rejection of the experience concerned.

The present constitutional discussions, both in public and among the eleven governments concerned, are taking place not in a vacuum either of historical knowledge or functional experience, but rather within the context of a century of operations and within an immediate atmosphere of controversy both on the level of power and of symbols. Therefore, any reopening of the questions of redistribution of powers for debate in Canada cannot be only an exercise in the cold abstractions of some de novo model building.

Instead it becomes the infinitely delicate problem of dealing with the sensitive body of a living organism where any major surgical change not only is an operation requiring the highest of political skills but also where the gains, in view of the possible risks to the body in such an exercise, must clearly appear to outweigh any possible losses that could result from the new shape of the re-designed community. This paper is concerned, therefore, to discuss the problems of approaching the task of dealing with a reconsideration of the distribution of powers rather than with substantive questions of "powers" as such. It is the selection of the approach that is vital at this stage in order to assure the maximum of benefits and the minimum of distress to the existing body politic of Canada and its eleven governments.

Moreover, it is the opinion of the Government of New Brunswick that only after some general approach to the study of the distribution of powers as a whole has been worked out, would it be possible to identify certain priorities that deserve attention among the particular powers and to relate these priorities, if any, to particular methods of study that seem appropriate to them in the context of the approach to the whole. Finally, it is when this matter of an approach to the whole, the identifying of priorities deserving study, and the best methods of studying such areas, are all considered that it will be possible to determine the weight to be given to the present proposals of the Federal Government that a priority should in fact be attached to certain questions involving the economic powers and social responsibilities of the two levels of government as a first exercise in discussing the "distribution" question.

II. Special Problems before the Continuing Committee and their Relationship to the Development of an Approach to the Whole Question of the Distribution of Powers.

The Conference of First Ministers in June, while giving specific instructions to the Continuing Committee to proceed with the question of the distribution of powers, nevertheless left with the CCO as well a number of unfinished matters, notably: possible formulas for obtaining a national consensus in the exercise of the federal spending power in the matter of shared programs; possible formulas for constitutional revision dealing with regional disparities; the technical significance of developing an indirect sales tax power in the Provinces; the possibility

of a power over estate taxes in the Provinces and the various methods of dealing with this matter and the consequences flowing therefrom. It will be evident that several of these have a direct bearing on the distribution of powers, both directly and indirectly, even though there are certain intrinsic technical issues that each gives rise to, and which, therefore, must be studied as the First Ministers indicated. It will be necessary to bear these particular problems in mind as the whole of the question of distribution is considered in order to prevent isolated judgments either on substance or technique which then may have to be reconsidered in the light of the larger pattern of analysis affecting the general question of powers as a whole at both levels of government.

III. The Special Situation of International Relations, the Legal Position of Cities, and possible Regional Integration.

From the very beginning of the present constitutional review undertaken by all Government, the Government of Quebec has been giving a special role and identity to the question of international relations. Indeed there is also the federal paper originally presented on this subject, with particular reference to education and related areas, and the repeated references to the problem both at the meetings of the First Ministers and elsewhere. All this suggests that it may be necessary to consider what particular approach should be taken to this question, but at the same time to relate that consideration to the larger issue of developing an approach to the distribution of powers as a whole.

A similar but a so far almost totally unexplored special question is the role of the city in the modern state, occupying as it does a central economic, political and social place in our general demography and concentrating in itself some of the most serious problems of the day. The approach to studying the division of powers may somehow have to find a special category for the city that brings some new balance into its juridical status between its classically subordinate role to and within provincial jurisdiction and its almost trans-provincial significance as a physical fact so often of much larger dimension than its legal position. It is possible to envisage undue controversy later if this question is left unresolved and at the position as it now exists, while at the same time it is equally possible to forecast very considerable difficulty in formulating a framework of powers for cities that in any way challenges the traditional supremacy of the Provinces over them. Yet so unsatisfactory has been the developing situation of the city that some kind of political and legal theories about their status, more consistent with their needs, should at least be considered and speculated upon as part of the task of a total reexamination of Canada's Constitution and principal institutions.

