

Re-examining the Law-Making Power in the Canadian Constitution:
A Case for a Non-Delegation Doctrine

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ABSTRACT

This thesis argues that there is a limited separation of powers in the Canadian Constitution between the executive and legislative branches. The fundamental nature of the *Constitution Act, 1867* which commits the law-making power to elected legislatures demands that those bodies be prohibited from delegating their primary legislative powers to the executive. Judicial tolerance of such delegation flows from the unexamined assumption that as with the British constitution, the pivotal principle of our Constitution is parliamentary supremacy. It is not. Furthermore, such tolerance is troublesome in view of the fact that in constitutional practice today, cabinet controls Parliament. Canadian courts have the tools to develop a non-delegation doctrine that would insist that only legislatures could enact new laws or change existing ones. Such a doctrine would uphold the Constitution and ensure that all primary legislation be subject to the democratic safeguards provided by the rules of parliamentary procedure.

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Abstract

The *Constitution Act, 1867* is Canada's basic constitutional document. It has always been and continues to be fundamental law in Canada. That document commits the law-making power to elected legislative bodies in this country, not to the executive. Little critical attention has been paid either by Canadian constitutional writers or the courts as to what limitation this might or should impose on the delegation of legislative power by those bodies. Greater attention has been given to the preamble to that Act, which declares that Canada is to have "a Constitution similar in principle to that of the United Kingdom". This has been taken as an affirmation that, as with the British constitution, the pivotal principle of our Constitution is the sovereignty of Parliament. Once this is accepted, it becomes axiomatic that there cannot be an enforceable separation of powers between any branch of government in Canada. Canadian courts do not, therefore, strike down statutes on the grounds that they delegate legislative power. There is no Canadian equivalent to the United States delegation doctrine that prohibits Congress or a state legislature from delegating legislative power.

The greatest obstacle to the development of a Canadian non-delegation doctrine is the courts' commitment to the belief that Canadian parliamentary supremacy is equivalent to British parliamentary sovereignty. It is not. While parliamentary supremacy is a cardinal principle of our Constitution, it does not trump all others. Any belief that it does stems from

a fundamentally inadequate interpretation of our Constitution. Furthermore, while it is true that there is no watertight compartmentalization of functions among the various branches of government in Canada, this does not mean that there is not a legislative function sacred to Parliament alone. There is. As far as a separation of executive and legislative powers is concerned, the various cases that draw a distinction between impermissible "abdication" and permissible delegation of legislative power are important. They strongly support the view that the formula set out in the *Constitution Act, 1867* for enacting law is more than simply a procedural requirement. It has substantive content.

The concepts of collective and individual ministerial responsibility have failed as a public accountability mechanism: in constitutional practice today, cabinet controls Parliament. The function of party organization, which has come to dominate the operation of our parliamentary system means, in legislative terms, that the delegation of primary legislative power amounts to cabinet deciding what power it wishes to delegate to itself or to a person or body of its own choosing. The delegate is then free to make important policy choices about how this country is to be governed outside the legislative process—behind closed doors free from parliamentary scrutiny.

It is argued in this thesis that the courts have not only the power but the constitutional imperative to remedy this constitutional imbalance by the development of a non-delegation doctrine. Such jurisprudence, should it be developed, would give parliamentary supremacy its proper significance. Parliament and not the executive would be sovereign. At the same time, it would ensure public accountability by forcing ministers to answer for policy and legislative choices in the public forum of elected legislatures.

That the courts have the authority to develop this doctrine is consistent with Canada's written Constitution and with constitutional theory that underlies current constitutional practice. That the courts have an obligation to develop this doctrine is demanded by the Constitution whose enforcement is not only legitimated but mandated by the rule of law.

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The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.

Mr. Justice Owen Dixon—*Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan*

Introduction

The defining feature of the English constitution is parliamentary supremacy.¹ This means that there is no power under the English constitution that can rival the legislative supremacy of the British Parliament.² This legislative supremacy means that each of the processes of government—executive, legislative and judicial—are not legally confined to a separate institution of government.³ Thus, in Britain the executive may, with the consent of Parliament, exercise unlimited legislative power. Canadian constitutional writers have, with the notable exception of Noel Lyon,⁴ taken the position that this is also true in Canada,

¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965) at 39-40.

² J.B.D. Mitchell, *Constitutional Law*, 2nd ed. (Edinburgh: W.Green & Son Ltd., 1968) at 64.

³ While it is true that the independence of the judiciary and its separate existence is strongly recognized in British constitutional law, ultimately, it is subject to the legislative will of Parliament. Clearly, however, any statute that purported to strip the courts of their power would precipitate a constitutional and political crisis.

⁴ N. Lyon, "The Central Fallacy of Canadian Constitutional Law" (1976) 22 McGill L.J. 40.

arguing that the *Constitution Act, 1867*⁵ does not call for a general separation of powers.⁶ Lyon maintains that such a view is the result of giving too much uncritical attention to the preamble to the 1867 Act, which states that Canada is to have "a Constitution similar in principle to that of the United Kingdom".⁷ Such a focus has led to the assumption that Canadian legislatures, subject to the division of powers in the Constitution,⁸ possess a supremacy equal to that of the United Kingdom Parliament.⁹ Lyon's position is that while legislative supremacy is a central principle of Canadian constitutional law it is not the central principle as is the case in England.¹⁰ Not enough attention has been paid to the fact that the

⁵ (U.K.), 30 & 31 Vict., c. 3. Formerly entitled the *British North America Act*. This title shall be used when referring to the Act in an historical context.

⁶ See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 184-185. See also R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, vol.1, 2nd ed., trans. M. Rankin (Toronto: Carswell, 1985) at 6 and J.M. Keyes, *Executive Legislation* (Toronto: Butterworths, 1992) at 35-44. It is interesting to note that Dickson, J., in *Re Residential Tenancies Act, 1979* (1981), 123 D.L.R. (3d) 554 at 566, [1981] 1 S.C.R. 714 cited Hogg for the proposition that there is no general separation of powers in Canada. But compare Dickson J.'s judgment in *Re Fraser*, *infra* note 194 where he appears to have changed his mind. However, in spite of that judgment the Federal Court of Appeal in *Vanguard Coatings and Chemicals Ltd. v. Canada*, [1988] 3 F.C. 560 (C.A.) rejected the view that there is a separation of powers between the executive and legislative branches in our Constitution. Compare J.E. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, vol.1, 4th ed. (Cowansville: Yvon Blais, 1989) at 88 where it is suggested that there is in Canada an underdeveloped separation of powers doctrine between the executive and legislative branches of government. Magnet suggests that such a doctrine may be ripe for development in view of recent decisions of the Supreme Court of Canada where that Court has made particular reference to a general separation of powers doctrine. These decisions are dealt with later in this thesis. Compare also W. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769 (Part I), 1139 (Part II) where it is argued that there is a separation of powers between the judiciary and the two political branches in that the power of judicial review exercised by Canadian superior courts is constitutionally guaranteed.

⁷ Lyon, *supra* note 4 at 43.

⁸ Since 1982, they are also subject to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁹ Lyon, *supra* note 4 at 43-44.

¹⁰ *Ibid.* at 44. It should also be noted that Eliot, *infra* note 83, in discussing manner and form provisions points out at 235 that the doctrine of parliamentary supremacy "simply does not apply in countries with entrenched constitutions".

entire Constitution is part of the law of Canada, not just sections 91 and 92.¹¹ The common assumption among lawyers seems to be that expressed by Peter Hogg:

The Constitution Act, 1867 for the most part limited legislative power only to the extent necessary to give effect to the federal principle. Any power withheld from the federal Parliament was possessed by the provincial Legislatures, and vice versa. If there was room for doubt on this point, the Privy Council scotched it by repeatedly enunciating the principle of exhaustive distribution of legislative powers: "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the *British North America Act*". The federal Parliament and provincial Legislatures, provided they stayed within the limits imposed by the scheme of federalism, received powers as "plenary and ample" as those of the United Kingdom Parliament.¹²

Beyond sections 91 and 92 and the cases interpreting them, it would appear that "Canadian constitutional law coincides with English constitutional law".¹³

In Canada, as in England, the power of the state emanates from the Crown and government operates in the name of the Crown.¹⁴ The Honourable Stephen Sedley observes

¹¹ Lyon, *ibid.* Section 91 of the *Constitution Act, 1867* authorizes Parliament to legislate for the "peace, order and good government" of Canada in matters not assigned to the provinces. Section 92 assigns to the provinces a list of specific matters in respect of which they may legislate.

¹² Hogg, *supra* note 6 at 303-304.

¹³ Lyon, *supra* note 4 at 44. In this regard it is interesting to note that Dicey, *supra* note 1 at 166 stated unequivocally that in spite of the preamble to the *British North America Act*, the Canadian Constitution was essentially modelled on the constitution of the United States. According to Eliot, *infra* note 83 at 236, this meant that "it was equally incorrect to speak of parliamentary sovereignty to be a governing principle of Canada's Constitution".

¹⁴ Mitchell, *supra* note 2 at 167. See J.E. Hodgetts, "Parliament and the Powers of the Cabinet" (1945) 52 *Public Affairs* 466-467 where the author points out that the legal authority of cabinet, i.e. its right to act, emanates from the Crown rather than the legislature. The power of cabinet to exercise that legal authority, on the other hand, comes from the legislature.

that from a constitutional viewpoint this is unproblematic.¹⁵ What is important according to Sedley is not what one calls the state but rather that no one branch of government should exercise the principal functions of that state.¹⁶ This is why it is recognized in Britain that "the Queen in Parliament is, and therefore ought to be, a different legal entity from the Queen as the source of justice and neither is . . . same entity as the executive departments headed by the Queen's ministers."¹⁷ Our Constitution recognizes these same entities. The Diceyan tradition nonetheless insists that the separation is subordinate to the supremacy of Parliament.¹⁸ However, unlike our Constitution, the British constitution is not fundamental; it is descriptive only. It explains how the United Kingdom has come to be governed.¹⁹ In doing so, it not only legitimates the constitutional arrangements it describes but also confers transience on those arrangements. In the absence of a "higher law", British courts, at least prior to Britain's entry into the European Economic Union,²⁰ accepted unquestioningly the

¹⁵ The Hon. Stephen Sedley, in "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 L.Q. Rev. 270 at 270.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 270-271.

¹⁸ *Ibid.* at 271.

¹⁹ *Ibid.* at 270.

²⁰ Section 2 of the *European Communities Act* (U.K.), 1972, c. 68 enacted that both past and future Acts of the British Parliament would be subject to European Community law. The Act was buttressed by the Treaty of Rome by which Britain entered the European Economic Community. *Factortame Ltd. v. Secretary of State for Transport (No. 2)*, [1991] 1 All E.R. 70 (H.L.) [hereinafter *Factortame*] involved a clash between the *Merchant Shipping Act 1988* (U.K.), 1988, c. 12 and Community law. Pending a final ruling by the European Court, the House of Lords took steps to restrain the Secretary of State from obeying the *Merchant Shipping Act*. There was no express statutory provision that the Act should override Community law. Faced with such a provision it is difficult to know what British courts would do given that the House of Lords in *Factortame* clearly ignored the rule of implied repeal, i.e. that a later statute always abrogates an earlier one, a doctrine developed by the courts to preserve the supremacy of the existing legislature.

supremacy of Parliament. In turn, this led to judicial confirmation that there could be no separation of powers between the executive and Parliament.²¹ It is submitted in this thesis that such a position is questionable in Canada both historically and jurisprudentially, that there is, in fact, a limited separation of executive and legislative powers in this country and that the separation should be judicially enforced.

I. The Canadian Constitution, the Courts and the Law-Making Power : An Overview

(A) The Fundamental Nature of the Canadian Constitution

Canada's constitutional law is grounded in a written constitution that, while setting out the basics of how our country is to be governed, is and has always been, supreme over other law in Canada.²² The Constitution of Canada²³ not only legitimates our constitutional

²¹ *Contra* The Hon. Stephen Sedley, *supra* note 15 argues that the common law is the primary crucible of modern constitutional law and that it has the capacity to move to a principled constitutional order.

²² In *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 807, 125 D.L.R. (3d) 1, the Supreme Court of Canada observed that "the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it". This was so by virtue of the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63 [hereinafter *Colonial Laws Validity Act*]. It provided that any colonial law that was repugnant to any Act of the British Parliament extending to the colony where the colonial law was enacted, was void and of no effect. The *Statute of Westminster 1931*, *infra* note 26 ensured that this Act would continue to apply to the *British North America Act*. The *Canada Act 1982* (U.K.), 1982, c. 11, repealed the 1931 Act in so far as it applied to Canada. The Constitution of Canada is now supreme by virtue of section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*. That section states:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

²³ Section 52(2) of the *Constitution Act, 1982* defines the "Constitution of Canada" as follows:

52.(2) The Constitution of Canada includes
 (a) the *Canada Act 1982*, including this Act;
 (b) the Acts and orders referred to in the schedule; and

arrangements but raises them to a height unknown in Britain.²⁴ If, up until 1982, the entrenchment of the *British North America Act* was seen less as "constitutionalizing" our arrangements than first as a recognition of British parliamentary supremacy²⁵ and then as a recognition of an inability to find an amending formula acceptable to all provinces,²⁶ thus somehow justifying an English law approach to the delegation of legislative to the executive, this is no longer the case. The 1982 repeal of the *Statute of Westminster* and the inclusion of section 52 in the *Constitution Act, 1982* make clear that every provision of the Constitution is supreme simply by virtue of being part of the Constitution.

In a sense what happened in Canada in 1982 can be seen as a "silent revolution" in that, legally, the seat of sovereignty was transferred from Westminster to Ottawa and the various provincial capitals. What Wade refers to as "the ultimate legal principle",²⁷ i.e. a

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

²⁴ See *Gallant v. R.*, [1949] 2 D.L.R. 425 (P.E.I.S.C.) [hereinafter *Gallant*] where the Supreme Court of Prince Edward Island declared an Act invalid where the Lieutenant Governor assented to that Act several months after his predecessor had withheld assent. In spite of the fact that the Act on its face showed the requisite consent of the Crown and the legislature, the Court held that the actions of the Lieutenant Governor contravened sections 55 and 90, *infra* note 289 of the *British North America Act*. This is contrary to the position taken by British courts who respect the "enrolled bill" rule and will not, where there is no error on the face of an Act, look behind it and examine the legislative process leading up to its enactment. This position was most recently reaffirmed in *Picken v. British Railways Board*, [1974] A.C. 765 (H.L.) [hereinafter *Picken*].

²⁵ B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. (Toronto: Butterworths, 1988) at 42.

²⁶ Subsection 2(1) of the *Statute of Westminster 1931*, (U.K.), 22 & 23 Geo. 5, c. 4 [hereinafter *Statute of Westminster*] repealed the *Colonial Laws Validity Act* and subsection 2(2) gave to each dominion the power to amend or repeal any imperial statute that was part of the law of that dominion. However, subsection 7(1) expressly excluded the *British North America Act* from the effect of section 2. This was done at Canada's request. The provinces wanted to ensure that the division of powers in the Constitution could not be unilaterally altered by the federal Parliament. There was no amending formula in the *British North America Act* and there was no consensus in Canada in 1931 as to what the formula should be. See H. Clokie, "Basic Problems in the Canadian Constitution" (1942) 20 Can. Bar Rev. 395 at 427.

²⁷ H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Cambridge Law Journal 172 at 189.

political fact for which no purely legal explanation can be given, appears to have changed in Canada. It is true, of course, that 1931 represented a new political fact for Canada. That Canada was, in general, freed from the prohibition of the *Colonial Laws Validity Act* and could by virtue of section 3 of the *Statute of Westminster* legislate extra-territorially meant that she had effectively cut the British umbilical cord. However, the fact that amendments to the *British North America Act* could be legally effected only by the British Parliament demonstrated that a domestic amending formula had yet to await the evolution of fundamental political events in Canada. The *Canada Act 1982* enacted those events. In the face of a repeal of that Act by the British Parliament (something that is inconceivable), British courts would, at least according to orthodox theory, be obliged to recognize its validity; undoubtedly Canadian courts, recognizing those fundamental events, would not do so. Thus, it would appear that the philosophical basis underlying the fundamental nature of our entire Constitution has changed. Its superiority over other rules of law flows not from its being enacted by the British Parliament but from the fact that it is a constitution, which, it may be argued,²⁸ is by its very nature meant to limit the powers of the institutions it has created. Now as perhaps never before it is clear that it is constitutional rather than legislative supremacy that is the defining feature of our constitutional arrangements.²⁹

²⁸ See K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) at 56-57. In this regard compare the *dictum* of Mr. Justice Pigeon speaking for himself and four other members of the Supreme Court of Canada in *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257 respecting the non-binding nature of sections 53 and 54 of the *Constitution Act, 1867*, and the decision of the Supreme Court of Canada in *Reference Re Language Rights in Manitoba*, *infra* note 44 where the Court takes an opposite view of manner and form provisions in the Constitution.

²⁹ In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 at 604 Madame Justice Wilson stated that section 52 of the *Constitution Act, 1982* is animated by the doctrine of constitutional supremacy. This seems to have been recognized by the Supreme Court of Canada in determining that "fundamental justice" in section 7 of the *Charter* not only pertains to procedure but has a substantive

In view of the events of 1982 it is no longer appropriate, if indeed it ever was, for the courts to treat the law-making power in the Constitution as little more than a manner and form provision that, if complied with, legitimates the delegation of power to the executive³⁰ to enact new laws or change existing laws. Such an approach is consistent with the doctrine of parliamentary, not constitutional, supremacy. It is not only appropriate, but essential, for the courts to question what point there is in providing in the *Constitution Act, 1867* that it shall be lawful for the Queen in Parliament to make laws "if it turns out to be lawful for the Queen in Council", or any other part of the executive, "to do the same thing without a similar constitutional grant of power".³¹ When Canadian courts place virtually no limits on Parliament's³² power to delegate its legislative power because "the demands of *realpolitik* are louder and more insistent than those of constitutional principle",³³ this amounts to a failure to uphold our Constitution.

element. See *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 69 B.C.L.R. 145. The Court came to this conclusion even though it acknowledged that the government never intended those words to cover anything but the procedural requirements of fairness. See Canada, *Minutes of Proceedings and Evidence*, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (Ottawa: Queen's Printer, Jan. 27, 1981) at 46:32.

³⁰ In this thesis, the term "executive" refers to the executive branch of government. This includes both the political arm of the executive, i.e. the cabinet, which by law is the Queen, Governor or Lieutenant Governor "in Council", ministers of the Crown and the various government departments and ministries, as well as the non-political arm of the executive, i.e. administrative bodies and agencies whether or not they are accountable to the political executive.

³¹ Lyon, *supra* note 4 at 49.

³² Whenever the term "Parliament" is used by itself in this thesis it refers both to Parliament and provincial legislatures.

³³ Sedley, *supra* note 15 at 275.

In England, the rule of law that has been held to be a cardinal principle of our Constitution³⁴ recognizes two sovereignties. Those sovereignties are the sovereignty of Parliament and the sovereignty of the courts, as was recently pointed by Lord Bridge of Harwich:

The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.³⁵

The executive, then, is not one of the sovereign and equal elements of the state. If this is true in England, it is certainly true in Canada, not only by virtue of the preamble to the *Constitution Act, 1867* but by the very structure of that document. No part of the executive has the power to make primary law under that Act. Under sections 91 and 92, such power is reserved to Parliament and the provincial legislatures. In this regard Lord Diplock's comments in *Hinds v. R.*³⁶ about written constitutions, established by a United Kingdom statute or order in council is particularly illuminating. He describes such constitutions as "drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the

³⁴ See *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, where the Supreme Court of Canada relied upon the doctrine to insist that no official may act except as authorized by law. See also *Re Resolution to Amend the Constitution*, *supra* note 22, *Reference Re Language Rights in Manitoba*, *infra* note 44. The rule of law is now expressly recognized in the preamble to the *Constitution Act, 1982*.

³⁵ *X v. Morgan-Grampion Ltd.*, [1991] A.C. 1 (H.L.) at 48 quoted in Sedley, *supra* note 15 at 289.

