DELEGATION POWER

THE DELEGATION POWER PAST AND PRESENT

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INTRODUCTION

In the aftermath of the Meech Lake Accord, there is still lingering suspicion on the part of Canada-outside-Québec about the "distinct society" clause and everything that "distinctiveness" entails. Recent public opinion polls show that, while there now is less equivocation about including the clause directly in the text of the Charter and in the proposed "Canada Clause", opposition to it continues to run deep if it means more power to, and 'special status' for, Québec.[1] This sentiment endures despite the apparent single-mindedness of Québec's political, economic, and cultural elites that a far more serious devolution of power will be required to salvage the union and forestall a referendum on independence in Québec.

Perhaps, the drafters of the federal proposals saw in the proposed delegation power a way out. The clause could enable the federal or provincial governments to transfer to the other jurisdictional responsibility for any number of matters which strict adherence to the text of the constitution would prohibit. This bilateral transfer of power could skirt around the rigours of the amending formulae and, all the while, remain faithful to the notion of the equality of the provinces. It is the latter which Alan Cairns, for example, has identified as a powerful rhetorical tool, both in the fight to thwart Meech Lake as well as in this round of reform.[2]

While the language of a delegation power can maintain the appearance of provincial neutrality — each province has equal opportunity to strike a deal — it is in practice that the clause will grate against the equality "principle". For it is ultimately with Québec that the federal government will be expected to negotiate arrangements for the delegation of power, likely in the direction advocated by the Liberal Party of Québec in the Allaire Report. The recent constitutional conference on the division of powers in Halifax embraced the notion of asymmetrical federalism, and it is with the aim of achieving less symmetry that the power likely now will be employed. This has not always been the intention of those who in the past have recommended the creation of just such a power. And, as the aim of legislative delegation has shifted, so has the appeal of such a proposal to appease aspirations within Québec for greater jurisdictional room. The aim of this essay is to explore some of the historical roots of the proposed delegation power, and consider those past proposals in light of current political and constitutional conditions.

PAST PROPOSALS

Attempts at delegating legislative power directly between the two orders of government — federal and provincial — have been thwarted by judicial interpretation. The courts defined sections 91 and 92 as largely carving out mutually exclusive spheres of jurisdiction, with some areas of concurrency.[3] The courts would not permit excercise of powers beyond legislative jurisdiction,[4] even where consent to such excercise was given through the development of cooperative, inter-governmental schemes. This was the case, for example, in early attempts at creating an old-age pension scheme[5] and marketing schemes for certain products.[6]

As a result of these restrictive interpretations regarding, particularly, federal powers over economic matters, the Rowell-Sirois Report recommended that a delegation power would be a "useful device" for overcoming these constitutional deficiencies: "Unified control and administration in the hands of a single government is sometimes desirable".[7] The report recommended a delegation power that would permit transfers of power in specific instances from the provinces to the federal government, and vice versa. But, written as it was in the wake of the depression of the '30s, it is likely that Rowell-Sirois had more in mind the former than the latter.

The issue of legislative delegation was dealt with conclusively in the 1951 *Nova Scotia Inter-Delegation* case,[8] where the Supreme Court struck down a proposed scheme which would have permitted the delegation of jurisdictional responsibilities from the province of Nova Scotia to Parliament, and vice versa, including a power to impose an indirect sales tax, if Parliament so agreed. This transfer of plenary jurisdiction over matters assigned "exclusively" to either level of government amounted, for the Court, essentially to an amendment to the constitution.[9] While Parliament or the legislatures could delegate responsibilities to subordinate agencies, they could not "abdicate their powers" and invest jurisdiction in bodies not empowered to accept such delegation.[10] The decision came under stinging criticism for the Court's failure to appreciate the nature of legislative delegation;[11] it was not an abdication of power, but an "entrusting...of the excercise of power...*with complete power of revocation or amendment remaining in the delegator.*"[12]

The direction of the transfer, from the provinces to the federal government, began to change even before the matter was taken up again in the constitutional conferences of 1950 and then again, more specifically, in the Fulton-Favreau proposals. The issue of a new delegation power was raised, and strongly promoted, by Premiers Macdonald of Nova Scotia and Douglas of Saskatchewan at the January 1950 Constitutional Conference of Federal and Provincial Governments. The matter then was referred, together with the larger question of an amending formula, to the Standing Committee of the Constitutional Conference.[13] Favreau reports in his *Amendment to the Constitution of Canada* that such a provision was proposed to circumvent the unanimity which likely would have been required in amending formulas being discussed at the time.[14] The matter dropped off the table in subsequent conferences,[15] and was not revived again until the early '60s.