Finally, in this category of special problems, is the significance of discussing the distribution of powers when fresh consideration is being given to more fluid and advanced views of regional governmental systems of which, of course, the possibilities of Maritime Union envisaging various degrees of integration, is perhaps the most immediate example.

IV. The Relationship between Sections 91 and 92 of the British North America Act and other Provisions of the BNA Act, and Constitutional Principles in General.

Traditionally it is assumed and with much justification that any study of the distribution of powers primarily involves an analysis of the kinds of matters presently set out in Sections 91 and 92 of the BNA Act. It would be well to remember, however, that there are other provisions of the Act which have a bearing on the powers of the two levels of government but are to be found elsewhere in the Act, as well as in certain general principles of the Constitution of which a classical instance is the status of the Royal Prerogative. Moreover, not only are other provisions of the BNA Act, and certain general principles of constitutional law and practice, involved in the many direct or indirect appraisals of the question of powers but there is also the extent to which the problem of powers may be influenced by the emerging discussion on the present program of constitutional review, as to some of the principal institutions of government within our present constitutional system.

Any changes, for example, in the essentially monarchic-responsible government-party system complex of relationships could, in fact, have considerable influence on the nature of the powers exercised by the particular institutions to be developed at both levels of government. Similarly the possible adoption of new and "entrenched" bills of rights provisions will in fact have both direct and indirect consequences in the operation of the legislative and executive branches of both levels of government.<sup>1</sup>

1. See the New Brunswick Working Paper (prepared by Dean M. Cohen) to the Continuing Committee of Officials: "Comments on the Judicial Process and National Policy in a Federal State", May 20, 1969.

Finally, in this group of questions impinging on the distribution of powers but outside the actual lists of powers now found in Sections 91 and 92 or elsewhere, is the effect in law and fact of new institutions of consultation and cooperation between the two levels of government which may emerge as part of the changes in the theory and operation of Canadian federalism now pervading political practice and also being advocated by some governments but in much more elaborate and direct obligatory forms for a future Canadian Constitution. Perhaps the most striking example of this new framework within which such powers will be exercised, would be the creation of compulsory inter-governmental consultation in the matter of tax development and budget planning -- indeed, in almost the whole area of fiscal policy by all the eleven governments concerned. Such institutions, therefore, as are now being discussed by all governments, must be borne in mind in any parallel discussion of the powers presently exercised by all governments and therefore in any discussion of potential changes in the present system.

Nevertheless, it will be evident in any preliminary consideration of this question, namely, the distribution of powers, that primarily attention naturally will be focused on the kind of matters listed in Sections 91 and 92 as these have been interpreted by the Courts since Confederation.

V. Some Basic Considerations of Theory and Practice in Any Approach to a Reconsideration of the Distribution of Powers.

Ideally and from the point of view of analytical simplicity, the most attractive approach to a review of the redistribution of powers is one which asks the question which

level of government is best able to exercise and carry out the particular function concerned. This "functional" approach naturally commends itself because it compels a severe analysis of the "functions" of government in the modern state; the experience with those functions in the Canadian federal system; conclusions about where those functions have been best handled, perhaps on the basis of some appropriate cost-benefit analysis; and given certain estimates of the future direction of these problems, which level of government is best able to execute the tasks made necessary by these functions. Undoubtedly such a "functional test" will, in this simplistic sense, loom large in all discussions about the future of powers and their distribution in any Canadian constitution that might emerge from the present review.