³⁶ (1977), A.C. 195. In this case the Privy Council had to determine whether the Jamaican Constitution guaranteed a core of power exclusive to the Judiciary in spite of the fact that this was not expressly stated in the Constitution. The Privy Council held that it did and cited *Liyanage v. R.*, *infra* note 70 in support of its decision.

unwritten constitution of the United Kingdom".³⁷ Furthermore, after noting the evolutionary nature of the new constitutions that were provided to British colonies, he states:

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a government structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government....[I]t is well established ... that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.³⁸

(B) Executive Accountability, Legislative Supremacy and the Role of the Courts

When the courts in Canada allow elected legislatures to delegate their original law-making power to the executive, they are, in essence, saying that the law-making sections of the Constitution are nothing more than manner and form provisions. Such an approach ignores the Constitution. Furthermore, it is troublesome in view of the weaknesses of the concepts of collective and individual ministerial responsibility. The convention that requires a cabinet to resign or call for an election when it loses the confidence of the legislature is all but dead.³⁹ Theoretically the legislature can break the cabinet, but the operation of strict

³⁷ *Ibid.* at 212.

³⁸ *Ibid.*

³⁹ B. Chapman, *British Government Observed* (London: George Allan and Unwin, 1963) at 38 has, in commenting on ministerial accountability, observed that "[t]he ridiculous point about this doctrine, which is one of the central features of British constitutional law, is that no one believes in it". In the *Final Report of the Royal Commission on Financial Management and Accountability* (Ottawa: Minister of Supply and Services, 1979) (Chair: A.T. Lambert), concern was expressed about the state of responsible government in Canada. The Commission was of the view that the time had come to replace the formalism of ministerial responsibility. In essence, it recommended a system that would have taken executive processes out of Cabinet and imbedded them in Parliament, by which the Commission meant a non-partisan House of Commons.

party discipline and the fact that it is the Government that determines whether an adverse vote on a particular matter is a vote of no confidence means that a cabinet that holds a party majority in the legislature has little to fear. The occasions in Canada when a legislature has overturned a cabinet are not numerous.⁴⁰ Furthermore, the convention that a minister is required to resign if a serious administrative error committed by his department is publicly exposed is essentially a myth.⁴¹ Such resignations rarely happen in Canada.⁴² Any concerns that British courts might have with this democratic deficit would be difficult to address in view of the non-fundamental nature of the British constitution. It would be revolutionary for a British court, in the face of the failure of ministerial accountability to work in conventional ways, to act as an alternative accountability mechanism. This need not and should not be the case in Canada.

It is submitted that Canadian courts have the tools with which to address this issue and should use them. Judicial review is in essence a developing accountability mechanism that operates with respect to executive action. The courts uphold the law by ensuring that the executive does not act outside the powers granted to it by statute. They do not rely upon constitutional theory to ensure that the law is obeyed by the executive and the rule of law

⁴⁰ A. Heard in *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 69 points out that the defeat of the Clark government in 1979 was only the fifth time since Confederation that a federal cabinet had resigned or called an election as a result of losing a vote of no confidence.

⁴¹ However, closely tied to the convention of individual ministerial responsibility is the idea that ministers are always answerable to Parliament in that they are expected to explain and defend their actions and those of their departments before Parliament. This aspect of ministerial responsibility is very much alive as is evidenced by the importance of question period. It is this public accountability aspect of ministerial responsibility which it will be argued in this thesis would be an important reason underlying the development of a Canadian non-delegation doctrine.

⁴² Heard, *supra* note 40 at 54-55.

upheld. It seems somewhat ironic, however, that those same courts are prepared to employ that theory to uphold one of the very foundations of the rule of law—the principle of parliamentary supremacy. Relying on the theory of responsible government⁴³ to do this, given its practical evolution since 1867, is to use the theory against the very principle it was supposed to uphold.

The fact of the matter is that responsible government is a fiction. It has failed as a parliamentary mechanism to control cabinet. This has resulted in the executive exercising primary law-making power that by the Constitution is vested in Parliament. As guardians of the Constitution and upholders of the rule of law, the courts have a responsibility to correct this situation. The cases in which the courts have drawn a distinction between delegation and abdication provide the authority needed to revisit the question of just where the line needs to be drawn in prohibiting the delegation of legislative power. Refining and constitutionally rationalizing what seems in those cases to be a rather crude, instinctual separation of powers doctrine would result in protecting parliamentary supremacy rather than contradicting it. While this may seem paradoxical, it is sometimes necessary to depart from a principle if its aims are to be achieved. Indeed the principle of the inability of Parliament to bind its

⁴³ While the essential feature of responsible government is an intermingling of executive and legislative authority, nevertheless, its theory demands the ultimate subordination of cabinet to the legislature. In this thesis, this term is used as a synonym for both collective and individual ministerial responsibility. However, it is not meant to include the "political accountability" aspect of individual ministerial responsibility referred to at note 41.

successors⁴⁴ appears both as an example of the omnipotence of Parliament and a limitation upon the extent of that power.

It is submitted that in order to protect parliamentary supremacy the courts are obliged to develop principles on which Parliament and the provincial legislatures are to be prohibited from delegating primary legislative power. When those bodies are allowed to delegate such power to the executive in respect of a particular subject matter, it is, in essence, cabinet that is being allowed to delegate to itself or to a delegate of its choosing the power to lay down whatever policy it or the delegate wishes in respect of the subject matter, behind closed doors, free from parliamentary, and therefore public, view. While within the law policy decisions are "undoubtedly the fiefdom of ministers and departments",⁴⁵ where those decisions will have an important impact on the daily lives of citizens, they should only be able to be taken pursuant to a policy choice that has been channelled through Parliament and thus subject to the democratic safeguards of parliamentary procedure. Indeed, the fact that the Crown, in whose name the core functions of the state are carried on, has been held by

⁴⁴ See *Vauxhall Estates. v. Liverpool Corporation*, [1932] 1 K.B. 733, 746 (Div.Ct.), *Ellen Street Estates v. Minister of Health*, [1934] 1 K.B. 590, 597 (C.A.) But see *Factortame*, *supra* note 20 where the United Kingdom Parliament of 1972 evidently succeeded in binding its successors because of the necessity of honouring the Treaty of Rome by which Britain entered the European Economic Community. H.W.R. Wade in "What Has Happened to the Sovereignty of Parliament?" (1991) 107 L.Q. Rev. 1 at 4 observes that "[t]he House of Lords said not a word about this constitutional revolution". In spite of this case, however, there has been no general judicial trend in Britain to uphold the idea that the Parliament of today can in any way bind the Parliament of tomorrow. In Canada, the decision of the Supreme Court in *Reference Re Language Rights in Manitoba*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 established that manner and form provisions imposed by the Constitution are binding. Its decision in *R. v. Mercure*, [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1 established that legislatures are also bound by manner and form provisions in ordinary statutes where those provisions are mandatory rather than directory. Its decision in *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 would appear to limit the binding effect of such provisions to form but not substance.

⁴⁵ Sedley, *supra* note 15 at 284.

the Supreme Court of Canada in *Reference Re Anti-Inflation Act*,⁴⁶ to be prohibited from using the royal prerogative to legislate⁴⁷, would appear to lend support to this view. In 1976 Chief Justice Laskin speaking for the majority in that case stated that "[t]here is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of the Legislature".⁴⁸

In view of the immense power that the executive branch of government has come to exercise in Canada, it is unfortunate that the Supreme Court of Canada has generally been deferential to exercises of delegated legislation by cabinet. In *Thorne's Hardware v. R.*,⁴⁹ for example, it reaffirmed the very narrow authority of courts to review exercises of the subordinate legislative power by the Governor in Council.⁵⁰ This judicial position coupled with what is only a notional ability of Parliament to call the government to account allows

⁴⁶ [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

⁴⁷ By origin, prerogative powers were powers that of necessity inhered in British monarchs as the governors of the realm. They can be traced to a time when the Sovereign combined in himself all legislative, executive and judicial functions. The Revolution of 1688, which was in essence the culmination of the seventeenth century struggle between government by prerogative and government by Parliament, established the supremacy of Parliament. Henceforth, whatever powers were exercised by the Crown without express legislative authorization were exercised by the grace of Parliament.

⁴⁸ *Reference Re Anti-Inflation Act*, *supra* note 46 at 433. Compare what was said by Lord Fraser in *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 W.L.R. 1174 (H.L.). This case involved an order in council made under the prerogative that took away from civil service employees the right to belong to a trade union. Lord Fraser, at 1185, described the order in council as "primary legislation". This statement must surely be read narrowly in view of the fact that early British case law established that the royal prerogative could not be used to alter the law of the land. See *Case of the Proclamations* (1610), 12 Co. Rep. 74.

⁴⁹ [1983] 2 S.C.R. 106, 143 D.L.R. (3d) 577.

⁵⁰ For a general discussion of the degree of judicial deference to the decisions of the executive, especially cabinet, see D. Mullan, "Judicial Deference to Executive Decision-Making: Evolving Concepts of Responsibility" (1993) 19 *Queens Law Journal* 137.

the executive power both to formulate and enact policy and to become, *de facto*, a sovereign power in Canada. This, it is submitted, is not consonant with the structural demands of the entrenched *Constitution Act, 1867*, which envisages elected legislatures rather than elected cabinets making primary law in this country. To that extent at least, there is a separation of powers in our Constitution between the legislative and executive branches that should be upheld by the courts.

The judicial development of a non-delegation doctrine that would prohibit Parliament from delegating primary legislative power would mean that the courts could no longer uphold statutes that are broad subjectively worded grants of power, since "open-ended discretion to choose ends is the essence of legislative power".⁵¹ Cabinet would have to make its fundamental political choices—its value choices—about how it wants its jurisdiction to be governed, via the legislative process. Simply addressing difficult problems by vague legislative proposals without any resolution of the values and interests that confront the cabinet and at least some indication as to how they should be resolved would not constitute making fundamental choices about how the country is to be governed.⁵² Such legislation would amount to the cabinet delegating that power to itself or some other part of the executive, thus allowing fundamental political issues to be decided without the benefit of legislative scrutiny and deliberation. Furthermore, a non-delegation doctrine would allow the courts to ensure that the executive is constrained from using any powers validly delegated to it in such a way as to undercut or change the basic general intent fostered by the fundamental

⁵¹ L.H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola: Foundation Press, 1988) at 363.

⁵² A. Aman & W. Mayton, *Administrative Law* (St. Paul: West Publishing Co., 1993) at 10-11 and 17.

policy choices set out in the delegating statute.⁵³ The rationale of deferring to exercises of executive discretion simply because policy issues are involved would not be appropriate in the face of a non-delegation doctrine.⁵⁴ The value choices made by the executive would be statutorily constrained choices in the sense that those policy preferences would have to further or at least not be incompatible with the general legislative intent and objects of the legislation as sanctioned by Parliament.⁵⁵ At the end of the day, a Canadian non-delegation doctrine would ensure that the executive is subject to a degree of parliamentary and therefore public accountability that is absent when primary legislative power is exercised by way of the regulatory process.

There are some who would undoubtedly take the position that the development of a non-delegation doctrine would lead to "an incursion of law into politics."⁵⁶ However, "the governance of the state is a prime concern of the rule of law: government beyond law is tyranny".⁵⁷ The formula prescribed in the *Constitution Act, 1867* for enacting law is not merely a procedural requirement. It has substantive content and the courts are not only entitled to but must insist on government under the rule of law. The fact that the courts have

⁵³ A. Aman, in "Administrative Law In a Global Era: Progress, Deregulatory Change and the Rise of the Administrative Presidency" (1989) 73 *Cornell Law Review* 1101 at 1171-1173, points that in the United States major shifts in agency law or policy that appear to be at odds with an agency's enabling legislation can raise constitutional problems. See Lowi, *infra* note 309 for a critique of broad delegations of powers to agencies that allow such shifts to occur.

⁵⁴ Aman, *ibid.* at 1230 argues that courts in the United States can and should determine whether congressional value choices are being implemented in a principled manner by the delegate involved.

⁵⁵ *Ibid.* at 1231. Aman states that the courts should not defer to Presidential policy preferences unless they further the value choices made by Congress.

⁵⁶ Sedley, *supra* note 15 at 284.

⁵⁷ *Ibid.*

felt free to inject the power to delegate law-making into sections 91 and 92 of that Act as an attribute of or as part of the content of the legislative power conferred by those sections makes sense. If a legislature could not delegate part of its legislative functions, effective government would be cumbersome if not impossible. However, that does not mean that the courts should totally acquiesce to the demands of *realpolitik* over constitutional principle. Judicial failure to address the issue of the delegation of original law-making power from a principled position "cedes to government territory which is properly that of the law".⁵⁸

While it is true that each branch of government is not prohibited from exercising powers other than its own, it is submitted that the *Constitution Act, 1867* does establish that there is a power proper to each branch that may be exercised only by that branch. This elemental doctrine of the separation of powers between the executive and legislature takes on life in the delegation/abdication distinction drawn by the courts in the cases discussed below.⁵⁹ Furthermore, there is no contradiction inherent in the simultaneous operation of this doctrine and the principle of parliamentary supremacy unless one assumes that legislative supremacy in Canada is equivalent to British legislative supremacy. It is not. Moreover, any doctrinaire insistence that responsible government is incompatible with a separation of executive and legislative powers would certainly appear questionable in view of the comments of Madame Justice Wilson in *Operation Dismantle Inc. v. R.* [hereinafter

⁵⁸ *Ibid.*

⁵⁹ See text, *infra* at pp. 45-58.

Operation Dismantle cited to S.C.R.]⁶⁰ clarifying the ambit of section 7 of the Charter and its relationship with section 1. That section, in her words:

...is the uniquely Canadian mechanism through which the Courts are to determine the justiciability of particular issues that come before it.... It embodies through its reference to a free and democratic society the essential features of our constitution including the *separation of powers, responsible government and the rule of law*.⁶¹ [emphasis added]

Adopting a fundamental law approach, rather than a sovereignty approach in interpreting our Constitution does not mean that Canadian legislative bodies are not supreme; they are supreme in that the *Constitution Act, 1867* gives those bodies a monopoly of the law-making power. What that supremacy does not mean, however, is that those bodies can make any law whatsoever. The exercise of law-making power is circumscribed by the terms of the 1867 Act, which confers original law-making power upon Parliament and the provincial legislatures and no others.

The major obstacle to the development of a non-delegation doctrine in Canada is the belief that Canadian parliamentary supremacy coincides with British parliamentary supremacy. So long as this view is dominant, the development of a delegation doctrine in Canada will remain stifled. However, there is evidence to suggest that the courts are beginning to come to terms with the notion that a separation of powers is meaningful in the Canadian context, so that it is not merely a principle to be respected in the abstract but a constitutional principle to be enforced. Moreover, this evidence suggests that the courts are beginning to acknowledge and come to terms with their role in ensuring public authority

⁶⁰ [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

⁶¹ *Ibid.* at 491.

accountability. It is open to them to go that step further and embrace a non-delegation doctrine. However, before that point is argued, it is necessary to examine the spell-binding role played by parliamentary supremacy in the Canadian juridical context. That role finds its justification in history, practice and, it is submitted, a fundamentally inadequate interpretation of the *Constitution Act, 1867*.

II. The Historical Foundations of Canadian Parliamentary Supremacy

(A) The Dominant View of the Nature of Canadian Parliamentary Supremacy

If there has been a dominant theme in Canadian constitutional law, it is that far too little attention has been paid to the written character of the *Constitution Act, 1867* and too much to the preamble to the Act—a preamble that has been assumed to bestow on Canadian legislatures the English version of parliamentary supremacy.⁶² Such a focus has resulted in the courts adopting an English law approach when interpreting the law of the Constitution rather than interpreting that law as found in the 1867 Act.⁶³ This approach and its implications for the law-making power in the Constitution are highlighted in the Supreme Court of Canada's decision in *Reference Re Criminal Law Amendment Act, 1968-69* [hereinafter *Breathalyser Reference* cited to S.C.R.]⁶⁴.

In the *Breathalyser Reference* the Court was asked to determine whether the Governor in Council had acted with authority in proclaiming some, but not all, of the provisions of an

⁶² Lyon, *supra* note 4 at 40, 43.

⁶³ *Ibid.* at 42.

⁶⁴ [1970] S.C.R. 777, 10 D.L.R. (3rd) 699.

amendment to the *Criminal Code*⁶⁵. Although the Court divided five to four on the issue, all nine judges dealt with the issue by asking whether Parliament had intended to authorize staggered or selective proclamation of the various packages in the Act. Their answer focused on the interpretation of the true meaning of the word "provision" as used in the challenged section. Lyon maintains that this approach was more appropriate to an English court involved in an exercise of statutory interpretation than a Canadian court involved in constitutional adjudication.⁶⁶ The preliminary question that should have been asked by the Court, says Lyon, was whether the *British North America Act* imposed any limit on Parliament's power to delegate to the federal Cabinet.⁶⁷ For Lyon, the failure to ask that question flowed from the "unexamined assumption that Canadian legislatures enjoy a supremacy of the same quality as that of the Parliament of the United Kingdom".⁶⁸ Had the Court posed such a question, it might have been forced to conclude, as does Lyon, that if Parliament is permitted to delegate power to enact new laws or alter existing laws, then it has been allowed to pass on to another body the power to "make laws" within the meaning of section 91.⁶⁹ Such an interpretation reduces section 91 to a manner and form provision, and robs it of any substantive content.

⁶⁵ S.C. 1953-54, c. 51.

⁶⁶ Lyon, *supra* note 4 at 42.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 43.

⁶⁹ *Ibid.* at 49.

There is little doubt that Lyon, in supporting a general separation of powers doctrine,⁷⁰ is a lone voice among constitutional scholars. This is understandable given the evangelical belief that Canadian parliamentary supremacy is the same as British parliamentary supremacy and must therefore be the defining feature of our Constitution. It was probably difficult for early writers commenting on the *British North America Act* to believe that the Fathers of Confederation could have contemplated what would have been seen as a radical departure from the British constitutional model, especially in view of the preamble to the Constitution. Indeed, Lefroy⁷¹ states that it is that preamble that clearly imports the concept of British parliamentary supremacy into our Constitution.⁷² In support of his position he invokes Dicey's *Law of the Constitution* that the sovereignty of Parliament is the dominant characteristic of English political institutions.⁷³ While Lefroy admits that both Canadian legislatures and legislatures in the United States are restricted by their respective constitutions, nevertheless, the former have more unfettered legislative powers than the latter. In America a legislature is a legislature, and nothing else. Unlike the British Parliament, it cannot command or extinguish and swallow up the executive and the judiciary,

⁷⁰ Lyon argues that there is a separation of powers between these two branches of government and the judiciary. For this proposition he cites *Liyanage v. R.*, [1967] 1 A.C. 259 (P.C.) [hereinafter *Liyanage*] where the Privy Council read into the Judicature provisions of Ceylon's written constitution—provisions similar to the Judicature provisions our Constitution—a central core of activity immune from legislative or executive interference. Lyon concludes that because Lord Pearce implied that this was the necessary corollary of a written constitution and not just an exception to the rule of judicial deference to the legislative branch, all of the *Constitution Act, 1867* is judicially enforceable.

⁷¹ A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897-1898).

⁷² *Ibid.* at 247.

⁷³ *Ibid.* at 247-248.

appropriating to itself their functions. The same instrument that creates that legislature also creates the executive and the judiciary. For this reason, unlike a Canadian legislature, its legislative power is fettered to the extent that it cannot be delegated. Thus, while United States legislatures are restricted in their power to legislate as set out in their constitutions, Canadian legislatures are not similarly restricted.⁷⁴

(B) The Limited Nature of Canadian Parliamentary Supremacy

Just why the preamble to our Constitution must mean that Canadian parliamentary supremacy is of the same quality as that of Britain is never really explained by Lefroy. Chief Justice Lamer of the Supreme Court of Canada has pointed out in the recent decision of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)*⁷⁵ that "...[w]hile the Constitution of Canada is undoubtedly founded upon many of the same broad principles as is the Constitution of the United Kingdom, the two are far from identical. 'Similar in principle' does not mean identical in the powers it grants".⁷⁶ A case can be made that our Constitution as adopted in 1867 did not enshrine the doctrine of parliamentary supremacy as that term was understood in England. While it is true that where the common law has gone the theory of the supremacy of the law has necessarily also gone, this is not true of the theory of parliamentary supremacy. The common law, being English law, did not recognize the sovereignty of a legislature as an abstract idea, as a quality belonging to a

⁷⁴ *Ibid.* at 249-250.