The Fulton-Favreau proposal in 1960-61 included a new power to delegate in an amended s. 94 of the *British North America Act*,[16] and it is used as the failed benchmark for future proposals. It permitted instances of delegation from the provinces to the federal government in only a number of provincial matters, including the very broad power over property and civil rights, and unlimited transfers of federal matters to the provinces. The delegation would take the form of a statutory scheme, and no statute could take effect without the consent of a number of legislative assemblies and Parliament. In order for any delegation, in either direction, to occur, at least four provinces normally would have to participate. If other provinces did not participate, in the case of a provincial transfer to Parliament, Parliament had to declare that it had consulted with the governments of all of the provinces, that the statute in question was of concern to fewer than four provinces, and that those provinces had consented to the delegation. As delegation did not signify abandonment of jurisdiction, provisions were made for the revocation of consent by the delegator and the repeal of statutes.[17]

The formula was cumbersome and impractical: as William Lederman wrote, the delegation proposals were either "dangerous or useless."[18] Moreover, wrote Lederman:[19]

> Certainly it can have no attraction to those who desire to develop a particular status for Québec, because the consent of four Provinces would be required for a delegation of federal powers, and where are Québec's three companions in the circumstances?

In the meanwhile, the courts became more receptive to the idea of delegation through administrative channels. Federal schemes, for example, which delegated regulatory responsibility to provincial administrative agencies were constitutionally permissible,[20] as was a federal statute which delegated wholesale responsibility for licensing to provincial transport boards.[21]

These devices provided the kind of flexibility demanded of modern societies with divided jurisdiction. Compared to previous proposals for a delegation power, the "practical result achieved by the courts", wrote Gerald La Forest, "may well be as good as we are likely to get."[22]

Nonetheless, subsequent proposals for a delegation power were included in the 1979 Pepin-Robarts Report,[23] which recommended recognition of the power to delegate "by mutual consent, legislative powers on condition that such delegations be subject to periodic revision and be accompanied where appropriate by fiscal compensation."[24] The Québec Liberal Party "Beige Paper" recommended such a power which could be used for specific purposes, for a limited duration, and ratified by a new Federal Council.[25] The Macdonald Commission on the Economic Union also recommended amendment to the constitution to permit legislative delegation.[26] More recently, the Beaudoin-Edwards Committee appointed to study the process for amending the constitution of Canada in the wake of the death of Meech Lake, "strongly" recommended that the joint parliamentary committee study the question "in the framework of the division of powers."[27] This was necessary because Beaudoin-Edwards advocated the adoption of an amending formula which employed four regional vetos. This was the kind of unanimity requirement the Premiers in 1950 feared would stifle constitutional change and which generated the exploration for a delegation mechanism.

PRESENT CONCERNS

Many of the concerns which motivated a delegation power have been alleviated by the 1982 amending formulae. No province (except for the few matters listed in s.41) has a veto over constitutional change: transfers of legislative power can be accomplished with the assent of at least seven provinces representing at least fifty percent of the population. It could be argued that some of the work of a delegation power can be accomplished using the s.43 amending formula, amendments involving one or more, but not all, of the provinces.[28] None of the formulae, admittedly, have the flexibility which can be gained by legislative delegation.

