

Power Over the Economy

CONFIDENTIAL

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MEMORANDUM FOR MR. KIRBY
MR. TASSE

Concurrency, Paramountcy, and Disallowance

The argument has been suggested by the Minister that concurrency combined with federal paramountcy is more or less equivalent to the federal disallowance power because both involve a federal veto over provincial laws, and as such it is politically unacceptable. Consequently it is argued that we should avoid constitutional changes that involve such concurrency, it being better to define or clarify exclusive federal and provincial powers in areas of common concern.

This proposition should be considered carefully before it is advanced strongly or acted upon, as concurrency is in many ways a potentially useful and attractive device for assigning powers in areas of mutual concern. Following are some points which might be kept in mind:

1. Concurrency is not a novel concept. There is express provision for it in the B.N.A. Act, in sections 94 (Agriculture and Immigration) and 94A (Old Age Pensions). Implied concurrency exists much more extensively as a result of interpretations of the constitution that have upheld both federal and provincial laws in the same general field that deal with different aspects of the same thing. Some examples are federal and provincial laws dealing with highway safety, the environment, consumer protection, securities, terms of loan contracts, etc. Where there is direct conflict (e.g., obedience to one law requires disobedience of the other) the federal law is paramount. However, such conflict is rarely found by the courts to exist. On the whole concurrency, express or implied, has caused few problems.

2. Concurrency has the advantage that it allows the government which feels immediately concerned to act with respect to a matter, even if the other one does not wish to do so. Where there is an exclusive power, if the government possessing the power does not act the other level of government is nevertheless precluded from acting. Thus in the case of the Saskatchewan potash regulations, for example, even though the federal government had taken no legislative action to protect the potash producers, the provincial regulations doing so were held invalid because they were held to be in relation to trade and commerce (an exclusive federal matter). Concurrency thus allows flexibility in a federal system. Where a problem is essentially local in nature and Parliament is not likely to deal with it, the province affected can do so. If on the other hand there are some aspects of it which come to have national importance, Parliament may deal with these. These shifts in legislative activity can occur without the necessity of formal agreement or action such as a constitutional amendment or delegation of legislative power.
3. Overriding a provincial law by a paramount federal law is not, in concept or practice, like the use of the disallowance power. In concept it is different because the override arises only because Parliament has asserted its own jurisdiction to adopt a law to achieve certain objectives presumably desirable in themselves. It is only incidentally that a provincial law may be overridden, to the extent that a court may find a conflict. Put another way, disallowance is a veto by the federal executive of a provincial law, while overriding through the exercise of a concurrent power is a legislative act by Parliament. In practice concurrency is different because the paramount federal law does not, as in the case of disallowance, entirely nullify the provincial law. It will only affect the operation of the provincial law to the extent of the conflict and for the time during which the federal law remains in force.
4. Since the historical trend in federal systems has been to find more and more areas of overlapping concern as between central and regional governments, concurrency seems to be one obvious technique to "manage the overlap". It recognizes that each order of government

potentially has a legitimate interest in the matter and allows them both to act subject to the rare possibility of conflict between their laws. The assignment of paramountcy can be based on a judgment as to which order of government ultimately has the more important interest.

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