⁷⁵ *Infra* note 317.

⁷⁶ *Ibid.* at 232.

legislature inherently. Supremacy over the law was conceived by the common law as an authority of the Parliament at Westminster.⁷⁷

The *British North America Act*, a statute of the British Parliament, was enacted in the exercise of its legal supremacy over the law in Britain's colonies. The legislatures set up by that statute were not at common law supreme over the law. Their powers were limited by that law. The common law acknowledged only one sovereign legislature—the Parliament at Westminster.⁷⁸ Subject to this sovereign power, the rule of law was supreme in Canada. This is, of course, why Canadian courts examined the validity of the enactments of both federal and provincial legislatures—to ensure that they did not go beyond the limits of the 1867 Act.⁷⁹ The rule of law demanded that the courts disregard as unauthorized and void the actions of any branch of government that exceeded the limits of the power that branch derived from that Act. In short, our Constitution, unlike that of the United Kingdom, was meant to be based upon the supremacy of the law, not the supremacy of Parliament. Colonial legislatures were to be supreme within the limits of the law. This was clearly implied in the *Colonial Laws Validity Act*, which, of course, applied to Canada as a self-governing colony. It is certainly not inconceivable that the English drafters of the *British North America Act* could have envisaged a constitution whose fundamentals were not identical to their own. After all, they had been exposed to a different view of the constitution from that which prevailed in Britain in 1867. Historically, the sovereignty of Parliament had not always

⁷⁷ The Right Honourable Sir Owen Dixon, "The Law and the Constitution" (1935) 40 *L.Q. Rev.* 590 at 595.

⁷⁸ *Ibid.* at 595-596.

⁷⁹ Strayer, *supra* note 25 at 7 states that when Canadian courts struck down a statute on constitutional grounds, they were applying the *Colonial Laws Validity Act*.

meant the absence of any legal restraint upon the legislative power of the United Kingdom Parliament.⁸⁰

Section 5 of the *Colonial Laws Validity Act* provided that every representative⁸¹ legislature in a British colony had, and was deemed to have had always, full power to make laws respecting its constitution, powers and procedure.⁸² However, the section also demanded that laws made in the exercise of that power be passed in the manner and form required by the law actually in force at the time. The law requiring a manner and form of legislation could be contained in an Imperial Act, in letters patent, in an order in council or in a colonial law. While this provision gave colonial constitutions much of the flexibility that is a distinguishing feature of the British Constitution—a feature that Constitution derives from Parliament's supremacy over the law—at the same time the provision, at least in one respect, made the law for the time being in force supreme over that legislature.

⁸⁰ There have been legal assertions that legislation could be confined by morality or natural law. See *e.g.* *Dr. Bonham's Case* (1610), 8 Co. Rep. 114a at 118a, 77 E.R. 646 (K.B.) where Lord Coke claimed that the courts had the power to review the validity of parliamentary legislation on these grounds. While Coke's statement about fundamental law was *obiter* and inconsistent with his comments in his *Institutes*: See 4 *Inst* 36, nevertheless, it is to him that the doctrine is first attributed. The medieval notion of fundamental law made its final appearance in *Lee v. Bude and Torrington Junction Railway Co.* (1871), L.R. 6 C.P. 576 where the court clearly and once and for all refuted the idea that considerations of abstract justice could override a statute. See also *Picken*, *supra* note 24. Survivals of natural law theories have come to be translated into presumptions of statutory interpretation. The origins of these presumptions are discussed in *Re Estabrooks Pontiac Buick* (1982), 44 N.B.R. (2d) 201 at 210-11, cited by R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 318.

⁸¹ Section 1 of the Act defined a "representative legislature" as being a legislative body one half of which was elected by the inhabitants of the colony.

⁸² Clement, *infra* note 99 at 47-48, states that this section related to the organization of colonial legislative bodies, i.e. their non-legislative powers and the manner in which they were to perform their functions.

It was a commonplace in 1865 that the British Parliament could not limit itself by a manner and form provision.⁸³ "Its supremacy over the law meant that the last expression of its will had to take effect notwithstanding anything to the contrary in the existing state of the law."⁸⁴ The British Parliament would not have imposed a manner and form requirement on colonial legislatures had it intended them to disregard that requirement and thus have a like supremacy over the law. Indeed, the Judicial Committee of the Privy Council disposed of the case of *A.G. N.S.W. v. Trethowan*⁸⁵ on the grounds that under section 5 of the *Colonial Laws Validity Act* the New South Wales legislature could alter its constitution only "in the manner and form required by the law". The requirement of a referendum had not been satisfied, and accordingly that legislature had not observed the manner and form required for legislation abolishing the Legislative Council. Thus, the United Kingdom Parliament, by prescribing the formula for the validity of legislation in the *Colonial Laws Validity Act*, could enable both the federal and provincial legislatures in Canada to do the one thing the Parliament at Westminster could not do, i.e. bind its successors.⁸⁶

⁸³ In the 1950's Sir Ivor Jennings formulated a "new" view of parliamentary sovereignty, which recognized that legal sovereignty is simply a term indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. This is discussed in R. Eliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 *Osgoode Hall Law Journal* 215 at 220-225. Even though Eliot says at 225 that this view has "clearly become the preferred view among constitutional scholars", he cites *Manuel v. A.G.* [1983] Ch. 77 (C.A.) for the proposition that British courts are still wed to the idea that it is their duty to obey and apply every Act of Parliament. *Factortame* is exceptional in that it flies in the face of such a proposition.

⁸⁴ Dixon, *supra* note 77 at 602.

⁸⁵ [1932] A.C. 526 (P.C.).

⁸⁶ Wade, *supra* note 27 at 182. The main thesis of Wade's argument is that because of the continuing legal supremacy of the British Parliament, changes that detract from that supremacy cannot be made by law. The rule that British courts must recognize as valid and therefore obey any statute that has been adopted by the three constituent parts of Parliament, is more than just a rule of the common law; it is the ultimate political fact upon which the whole system of legislation is based. As such, legislation derives its authority from this

While it was certainly open to the British Parliament to have conferred on Canadian legislatures in 1867 a supremacy of the same quality as its own,⁸⁷ it is submitted, that given the non-inherent nature of that supremacy, something more than the general words in the preamble of the *Constitution Act, 1867* would have been required to achieve this end. There appears to be support for this proposition when one considers the question of whether Canadian colonial legislatures possessed, and if they did not, could, under their general legislative powers, legislate to themselves the same parliamentary privileges possessed by the British Parliament. Privileges formed in themselves a special body of law that became known collectively as the *lex et consuetudo parliamenti*.⁸⁸ R. MacGregor Dawson states that this body of law, unlike the major part of the common law, was not transplanted to Canada.⁸⁹ He notes that "[t]he creation of legislative bodies overseas did not endow those bodies with privileges and powers of the English Parliament... which were primarily judicial in origin".⁹⁰

The Privy Council had, in a series of decisions preceding Confederation, uniformly held that the *lex et consuetudo parliamenti* was "strictly local in its application" and was therefore "a branch of the common law which emigrating colonists would not carry with

"ultimate legal rule." Statutes of colonial legislatures subject to the *Colonial Laws Validity Act* on the other hand, depended for their ultimate legal authority on the Parliament at Westminster.

⁸⁷ That legislature would, of course, always be subordinate in that its constitution could be repealed or amended by the British Parliament.

⁸⁸ C. J. Boulton, ed., *Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament*, 21st ed. (London: Butterworths, 1989) at 69.

⁸⁹ R. M. Dawson, *The Government of Canada* 5th ed., rev'd N. Ward (Toronto: University of Toronto Press, 1970) at 338.

⁹⁰ *Ibid.*

them".⁹¹ In *Kielly v. Carson* [cited to E.R.]⁹² the Privy Council was asked whether the Newfoundland Assembly had the power to imprison for breach of privilege committed outside that Assembly. The Privy Council held that it could not claim such a privilege despite the fact that such a privilege could be claimed by the British House of Commons:

It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription;...⁹³

In the absence of an express grant of power from the British Parliament, the only rights, immunities and privileges that could be claimed by colonial assemblies were those that were impliedly granted by whatever Act or instrument established that assembly in order that it might carry out its functions. The legislatures had these powers simply by virtue of their creation. The power to commit for contempt was not one of those inherent powers. This point of view was confirmed after Confederation by the Supreme Court of Canada in the case of *Landers v. Woodworth*⁹⁴ where Ritchie, J. stated:

I think a series of authorities, binding on this Court, clearly establishes that the House of Assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute or essentially necessary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and that, without

⁹¹ Clement, *infra* note 99 at 37.

⁹² (1842), 4 Moore 63, 13 E.R. 225 (P.C.).

⁹³ *Ibid.* at 235.

⁹⁴ (1878), 2 S.C.R. 158.

prescription or statute, local legislatures have not the privileges which belong to the House of Commons of Great Britain by the *Lex et consuetudo Parliamenti*.⁹⁵

It was not until 1896 in the case of *Fielding v. Thomas*⁹⁶, that the provinces received judicial recognition that they possessed the express power to adopt all the privileges of the British, if not because of subsection 92(1) of the *British North America Act*, which allowed the provinces to amend their respective constitutions, then because of section 5 of the *Colonial Laws Validity Act*, which already expressly conferred such a power on provincial legislatures. What is clear from these cases is that, without an express grant of power in either the *Colonial Laws Validity Act* or the *British North America Act*,⁹⁷ no such power existed. And this in spite of the plenary nature of the federal Parliament's power to make law for the "peace, order and good government" of the country under section 91 of the *British North America Act*. One would have thought that such a clause would have given Parliament the power to confer on itself the rights, privileges and immunities possessed by the House of Commons in the United Kingdom, especially if its legislative supremacy was intended to coincide with that of the British Parliament. The fact that this was not legally so says much

⁹⁵ *Ibid.* at 201-202.

⁹⁶ [1896] A.C. 600 (P.C.).

⁹⁷ In the decision of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)*, *infra* note 317 at 228, Chief Justice Lamer of the Supreme Court of Canada appears to ground Parliament's original power to legislate its privileges in section 18 of the *Constitution Act, 1867*. At the time that *Fielding v. Thomas* was decided, this section allowed Parliament to legislate in respect of those "privileges, immunities and power" held by the British Parliament at the time of the enacting legislation. Unlike subsection 92(1) of the 1867 Act, which specifically gave the provinces power to alter their respective "constitutions", no mention is made of this in section 18. Clement, *infra* note 99 at 48 states that section 18 was not, therefore, wide enough to authorize Parliament to make any changes in its constitutional machinery. For this, it had to rely on section 5 of the *Colonial Laws Validity Act* which specifically authorized colonial legislatures to make laws respecting their "constitutions."

about the quality of legislative supremacy in Canada as well as the degree of specificity required in the *British North America Act* to transfer a non-inherent British power from the United Kingdom to Canada.

(C) Responsible Government and Parliamentary Supremacy

Hogg maintains that in Canada the "close links between the executive and legislative branches which is entailed by the British system of government is utterly inconsistent with any separation of the executive and legislative functions".⁹⁸ This position was, in fact, alluded to by W.H.P. Clement as early as 1916.⁹⁹ According to Clement the preamble to the *British North America Act* imports into that document the underlying principle of executive responsibility to the people through Parliament, which he says is the distinguishing feature of the British form of government as contrasted with that of the United States.¹⁰⁰ While in both the British and American systems the body which makes the law must necessarily be supreme over the body which simply carries out the law when made, yet, in the former system, the arrangement of the machinery of government is different. Clement, in discussing this "arrangement of the machinery of government", says:

Of late years it has been found necessary to revise somewhat our ideas concerning the British constitution. The older authorities dwell upon the division of power between the legislative and executive departments of

⁹⁸ Hogg, *supra* note 6 at 343-344. However, a linking of the executive and legislative branches is not necessarily inconsistent with a separation of powers. As Wheare, *supra* note 28 at 27 points out, the Constitution of the Fourth French Republic which envisaged a parliamentary executive although one was not expressly prescribed, declared that the National Assembly was to have the exclusive power to make law and that it could not delegate this power.

⁹⁹ W.H.P. Clement, *The Law of the Constitution* 3rd ed. (Toronto: Carrwell, 1916).

¹⁰⁰ *Ibid.* at 340-344.

government.... and they dilate with quiet enthusiasm upon the "checks and balances" provided in and by such a division.... of power. Gradually, however, this "literary theory", safe-guarding the ark of the constitution with its supposed division of sovereignty into departments, came to be recognized as an incomplete and, in truth, wholly erroneous explanation of the working of the constitution. Of comparatively recent writers, the late Walter Bagehot.... attacks with vigour this "literary theory" with its supposed checks and balances....¹⁰¹

M.J.C. Vile, in his seminal work *Constitutionalism and the Separation of Powers*,¹⁰² described Bagehot¹⁰³ as presenting "a picture of the English system that was mangled and exaggerated".¹⁰⁴ Bagehot's emphasis on the close union, the nearly complete fusion, of legislative and executive powers between the different branches of government was distorted.¹⁰⁵ The nineteenth century theory of the balanced constitution was based on a subtle division and interdependence of government in England. Almost all the history of English constitutionalism was characterized by a recognition of the need for a partial separation of government personnel and a partial separation of the functions of government.¹⁰⁶ Bagehot simply ignored this fact. Indeed, much of the blame for the rejection by early Canadian constitutional scholars of any form of a separation of powers in our Constitution may be attributed to Bagehot's misinterpretation of constitutional arrangements in the United Kingdom.

¹⁰¹ *Ibid.* at 339.

¹⁰² (Oxford: Oxford University Press, 1967).

¹⁰³ W. Bagehot, *The English Constitution* (London: Watts, 1964). This book was first published in 1867.

¹⁰⁴ Vile, *supra* note 102 at 225.

¹⁰⁵ Vile, *ibid.* points out at 226 that Bagehot's famous metaphor of the cabinet as a "hyphen which joins, a buckle that fastens" the two parts of the state is not the same thing as "fusion".

¹⁰⁶ *Ibid.*

Although Dicey was not an advocate of the separation of powers, Vile observed that his treatment of the constitutional arrangements in Britain implicitly supported some form of separation of powers in that "the whole burden of the *Law of the Constitution* was that the making of the law, and the carrying out of the law, were distinct and separate functions, and those who carry out the law must be subordinated to those who make it".¹⁰⁷ Vile pointed out that Dicey did not, of course, fully analyze the extent to which different functions should be distributed between different persons. He noted that if the subordination of the executive to the law was the keynote of Dicey's work, it would "reduce this principle to nonsense to assume that legislators and executives were identical, that the powers of government were fused".¹⁰⁸ Indeed, the early history of the development of cabinet government both in the United Kingdom and Canada illuminated the fact that the executive and legislative branches were not identical.

In the United Kingdom before 1832, the formulation of legislation was by private Act of Parliament.¹⁰⁹ With the Reform Act of 1832, the House gained enough political authority to force a change in ministries if the government lost the confidence of the elected members of Parliament.¹¹⁰ It began to be recognized that it was the government's role to formulate legislation and to initiate and secure its passage in the House of Commons, but that it was the House that had effective control over the destiny of that legislation. Cabinet could

¹⁰⁷ *Ibid.* at 230.

¹⁰⁸ *Ibid.*

¹⁰⁹ R. Jackson & M. Atkinson, *The Canadian Legislative System: Politicians and Policymaking*, 2nd rev'd ed. (Toronto: Macmillan, 1980) at 4.

¹¹⁰ Heard, *supra* note 40 at 68.

formulate and initiate legislation, but now a majority of the House could, in refusing to turn executive policies into law, bring down the government of the day. Cabinet government meant that the House could control indirectly the legislative function now being exercised by cabinet. That is exactly what occurred in England between 1832 and 1867. During this period no government served out its full term in office: ten governments in that period either resigned or advised an election after a parliamentary defeat.¹¹¹ Cabinet government was, in short, an effective mechanism by which the House could ensure the accountability of the cabinet to the House and, ultimately, to the public.

After the passage of the Reform Act of 1867, however, political parties became national organizations that could command the support of the electorate.¹¹² Most candidates had to rely on these parties for electoral success. At the same time, governments began to accept more responsibility for legislative programs. The public Act of Parliament became the main legislating instrument, and private bills declined to insignificance.¹¹³ In Parliament, procedure began to solidify, generally in the direction of increased governmental control. The significance of cabinet continued to grow. Cabinet government was modified with the rise of party discipline and became a tool by which the government of the day could control the majority in the House.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Jackson & Atkinson, *supra* note 109 at 5.

There is little doubt that the system of responsible government¹¹⁴ implicit in the preamble of the *Constitution Act, 1867* contemplated an effective rather than a nominal control by the legislature over the executive's legislative function. The combined effect of responsible government and the grant of law-making power in sections 91 and 92 of that Act meant that all legislative functions were directly or indirectly under the control of the legislative branch of government. Up until 1906, the federal Parliament operated under procedural rules that allowed it to play a significant legislative role.¹¹⁵ Private members' bills, not government bills, dominated Parliament during those years. In fact, Kornberg observes that such bills constituted most of the statutes receiving royal assent during this period.¹¹⁶ However, in 1906 the Cabinet made the first significant effort to exert greater control over the House of Commons. It changed the Standing Orders of that House to limit the times and the circumstances when a member could move a motion to adjourn the House and thereby "sidetrack government business".¹¹⁷

Unlike in Britain, however, the Canadian experience with responsible government was marked by struggle. The desire to control the executive by the House of Assembly never witnessed the success of the British model as exercised between 1832 and 1867 in Britain. Before 1840, Canadian experience with cabinet government was largely unsuccessful, as the members of the legislative council chosen to be members of the executive had employed their

¹¹⁴ This term is uniquely Canadian but essentially refers to the British system of cabinet government.

¹¹⁵ A. Kornberg, *Legislatures in Developmental Perspective*, A. Kornberg & L.D. Musolf, eds. (Durham: Duke University Press, 1970) at 97.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

influence in the assembly to promote executive interests instead of using their influence with the governor to promote the objects of the assembly.¹¹⁸ Some constitutional actors of the time promoted a responsible government which was more akin to the American system: that is, it was the granting and withholding of supply that should prove the effective check on legislative action.¹¹⁹ Ultimately, Lord Sydenham ended any debate when he chose to introduce the British cabinet system, revolutionizing the previous method of colonial government and installing himself as Governor General, Prime Minister and party leader. He organized and maintained for the first time a government party, members of which he personally chose and on whom he relied for passing his policies into law.¹²⁰ But it was Lord Elgin's arrival in 1847 that ensured that Canada's government mirrored that of Britain.¹²¹

The history of responsible government in Canada was a struggle for effectiveness; in Britain, cabinet government was simply a product of evolution. Today one might argue that in both Britain and Canada the concept of responsible government has failed as a continuing mechanism for accountability. That failure is all the more striking in Canada in view of the determined struggle for its effectiveness as a constitutional principle. Lord Denning, writing in 1951, recognized that the evolution of responsible government in both countries revealed a

¹¹⁸ Adam Shortt, "The Relation Between The Legislative And Executive Branches of The Canadian Government" (1913) 7 *American Political Science Review* 181 at 185.

¹¹⁹ *Ibid.* at 184.

¹²⁰ *Ibid.* at 187.

¹²¹ *Ibid.* at 188-189.

marked divergence between theory and the factual basis on which that theory rested for its effectiveness:

Over one hundred years ago Parliament was no doubt the supreme power in the land, both in law and in fact... Members of the House of Commons were unpaid and were expected to vote according to their conscience and not according to the dictates of a party. All this has altered now.... Members of the House of Commons...are not as independent as they were. Nearly all legislation is initiated by the executive and members of the government party are expected to endorse it.

All I would point out is that...in practice sovereignty no longer rests with Parliament. It rests with the executive and in particular with the cabinet. The ministers of course gain their authority by being leading members of the party which wins the general election. So it may be said that ultimately they are dependant on the will of the majority of the people. But this is a very remote control, not only because there may only be a general election once every five years, but also because it is often impossible to ascertain what the will of the majority is upon any particular topic.¹²²

While the British courts may be justified—given the non-fundamental and continuously evolving nature of the British constitution—in continuing to invoke the concept of ministerial responsibility as an excuse for upholding the widest of delegations of discretion to the executive, it is submitted that Canadian courts are in a somewhat different position because of the fundamental nature of our Constitution. It seems eminently reasonable that the Supreme Court of Canada should refer, as it has done, to the various postulates underlying our Constitution in its efforts to interpret that document.¹²³ However, this position must be considered in light of Viscount Sankey's classic formulation that the *British North America*

¹²² Lord A. Denning, "The Spirit of the British Constitution" (1951) 29 Can. Bar Rev. 1181 at 1189-1190.