Moreover, much of what the courts may have prohibited in the past, and which fuelled discussion of a delegation power, can now be accomplished by

administrative delegations and incorporations of another jurisdiction's legislative schemes by reference. As Peter Hogg describes the present situation, what could not be done directly can now be done indirectly.[29]

What are some of the aims, then, that can be served by the proposed delegation power? As the Allaire Report suggests, jurisdictional responsibility could be streamlined to make more "efficient" the economic union, so as to reduce overlap or gaps in power. But, streamlining could flow not only from Parliament to the provinces.[30] For example, provinces could consent to a federal scheme for securities regulation. Equity concerns could be addressed: for example, provinces could consent to having Parliament legislate directly over child care in order to institute a national day-care strategy. But, what if some provinces decline to participate in the delegation to Parliament? These concerns were raised in the economic union context by A.E. Safarian:[31]

> Frequent resort to delegation could bring about disparity in supposedly national programs with common market objectives in the event that one or more provinces declined to delegate. In the face of changing economic conditions and changing federal and provincial perceptions of interests, it places a heavy load on negotiation between governments to achieve consistency on a continuing basis.

Perhaps the most practical application of the delegation power would be in one-on-one circumstances, where the exigencies of one province call for immediate, but revocable change. Or, it can facilitate the idea of federalism as a social laboratory. Premier Tommy Douglas, at the 1950 constitutional conference, described the delegation power as "a useful means for testing action by results, which may be very important in affording evidence to whether there should be a permanent transfer of legislative jurisdiction from the dominion to the provinces or vice versa."[32]

Further, what are the implications for political accountability? Professor Lederman, as already noted, characterized the power of legislative delegation as "dangerous".[33] He feared the obfuscation of jurisdictional responsibilities which would result from frequent use of the delegation power:

> It would be all too easy to engage frequently in such delegation under strong but temporary political pressures of the moment, thus creating a patch-work pattern of variations Province by Province in the relative powers and responsibilities of the federal and provincial legislatures. This could seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions.

Transfers of legislative power could confuse, and confound, the citizenry about who is responsible for what. Moreover, the consultative and consensual nature of a delegation power can dull otherwise imaginative and progressive legislative schemes. This critique should be of considerable concern in any democracy, particularly one based on federal principles.[34] But, it could be that Lederman presumes too little: that the Canadian public is not conscientious and vigilant enough to ascertain those spheres of responsibility when necessary and then take to account those responsible. He may also presume too much: that the Canadian public already has a clear conception of jurisdictional responsibilities which would be undermined by legislative delegation.[35] The complaint also assumes that this intermeshing of responsibilities has not already been achieved, to some degree, under the present constitutional arrangements; an assumption which Hogg, among others, discredits.[36]

THE PRESENT PROPOSAL

Safeguards

It is presumed that delegations will occur as has been described in earlier proposals: each delegation will be for specific purposes and pursuant to statute. What otherwise could have been accomplished pursuant to constitutional amendment, could become a *de facto* amendment. In other words, once having delegated power, it may be unlikely that such power would be reclaimed back. Justice Rand foresaw this possibility in the *Nova Scotia Inter-delegation* case: "Possession here as elsewhere would be nine points of law...The power of revocation might in fact be no more feasible, practically, than amendment" of the constitution.[37] If that would be the practical effect, if not the intention, of delegation, it would be highly inappropriate to avoid the constitutional requirements for amendment. For this reason, it would be appropriate to have a sunset clause of, say, five years included in any statute which gives effect to a delegation.[38] The legislatures would have to re-visit this delegation every five years, as required when opting out of Charter rights and freedoms under s.33, then debate and decide either to renew or let lapse their legislative commitment to this delegation. Repeal of delegation statutes, or revocation of consent, could occur prior to the five year period, with proper notice.[39] No delegation, it could be argued, is thereby permanent, rather, the emphasis is on the nature of delegation as borrowed jurisdiction.[40]

Concerns over financial compensation for accepting a delegation will arise. The Pepin-Robarts Report suggested that, where appropriate, financial

compensation follow the delegation. The Québec Liberal Party in 1980 also preferred that the government delegating continue to assume the financial burden of the activities delegated. Given the temporary shifting burden involved in delegation, it would be sensible that financial responsibility reside with the delegating jurisdiction, and that in most cases equivalent fiscal resources be made available to the receiving jurisdiction to carry out its new responsibilities.