There are, however, two serious difficulties in the way of any oversimplified functionalism as the determining measure of legislative competence. The first difficulty is, of course, the momentum of history itself. If Canada were starting without history it could design systems without the hand of the past to influence the allocations of power. But the truth is that history and the geo-social facts of Canadian life together create a framework which is likely to be more powerful than intellectual analysis even with the optimum of realism and ability applied. Canadian Confederation may be going through stresses amounting at some moments to the appearance of crisis. But it still has been and continues to be an operating system that on the whole seems to have had a very considerable measure of success simply as an ongoing political fact despite the challenges to the present structures that have become acute in recent years. Thus it is simply not possible to discuss "powers"

in terms of some abstract functionalism for these are not to be tested by a seminar but by the hard decisions of the political past and the demanding future. Hence the double question will always be present in the debate over powers and their distribution, namely, "who" can do "what" best? and who has done it until now and how badly or how well?

There is perhaps an even more sophisticated difficulty in the matter of functionalism. It has to do with the meaning of functionalism itself. It very well may be that discussion will demonstrate at least two (and possibly more) basic but quite different meanings to that attractive term. There is the meaning already referred to -- namely, "who" can do "what" best? But the other interpretation asks the question as to the meaning of what is "best" and "for whom"? It may be demonstrated that a given kind of activity in Canadian society is of coast-to-coast, national importance, or is of a nature that the least "cost" and greatest efficiency are achieved by a unified central policy and administration with respect to that subject. Yet at the same time it may equally be demonstrated with respect to that subject that another value may be involved just as important as cost or efficiency, namely, the sense of identification with and easy relationship to the organs of the state administering such a program. Size, geography and related factors are among the problems of modern government (particularly in Canada with its distances), indeed throughout the world, with impersonal technologies both as goal and method.

The thin fabric of order even in stable social systems has given us all pause to wonder how consensus is maintained in the face of so many forces creating alienation

climates often for young and old alike. While the 'town hall' is gone forever as the symbol of democratic decision-making, it need not necessarily mean that computers or distant mandarins must inevitably be the sole alternative. Hence, the decentralization of the functions of government is increasingly demanding attention not because it is always "functionally" economic to do so but because it may be psychologically necessary if we are to have viable social fabrics at all. In France, in Britain, in the United States, the first two unitary governments and the third a federal system, the debate over de-centralization is now increasingly serious. And the reasons are simply that bigness at some stage creates social problems which more than offset the appearance of economies and efficiencies of scale.

Hence it is not easy to use the 'functional' test in oversimplified terms because several values are involved by which "functionalism" itself may be tested. Therefore any discussion of the distribution of powers in Canada must somehow bear in mind the new (and the old?) tensions between the needs of efficiency leading towards centralization in an increasingly complex and technology-oriented society on the one hand, and the human needs of the individual in relation to the state where values of significance that will counteract feelings of alienation may better be achieved by a closer link between the citizen and his government through using the machinery of more localized institutions.

In Canada, of course, this whole problem of function and of history is made even more complex by a number of unique features in Canadian society. French and English-speaking relations and the heavy concentration of

French-language Canadians in the Province of Quebec gives to the historical, and to the second test of functionalism, namely, the non-alienation values, a dimension which perhaps would not be so obviously present if this geo-political fact were not a central theme of Canadian life. The search for self-preservation in French-language Quebec, and surely equally among French-speaking Canadians elsewhere in Canada, necessarily has certain immediate bearings on the various tests to be applied to problems of powers since they may seem to be related to values more significant in the eyes of some than the values of functionalism in its original "efficiency" sense.

Moreover, equally important to consider here are some distortions in the very structure of the Canadian federal framework. Two members of that system, Ontario and Quebec, occupy the "heartland" of the country and between them almost two-thirds of the population. They are, therefore, by their very size and place already extremely powerful units and in a sense, create a kind of imbalance within a federal system whose magnitudes run from Prince Edward Island to Ontario. The only balancing instrument for preventing these distortions from becoming unbearable for the system to support is the unifying and transcendent influence represented by the power of the Federal Government and its institutions. Indeed, it might be argued that in any approach to the distribution of powers that federal system which has a high degree of equilibrium between all the components might be able to afford, at least theoretically if not practically, a less formidable

framework embracing all the components within the national governmental system. But where, as in Canada, the disequilibrium is so apparent and where the eight remaining Provinces are in a sense outweighed politically and otherwise by the two, the only serious countervailing force that achieves both unity and equity is a strong federal framework, able to match and indeed to overbalance where necessary any of the components. For two of these are so strong that without such countervailing balances they would almost inevitably cause even greater distortions and lead to the inequities which would very likely flow from such distortions -- inequities of political power and economic strength.