¹²³ See *Operation Dismantle*, *supra* note 60. See also *A.G. Que. v. Blaikie* *infra* note 226 where the Supreme Court of Canada relied heavily on the conventional relationship between a legislature and its government in order to arrive at its decision.

Act "planted in Canada a living tree capable of growth and expansion...".¹²⁴ That document must be interpreted in an evolutionary way. How then can one justify treating the Constitution as a organic document while at the same refusing to recognize that the postulates underlying it are also organic? In the High Court of Australia,¹²⁵ Mason, J. in *R. v. Toohy, ex parte Northern Land Council*¹²⁶ commented that "...the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia".¹²⁷ In the same case Gibbs, J. said that "...under modern conditions of responsible government parliament could not always be relied on to check excesses of power by the Crown or its Ministers".¹²⁸

The Supreme Court of Canada has, however, clearly rejected any legal remedy in the face of a failure of the political mechanism for accountability. In *Bhatnager v. Canada (Minster of Employment and Immigration)*,¹²⁹ the court held that in order to cite a minister for contempt where that minister's servants had disobeyed a court order, personal knowledge and involvement on the part of the relevant minister must be proved. This judgment highlights the principled vacuum into which we have fallen: ministerial responsibility does

¹²⁴ *Edwards v. A.G. Can.*, [1930] A.C. 124 at 136, 1 D.L.R. 98 (P.C.).

¹²⁵ A country that like Canada has an entrenched constitution.

¹²⁶ (1981), 151 C.L.R. 170.

¹²⁷ *Ibid.* at 222.

¹²⁸ *Ibid.* at 192.

¹²⁹ [1990] 2 S.C.R. 217, 71 D.L.R. (4th) 84.

not call ministers to account, but the courts recognize the actual working of government today in order to relieve the 'innocent' minister of legal responsibility for accountable acts. Even when the courts do take a realistic view of things and do not simply adhere to the myth of ministerial responsibility, accountability remains an illusion.

The principle of responsible government as fostered by the preamble to the *Constitution Act, 1867*, was intended to effectively check executive power and so protect legislative supremacy. It no longer does so. When the courts refuse to prohibit the delegation of primary law-making power in the name of parliamentary supremacy and rationalize their decisions by relying on the principle of ministerial accountability, they are, in fact, undermining that supremacy and ignoring that Act. On the other hand, it seems that the courts in Canada have been upholding the *Constitution Act, 1867* quite unawares. They are doing so in those cases that draw a distinction between delegation and abdication of legislative powers. These cases, without specifically stating the fact, acknowledge and enforce a separation of powers that is inherent in the Canadian constitutional structure. These cases demonstrate that supremacy of the law, not supremacy of Parliament, is the organizing principle of our Constitution. An examination of these cases reveals that the conceptual basis for precluding a judicially recognized separation of powers between the executive and legislative branches in Canada is not valid.

III. The Canadian Constitution, the Judiciary and A Separation of Executive and Legislative Powers

The failure of a separation of powers between the executive and the legislature to achieve legal operation in Canada may well be ascribed as much to judicial incredulity as to

a true belief in the doctrine of parliamentary supremacy. It must have seemed inconceivable that the executive should be forbidden to carry on the practice of legislation by regulation—the most conspicuous legal activity of a modern government. While case law in Canada certainly appears to establish that a delegation cannot be attacked on the ground that it confers legislative power on the executive branch of government, what it in truth establishes is that the courts will not "readily imply"¹³⁰ any limitation on the power of Canadian legislatures to delegate their legislative powers. Given the refusal of the courts to support a non-delegation doctrine in this country appears to be based on the fact that Canadian legislatures are assumed, subject to the division of powers in the Constitution, to have legislative power as "ample and plenary"¹³¹ as that of the British Parliament, one must ask on what constitutional grounds the courts would impose such a limitation? Unfortunately, there has been little, if any, judicial analysis on this point. However, while courts in this country have clearly never felt at ease in working out the general implications of a broad separation of powers, they have not dismissed the doctrine altogether.

(A) Thrasher and Hodge: A Competing View of the Law-Making Power?

Judicial opinion in Canada has not always been unanimous in holding that the *British North America Act* did not establish a general separation of powers in Canada. In *Sewell v. British Columbia Towing Co.*¹³² [hereinafter *Thrasher*] the question raised before the

¹³⁰ Hogg, *supra* note 6 at 343.

¹³¹ Hodge, *infra* note 137 at 132.

¹³² (1882), 1 B.C.R. 153 (B.C.S.C.).

British Columbia Supreme Court was whether the British Columbia legislature could enact legislation to make rules to govern the procedure of the Supreme Court of the province in all civil matters and could delegate this power to the Lieutenant Governor in Council. The majority of the Court held that the provincial legislature could not use its legislative power to enact legislation that would interfere with functions essentially belonging to the judiciary or the executive. While the case essentially revolved around the question of whether there was a separation of power as between the legislature or the judiciary, it is interesting, nevertheless, to note the views of both Mr. Justice Begbie and Mr. Justice Crease of the British Columbia Supreme Court with regard to a general separation of powers in Canada. Mr. Justice Begbie, after stating that executive and judicial functions could not be delegated to the legislature since they were not given to that body by the Constitution, goes on to say:

The necessity, especially in a constitutional Government, of distinguishing between the functions of the Legislature, of the Executive, and of the Judiciary, requires no comment. It is a necessity indeed which may be said only to exist in a constitutional Government; for if these functions be allowed to be usurped by any one branch, the Government will cease to be constitutional.

As to the line of demarcation between the Legislature and the Executive, it is well observed by a distinguished writer (Doutre, Constitution of Canada, page 104) that in a constitutional Government "the Executive is merely the committee of management of the party which has the majority in Parliament". Differences of opinion, therefore, as to whether any particular exercise of authority belongs of right purely to the Legislature, or purely to the Executive, are not very likely to arise. And if any act of either should be called into question by the minority, as an encroachment on the other, the majority in Parliament will generally sustain the action of their own committee, or be sustained by them, as the case may be. But it is not necessary here to enquire into the boundaries between the functions of the Legislature and of the Executive.¹³³

¹³³ *Ibid.* at 172.

It would appear that Mr. Justice Begbie, rather than denying that a separation of functions exists constitutionally between the legislature and the executive, is explaining how responsible government functions to mask and undermine that separation. Mr. Justice Crease, in striking down the legislation at issue, stated:

It a general principle of universal acceptance among jurists that the Legislative, Executive, and Judicial departments of Government should be kept entirely distinct from each other; and the reason for this separation of functions is obvious. They are a constant constitutional and conservative check on each other.

It is for the Legislature to make the law, the Judiciary to interpret it, and the Executive to execute it;...¹³⁴

Neither Mr. Justice Begbie nor Mr. Justice Crease made any references to the writings of Dicey; rather they relied on Cooley's *Constitutional Limitations*,¹³⁵ which dealt with the separation of powers in the American Constitution. Perhaps this was too much for the judges of the Supreme Court of Canada who, when the case was referred to them by the Governor General in Council, held that the legislature of British Columbia could make rules to govern the procedure of the Supreme Court of the province in all civil matters and could delegate this power to the provincial cabinet.¹³⁶ The Court gave no reasons for its decision.

In the following year, the issue of delegation of legislative power was dealt with by the Judicial Committee of the Privy Council in *Hodge v. R.*¹³⁷ [hereinafter *Hodge* cited to App. Cass.], which is generally cited as one of the seminal cases establishing that a non-

¹³⁴ *Ibid.* at 221. It is interesting to note that the words that appear in the last paragraph of Mr. Justice Crease's comments reappear in the Supreme Court of Canada's decision in *Re Fraser*, *infra* note 194.

¹³⁵ T. Cooley, *A Treatise on the Constitutional Limitations*, 4th ed. (Boston: Little Brown and Company, 1878).

¹³⁶ See the answers of the Court reported in the footnote to the case as reported in 1 B.C.R., *supra* note 132.

¹³⁷ (1883), 9 App. Cas. 117, 50 L.T. 301 (P.C.).

delegation doctrine does not exist in Canada. The legislation at issue in the *Hodge* case provided for the appointment of a licence commissioner empowered to pass resolutions for the regulation of taverns and shops. A Licence Commissioners Board was authorized to impose penalties for breach of the regulations. The plaintiff argued that the Ontario legislature could not delegate this power on the basis that it was itself a delegate of the British Parliament.

In point of fact, the plaintiff in *Hodge* was correct: all legislatures in Canada were subordinate to the British Parliament in that their power depended upon the *British North America Act*, an Act of the British Parliament that could be changed or abolished by that Parliament. Subordination has always been held to be one of the indicia fundamental to the delegation relationship; the intention of the body granting a particular power has not been. However, the Privy Council, clearly anxious to avoid undermining the concept of self-government in Canada, focused on the intention of the British Parliament in granting legislative power to Canadian legislative bodies. To have classified that power as delegated would have made futile all the efforts of the Fathers of Confederation. Sir Barnes Peacock, who delivered the judgement for their Lordships, summed up the power of provincial legislatures in the following way:

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on the entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under mandate from the British Parliament. When the *British North America Act* enacted that there should be a legislature for Ontario...it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could be bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the

Imperial Parliament, or the Parliament of the Dominion, *would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.*¹³⁸ [emphasis added]

The words in italics in the above passage were omitted when it was quoted by the Privy Council in the subsequent case of *Liquidators of Maritime Bank of Canada v. Receiver General of New Brunswick*.¹³⁹ The result of the omission, says Lyon, was to create the impression that the *Hodge* decision had equated provincial legislature to the Imperial Parliament and that Canadian constitutional law was founded on the principle of British parliamentary supremacy.¹⁴⁰ One can argue, however, that what this decision was meant to establish is that a provincial legislature cannot delegate primary law-making power.

It was no accident that in the course of rendering its decision the Privy Council, whose members would have been well acquainted with the principle of the supremacy of Parliament, described the Ontario Legislature's power to delegate its law-making power as "an authority ancillary to legislation"¹⁴¹ and as a "limited discretionary authority—"¹⁴² words hardly consistent with that principle. Given these words, and keeping in mind that the Privy Council said that in exercising its law-making function the legislature was subject to the limits of section 92 of the *British North America Act*, there is no reason to assume, in view of the fact that the legislature's power came from that section, that this power itself did

¹³⁸ *Ibid.* at 132.

¹³⁹ [1892] A.C. 437 (P.C.).

¹⁴⁰ Lyon, *supra* note 4 at 43.

¹⁴¹ *Hodge*, *supra* note 137 at 132.

¹⁴² *Ibid.*

not demand a minimum content of meaning and was being given one by the Privy Council. In view of the fact that the power was to be exercised within the confines of the 1867 Act and that it was good judicial statesmanship to remove from the legislatures functioning under the Act any stigma of being mere delegates and to recognize their sovereignty within the domestic sphere, too much should not be read into the Privy Council's references to the plenitude and amplitude of colonial legislative power and of its supposed equivalence to that of the British Parliament. What other comparison would have been more appropriate to convey that Canadian legislatures were self-governing bodies?

The fact of the matter is that the delegation of legislative power by the British Parliament to Canada "was as much a delegation of authority as the delegation of legislative power to Congress by the American constituent body."¹⁴³ The Privy Council, for reasons of statesmanship, simply chose to ignore it. The plenary power of legislation to which the Privy Council referred in *Hodge* was never intended to be exercised free of the limits of the *British North America Act*. This no doubt helps to explain why the Privy Council was prepared to hold in *Re Initiative and Referendum Act*¹⁴⁴ that the Manitoba Legislature, its plenary powers notwithstanding, was prohibited from creating and abdicating power to a new body armed with a general legislative power. Furthermore, it should be noted that a self-governing Parliament is not necessarily "a supreme Parliament" in the sense that the term is used in reference to the Parliament at Westminster. This was made clear in the decision of

¹⁴³ Geoffrey Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1980) at 117.

¹⁴⁴ *Infra* note 158.

the South African Supreme Court in *Harris v. Minister of the Interior*.¹⁴⁵ After the passage of the *Statute of Westminster*, the Parliament of South Africa, believing it was now sovereign and therefore as supreme as the Parliament of the United Kingdom, enacted legislation that simply ignored an unentrenched manner and form provision in the South African Constitution. The Supreme Court struck down the impugned statute stating that the South African Parliament was subject to the limits of the South African Constitution.¹⁴⁶

The Privy Council did not have to determine in *Hodge* the scope of Parliament's power of delegation. It had, however, indicated in a *dictum* that the federal power was at least as wide as that of the provinces. Just how wide remained uncertain. The question of whether there was any limit to the extent of the federal Parliament to delegate its legislative power was determined in *Re Gray* [cited to S.C.R.].¹⁴⁷

¹⁴⁵ (1952), 2 S.A.L.R. 428, [1952] 1 T.L.R. 1245 (A.D.). This is not to suggest that the Court said that the Union Parliament was not sovereign. The Court simply did not define legal sovereignty in the way it was traditionally defined by British courts. The Court pointed out that the Union Parliament would have no existence but for the South African Constitution. Since it was this document that defined the institution of Parliament in South Africa for various purposes, the Court in holding the Union Parliament to the rules of the Constitution in this case, was in fact, recognizing the sovereignty of that Parliament. Wade, *supra* note 27 at 191-192 argues that this case is an example of the "sovereignty of the courts" referred to by Lord Harwich, *supra* at page 9 of the text, in that the Court made it clear that it was for it to say what constituted a valid Act of the South African Parliament. Given that South Africa had cut its legal ties with the United Kingdom, the Court had to seek its own "ultimate legal principle." No legislation could tell the Court what to recognize as the proper expression of the new sovereign power in South Africa. Since legally the question was ultimate, the Court was free to apply the traditional British view of parliamentary supremacy to the Union Parliament or to hold the Union Parliament to the rules of the South African Constitution. The Court chose to see the manner and form provisions of the Constitution not as binding the South African Parliament but as defining it.

¹⁴⁶ The Rt. Hon. Sir Owen Dixon in "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 Australian Law Journal 240 at 242 comments that much of the difficulty in understanding the Court's decision in this case occurred because there was a failure to understand that parliamentary supremacy was a doctrine of the common law as to the Parliament at Westminster and not otherwise a necessary part of the idea of a unitary system of government.

¹⁴⁷ (1918), 57 S.C.R. 150, [1918] 3 W.W.R. 111.

(B) The Abdication/Delegation Distinction

Re Gray [cited to S.C.R.] arose out of the *War Measures Act*,¹⁴⁸ which empowered the Governor in Council to proclaim a state of real or apprehended war, invasion or insurrection and subsequently to make any order or regulations deemed necessary to deal with the situation. The Act essentially transferred to the federal Cabinet virtually all of Parliament's legislative power for the duration of the war. In 1918 the Governor in Council exercised its power under the Act by passing an order in council amending the *Military Service Act, 1917*.¹⁴⁹ The order was challenged on the grounds that Parliament had exceeded its powers in delegating power to the Cabinet to amend or repeal legislation enacted by Parliament. A month earlier the same order in council had been challenged on the same grounds in Alberta in *Re Lewis*.¹⁵⁰ The Appellate division of the Supreme Court of that province declared the order to be invalid on grounds reminiscent of what is arguably a proper reading of the *Hodge* decision—that the power to legislate in our Constitution is inherently restrictive in that it does not include the power to delegate primary law-making power. The Court said:

...orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment; that is, if they are not merely ancillary, subsidiary and subordinate to the legislative enactment and for the purpose of the more convenient and effective operation thereof or

¹⁴⁸ S.C. 1915, c. 2, as rep. by *Emergencies Act*, S.C. 1988, c. 29, s. 80.

¹⁴⁹ S.C. 1917, c. 19.

¹⁵⁰ (1918) 41 D.L.R. 1 (Alta. C.A.).

are inconsistent with the direct enactments of the legislature which conferred the delegated power.¹⁵¹

The Supreme Court of Canada took quite a different view from that which prevailed in Alberta. Four of the six judges held that the Governor in Council could, under the *War Measures Act*, repeal or amend an existing statute and could even do so while Parliament was sitting. What is interesting about the case is that none of the four majority judges was prepared to accept that Parliament's power of delegation was unrestricted. There was a distinction to be made between delegation and abdication, a distinction that could not be supported if the organizing principle of the *British North America Act* was meant to be parliamentary supremacy. The judgement of the Chief Justice of the Court, Mr. Justice Fitzpatrick, appears particularly contradictory in this regard. One of the arguments put forth by the plaintiff was that the power to amend or repeal legislation could not be delegated because, under the *British North America Act*, Parliament alone is to make laws while the executive is to execute those laws and the courts to interpret them. Mr. Justice Fitzpatrick said that he could not accept this broad proposition. But immediately after rejecting this proposition, he said:

Parliament cannot, indeed, abdicate its functions, but within *reasonable limits* [emphasis added] at any rate it can delegate its powers to the executive government.¹⁵²

The above statement is made even more confusing when the Chief Justice goes on to explain that in Canada, unlike Britain, Parliament is subject to the 1867 Act, but that:

¹⁵¹ *Ibid.* at 17.

¹⁵² *Re Gray, supra* note 147 at 157.

I cannot, however, find anything in that Constitutional Act which, so far as *material to the question now under consideration*, [emphasis added] would impose any limitation on the authority of the Parliament of Canada to which the Imperial is not subject.¹⁵³

Perhaps, however, the above two statements can be reconciled. Perhaps all that Mr. Justice Fitzpatrick was saying was not that he did not support any kind of a separation of powers in Canada; he simply did not support an application of the doctrine in this case. This may have been because the *War Measures Act* did at least appear to impose some limits on the executive in that it required the power delegated to be used only in time of war. It is interesting to note that Mr. Justice Fitzpatrick did not simply invoke the doctrine of parliamentary supremacy to support the delegation. Rather he looked to the Constitution to see if it imposed any limit on Parliament to delegate its power to amend or repeal legislation in this particular situation. The fact that he said he could find no limit imposed in respect of the delegation of the amending and repealing power in the case of the *War Measures Act* did not mean that no limitation existed.

The distinction made by the four majority judges in *Re Gray* between delegation and abdication clearly implies that there are definite limits to what Parliament can delegate. At the very least there must be some particularization of its general legislative power. Mr. Justice Duff in commenting on the scope of the *War Measures Act* is apposite in this regard:

It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor-in-council the whole of the legislative authority of parliament. The authority devolving upon the Governor-in-council is...strictly conditioned in two respects: First—It is

¹⁵³ *Ibid.*

exercisable during war only. Secondly—The measures passed under it must be such as the Governor-in-council deems advisable by reason of war.¹⁵⁴

This begins to sound very much like the fluid "standards test"¹⁵⁵ used by American courts to uphold what would otherwise be a prohibited delegation of legislative power to the executive.

It was unfortunate that the question of the validity of "in depth delegation" arose as it did in a wartime situation. One is left with the lingering feeling after reading *Re Gray* that the Court's decision was its contribution to the war effort. Mr. Justice Fitzpatrick's last words in his judgment are interesting in this regard:

Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.¹⁵⁶

Had the Court considered such sweeping delegation in an ordinary situation, perhaps it may well have been prepared to discuss at some length the basis for indicating that there is a distinction between abdication and delegation. This, of course, would have required a disciplined discussion of the doctrine of the separation of legislative from executive powers, and courts in this country have never felt at ease working out the broad implications of this

¹⁵⁴ *Ibid.* at 170. Four years after *Re Gray* the Privy Council, in a *dictum* in *Fort Francis Pulp and Paper Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695, 3 D.L.R. 629 (P.C.) suggested that our courts do have a legal obligation to assure themselves that an emergency does exist before any emergency legislation is to have legal effect. Viscount Haldane at 706 A.C. did not preclude judicial scrutiny of the facts underlying such legislation even though the *War Measures Act* made it very clear that a government proclamation made under that Act was conclusive evidence of the emergency.

¹⁵⁵ See text, *infra* at p. 77.