And, in order to overcome the objections raised in the *Nova Scotia Inter-delegation* case, that the division of powers in the constitution assigns the power to make laws "exclusively" to either Parliament or the provincial legislatures, it would be advisable that any amendment take the form of a notwithstanding clause. This was proposed in the Fulton-Favreau formula and by the First Ministers in April 1981.[41]

Could, as the Canadian Bar Association suggests, the federal government transfer jurisdiction over "Indians and Land reserved for Indians" under the proposed power?[42] Aboriginal peoples look first to the federal government for the honouring of treaty obligations and aboriginal rights: they have a "principal and special relationship with the federal government...[the] relationship with provincial governments is secondary."[43] The Supreme Court of Canada has described this special relationship as "trust-like", "requiring a high standard of honourable dealing" on the part of the federal Crown.[44]

Section 35.1 commits the government of Canada and the provincial governments to convene a constitutional conference to which aboriginal representatives will be invited to participate in the event that "any amendment" is proposed to be made to s.91(24) of the *Constitution Act, 1867*. As the delegation is not an "amendment", s.35.1 offers little protection to aboriginal peoples who, as long as they remain a "subject matter" under s.91(24),[45] could be subject to legislative delegation. As a result, it is imperative that any delegation power between the federal and provincial governments exclude a s.91(24) transfer or that s.35.1 be amended to include delegations and beefed-up to give aboriginal peoples a vote at the conference table.[46]

Consideration could also be given to delegations between aboriginal governments and the federal or provincial governments. While this would not satisfy completely demands for full control over local aboriginal government, it could provide the opportunity for future cooperation and experimentation.

Amending Formula

Henri Brun, in his testimony before the National Assembly Commission to Study All New Constitutional Offers, suggested that the federal proposal for a new delegation power would trigger the rigours of the unanimity formula. He argued that, as this was an enabling provision which permitted future re-divisions of power, this would be an amendment to the amending formula, requiring the unanimous approval of all of the provinces.[47]

This is an interesting, and somewhat compelling, argument. One's conclusion may turn on how one characterizes the purpose or intent behind the amending formulae. The amending formulae concern: amendments affecting only Parliament or only the provincial legislatures; amendments of concern to Parliament and all of the provinces; and amendments which concern Parliament and one or more but not all provinces. The formulae which apply to amendments of concern to Parliament and all of the provinces, or one or more but not all provinces, provide a method for changing the distribution of powers and certain national institutions. The formulae are concerned only with *permanent*, as opposed to *temporary*, changes to jurisdiction or national institutions. But, delegations are only temporary; ultimate jurisdiction continues to reside as mandated in the constitution. In this way, the delegation operates as does the proposed spending power provision: both will permit temporary alterations of spheres of jurisdiction. Those alterations will be by ordinary statute, subject to repeal, perhaps with notice, in the ordinary way. With appropriate safeguards, the proposed delegation power should be seen as enabling administrative agreement between two levels of government, and not an amendment to the amending formula.

Another response may be to argue that the proposed delegation power would not be included in Part V of the *Constitution Act, 1982*, and would not be, thereby, "an amendment to this Part". It may be significant that previous proposals, such as the Fulton-Favreau formula, suggested that the power be included as an exception to ss. 91 and 92 and be placed in either sections 93 or 94 of the 1867 Act. But, this does not directly address the concerns raised by Professor Brun.[48]

It is worth noting that, if Brun is correct, and temporary transfers of jurisdiction are included in the amending formula, not only would the delegation power be caught by unanimity, but so would the proposed spending power, the enabling provisions for agreements regarding culture and immigration, and possibly the new federal power to make laws for the efficient functioning of the economic union.

CONCLUSION

In the present political context the delegation power can achieve some of the aims of the Québec government, namely, devolution of responsibility from Parliament to the Québec National Assembly in a number

of key areas. Peter Meekison, for example, cites unemployment insurance as a subject matter ripe for transfer under a new delegation power.[49] Other likely candidates could be communications, marriage and divorce, or even the power of indirect taxation.