Thus the question of distribution of powers must take into account the dilemma of distortion; the dilemma of the tensions between centralization and decentralization serving functionalism (or efficiency) but avoiding "alienation"; and the dilemma of "identity" in which somehow a bi-lingual Canadian society emerges without in any way submerging in the new 'one-ness' the original 'one-ness' or identity of each of the two great language groups of the federation.

These then are among the factors to be kept in the forefront as the exercise opens into studying the distribution of powers. It is an exercise which clearly will have to be approached with a sense of humility and of history, but without any reservations as to the possibility that change may be necessary to meet the new situation in which Canada finds itself technically and socially. In a sense the burden will be on those who wish for radical change to demonstrate that the benefits outweigh any foreseeable costs against the background of a century of experience. Yet the burden must not be so onerous as to

inhibit imagination and experiment so necessary to meet the problems of making Canada more profoundly unified and its governments more effective in the service of the people.

Finally, there is a certain "objectivity" that now may be possible in examining the distribution of powers, from whatever aspect, than was the case a few months ago. When the constitutional discussions first arose there was a tendency on the part of some governments to try to match the debate over powers with the debate over revenues and spending, all on the logical ground that until member governments knew what their responsibilities were they could not know what should be their financial arrangements within any new system.

There were both advantages and disadvantages to this line of approach. On the surface it seemed to offer a view of balancing responsibilities with revenues. But viewed more deeply it could also have led to pre-judging the ultimate scope of federal authority itself because so much attention would have been paid to the question of immediate powers and revenue needs that the longer range interplay between powers and revenues, and the other effects involved in this whole complex of issues, might not be wholly and adequately considered. For this reason the recent decision and consensus on the part of most governments to have all governments have access to all sources of taxation (with certain understood limits) and to have the federal government take a somewhat more self-limiting attitude toward shared-cost programs, which might impose federal priorities on unwilling Provinces and thus distorting their own priorities, has led to removing this part of the debate from impinging immediately on a more detached analysis of the powers question itself.

For it is now possible to make the assumption that the Provinces will have access to direct and indirect taxation (as limited above) and then to say that the discussion over powers can also take place within the new realism that attaches now to some estimated effects of this new access. For while there is in any case a circular, chicken-and-egg problem here, a beginning was made in the achievement of more or less consensus on the taxing and spending powers (subject to certain unfinished matters referred to above) and thus it is possible to examine the distribution of powers with the parallel pressure of the taxation-spending issues in part removed, at least for the time being.

VI. Are There Priorities in the Distribution of Powers and How Shall They Be Identified?

It is very tempting to examine the existing distribution of powers and to select those that to the individual observer seem to suggest a priority but, of course, the priorities will vary in many cases with the observer. Some may believe that economic and social-welfare powers are natural adjuncts of the earlier discussion on the taxing and spending issues. This may or may not be the case although there are, no doubt, good arguments in favour of it and a start must be made somewhere.

Another approach is to frankly ask two types of questions:

1. What powers may be described as "high-cost symbols" in contrast to others that are "low-cost symbols." Such an analysis would mean that

provinces believing that it was symbolically or politically important for them to have certain powers might prove quite persuasive providing the cost, as these affected the general federal system, were not serious. By contrast where the cost would be high, then such "high-cost symbols" in certain power transfers, while desired by some, might well be resisted by other member governments because they in fact would clearly weaken the federal structure. Hence it might be useful to determine what powers seem to be symbolically "low-cost" and concentrate first on the easy tasks before daring to venture on more difficult ground.