¹⁵⁶ *Re Gray*, *supra* note 147 at 160. In *Brader v. Ministry of Transport*, [1981] 1 N.Z.L.R. 73 (C.A.), Cooke, J. at 77 accepted that "...traditionally the courts have been disposed to be more tolerant in time of war than in time of peace of the practice of legislating on matters by regulation instead of by Acts of Parliament".

doctrine. However, it seemed that the Supreme Court in indicating that Parliament's power to delegate was not absolute was impliedly recognizing some kind of separation of powers, which, if legally binding, could only be so by reason of the *British North America Act*. The issue of abdication was to arise again in *Shannon v. Lower Mainland Dairy Products Board* [hereinafter *Shannon Dairies* cited to A.C.].¹⁵⁷ However before turning to this case, it is important to deal first with a delegation case which, it is submitted, lends further support to the view that at the end of the day the *British North America Act* was meant to be based on the supremacy of the law rather than on the notion of British parliamentary supremacy.

In *Re Initiative and Referendum*¹⁵⁸ [cited to A.C.] the Privy Council was asked to strike down Manitoba's *Initiative and Referendum Act*,¹⁵⁹ an Act that enabled the electors in that province to initiate a proposed law by way of petition. If the Legislative Assembly did not enact the proposed law, it had to be submitted to the electorate in a referendum. If the proposed law was approved by a majority in that referendum, the proposal would become law. This meant, of course, that royal assent would be by-passed. The Privy Council struck down the legislation on the grounds that the by-passing of royal assent was unconstitutional. Section 92(1) of the *Constitution Act, 1867*, while allowing provincial legislatures the power to amend their constitutions, prohibited an amendment regarding the office of the Lieutenant Governor. What is of particular interest in the decision is the Privy Council's famous *dictum* that follows. It suggested that the term "Legislature" as used in section 92(1) contemplated

¹⁵⁷ [1938] A.C. 708, 4 D.L.R. 81 (P.C.).

¹⁵⁸ [1919] A.C. 935, 48 D.L.R. 18 (P.C.).

¹⁵⁹ S.M. 1916, c. 59.

some form of representative assembly whenever general law-making power was to be exercised:

No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as...in *Hodge v. The Queen*... but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.¹⁶⁰

Mr. Justice Beetz, speaking for the majority of the Supreme Court in *Re Ontario Public Service Employees' Union v. A.G. Ontario*¹⁶¹ points out that the Privy Council was undoubtedly aware that the Manitoba legislature could have easily corrected the technical flaws in its legislation without seriously affecting the substance of the legislation. This leads Mr. Justice Beetz to conclude that the above *obiter* may stand for the wider proposition that the power of constitutional amendment given to the provinces by section 92(1) of the *Constitution Act, 1867* does not necessarily include the power to effect a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.¹⁶² If Mr. Justice Beetz is correct, one is forced to ask why such a limit should exist? If Canada inherited the concept of British parliamentary supremacy via the preamble to the *Constitution Act, 1867*, why should the term "Legislature" carry any

¹⁶⁰ *Re Initiative and Referendum*, *supra* note 158 at 945. The Privy Council suggested at 943 that it might be otherwise in the case of the federal Parliament, given that section 91 of the *British North America Act* conferred on it the power to make laws for any matter not coming within the exclusive jurisdiction of the provinces. However, the residual nature of this power did not prevent the Supreme Court of Canada from deciding in *Reference Re Legislative Authority of Parliament of Canada in Relation to Upper House*, [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1 that Parliament could not unilaterally abolish the Senate. The Court said this would amount to Parliament transferring all its legislative authority to a new legislative body.

¹⁶¹ *Infra* note 197.

¹⁶² *Ibid.* at 46-47.

inherent limit on Parliament's power to delegate? Certainly no British court would strike down a statute of the Westminster Parliament on the grounds that it purported to confer a general concurrent legislative power on some body created by Parliament.

The fact that the Manitoba legislation resulted in the province having two legislative bodies with concurrent powers should not have created problems for any legislature that was, within its sphere of jurisdiction, as supreme as the British Parliament. Had the electorate ever attempted to get rid of its creator¹⁶³ the court could have, as it would have done in England, simply interpreted such legislation not to include the power to abolish the delegator of that legislation.¹⁶⁴ That the Privy Council refused to interpret the statute in this way and insisted, even in the face of clear words in the 1867 Act that provinces had the power to alter their constitutions, that the term "Legislature" was to be read in such a way as to restrict Parliament's legislative power, tells much about how it viewed parliamentary supremacy in Canada.¹⁶⁵ Had the British Parliament in 1867 meant parliamentary supremacy to be the

¹⁶³ Stephen Scott in "Constituent Authority and the Canadian Provinces" (1967) 12 McGill L.J. 528 at 536 points out that the *Initiative and Referendum Act* created a situation whereby Manitoba would have two equally competent legislative powers. Each could use its legislative powers to abolish the other. It would be a question of who got to the statute book first.

¹⁶⁴ This is because Parliament is continuously supreme. The Parliament of today cannot, therefore, bind its successors. See *British Coal Corp. v. R.*, [1935] A.C. 500, All E.R.Rep. 139 (P.C.) where the Privy Council held that as a matter of abstract law the British Parliament could repeal or amend the *Statute of Westminster*. Thus, premising the continued existence of Parliament, irrevocable abdication is a legal impossibility. However, there is nothing to prevent the Parliament of today from adopting legislation that attempts to bind the Parliament of tomorrow by permanently parting with legislative power. However, such legislation will simply not have any legal effect. See *Société Canadienne de Métaux Reynolds Ltée. v. Société Québécoise d'Assainissement des Eaux* (1992), 101 D.L.R. (4th) 480 (Que. C.A.). The use of the term "abdication" in the abdication cases dealt with in this thesis thus refers not to a parting with essential legislative powers but rather a sharing of those powers.

¹⁶⁵ Three years after *Re Initiative and Referendum*, the Privy Council in *R. v. Nat Bell Liquors*, [1922] 2 A.C. 128, 2 W.W.R. 30 (P.C.) suggested that the legislative process could include referendums provided that there was no violation of any of the provisions set out in the *Constitution Act, 1867*, respecting that process. Hogg, *supra* note 6 at 352 points out that it is difficult to reconcile this case with *Re Initiative and Referendum* as does Berridale Keith in "Notes on Imperial Constitutional Law" (1922) 4 *Journal of*

defining feature of the *British North America Act*, it is unlikely it would have intended that any legislature in this country should be prevented from being allowed to validly enact legislation that could have been validly enacted by the British Parliament. Furthermore, that the Privy Council felt obliged to reintroduce the old distinction between delegation and abdication in the form of an implied prohibition against erecting a new legislature indicates its uneasiness with equating provincial legislative powers with the legislative powers of the British Parliament. It was simply another way of saying that those legislatures could not delegate their essential legislative functions. It is not surprising that the Privy Council, like the Supreme Court in *Re Gray*, refused to say just what constituted abdication. However, the principle of abdication having been judicially recognized, it was to arise once again in a provincial context.

*Shannon Dairies*¹⁶⁶ involved the *Natural Products Marketing (British Columbia) Act*,¹⁶⁷ a piece of skeleton legislation that allowed the government to establish marketing schemes under the control of boards established by the Act and to determine the power of those boards. The regulations were challenged on various grounds, one of which was that the regulations were *ultra vires* based on a previous decision, *Credit Foncier Franco-Canadian v.*

Comparative Legislation and International Law 233 at 241. It is interesting to note that in 1958 in response to inquiries about once again using the *Direct Legislation Act*, S.A. 1913, c. 3 under which the challenged legislation in *Nat Bell Liquors* had been enacted, the Alberta government referred the matter to the Deputy Attorney General of the province for a legal opinion. He opined that in view of *Re Initiative and Referendum*, the statute was *ultra vires*. See J.P. Boyer, *Lawmaking by the People* (Toronto: Butterworths, 1982) at 34.

¹⁶⁶ *Supra* note 157.

¹⁶⁷ R.S.B.C. 1936, c. 165.

Ross [hereinafter *Credit Foncier* cited to W.W.R.].¹⁶⁸ There, the Alberta Court of Appeal had struck down an Alberta statute that purported to reduce or eliminate the interest payable upon certain classes of debt.¹⁶⁹ Section 12 of the legislation provided that the Lieutenant Governor in Council could from time to time declare any kind or description of debt as a debt to which the Act applied. The Court held the section to be invalid. *Hodge* was distinguished on the ground that, in that case, the challenged authority was to make regulations for the purpose of rendering effective the legislation duly enacted by the legislature, not, as was the case with the Alberta legislation, authority to make an independent enactment "legislation itself".¹⁷⁰

Shannon Dairies was initiated in that same year and was styled in the lower courts as *Hayward v. British Columbia Lower Mainland Dairy Products Board*.¹⁷¹ The judge at first instance, Mr. Justice Manson, declared the regulations *ultra vires* on the grounds cited by the Alberta Court in *Credit Foncier* but went on to say that "the scheme of the B.N.A. Act

¹⁶⁸ [1937] 2 W.W.R. 353, 3 D.L.R. 365 (Alta. C.A.).

¹⁶⁹ *The Reduction and Settlement of Debts Act*, S.A. 1936, c. 2.

¹⁷⁰ *Credit Foncier*, *supra* note 168 at 358.

¹⁷¹ [1937] 2 W.W.R. 401 (B.C.S.C.).

contemplates that the executive body and the legislative body shall be kept distinct. The delegation by the Legislature of legislative power to the Executive Council means the establishment of Fascism in this Province."¹⁷²

The British Columbia government, unhappy with Mr. Justice Manson's decision, referred the question of the validity of the Act to the Court of Appeal,¹⁷³ which, while upholding the legislation, used language more appropriate to an American separation of powers case than to a Canadian delegation case based on the doctrine of parliamentary supremacy. John Willis in his article "Administrative Law and the British North America Act"¹⁷⁴ rightly points out that:

The decision of that court reads just like an American decision on delegation: apparently accepting the prohibition against "abdication" as law, the court proceeded to apply the concept "abdication" to the facts of the case. It examined the legislation and found that the Legislature had set out in the Act a 'purpose and intent' which... is not vague and uncertain but definite and concrete," that the Act did not "create a new deliverative [sic] body with the right to legislate"—or, to speak in the American tongue, that the Legislature had established a "standard" for the executive.¹⁷⁵

The Court, while not addressing the question of just what exactly constituted abdication, recognized the principle but concluded that the Act before it fell outside the principle. A few months later the Privy Council heard the appeal.

¹⁷² *Ibid.* at 421.

¹⁷³ *Re Natural Products Marketing (B.C.) Act*, [1937] 4 D.L.R. 296, 52 B.C.L.R. 179 (B.C.C.A.).

¹⁷⁴ (1939) 53 Harvard L. Rev. 251.

¹⁷⁵ *Ibid.* at 259.

Hogg maintains that the Privy Council's decision in *Shannon Dairies* effectively overruled the *Credit Foncier* decision.¹⁷⁶ This is, however, far from clear. In upholding the legislation in issue, the Privy Council appeared to base its decision on the supremacy of Parliament, thus impliedly rejecting the rule against abdication :

Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act.¹⁷⁷

However, the Privy Council went on to qualify this statement by saying that Martin, C.J. of the British Columbia Court of Appeal appeared to have disposed of the objection to the Act very satisfactorily and that their Lordships had nothing to add to what he had said in his judgement on the reference. The Court of Appeal, however, had decided that the rule against abdication did exist but had not been violated by the British Columbia statute in question.¹⁷⁸

Talk concerning delegation and abdication arose once again in *Reference Re Regulations in Relation to Chemicals* [cited to S.C.R.].¹⁷⁹ The Court was asked to consider the validity of regulations in relation to chemicals enacted by the Governor in Council, which provided for a controller of chemicals and enumerated his powers and duties. One of the questions put to the Court was whether there was any limit to the extent of Parliament's

¹⁷⁶ Hogg, *supra* note 6 at 343 note 16.

¹⁷⁷ *Shannon Diaries*, *supra* note 157 at 722.

¹⁷⁸ Willis, *supra* note 174 at 260 points out that it would have been better had the Privy Council not made this last remark, for it left in doubt what they intended: that there was no rule against "abdication" or that such a rule existed but had not, in this case, been violated.

¹⁷⁹ [1943] S.C.R. 1, 79 C.C.C. 1.

power to delegate. The Court, relying on *Re Gray* and emphasizing that Parliament retained control of the power it had delegated, answered in the negative. While there was little direct talk concerning the distinction between delegation and abdication, Duff, C.J. did say:

It must not... be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed by Parliament to the Executive for legislative action in the case of an emergency.¹⁸⁰

Further on in his judgement he implies that he would not support a delegation of general legislative power, even to the Cabinet:

[E]very order in council, every regulation, every rule, every order... derives its legal force solely from the *War Measures Act* or some other Act of Parliament.... And the *War Measures Act* does not, of course, attempt to transform the Executive Government into a Legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures.¹⁸¹

While Rinfret, J. did not appear to speak directly about there being a rule against abdication, his reference to what was established in *Hodge*, *Re Gray* and *Shannon Dairies* would indicate his support for such a rule:

In turn, no question of constitutionality under the *B.N.A. Act* is raised with regard to the *War Measures Act*. The Act is within the legislative field of the Dominion Parliament... and it is well established that it is within the power of Parliament, when legislating within its legislative field, to confer *subordinate* [emphasis added] administrative and legislative powers (*Hodge v. The Queen... Re Gray... Shannon v. Lower Mainland Dairy Products Bd....*)¹⁸²

¹⁸⁰ *Ibid.* at 10.

¹⁸¹ *Ibid.* at 13.

¹⁸² *Ibid.* at 16.

His refusal to consider the *War Measures Act*¹⁸³ as violating the principle set down in the cases to which he referred was rationalized in the following way:

The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority...to pass legislative enactments such as should be deemed necessary and advisable by reason of war, and when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself.The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament.¹⁸⁴

John Mark Keyes states that Bora Laskin¹⁸⁵ in commenting on this case sees such limitations on abdicating authority as "at most something to talk about."¹⁸⁶ In fact, what Laskin said was "that in wartime the distinction between delegation and abdication is at most something to talk about, although in peace time it may be something to act upon."¹⁸⁷ And indeed, a peace time case did come before the Supreme Court of Canada in 1978 that elicited a very powerful *dictum* from the Court on this very issue.

At issue in *Re Manitoba Government Employees Association and Government of Manitoba* [hereinafter *Re Manitoba Government Employees Association* cited to S.C.R.]¹⁸⁸ was an agreement made by the Government of Manitoba with the Government of Canada

¹⁸³ S.C. 1915, c. 2 as am. by R.S.C. 1927, c. 36.

¹⁸⁴ *Reference Re Regulations in Relation to Chemicals*, *supra* note 179 at 17-18.

¹⁸⁵ B. Laskin, "Administrative Law—War—Subdelegation of Power Without Express Statutory Authorization" (1943) 21 Can. Bar Rev. 141.

¹⁸⁶ Keyes, *supra* note 6 at 44 quoting Laskin, *ibid.* at 144.

¹⁸⁷ Laskin, *ibid.*

¹⁸⁸ [1978] 1 S.C.R. 1123, 79 D.L.R. (3d) 1.

providing for the application of the *Anti-Inflation Act*¹⁸⁹ and the *Anti-Inflation Guidelines*¹⁹⁰ to the public sector in Manitoba. The Manitoba Government was authorized to enter such an agreement by an order in council made under section 16 of Manitoba's *Executive Government Organization Act*.¹⁹¹ The section provided that a minister could enter into an agreement on behalf of the government with the Canadian Government or any minister of that Government "for the benefit or purposes of the residents of Manitoba or any part thereof". It was argued before the Court that the Act gave the Manitoba cabinet the authority to enter into binding agreements that would have the effect of amending any legislation that conflicted with such agreements, even legislation enacted after the Act. Ritchie J., speaking for the majority disagreed:

In my opinion, s. 16 does no more than authorize the making of agreements as therein specified but it is lacking in any provision that such agreements once entered into will be effective to suspend the operation of other provincial legislation or constitute legislation binding on employees in the public sector of the Province of Manitoba. If the section is to be read as giving legislative force to all agreements entered into under the authority of an Order in Council on the ground that the Executive deems such an agreement to be "for the benefit or purposes of the residents of Manitoba" then this would appear to me to constitute a delegation of legislative power amounting to an abdication by the legislature of its ultimate authority to pass laws "for the benefit or purposes of the residents of Manitoba".¹⁹²

However, Ritchie J. did not say what the consequences of "abdication" would be. Rather, he went on to hold that he could find no language that would allow the *Executive Government*

¹⁸⁹ S.C. 1974-75-76, c. 75.

¹⁹⁰ P.C. 1975-2926, SOR/76-1.

¹⁹¹ S.M. 1970, c. 17.

¹⁹² *Re Manitoba Government Employees Association and Government of Manitoba*, supra note 188 at 1145.

Organization Act to override subsequent legislation. However as Finklestein¹⁹³ points out, the implication is that "abdication" would be invalid. The *dictum* certainly appears to indicate that, ultimately, the *Constitution Act, 1867* is based on the supremacy of the law rather than the supremacy of Parliament. Furthermore, one can draw similar implications from language used by the Supreme Court of Canada in the course of rendering its decision in two other non-delegation cases decided in the last ten years.

(C) Towards a New View of Legislative Supremacy? : Some Recent Cases

In *Re Fraser and the Public Service Staff Relations Board* [hereinafter *Re Fraser* cited to S.C.R.]¹⁹⁴ the Supreme Court of Canada upheld the dismissal of a federal official who had publicly criticized the federal government's policies concerning metrification and the constitutional entrenchment of the *Charter*. Chief Justice Dickson, in the course of rendering the Court's decision, stated:

A job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public. In my opinion, the Adjudicator appreciated these two dimensions.

This analysis and conclusion, namely that Mr. Fraser's criticisms were job-related, is, in my view, correct in law. I say this because of the importance and necessity of an impartial and effective public service. There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. *In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.* [emphasis added]

¹⁹³ N. Finkelstein, ed., *Laskin's Canadian Constitutional Law*, vol. 1, 5th ed. (Toronto: Carswell, 1986) at 45.

¹⁹⁴ [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122.

The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy.¹⁹⁵

One might argue that these words amount only to a recognition that such a doctrine exists in Canada, not that it is judicially enforceable. But such an argument overlooks the fact that Mr. Justice Dickson does not say that this separation of powers is inherited from Britain via the preamble to the Constitution. In commenting on the "freedom of speech" defence raised by the plaintiff, however, Mr. Justice Dickson does say at page 462 of his judgement, that freedom of speech "is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*". The fact that Mr. Justice Dickson says that there is a broad separation of powers in Canada and the conspicuous absence of linking this to the preamble may well suggest that such a separation exists in the 1867 Act itself, for if we have the separation not by virtue of the preamble to that Act, then we must have it by reason of the Act itself. From where else can it come? Canada and its governmental structure exist only by virtue of that Act. If, then, a separation of powers is part of the *Constitution Act, 1867*, the fundamental nature of that Act and the rule of law demands that it be enforced.¹⁹⁶

¹⁹⁵ *Ibid.* at 468-470.

¹⁹⁶ It is interesting to note that three members of Supreme Court of Canada agreed with Mr. Justice La Forest's comments regarding a separation of powers in *Douglas/Kwantlen Faculty Association v. Douglas College*, [1991] 1 W.W.R. 643, 77 D.L.R. (4th) 94 at 123. In the course of determining whether an arbitration board could be a court of competent jurisdiction within the meaning of section 24(1) of the *Charter*, La Forest J. accepted that a broad separation of powers does exist in Canada and cited *Fraser* in support of this proposition, but pointed out that it was not rigidly defined in our system of government. In support of this latter proposition he quoted Mr. Justice Dickson's citation of Hogg's view of a separation of powers, *supra* note 6, in *Reference Re Residential Tenancies Act, 1979*, *supra* note 6. This is somewhat confusing given that Hogg states there is no general separation of powers in Canada.