Will this kind of asymmetry be politically acceptable to a public already deeply suspicious about the substance of constitutional reform in so far as it meets Québec demands? At the Halifax constitutional conference on the division of powers, reaction to this proposal "was largely negative". Some called it "back door asymmetry". On the other hand, the conference delegates preferred that Québec's aspirations be met more directly through administrative, rather than legislative, delegation or a direct transfer of specific powers.[50]

Would the proposed delegation power satisfy the concerns of the government of Québec? Past proposals for legislative delegation made clear that legislative transfers were only available through specifically approved statutory schemes, revocable on the insistence of either party. And, concerns about the transfer of financial compensation related to the delegation remain unclear. This hardly qualifies as the type of "profound change" the Bélanger-Campeau report calls for;[51] it provides neither the stability or autonomy called for in the Allaire Report as guiding objectives in the new political and economic order.[52]

In the result, it may be that the proposed delegation power, arising long after the crisis which precipitated its consideration; after other forms of delegation have succeeded in achieving similar objectives; after an amending formula is in place which does not require unanimity for general redistribution of powers; and after demands from the province of Québec have outstripped any accommodations which may have been available under a federally-controlled delegation power, will be relegated to the backwater of constitutional amendments, available, when necessary, for administrative convenience but with little contemporary resonance.

But, it could also result in more effective and creative governance. The delegation power furthers the aim of federalism, providing "laboratories for different types of public policy"[53] which may be more responsive to the demands of differing political communities within Canada.

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1. See "Breaching the Barriers" *Maclean's* (6 January 1992) 54.
2. See Alan Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McLelland and Stewart, 1991)
3. See W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Can. Bar Rev. 408 at 417.
4. See Lord Watson in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367 quoted in Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) at 70.
5. *A.G. Can. v. A.G. Ont.*, [1937] A.C. 355.
6. *A.-G. B.C. v. A.-G. Can*, [1937] A.C. 377. See generally J.A. Corry, *Difficulties of Divided Jurisdiction* (A Study Prepared for the Royal Commission on Dominion-Provincial Relations) (Ottawa: King's Printer, 1939) at 11-20.
7. Donald Smiley, ed., *The Rowell-Sirois Report, Book 1* (Toronto: Macmillan, 1978) at 198.
8. [1950] 4 D.L.R. 369 (S.C.C.).
9. See *ibid.* at 377, per Taschereau J.
10. *Ibid.* at 381-82, per Taschereau J.
11. See, for example, Ballem, Case and Comment, (1954) 32 Can. Bar Rev. 788; Bourne, Case and Comment (1965) 34 Can. Bar Rev. 500.
12. Raphael Tuck, "Delegation — A Way Over the Constitutional Hurdle" (1945) 23 Can. Bar Rev. 79 at 89 (emphasis in original).
13. See *Proceedings of the Constitutional Conference of Federal and Provincial Governments* (January 10-12, 1950) (Ottawa: King's Printer, 1950) at 21 and 37, respectively. The provinces of Manitoba and New Brunswick also supported the proposal.
14. In Anne F. Bayefsky, *Canada's Constitution Act, 1982 & Amendments: A Documentary History*, Vol.I (Toronto: McGraw-Hill Ryerson, 1989) at 45.
15. See *Proceedings of the Constitutional Conference of the Federal and Provincial Governments* (Second Session, September 25-28, 1950) (Ottawa: King's Printer, 1950) at 36.
16. It was also proposed that it be included as s.93A. See Bayefsky, *supra*, note 14, Vol.I at 11.
17. See generally Eugene Forsey, "The Canadian Constitution and its Amendment" in *Freedom and Order* (Toronto: McLelland and Stewart, 1974) 227.
18. *Supra*, note 3 at 427.
19. *Ibid.*
20. *P.E.I Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.
21. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.
22. Gerard V. LaForest, "Delegation of Legislative Power in Canada" (1975) 21 Can Bar Rev. 131 at 147.
23. The McGuigan-Molgat Committee and the Canadian Bar Association both recommended only permission to delegate administrative, and not legislative, powers. See Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 1972, "Final Report" in Bayefsky, *supra*, note 14, Vol.1 at 260 and Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Ottawa: Canadian Bar Foundation, 1978) at 66-67.
24. The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply and Services, 1979) at 104.
25. The Constitutional Committee of the Québec Liberal Party, *A New Canadian Federation* (Montreal, Québec Liberal Party, 1980) at 71-72.
26. Royal Commission on the Economic Union and Development Prospects for Canada, *Report,* Vol.3 (Ottawa: Supply and Services, 1985) at 256-257.
27. Report of the Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada* (June 1991) at 29.
28. See, for example, "An Option if Meech Lake is Not Ratified" (ed), *The Globe and Mail* (27 April 1990) A6. The consensus as to the original intent behind the provision appears to be that it is not available for re-divisions of power under ss. 91 and 92. See J.