2. Another approach is that of achieving administrative simplicity where there is now confusion between the competing or overlapping jurisdictions of both levels of government. Of course, parallel and overlapping jurisdiction is bound to be present in any federal system, whether so stated in the language of the constitution or whether so interpreted by the Courts, subject to concepts of "paramountcy". Good examples here are the problems of immigration, the administration of justice, financial institutions and perhaps the Indian and Eskimo questions.

But before any of these approaches are possible and any priorities identified, it is really necessary to look at the power systems as a whole that now operate in law and fact as between the two levels of government. Only out of such

a general exercise will there emerge what may be called a concept of minimum viability for both a "strong" federal government and "strong" Provinces, with some sense of the nature of the powers required for such minimum viability. The truth is, as most students of Canadian constitutional law and federalism know, that while Canada began as a strongly centralized quasi-federal system, the Courts shifted the balance juridically so that by 1939 the Provinces were in law very strong indeed even though most of them in fact were unable to bear many of the costs of these responsibilities. A swing of the pendulum again towards the center was accelerated by federal financing of unemployment costs in the Provinces in the late 1930's and even more, of course, by the almost total centralization of major economic powers and fiscal control in the federal authority, made necessary by World War II and the immediate post-war reconstruction. The third phase in this development came with the mounting re-discovery of their responsibilities by the Provinces in the 1950's as education and welfare costs rose sharply and as shared-cost programs enlarged the scope of general government activity and expenditures both federal and provincial.

Therefore, apart from the language question and certain related and essentially symbolic matters, the total picture of Canadian federalism at this moment of re-examining the problem of powers, must be seen in the light of this long series of swings with a great residue of authority left in law with the Provinces (wages, prices, education, welfare and resources) at the same time as federal fiscal 'supremacy' through the tax sharing agreements and through the dynamism of federal social and economic initiatives, created the new intensity of action and interaction that is now central to the federal-provincial debate over powers.

To sort all of this out, to assume that certain matters (other than the language question) have therefore some "natural" priority would not be easy to achieve. For these reasons the Government of New Brunswick is of the opinion that no pre-judgment should be made as to any priority for studying these issues until some further reflection has been given to the general question of the approach itself in the matter of the distribution of powers, viewed as a whole.

VII. Some Proposed Methods of Study

There are a number of possibilities or options in determining the better means to an understanding of these questions. These may be briefly stated as follows:

1. The CCO itself should have a general debate perhaps at a special session, lasting not less than two days, concentrating solely on the question of how to approach the distribution of powers, and what methods are required on "which subjects" for study in depth by sub-committees or specially appointed groups reporting to the CCO itself and supervised by the Secretariat.
2. Once the CCO has had a chance to view the problem as a whole, both as to subject matter and as to method, it will then be in a position to develop some consensus on priorities -- other than those priorities already assigned to it by the First Ministers, e.g. international relations and regional disparities, the estate tax and the indirect retail sales tax.

3. It remains a fact that four or five of the best students of Canadian Federalism and Canadian Constitutional Law are not yet involved in any sustained way in the work of constitutional review and this need for expert assistance will give an opportunity to bring some of these valuable resource persons into the study patterns to be established by the CCO.
4. At the same time the special matters assigned by the First Ministers to the CCO may also require the assistance of experts, particularly the indirect sales tax, the estate tax and possibly the study of the effects of a modified power in the Federal Parliament in the matter of a direct tax on real property in the Provinces.
5. It may be desirable to bring some of these most senior students of federalism and constitutional law into the CCO discussion at the earliest stage, namely the stage when the whole approach to the distribution of powers is examined and this should be considered altogether apart from their role at the second stage of working as members on a task force or sub-committee, or group of experts on particular powers and their distribution.