The next case to deal with the issue of the political neutrality of the bureaucracy, *Re Ontario Public Service Employees' Union v. A.G. Ontario* [hereinafter *OPSEU* cited to S.C.R.],¹⁹⁷ also raises questions about just how the Supreme Court of Canada views the concept of parliamentary supremacy in this country. At issue in this case was the constitutionality of Ontario's *Public Service Act*,¹⁹⁸ which prohibited the appellants, who were government employees, from engaging in political activities. Mr. Justice Beetz, with whom the other judges of the Court concurred,¹⁹⁹ held that the legislation was constitutional by virtue not only of subsection 92(13) but also of subsections 92(1) and (4) of the *Constitution Act, 1867*. Mr. Justice Beetz concluded that the impartiality of the public service was an essential prerequisite of responsible government—a principle implicitly referred to in the preamble of that Act. However, Beetz, J. was not content to ground his decision regarding impartiality simply on the principle of responsible government. In the course of his judgement he referred to the stress placed by Mr. Justice Dickson on the "importance and necessity of an impartial and effective public service"²⁰⁰ in *Re Fraser*, quoting Mr. Justice Dickson's statement about the separation of powers in Canada and emphasizing by underlining his words "[t]he federal public service in Canada is part of the executive branch of Government".²⁰¹ Having concluded that the impugned provisions gave

¹⁹⁷ [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1.

¹⁹⁸ R.S.O. 1980, c. 418.

¹⁹⁹ Mr. Justice Chouinard did not participate in the judgement.

²⁰⁰ *OPSEU*, *supra* note 197 at 41-42.

²⁰¹ *Ibid.* at 42.

additional legislative effect to the principle of responsible government, one questions why it was necessary to refer to Mr. Justice Dickson's separation of powers statement in *Re Fraser*.

The most significant references in the *OPSEU* decision occur in relation to the doctrine of parliamentary supremacy. In their factum, the appellants argued that Canadian constitutional jurisprudence recognizes the existence of certain fundamental rights and freedoms by which the citizens of Canada can participate in federal political activities and that no province has the power to reduce or derogate from these rights and freedoms. The response of Beetz, J. to this argument never would have been given by a British court in like circumstances; it indicates clearly that supremacy of the law rather than supremacy of Parliament is the guiding principle of the *Constitution Act, 1867*. At page 57 of his judgement, Mr. Justice Beetz states:

There is no doubt in my mind that the basic structure of our Constitution as established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes* at page 133, "such institutions derive their efficacy from the free public discussion of affairs...." I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. On the whole, though, I am inclined to view that the impugned legislation is ... concerned...with regulating the provincial public service and affects federal and provincial elections only in an incidental way.

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from Charter considerations, [emphasis added] *the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.* [emphasis added] The present legislation does not go so far as to infringe upon the essential structure of free Parliamentary institutions.

So much for the idea that legislative bodies in this country, prior to 1982, had authority "as plenary and as ample... as the Imperial Parliament in the plenitude of its powers possessed and could bestow".²⁰²

Perhaps the most interesting and problematic decision rendered in the last ten years regarding the separation of powers and parliamentary supremacy is that of the Supreme Court of Canada in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)* [hereinafter *Auditor General* cited to S.C.R.].²⁰³ The case came to the Court because the Auditor General had unsuccessfully attempted to gain access to departmental and cabinet documents relating to the purchase of Petro-Fina shares and property. The Auditor General claimed he was entitled to the documents in view of the fact that section 13 of the *Auditor General Act*²⁰⁴ provided that the Auditor General was to have free access to information that related to the fulfilment of his responsibilities. The only provision in the Act that addressed the situation of a refusal of any such information to the Auditor General was section 7, which provided that the matter could be raised by him in his annual report to Parliament.

The Court, as a matter of statutory interpretation, determined that no judicial remedy was available. The remedy lay with Parliament. The Court need not have rationalized its decision further. However, the Court made an excursion into the area of a separation of powers. It emphasized that the controversy involved the balance between Parliament and the

²⁰² *Hodge, supra* note 137 at 132.

²⁰³ [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 309.

²⁰⁴ R.S.C. 1985, c. A-17.

executive. In the course of rendering the decision of the Court, Mr. Justice Dickson expressed concern for the effect of judicial intervention on "the constitutional balance of powers":

For this Court to order access to information for the Auditor General would be, in effect, to overrule a decision of the House of Commons not to act in this matter and to disturb the balance of constitutional powers between the executive and legislative branches of government.²⁰⁵

....Thirdly, it is significant that the Auditor General seeks a remedy against other political actors, namely Ministers of the Crown and Crown servants.... This raises issues related to the constitutional balance of powers in the Westminster, and our, system of government.²⁰⁶

Having come as close as it ever has to recognizing a Canadian doctrine of separation of powers,²⁰⁷ the Court then fell back to more familiar territory:

It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not ... constitutionally cognizable by the judiciary. The *grundnorm* with which the courts must work...is that of the sovereignty of Parliament.²⁰⁸

The Court's refusal to recognize the actual relationship between the cabinet and the House of Commons makes no sense in view of its functional approach in *Bhatnager*. One is left with the lingering feeling that, ultimately, whether the Court will take a realistic view of things will be determined not on the basis of principle but on whether it will serve to protect the *de facto* sovereignty of the political executive. This would not appear to bode well for a

²⁰⁵ *Auditor General*, *supra* note 203 at 89.

²⁰⁶ *Ibid.* at 97-98.

²⁰⁷ H.W. MacLauchlan, "Developments in Administrative Law: The 1889-90 Term", (1991) 2 *Supreme Court Law Review* 1 at 54.

²⁰⁸ *Auditor General*, *supra* note 203 at 103.

Canadian separation of powers. However, one must not lose sight of the fact that the Court voluntarily delved into an area of constitutional law where it need not have done so. Recognizing the existence of a separation of powers is the first step. Enforcing such a separation should follow once the courts admit to themselves that when, they call up parliamentary supremacy in aid of preserving executive power, they in reality are effecting a *de facto* shift in the "constitutional balance of powers" about which so much concern was expressed in the *Auditor General* case.

IV. Developing a Non-Delegation Doctrine for Canada: The Rationale—Re-adjusting the Constitutional Balance of Powers

(A) The Constitution and the Rule of Law

While Canadian constitutional scholars may say that it is too late in the day in Canadian law to begin "erecting principles of justiciability or principles of interpretation around a "constitutional balance of powers",²⁰⁹ it is argued that this is not so. There are substantial elements in the foregoing cases to lend strong support to the view that the doctrine of parliamentary supremacy has never meant in Canada what it has meant in England, namely, that there are no limits on Parliament's power to legislate except that it may not bind future Parliaments. Indeed, the very fact that the courts are willing to hold Canadian legislatures to the limits imposed on them by the *Charter*²¹⁰ is certainly not

²⁰⁹ MacLauchlan, *supra* note 207 at 57.

²¹⁰ The manner and form provision for amending the rights and freedoms set out in the *Charter*, section 38 of the *Constitution Act, 1982*, essentially gives the courts the final word as to their meaning and effect since it would be difficult to bring about an amendment under this section. Section 38 requires the consent of Parliament and at least seven provincial legislatures comprising at least fifty percent of the population of all the provinces, before any change can be made. This manner and form provision thus amounts to a restriction on the substance of future legislation. There is, of course, the override provision in section 33 of

consistent with the corollary of the supremacy of Parliament that the Parliament of today cannot bind the Parliament of tomorrow. No matter how discretely or how minimally that supremacy has been interpreted by the courts in Canada in a way different from how it would have been interpreted by courts in Britain in similar circumstances, the fact that it has been treated differently must mean that can be so only by reason of the existence in Canada of something Britain does not have—a fundamental law to which Parliament must adhere. Supremacy of the law then, rather than supremacy of Parliament, is the organizing principle of our Constitution, and the conceptual basis for precluding a judicially recognized separation of powers between the executive and legislative branch of government in Canada is not valid. For what else can the notion of abdication by legislatures of their law-making functions be but an elemental application of this doctrine? The answer of the High Court of Australia to this question demonstrates that, as with Canada, the spell-binding effect of the doctrine of parliamentary supremacy has lead to some undisciplined thinking about the nature of the law-making power under an entrenched constitution.

In the seminal case of *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan*,²¹¹ the High Court of Australia maintained that the federal Parliament was not competent to abdicate its powers of legislation by delegating to the executive the authority to make regulations over the whole head of power within section 51 of the Australian

the *Charter*, which allows any legislature to opt out of the application of sections 2 and 7-15 of the *Charter*. Normally, however, it is unlikely that section 33 will be used in view of its undemocratic nature. The fact that Quebec has made generous use of the section can be interpreted as a form of protest against the way it has been treated in the constitutional amendment process. Furthermore, it should be noted that the override clause is limited to sections 2 and 7-15. It does not, for example, apply to section 3 which sets out democratic rights in Canada.

²¹¹ (1931), 46 C.L.R. 73.

Constitution. However, the Court stressed that this was not because of the doctrine of separation of powers but simply because of the wording of the Constitution, which required a federal law to be "in respect of" some specific subject-matter listed in section 51. A grant of power over a whole subject-matter would not be a law "in respect" of that matter.²¹² Such an argument seems rather strained. In a federal state, setting out a list of subjects is the only way to indicate a division of powers between the central and state or provincial governments. The words "in respect of" a subject are meant only to achieve this purpose and should not, in a country such as Australia where parliamentary supremacy is supposed to be the organizing feature of its constitution, pose any impediment to delegating power over an entire subject-matter set out in that constitution. If the delegate were to make legislation that exceeded that subject-matter, i.e. was *ultra vires*, it could be called to account by the courts in the same way that Parliament could be called to account if it did the same thing. The truth of the matter is that, while neither the courts in Australia nor Canada may wish to cast the non-abdication doctrine in terms of a separation of powers, that is exactly what it is.

If then there is a constitutional separation of executive and legislative powers in Canada, it is submitted that the courts should be prepared to enforce that separation in more than the extreme cases of delegation. The Supreme Court of Canada has itself said it is the guardian of the Constitution.²¹³ As such, it must be prepared to take account of how

²¹² See also *Crowe v. The Commonwealth* (1935), 54 C.L.R. 69 and *Giris Fry. v. Commissioner of Taxation* (1969), 119 C.L.R. 365.

²¹³ In *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 at 649, the Supreme Court of Canada said:

A Constitution is drafted with an eye to the future....It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its

responsible government actually functions, not the way it is supposed to function. If the courts are going to insist on chanting the mantra of parliamentary supremacy in support of allowing broad delegations of legislative power, they should be able to point to some rational basis for believing that legislatures in this country are, in fact, capable of controlling the legislative process. Furthermore, if it is the principle of responsible government that is animating judicial refusal to enforce a more narrow separation of powers between the two political branches of government, this rationale should be reassessed. This should be done not only in light of the actual functioning of responsible government but also in light of the cases dealing with the notion of "abdication" that demonstrate that the courts, when faced with the extreme cases, are unwilling to put their faith in ministerial responsibility as a reliable accountability mechanism. Rather, they seem unable to maintain the fiction any longer and they choose to prohibit legislatures from delegating such power. It is in extreme cases that the courts are forced to admit that they must, in all sincerity, tell the emperor that he is wearing no clothes.

There are some who would undoubtedly argue, as does Finkelstein,²¹⁴ that it is inappropriate for the courts to deal with the question of abdication.²¹⁵ The matter is

framers. The judiciary is the guardian of the constitution and must in interpreting its provisions bear these considerations in mind....

²¹⁴ *Supra* note 193.

²¹⁵ *Ibid.* at 44. However, it is interesting to note that Canadian courts continue to be concerned with this question. See, for example, *Shoal Lake Band of Indians No. 39 v. The Queen in Right of Ontario, Re* (1980), 101 D.L.R. (3d) 132 (Ont. H.C.) and *R. v. Tenale* (1982), 134 D.L.R. (3d) 654 (B.C. Co. Ct.). At issue in both these cases was the constitutional validity of a delegation of legislative power by the federal Parliament to provincial Crown Ministers. The concern with the issue of abdication in these two interdelegation cases is particularly significant in light of the fact that the reasoning of the Supreme Court of Canada in *A.G.N.S.v. A.G.Can.*, *infra* note 249 in prohibiting delegation between primary legislative bodies

political rather than constitutional and should be left to the electorate. Finkelstein points out that the only real distinction between delegation and abdication, given the continuing existence of the delegating authority, appears to be the absence of "both limit of time and occasion and limit of object as judicially manageable standards".²¹⁶ This is, of course, exactly the point. As Allan²¹⁷ rightly observes, implicit in the idea of the rule of law, an organizing principle of our Constitution, is a commitment to some degree of separation of powers between the executive and the legislature.²¹⁸ If this were not so, there could not be government under the rule of law since government "could make laws at its own pleasure, and determine the extent of its own infraction of the laws".²¹⁹ Even though cabinet, in reality, controls both executive and legislative power, the court recognizes the distinction when ensuring that cabinet not exceed the limits of its statutory powers.²²⁰ Indeed, the courts insist that this distinction be maintained when they refuse to sanction "abdication" of legislative power. To sanction limitless delegation would be to sanction government beyond the rule of law. However, the lack of limits in enabling legislation is but one way to effect such government. Delegation of primary legislative power, given cabinet's effective control

was, essentially, that interdelegation would rearrange the division of powers between the federal and provincial levels of government established by the Constitution. See Hogg, *supra* note 6 at 354-355.

²¹⁶ *Ibid.*

²¹⁷ T.R.S. Allan, *Law, Liberty, and Justice* (Oxford: Oxford University Press, 1993).

²¹⁸ *Ibid.* at 22.

²¹⁹ *Ibid.*

²²⁰ *Ibid.* at 50.

over law-making, has the same result. Such a result is not sanctioned by the law-making provisions of the *Constitution Act, 1867*.

The fact that the power to make laws in the Constitution is committed to the Queen in Parliament rather than the Queen in Council is a clear recognition that the law-making and executive functions are distinct. While cabinet may well be the supreme source of policy, the Constitution recognizes that it is Parliament that is the supreme law-maker. Furthermore, this distinction is reinforced when one considers that the formal requirements of law-making set out in the Constitution are not concerned simply that laws be the outcome of the democratic legislative process. If that were so, then a simple resolution of the House of Commons would suffice to transform a bill into law. Legally, this is not possible.²²¹ Cabinet policies can only be transformed into law by formal legislation enacted in accordance with the procedure set out in the Constitution. Thus, when the courts uphold the delegation of primary legislative power to the executive, they are in essence, ignoring the Constitution and flouting the rule of law.

The refusal of the courts to place any meaningful restrictions on the delegation of legislative power to the executive, their refusal to review the exercise of legislative power by cabinet except on very limited grounds²²² and their willingness to broadly interpret

²²¹ "To make law" within the meaning of the Constitution is entrenched in that the participation of the Queen and Senate cannot be altered except in accordance with section 41 and 42 respectively of the *Constitution Act, 1982*. Section 41 requires the consent of federal government and all provinces to effect a change to the office of the Queen, Governor General or Lieutenant Governor. Section 42 requires any change to the powers of the Senate to be made according to the general amending formula—the 7/50 formula—set out in section 38, *supra* note 210.

²²² While the Supreme Court of Canada both in *A.G. Can. v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1 and *Operation Dismantle*, *supra* note 60 has supported the view that in principle there is no impediment to treating cabinet decisions and processes as justiciable, in practice the overwhelming tendency of the Court is to confine judicial review as Mullan, *supra* note 50 points out in his article.

statutory statements of objectives and purposes²²³ combined with the breakdown of ministerial responsibility as an accountability mechanism, have resulted in a situation where there are few if any checks on executive power.²²⁴ This is not consonant with either the *Constitution Act, 1867* or the rule of law that demands that the Constitution be upheld by the judiciary. As such, it has a responsibility to pierce "the cellophane curtain"²²⁵ behind which the executive in this country both makes and executes the law. It must be prepared to look behind the facade of parliamentary supremacy and to stop pretending, given what is generally known about the actual functioning of responsible government, that the legislative branch is sovereign and it must prohibit the delegation of primary law-making power. To those who would say that it is inappropriate for the courts to look to the true workings of government to uphold the Constitution, the decision of the Supreme Court of Canada in *A.G. Que. v. Blaikie (No. 2)* [hereinafter *Blaikie* cited to S.C.R.]²²⁶ would indicate otherwise.

In the *Blaikie* case the Court was asked to consider whether section 133 of the *Constitution Act, 1867*²²⁷ applied to regulations or by-laws of municipalities and school boards in so far as they came within sections 9 and 10 of Chapter III of Title I of the

²²³ Mullan, *ibid.* at 144-145.

²²⁴ This is particularly important in view of the fact that many if not most important decisions are made by senior civil servants. J.R. Mallory in "Responsive and Responsible Government" (1974) 12 *Proceedings and Transactions of the Royal Society of Canada* 207 at 216 states that senior civil servants can use their vast knowledge to persuade ministers that nothing can be done in a particular situation or that what has been done is right. In the face of superior knowledge, it is difficult for ministers to be able to argue successfully their view of what policy should be.

²²⁵ This term is borrowed from Chief Justice Campbell in *Gallant*, *supra* note 24 at 429.

²²⁶ [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15.

²²⁷ Section 133 mandates that both English and French be used in the records and journals of all Canadian legislatures and that the Acts of those legislatures be printed and published in both those languages.

Charter of the French Language.²²⁸ In the course of its holding that section 133 of the 1867 Act does apply to regulations, the Court had this to say about legislative powers delegated to the government of the province of Quebec:

There is...a considerable degree of integration between the Legislature and the Government.

The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial legislative agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and *in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body*.²²⁹ [emphasis added]

That the Court was prepared to recognize how responsible government actually works as opposed to how it is supposed to work was rationalized in the following way:

It is true that the above mentioned conventions of the Constitution were well established in 1867 and the delegation of legislative powers to the Executive was not then unknown. But such delegation was used sparingly and almost by way of exception. The exception has now become the rule in some matters to the point where a large and important part of the laws in force in the Province consists of regulations made by the Executive. The requirements of s. 133 of the *B.N.A. Act* would be truncated... should this section be construed so as to govern such regulations.²³⁰

In the face of the Supreme Court's recognition that it is cabinet that in reality legislates in this country, it is difficult to see how the judiciary can continue to rely on the doctrine of the

²²⁸ R.S.Q. 1977, c. 5.

²²⁹ *Blaikie*, *supra* note 226 at 320. This statement seems inconsistent with that of the Court in the *Auditor General* decision quoted *supra* at p. 63 of the text.

²³⁰ *Ibid.* at 320-321.

supremacy of Parliament as the rationale for allowing legislatures to delegate sweeping law-making powers to the executive.

(B) Public Accountability

(i) The Inadequacy of Administrative Law

Two years after *Blaikie*, the Supreme Court of British Columbia was given an opportunity in *Waddell v. Governor in Council* [hereinafter *Waddell*]²³¹ to deal with the delegation of primary legislative power to cabinet. In issue in the *Waddell* case was subsection 20(4) of the *Northern Pipeline Act*,²³² which authorized the Governor in Council to "rescind, amend or add" to the terms and conditions set out in Schedule III to the Act. The Cabinet made an order in council pursuant to this power that was impugned by Mr. Waddell, M.P., on the grounds that it created a new scheme to establish a pipeline to export Alberta natural gas. He argued that the parent Act established a pipeline to transmit American natural gas from Alaska through Canada to states below the 49th parallel. At trial, Mr. Waddell explained that he brought the case before the court because he was concerned with the growing trend on the part of the executive to by-pass Parliament by making broad, general regulations that, he argued, deprived Parliament of its constitutional role as the forum in which policy matters of political importance ought to be fully and publicly debated. He submitted that Parliament could not validly delegate to a subordinate agency power to

²³¹ [1984] 1 W.W.R. 307, 5 D.L.R. (4th) 254, (B.C.S.C.).

²³² S.C. 1977-78, c. 20.

amend the provisions of the parent statute. In the alternative, he argued that the order was *ultra vires* its parent act.

The court in *Waddell*, after accepting that subsection 20(4) of the *Northern Pipeline Act* was a so-called Henry VIII clause,²³³ went on to review the objections to such clauses expressed by the Donoughmore Committee²³⁴ and the McRuer Commission²³⁵ and stated that, however objectionable those clauses may be, they are acceptable as a matter of law. In doing so, the court simply fell back on unexamined assumptions, but clearly the practice was troublesome to the court. While Mr. Justice Lysyk considered the findings in the *Breathalyser Reference*, he refused to dismiss the issue by falling back on the rationale of Judson, J., speaking for the majority in that case, that courts could not "examine policy considerations animating the executive".²³⁶ He distinguished the case on several grounds

²³³ So called because according to the Donoughmore Committee, *infra* note 234 at 61 "...that king is regarded popularly as the impersonation of executive autocracy".