Peter Meekison, "The Amending Formula" (1982) 8 Queen's Law J. 99.
29. *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 303. But see E.A. Dreidger, "The Interaction of Federal and Provincial Laws" (1976) 54 Can. Bar Rev. 695 at 700-703.
30. As proposed by F.R. Scott, "Social Planning and Canadian Federalism" in M. Oliver, ed., *Social Purpose for Canada* (Toronto: University of Toronto Press, 1961) at 399.
31. *Canadian Federalism and Economic Integration* (Ottawa: Information Canada 1974) at 104.
32. *Supra*, note 15 at 37-38.
33. *Supra*, note 3 at 426.
34. For the same concerns in the spending power context see Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and the Spending Power" in K. Swinton and C. Rogerson, eds, *Competing Constitutional Visions* (Toronto: Carswell, 1991) at 190-192.
35. See LaForest, *supra*, note 22 at 146.
36. Hogg, *supra*, note 32 at 300. See also McDonald Commission at *supra*, note 29 at 257.
37. *Supra*, note 8 at 387.
38. *Supra*, note 27 at 104.
39. As the notice requirement may be constitutionalized, it may be distinguished from *Reference re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
40. See *Laskin's Canadian Constitutional Law*, 5th ed., Vol.1 (Toronto: Carswell, 1986) at 43.
41. Bayefsky, Vol.2, *supra*, note 14 at 812-813.
42. Canadian Bar Association, *Rebuilding a Canadian Consensus* (Ottawa: C.B.A., 1991) at 291.
43. Assembly of First Nations, *First Circle on the Constitution* (November 21, 1991) at 22.
44. See *R. v. Sparrow* (1990), 70 D.L.R. 385 (S.C.C.) at 408-409.
45. This idea is borrowed from Patricia A. Monture-OKanee,"Seeking My Reflection: A Comment on Constitutional Renovation" in D. Schneiderman, ed., *Conversations: Women and Constitutional Reform* (Edmonton: Centre for Constitutional Studies, 1992) at 30.
46. See Andrew Bear Robe, "First Nations and Aboriginal Rights" (1991) 2:2 Constit. Forum 46
47. Québec, Assemblée Nationale, Commission parlementaire spéciale, *Journal des débats* (10 Octobre 1991) CEOC-97.
48. There may be other reasons why a delegation amendment may trigger unanimity, for example, it could be argued the "office of the...Governor General and Lieutenant Governor of a province" is amended. But see Hogg, *supra*, note 32 at 292.
49. "Distribution of Functions and Jurisdictions: A Political Scientist's Analysis" in Ronald L. Watts and Douglas M. Brown, *Options for a New Canada* (Toronto: University of Toronto, 1991) at 279.
50. Atlantic Provinces Economic Council, "Renewal of Canada: Division of Powers Conference Report" (January 22, 1992) at 16.
51. Québec, *Report of the Commission on the Political and Constitutional Future of Québec* (March 1991) at 72.
52. Liberal Party of Québec, Report of the Constitutional Committee, *A Québec Free to Choose* (January 28, 1991) at 25.
53. See Katherine E. Swinton, speaking of the value of diversity in federal jurisdictions in *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 49.