²³⁴ U.K., *Report of the Committee on Ministers' Powers* Cmd. 4060 (London: 1932) (Chair: Earl of Donoughmore). This Committee was established because of a rising tide of public concern in Britain about the extent of ministerial power in the making of delegated legislation and the making of quasi-judicial or judicial decisions. There was a particular fear that the increased practice of making legislation outside the legislative process was a serious threat to democracy in that country. Much of this fear was fuelled by Lord Hewart's book entitled the *New Despotism* (London: E. Benn Ltd., 1929). The Committee while accepting that delegated legislation was legitimate, recommended certain safeguards, such as publication.

²³⁵ Ontario, *Report of the Royal Commission Inquiry into Civil Rights*, No. 1, vol. 1 (Toronto: Queen's Printer, 1968) (Chair: J. McRuer). The Commission had been established in 1964 to examine, study and inquire into the laws of Ontario to determine the extent to which they interfered with freedoms, rights and liberties. The Commission had its genesis in a political mismove involving the government's response to the problem of organized crime in the province. The Commission uncovered a number of shocking abuses and recommended, among other things, more control of police powers, a full review of expropriation proceedings and greater control by the legislature of the law-making powers committed to it by the Constitution.

²³⁶ *Breathalyser Reference*, *supra* note 64 at 783.

and instead relied on an 1874 British case²³⁷ for the proposition that the court was entitled to determine the scope of subsection 20(4) by looking beyond the literal terms of the subsection to the purposes or objects of the Act as a whole in order to ascertain limitations on the delegated power which must have been intended by Parliament. After undertaking an analysis of the primary purpose of the Act and reviewing extrinsic evidence relevant to whether the order at issue was *ultra vires* the parent Act, the court determined that Mr. Waddell had failed to demonstrate that the order failed to conform with the objects of that Act and dismissed the action. Nonetheless, the case does stand for the proposition that the intent of the legislature is the guideline by which the courts can impugn or uphold the use of the delegated power, even where that power is a Henry VIII type power. The intent is the standard by which to measure lawfulness.

The decision of Mr. Justice Lysyk in *Waddell* demonstrates that the judiciary is clearly concerned with controlling the delegation of broad law-making powers to the executive. What is troublesome about the decision is that the court automatically assumed that administrative law is adequate to the task of checking the executive. Ultimately, it is not. Administrative law does not address the very threshold deficiencies which a non-delegation doctrine is designed to address. While the *Waddell* case attempts to grapple with the problem of Henry VIII clauses, it fails to go far enough. By starting from the unexamined assumption that a legislature, being supreme, can delegate such power, the court is foreclosed from

²³⁷ *Macbeth v. Ashley* (1874), L.R. 2 H.L. Sc.& Div. 352.

checking the use of such power where it expressly or impliedly authorizes the executive to change policy²³⁸

To argue that the *Waddell* decision at least forces the executive to disclose to the legislature that it may wish to pursue such a course of action misses the point. Statutes that delegate primary law-making power are already subject to the parliamentary process. The fact that it can be said that a legislative body knows, or thinks it knows, what it is doing when it delegates such power does not mean that it can know what will be done with that power. A similar observation was made by Mr. Stanley Knowles in a speech made in the House of Commons in 1971:

It is our experience in Parliament time and time again to think we knew what we passed when we gave final approval to a piece of legislation, only to find months later that things were being done or restrictions were being imposed of a kind we did not believe appeared in the bill at all....[W]e discover that we

²³⁸ Section 12 of the *Telecommunications Act*, S.C. 1993, c. 38 confers power on the Cabinet to vary and amend a decision of the Canadian Radio and Telecommunications Commission. There is nothing in the Act that is equivalent to section 28 of the *Broadcasting Act*, S.C. 1919, c. 11, which allows the Cabinet to exercise its override power only where it concludes that a decision "derogates from the attainment of the objectives of the broadcasting policy". As such, there is no reason the Cabinet could not exercise its power to vary or rescind under the *Telecommunications Act* without regard to the Act's policy objectives. Mullan, *supra* note 50 at 156 comments that the use of subjective language such as "in the opinion of" and "as it deems necessary" in legislation can be seen as the equivalent of a privative clause—a signal that the courts should respect the decision of the delegate. That this view is shared by the Government was demonstrated in the clause-by-clause and report stage consideration of Bill C-68, *An Act Respecting Firearms and Other Weapons*, 1st sess., 35th Parl., 1995 which is presently before the Senate. Section 133 of that Bill, among other things, repeals and replaces section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46 to allow the Cabinet to prescribe any thing to be a prohibited firearm that "in its opinion" is not reasonable for use in Canada for hunting or sporting purposes. Concern was expressed by both opposition and Liberal members of the Standing Committee on Justice and Legal Affairs that was considering the Bill about how this Henry VIII clause might be abused by Cabinet. What was particularly troubling to Committee members was the inability of government officials to provide a reasonable explanation for altering the existing provision in the *Code* which is not cast in subjective language. An amendment to delete the subjective words in the proposed provision was adopted by the Committee at clause-by-clause consideration of the Bill. See Canada, *Evidence*, Standing Committee on Justice and Legal Affairs (Ottawa: Queen's Printer, June 5, 1995, 157: 35-42). [The actual text of the amendment appears in the *Minutes* of the proceedings of the Committee which were unavailable at the time this thesis was submitted.] However, at report stage, this was replaced by a government amendment that returned the provision to its original wording. See Bill C-68 as adopted by the House of Commons June 13, 1995.

had given authority to the Governor-in-Council to make regulations for the carrying out of the purposes of the act and that under this authority restrictive regulations were passed, or restrictive definitions introduced of such a nature as to produce quite a different result from the result we thought had been intended....Take the new Unemployment Insurance Act. Because we gave the Governor-in-Council the power to define "earnings" we found that things were happening which we did not expect and that in many cases benefits were greatly reduced.²³⁹

Legislation that contains specific provisions allowing the executive to amend the parent statute, while legally acceptable, lacks constitutional legitimacy. This would appear to be supported by the Donoughmore Committee²⁴⁰ which, in its objections to Henry VIII clauses, stated:

(c) There can be no doubt of the extreme convenience...of a dispensing power such as that contained in the so-called "Henry VIII Clause"....But again the argument of convenience may be pushed too far. Even though it may be admitted that Parliament itself has conferred these powers upon Ministers, and must be presumed *to have done so with knowledge of what it was doing*, [emphasis added] it cannot be regarded as inconsistent with the principles of Parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute which has been passed by the superior authority.²⁴¹

A similar view is implicit in the following statement by the McRuer Commission²⁴² concerning Henry VIII clauses:

The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be *publicly debated* [emphasis added] in the Legislature.²⁴³

²³⁹ House of Commons, *Debates*, (4 October 1971) at 8681.

²⁴⁰ *Supra* note 234.

²⁴¹ *Ibid.* at 59.

²⁴² *Supra* note 235.

²⁴³ *Ibid.* at 348.

When this does not occur the legislative process is by-passed and Parliament is "deprived of its constitutional role as the forum in which policy matters of vital political importance ought to be fully and publicly debated".²⁴⁴

The issue of Henry VIII clauses needs to be raised to a constitutional imperative, i.e. that the courts prohibit such delegation by legislatures. Elected legislative bodies should be the only bodies capable of creating new beginnings either by passing new laws or by changing existing laws. It is only after this is accepted by the courts and a prohibition placed on the delegation of primary law-making power that the tools of administrative law can and should be brought into play. They can be used to ensure that power validly delegated is exercised in conformity with the parent statute and not used to change or effect a shift in the basic intent of the legislature. The problem with the *Waddell* decision is that it operates from the wrong initial premise. First the courts should, in the interests of effective public accountability by the executive, accept the principle that primary law-making power can be exercised only by legislatures in this country; only then does it become appropriate for the courts to use the familiar principles of administrative law to protect that principle from being undermined by the executive.

There are those who would argue that administrative law is our best hope of constraining executive power. They would point out that, even if the courts were to develop a non-delegation doctrine, it would never effectively address the problems raised in *Waddell* and would be a futile exercise. They would undoubtedly point to the example of the United States. There the delegation doctrine has not proved to be a serious limit on the power of

²⁴⁴ *Waddell, supra* note 231 at 259.

Congress to delegate legislative power even though such delegation is forbidden by the separation of powers implicit in that country's Constitution. The doctrine has been used infrequently to invalidate Congressional delegations.²⁴⁵ So long as legislatures in that country provide some "intelligible principle" in legislation by which a delegate must be guided, the courts have held there to be no delegation of the law-making power.²⁴⁶ The courts' failure to develop a satisfactory test as to what constitutes a meaningful standard has resulted in such a wide definition of that term that both Congress and state legislatures have been able to in fact delegate what often amounts to primary legislative power.²⁴⁷ However, some recent decisions would suggest that there has been a resurgence of the delegation doctrine in the United States.²⁴⁸

The experience of the delegation doctrine in the United States need not be repeated in Canada. The development of a Canadian non-delegation doctrine could, or at least should, have different results given our different system of government. Since party politics in Canada has diluted ministerial responsibility to a responsibility to the party commanding a parliamentary majority, thus allowing cabinet to both initiate policy and ensure its

²⁴⁵ David Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?" (1985) 83 Mich. L. Rev. 1223 at 1224-1225. According to Schoenbrod, *Panama Refining Co. v. Ryan* 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. U.S.A.* 295 U.S. 494 (1935) are the only two cases where legislation has been held to be unconstitutional on the basis of the delegation doctrine.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.* at 1223-1226.

²⁴⁸ See *I.N.S. v. Chadha*, 462 U.S. 919 (1983) which invalidated the legislative veto that allowed one House of Congress to invalidate deportation decisions made by the Attorney General. See also *Bowsher v. Synar*, 478 U.S. 714 (1986) which struck down congressional assumption or limitation of executive powers and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) which held that congressionally created bankruptcy courts are unconstitutional additions to courts created under article III of the Constitution of the United States.

transformation into law, it might be argued that Canadian courts should make a more concerted effort than have their American counterparts to develop a coherent test as to what constitutes improper delegation.²⁴⁹ At least when Congress delegates what often amounts to primary legislative power, it is Congress that is taking the action. It is not a question of the executive in the United States delegating this power to itself or some other delegate of its choosing as is the case in Canada where cabinet dominates the legislative process.

(ii) The Inadequacy of the Regulatory Process

A second argument that would likely be raised against judicial efforts to develop a Canadian non-delegation doctrine would be that the doctrine would be meaningless in the face of continued cabinet control of both the legislative process and the legislative product. It is clear, of course, that protecting parliamentary supremacy by making the practice of

²⁴⁹ Eventually, Canadian courts may well have to come to grips with this issue in the context of legislative interdelegation. The Supreme Court of Canada has held in *A.G. N.S. v. A.G. Can.*, [1951] S.C.R. 31, 4 D.L.R. 369, that Parliament cannot delegate its legislative authority to a provincial legislature. Is then the federal government prohibited from delegating legislative power to a Lieutenant Governor in Council of a province? Hogg, *supra* note 6 at 358 cites the Supreme Court of Canada's decision in *R. v. Furtney*, [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498, for the proposition that such delegation is permissible. However, this is not entirely clear. Mr. Justice Stevenson speaking for the majority of the court commented at 508-509 C.C.C. of his judgement:

It may be that in some instances a delegation to the Lieutenant-Governor would be tantamount to a delegation to a legislature. That question need not be resolved in this case because the *essential elements of the substantial federal scheme* [emphasis added] are spelled out in the *Code* and what was done by the Lieutenant-Governor was to make administrative decisions relation to matters of essentially provincial concern.

If ever that question has to be resolved, the courts will be obliged to develop a rule or test to determine what constitutes "legislation." See also *Seafarers' International Union of Canada v. Canada Labour Relations Board* (1993), 154 N.R. 314 (Fed. C.A.) where the Court accepts that *Furtney* stands for the proposition that Parliament may delegate its legislative power to any body or person other than a provincial legislature either directly or possibly indirectly through the *facade* of a Lieutenant Governor in Council.

collective and ministerial responsibility accord to the theory is beyond the jurisdiction of the courts. However, a non-delegation doctrine would have the effect of restricting, albeit indirectly, the exercise of executive legislative power by expanding the application of a principle closely allied with ministerial responsibility—public accountability through questioning and criticism in the legislature. Subjecting enabling acts that confer primary legislative power on the executive to scrutiny by a legislature is one thing; subjecting primary legislation itself to the same scrutiny is another. A non-delegation doctrine would insist on the latter. But is this really necessary? After all, are there not mechanisms already in place that address the problems of delegation from the parliamentary and democratic perspective? A brief review of these mechanisms shows that there are serious deficiencies in the regulatory process.

The *Statutory Instruments Act*,²⁵⁰ which came into force January 1, 1972, was a response to the concern among both members of Parliament and the public about the increase of legislative power delegated to the executive without any effective form of parliamentary control.²⁵¹ The Act provides for the examination, publication and scrutiny of regulations and other statutory instruments. Not only must all regulations and statutory instruments subject to the Act²⁵² be published in the *Canada Gazette* but by virtue of section 26 of the Act, they must also be referred to the Standing Joint Committee for the Scrutiny of

²⁵⁰ R.S.C. 1985, c. S-21

²⁵¹ While the *Regulations Act*, R.S.C. 1970, c. R-5 provided for the systematic publication and of all orders and regulations that had legislative effect, no provision was made for parliamentary scrutiny.

²⁵² Section 20 of the Act does allow the Governor in Council to exempt regulations and statutory instruments otherwise subject to the Act.

Regulations [hereinafter Scrutiny Committee], a committee composed of members of both Houses of Parliament. The Committee is authorized to review all regulations after they have been published and registered. The criteria for scrutiny have been established by the Committee itself and approved by both Houses.²⁵³ Essentially, the Scrutiny Committee ensures that the regulations are not *ultra vires*, do not trespass unduly on personal rights and liberties and do not contain material that should be dealt with by Parliament in a statute.²⁵⁴ At first blush, all this seems to bode well for parliamentary and public accountability. But there are a number of deficiencies.

The *Statutory Instruments Act* continues the requirement of its predecessor²⁵⁵ that subordinate legislation be published in the *Canada Gazette*, that "formidable anthology of disconnected public and private notices"²⁵⁶ that is widely regarded as an ineffective way to reach the public.²⁵⁷ A more serious deficiency, however, is the fact that the Act provides for no public consultation before regulations are made. While Treasury Board has published guidelines designed to encourage regulators to consult before making regulations and to pre-publish proposed regulations for further public input and comment,²⁵⁸ the President of the

²⁵³ Canada, *Seventeenth Report of the Standing Committee on Finance* (Ottawa: Queen's Printer, January 1993) (Chair: M. Dorin) at 60.

²⁵⁴ *Ibid.* at 9.

²⁵⁵ *The Regulations Act*, *supra* note 251.

²⁵⁶ Hodgetts, *supra* note 14 at 474.

²⁵⁷ There is presently before the House of Commons legislation that would replace the *Statutory Instruments Act*. Section 11(3) of Bill C-84, the *Regulations Act*, 1st Sess., 35th Parl., 1995 would allow a regulation to be published in another way that would be effective in bringing it to the attention of persons likely to be affected by it. It should be noted that the Bill would not radically alter the current law governing the examination and review of subordinate legislation.

²⁵⁸ D. Dupras, *Legislative Summary Bill C-84: Regulations Act* (Library of Parliament: 1995) at 25.

Board has no statutory duty to establish such guidelines, nor do regulatory bodies have a duty to comply with them.²⁵⁹ Thus, meaningful public scrutiny during the regulatory process tends to be uneven. For example, during the last years of the Mulroney government the Minister of the Environment established a non-statutory body—the Regulatory Advisory Committee—²⁶⁰ to advise the Minister on draft regulations and guidelines for the *Canadian Environmental Assessment Act*²⁶¹. This Committee is still in existence. However, at about the same time this Committee was established, the Minister of Justice established an advisory group called the Canadian Advisory Council on Firearms²⁶² whose mandate was to review and make recommendations affecting national policy, legislation, procedures and regulations under the firearms control provisions of the *Criminal Code*.²⁶³ This Council no longer exists. Efforts to have such a council established by statute were made by way of an amendment²⁶⁴ moved at clause-by-clause consideration of Bill C-68²⁶⁵ but the amendment was ruled out of order.²⁶⁶ Had the Government wished to ensure the passage of the

²⁵⁹ *Ibid.*

²⁶⁰ Canada, *Report of the Canadian Environmental Assessment Act Regulatory Advisory Committee*, No. 1 (Ottawa: Queen's Printer, April 1993) at 2-3.

²⁶¹ S.C. 1992, c. 37.

²⁶² Canada, *Report of the Special Committee on the Subject Matter of Bill-C-80 (Firearms)* (Ottawa: Queen's Printer, Feb. 1991) (Chair: J. Reimer) at 35.

²⁶³ *Supra* note 238.

²⁶⁴ Canada, *Evidence*, Standing Committee on Justice and Legal Affairs, (Ottawa: Queen's Printer, June 5, 1995) 156: 24.

²⁶⁵ *Supra* note 238.

²⁶⁶ Canada, *Evidence*, *supra* note 264 at 157: 25. The text of the amendment appears in the *Minutes* of the proceedings of the Standing Committee on Justice and Legal Affairs which were not available at the time this thesis was submitted.

amendment it could have done so despite the ruling.²⁶⁷ Furthermore, even where regulators do consult stakeholders, there have been complaints that consultation is sought too late in the regulatory process, stakeholders are not given enough time to properly study and respond to the issue, their views are often ignored without explanation and consultation is often used as a "means of ratifying a pre-determined solution rather than finding one".²⁶⁸

There are, of course, statutes that do mandate public consultation before subordinate legislation is made but they tend to be exceptional. Even those that attempt to do so fall short of the mark. A good example is the *Canadian Environmental Protection Act*.²⁶⁹ While section 2(d) of that Act requires the federal government "to encourage the participation of the people of Canada in the making of decisions that affect the environment", the Act allows few opportunities for the public to comment on proposals before decisions are made.²⁷⁰

Although under sections 8 and 9 public consultations may be held at the Minister's discretion with respect to public health and environmental quality objectives, guidelines and codes of practice, the Act does not require that notice be given. While the Act does allow certain decisions to be examined by a board of review, usually by way of an order of objection from a dissatisfied party, only some decisions are reviewable on a mandatory basis. Other

²⁶⁷ A Committee can overrule the decision of the Chairperson of a committee of the House of Commons by a majority vote. The government of the day always has the majority of members on such a committee.

²⁶⁸ *Seventeenth Report of the Standing Committee on Finance*, supra note 253 at 4.

²⁶⁹ S.C. 1988, c. 22.

²⁷⁰ Section 48 of the Act does require that when regulations are proposed for substances on the Toxic Substances List that notice be given in the *Canada Gazette*. It should be noted, however, that in a conversation the writer had on August 9, 1995 with Mr. Peter Bernhardt, one of the lawyers attached to the Standing Joint Committee for the Scrutiny of Regulations, it was pointed out that even where such notice is required, it is unusual for any substantial changes to be made to the proposed regulations. In many instances, the decision has already been made and the public is merely been presented with a *fait accompli*.

decisions are reviewable only by leave of the Minister, while others are not reviewable at all. Thus, even when there is a statutory commitment to public consultation in the regulatory process, public input remains uneven and limited.

Accountability to Parliament does not seem to fare any better under the *Statutory Instruments Act* than does accountability to the public. The primary method of procedure for the Scrutiny Committee is to report any objection it has to a regulation to the appropriate department or authority. The ultimate sanction is a report to the two Houses of Parliament in the face of non-compliance with remedial action suggested by the Committee.²⁷¹ The seriousness with which the Cabinet regards such a report is indicated by the fact that the Committee has, in its reports to those Houses, repeatedly complained of the lack of cooperation of government departments, and in particular of the Department of Justice, in withholding information.²⁷² Furthermore, the Committee essentially confines its review and scrutiny to the "legal probity of a regulation not its substantive merits".²⁷³ The Committee does not, therefore, consider a shift in policy by the executive under open-textured language in a statute to be a matter that should attract its objection and a suggested remedy. The Committee, however, may bring a flagrant case to the attention of the appropriate department

²⁷¹ G. Eglington, "Scrutiny of Delegated Legislation in the Parliament of Canada" (1978) 59 *The Parliamentarian* 271 at 272.

²⁷² See for example *Fourth Report*, 1st Sess., 32nd Parl., 1980, *Eight Report*, 2nd Sess., 32nd Parl., 1984.

²⁷³ *Seventeenth Report of the Standing Committee on Finance*, *supra* note 252 at 7. As is correctly pointed out in that report at 60, the criteria for scrutiny are by way of a "self-denying ordinance". Section 26 of the *Statutory Instruments Act*, which contains the terms of reference for the Scrutiny Committee, can be read very widely. That the Committee has confined its review to "legality, propriety and the rights and liberties of the subject" is a function of established tradition and concern with generating more work for a Committee that is already overburdened. In this regard it should be noted that in 1994 alone the *Canada Gazette*, Part II contained some 4,277 pages.

or agency or Parliament.²⁷⁴ But, in view of the fact that the Committee generally only reports to the two Houses twice annually and that little time is given to the consideration of such reports in Parliament,²⁷⁵ the effectiveness of this process is questionable.

It is clear that, in spite of the establishment of the Scrutiny Committee, there is no effective parliamentary control of delegated legislation. The following statement from the Third Report of the Special Committee on the Reform of the House of Commons [hereinafter McGrath Committee]²⁷⁶ is apposite in this regard:

Through the Joint Committee on Regulations and Other Statutory Instruments, Parliament has given itself the means to scrutinize delegated legislation, but a great deal remains to be done to assure effective parliamentary control.

We are also concerned that many regulations contain matters of policy that are never debated in the House of Commons. We therefore suggest that all standing committees use their mandate to review the policy and merits of statutory instruments made pursuant to legislation... Such a policy review ... is important because of the tendency of governments to present to Parliament general legislation pursuant to which the executive adopts regulations containing *the real substance of the law*.²⁷⁷ [emphasis added]

In an effort to give the House of Commons a more meaningful role in the scrutiny of regulations, the McGrath Committee recommended that the House adopt a mandatory procedure for affirming or disallowing subordinate legislation.²⁷⁸ It also recommended that

²⁷⁴ Conversation with Mr. Peter Bernhardt, *supra* note 270. Mr. Bernhardt indicated that he thought this a rather novel issue to which the Scrutiny Committee has not put its mind in any disciplined fashion. The Committee is essentially concerned that the language of the parent statute will bear the particular interpretation given it by the delegate.

²⁷⁵ *Ibid.*

²⁷⁶ Canada, *Third Report of the Special Committee on Reform of the House of Commons* (Ottawa: Queen's Printer, June 1985) (Chair: J. McGrath).

²⁷⁷ *Ibid.* at 35.

²⁷⁸ *Ibid.* at 36.

all such legislation be referred to the appropriate standing committee of the House in addition to being referred to the Scrutiny Committee.²⁷⁹

The McGrath Committee's first recommendation was addressed in 1986 when the Standing Orders of the House of Commons were changed to provide for disallowance procedure.²⁸⁰ This procedure²⁸¹ allows the Scrutiny Committee to make a report to the House containing only a resolution, which, if adopted by the House, results in an order of the House to the appropriate Ministry to revoke a statutory instrument that is the subject of the order. But the procedure has a number of deficiencies. First, the disallowance does not take effect immediately. Any order of the House that results from that procedure must be acted upon by the Minister. Faced with a recalcitrant Minister, the only recourse the House has is to find him in contempt and imprison him, something which is unlikely to happen. Second, debate is severely limited to one hour and no member may speak for more than ten minutes.²⁸² A third and more serious problem is the fact that the disallowance procedure is not a statutory procedure. The procedure, embodied as it is in the Standing Orders, is limited to instruments the Cabinet or a Minister has authority to revoke. It does not apply to subordinate legislation made by the non-political arm of the executive. As for the McGrath Committee's second recommendation, it has never been implemented. No change has been

²⁷⁹ *Ibid.*

²⁸⁰ *Seventeenth Report of the Standing Committee on Finance, supra note 253 at 16.*

²⁸¹ Sections 123-128 of the Standing Orders of the House of Commons (Ottawa: Queen's Printer, 1995) set out the procedure to be followed to instruct a Minister to revoke a regulation.

²⁸² However, the procedure does provide for a "deemed disallowance" in that if the resolution is not brought on for debate within a limited time, Standing Order 125 deems it to have been adopted.

made either in the Standing Orders or in the *Statutory Instruments Act* mandating that delegated legislation be sent to standing committees.

Concern about the weaknesses of parliamentary scrutiny of regulations has not abated since the McGrath Report. The Subcommittee on Regulations and Competitiveness of the Standing Committee on Finance in its 1993 report to the main Committee²⁸³ had this to say about the problem

There is widespread concern, well-merited in our view, that Parliament has lost control of the regulatory process.

....[A] good many of the rules that govern us must be made by the government and government officials. But this does not imply that Parliament can issue blank cheques to the Executive and then fail even to review what use is made of those cheques. Yet this is largely the situation today....[P]arliamentary scrutiny of regulations—with the notable exception of the SJC review...—is all but absent....The Executive's formal accountability to Parliament for regulation making... amounts, in practice, to a dead letter.²⁸⁴

The Report contained several recommendations. Among other things, it recommended that the Standing Orders should be amended to make the affirmative resolution procedures of the *Interpretation Act*²⁸⁵ operable.²⁸⁶ Of particular interest was its proposal that the requirements of an affirmative resolution for the coming into force of regulations should be included in the grant of enabling powers where the exercise of those powers substantially affects the provisions of the enabling statute or another statute, lays down a policy identifiable in the enabling Act or makes a new departure in policy.²⁸⁷ It is also interesting

²⁸³ *Seventeenth Report of the Standing Committee on Finance, supra note 253.*

²⁸⁴ *Ibid* at 7.

²⁸⁵ *Infra* note 313.

²⁸⁶ *Seventeenth Report of the Standing Committee on Finance, supra note 253* at 63-64.

²⁸⁷ *Ibid.*

to note that the Committee recommended that the disallowance procedure in the Standing Orders should be replaced by a statutory procedure covering all statutory instruments not subject to the affirmative resolution procedure.

What is clear from the foregoing is that the mechanisms in place to ensure parliamentary control of subordinate regulations are limited and haphazard. They simply do not take the place of scrutiny by way of the legislative process. But even if they could somehow be made as effective, they could never be guaranteed by legislation. What is here today could be gone tomorrow as is demonstrated by the introduction of Bill-C 62, the *Regulatory Efficiency Act*,²⁸⁸ which is presently before the House of Commons. This bill would allow the Cabinet to set aside any existing or future regulation made under any Act of Parliament and replace it with a privately negotiated compliance plan. This means that the government could, for example, grant exemptions from environmental or health regulations and replace them with such a plan. So much for the consultative role of the Regulatory Advisory Committee in respect of regulations made under the *Environmental Assessment Act*! The fact of the matter is that the only way to ensure that primary legislation gets effective scrutiny is to expose it to parliamentary debate by prohibiting its delegation. But, before the courts can develop a non-delegation doctrine, they must first re-examine constitutional principles and articulate, examine and develop the unarticulated premises on which the abdication/delegation cases rest. To do this, they must come to terms with the essence of primary and delegated legislation and the distinctions between them.

²⁸⁸ 1st Sess., 35th Parl., 1994.

V. Developing a Non-Delegation Doctrine for Canada: The Rule

(A) Primary and Subordinate Legislation Compared

It is indisputable that both primary and secondary legislation have the effect of law and that both depend upon Parliament or a provincial legislature for their legitimacy. However, enactments of legislatures and of a subordinate authority are different in kind. A legislature can, at any time, reassert its plenary power over regulations by revoking the delegated power or simply by passing an amending or repealing Act. Of course, all this can be done only within the democratic legislative process. Thus, while primary legislation requires royal assent, subordinate legislation does not.²⁸⁹ Section 2 of the federal *Interpretation Act*²⁹⁰ would appear to equate regulation-making power with legislative power in that it defines "enactment" as "an Act or regulation or any portion of an Act or regulation". However, placing regulations on the same footing as statutes for the purposes of interpretation, as was done in the *Blaikie* decision, is simply judicial recognition of the similarity of their legal effect, not of their legal nature.²⁹¹ This was clearly recognized by the Supreme Court of Canada in *R. v. Singer* [hereinafter *Singer*].²⁹²

The *Singer* case arose out of a regulation enacted under the *War Measures Act*²⁹³ that restricted the sale of codeine in pharmacies. While the Act gave the Governor in Council

²⁸⁹ Section 55 of the *Constitution Act, 1867* provides for the requirement of royal assent for acts passed by Parliament. That section is applicable to provincial legislatures by virtue of section 90 of that Act.

²⁹⁰ R.S.C. 1985, c. I-21.

²⁹¹ Dussault & Borgeat, *supra* note 6 at 360.

²⁹² [1941] S.C.R. 111.

²⁹³ S.C. 1915, c. 2 as amended by R.S.C. 1927, c. 206.

express power to impose penalties within prescribed limits, the regulation in question did not provide a penalty for its violation. Singer was, therefore, prosecuted under section 164 of the *Criminal Code*,²⁹⁴ which provided that, where a person disobeyed any Act of Parliament or any legislature without lawful excuse and no penalty was expressly provided by law, the person was subject to a maximum penalty of one year. The question for the Court was whether "Act of Parliament" included a regulation. The majority of the Court held that the regulation of the Governor in Council could not be considered an Act of Parliament. Even though subsection 3(2) of the *War Measures Act* stated that all orders and regulations made under that section were to have the force of law, the majority held that such a provision had no legal consequences. Rinfret, J. speaking for himself and Crocket, J. as part of the majority stated:

Of course, the *War Measures Act* enacts that the orders and regulations made under it "shall have the force of law." It cannot be otherwise. They are made to be obeyed and, as a consequence, they must have the force of law. But that is quite a different thing from saying they will be deemed to be an Act of Parliament.

An Act of Parliament, in order to become law and to form part of the statutes of Canada, must be adopted by the House of Commons, the Senate and receive the Royal Assent. *It is debated publicly, to the knowledge of the public*, [emphasis added] and it comes into force on the day of its sanction by Royal Assent, which is given publicly.

The regulation takes the form of an Order in Council, *debated secretly by the Privy Council* [emphasis added] and, generally speaking, will come into force as soon as it is signed by the Governor General, without there being any essential requirement for its publication.

²⁹⁴ R.S.C. 1927, c. 36.

....These circumstances show the great difference between an Act of Parliament and the Order in Council, *in so far as the people is* [sic] *concerned....*²⁹⁵ [emphasis added]

In short, delegated legislation is simply "law making outside the legislative process."²⁹⁶

The undemocratic nature of subordinate legislation that was underscored in the *Singer* case was echoed recently by the Standing Joint Committee for the Scrutiny of Regulations in a report²⁹⁷ laid before the House of Commons in November of 1992. The Committee, in recommending the revocation of certain regulations made under the *Public Works Act*²⁹⁸ that had the effect of restricting certain rights and freedoms in the vicinity of Parliament, stated:

Our constitutional order is meant to protect individual liberties while maintaining the ability of the government to govern.... Your Committee...firmly believes that significant limits or restrictions on individual rights and freedoms ought almost invariably to be established by an Act of Parliament that is, prior to its adoption debated in Parliament. In this way, the proposed measures are brought to the notice of Canadians, who then have the opportunity to make representations to legislators. This approach recognizes that regulations, unlike parliamentary legislation, can be made privately and without the benefit of public advice and criticism and the rules of parliamentary procedure that provide important democratic safeguards that are absent from regulation-making.²⁹⁹

(B) The Substance of A Non-Delegation Doctrine : What Should It Be?

²⁹⁵ *Singer, supra* note 292 at 114-115. The criticism regarding lack of publication has since been addressed by the *Statutory Instruments Act, supra* note 250 but there are still some statutory instruments that are not required to be published under that Act.

²⁹⁶ Schoenbrod, *supra* note 245 at 1235.

²⁹⁷ Sixth Report, 3rd Sess., 34th Parl.

²⁹⁸ R.S.C. 1985, c. P-38.

²⁹⁹ *Sixth Report, supra* note 297 Appendix B at 7.

Judicial insistence that original legislative power can only be exercised by legislatures alone would, in the end, amount to insisting that the executive subject all of its important public policy choices to the democratic legislative process. While this certainly does not eliminate the executive's considerable control over the making of legislation, it reduces significantly the control it could have exercised had it been allowed to legislate those policies via secondary legislation. This is so because ministers do explain and defend their departmental policies before the elected representatives of the people. While ministers are not required by law or convention to answer any question put to them by members of their legislature or to provide any reason for doing so,³⁰⁰ they usually do answer or, if they refuse, provide a reasonable explanation for so doing. This is because there is a great deal of political pressure on ministers to justify both their actions and those of their departments. A minister who simply refuses to answer does so at his political peril.

Some may argue that it is this political aspect of ministerial responsibility rather than its ineffective constitutional aspect that is animating the courts to uphold the delegation of primary legislative power to the executive. After all, legislatures are, in such cases, able to debate the "merits" of the cabinet policy of delegating to itself or some other part of the executive the power to make important basic policy behind closed doors. Questions can be asked by members of those legislatures and answers given about the legislation in question. The opportunity for some degree of public accountability exists. It is submitted, however, that this is not the rationale animating the courts. If it were, the courts should be no more concerned when a legislature arms cabinet with general legislative power, i.e. "abdicates" its

³⁰⁰ Heard, *supra* note 40 at 53.

law-making function, than when it arms cabinet with the power to make law in respect of a particular subject-matter without articulating the basic policy in respect of that subject matter, i.e. delegates its primary law-making function. While it may appear that members would be able to question a minister with a little more specificity in the latter situation than in the former, this is more illusion than reality. In both cases the statute delegating law-making power remains hollow if that power is not exercised. In both cases policy is yet to be made. It is impossible for members to ask questions about the merits of a policy that does not exist. In both cases, parliamentary debate can amount to no more than a debate as to the wisdom of delegating such power to the executive.

The essence of a delegation doctrine should be to insist that primary legislation reflect the fact that important public policy choices are to be made only by elected legislative bodies.³⁰¹ It is for those bodies alone to make the "hard-choice decisions"³⁰² about particular issues or problems that are to be addressed by legislation. They should set out not only their goals or purposes in a statute but also a resolution of the values and interests that confront them.³⁰³ Simply identifying goals or listing purposes and leaving it to the delegate to pursue those goals or achieve those purposes in any way it chooses is not making the hard

³⁰¹ Hogg, *supra* note 6 at 306 states that "...in a democratic society important public policy choices should be made in the elected legislative assemblies...."

³⁰² Mallory, *supra* note 224 at 212.

³⁰³ Aman & Mayton, *supra* note 52 at 18-24. *Contra* E. Rubin "Law and Legislation in the Administrative State" (1989) 89 Col. L. Rev. 369 who in formulating a theory of legislation accepts as a starting point that it is appropriate for a legislature to enact what he calls "intransitive" legislation. Such legislation would allow delegates to determine policy problems under instructions from the legislature.

choices about what is at issue in the statute.³⁰⁴ It should be elected legislative bodies rather than a delegate who determines the substance of the law. Delegated legislation must be truly subordinate in a substantive, not merely a procedural, way. That is, the delegate can deal with policy in so far as the delegate can exercise a discretion, but that policy choice or discretion that the delegate exercises must be circumscribed by the overall goal and the means of achieving it set out in the statute. It must be a statutorily constrained value choice.

"Here is the problem you deal with it and find a solution"³⁰⁵ legislation cannot be said to be legislation in which a legislature has made an important public policy choice. Even worse is legislation that is merely enabling. Not even the problem is identified in such legislation. For example, in *Horsemen's Benevolent and Protective Association of Alberta v. Alberta Racing Commission*, [hereinafter *Alberta Racing Commission*]³⁰⁶ the regulation making power was contained in the *Racing Commission Act*,³⁰⁷ Twenty-one subsections enabled the Alberta Racing Commission to govern, direct, regulate and control horseracing and the operation of race tracks in all its forms in the province. At issue in the case was a directive passed by the Commission prohibiting synthetic corticosteroids in racing horses that was challenged on various grounds. The object of the statute—to govern, direct, control and regulate horse racing—could be gleaned from the subsections. The court acknowledged,

³⁰⁴ The Canadian telecommunications policy as set out in the *Telecommunications Act* consists of series of potentially conflicting goals. The Act provides little guidance as to which should take priority in the event of a conflict, thus leaving it to the Canadian Radio and Television Commission to make important policy choices about implementation of those objectives.

³⁰⁵ Aman & Mayton, *supra* note 52 at 12.

³⁰⁶ (1989), 100 A.R. 304 (Alta. C.A.).

³⁰⁷ R.S.A. 1980, c. R-1.

however, that the statute provided the commission with a "bare bones" enabling power which contained no statement at all of the intent of the legislature pertaining to horseracing.³⁰⁸ It can hardly be said that the Alberta Legislature had expressed its intent pertaining to horse racing any more than it could be said that the Manitoba Legislature had expressed its intent pertaining to all the statutes covered by the subordinate legislation at issue in *Re Manitoba Government Employees Association*. When a legislative body simply authorizes regulations for a stated purpose, the delegate has a free hand to establish not only the details but also the main principles. The entire law is therefore left to the decision of subordinates. So long as whatever law is made is within the stated purpose, it cannot be challenged. The court in the *Racing Commission* case had no problem with upholding the skeleton legislative grant of power and found that the authority did not exceed its powers in making the challenged directive.

However, it is argued that this kind of a grant of power is objectionable. There is a logical fallacy in accepting a mere enabling power, without more, for a delegate under the *Constitution Act, 1867*. Power granted to "govern, direct, control and regulate" a specific subject-matter is in principle no different from power granted to make law "for peace, order and good government"; the fact that a delegate is limited to exercising its power in respect of a particular matter does not change the fact that it is the delegate and not a legislature that is making the entire law in this matter. The difference is one of degree. However, the *Constitution Act, 1867* enables only Parliament and provincial legislatures to make laws. An enactment that simply transfers that legislative power—the establishing of main principles and

³⁰⁸ *Alberta Racing Commission*, *supra* note 306 at 313.

thus the power to make the important public policy choices about a particular subject-matter—to the executive is not an exercise of legislative power but a failure to legislate. It amounts to parliamentary "legiscide".³⁰⁹ If such a grant were in and of itself always acceptable, the courts would not have been compelled to accept the abdication/delegation distinction in the first place. And if one accepts that this distinction is justifiable, one must be able to point to the principled reason this is so. To add the criterion that the power must be exercised with respect to some subject-matter, for example, horseracing, conflates any difference between primary and delegated legislation, which, it is submitted, must be maintained. That difference is that delegated legislation is of a fundamentally different kind: it is not purely legislative in nature, but it is in its essence made to carry out the primary legislation; it is delegated, and therefore essentially administrative or executive in nature. To ignore this aspect of delegated legislation is "to ignore its method, its purpose and its constitutional fact".³¹⁰ This is something that the abdication/delegation distinction accepts as an unarticulated premise.

To merely prescribe a subject-matter (for example, horse racing) makes the exercise of delegated power only procedurally different from the exercise of primary legislative power. But the delegate is not a free agent. The delegate does not have a roving mandate to do good; only Parliament and provincial assemblies have that. The courts must therefore ask themselves whether the statute prescribes more than just policy to make policy. Does the

³⁰⁹ Theodore Lowi, "Two Roads to Serfdom: Liberalism, Conservatism And Administrative Power" (1986) 36 *American University Law Review*, 295 at 299.

³¹⁰ J. Small, "Legitimate Expectations, Fairness and Delegated Legislation" (1995) 8 *Can. J. Adm. Law & Practice*, 129 at 139.

statute constrain the delegate in exercising the power for a purpose, goal or object that identifies the fundamental reason for adopting the legislation in the first place? Does it indicate to the delegate the remedial measures appropriate to achieve that purpose, goal or object? In other words, statutes that merely confer wide subjective grants of power would be unconstitutional; the lawfulness of the exercise of any subjective grant of power conferred within an otherwise constitutionally valid statute would always be measured by the reasoned purpose, goal or object set out in the statute and the permissible parameters of the means to achieve these ends.

We return to the power to "govern, direct, control and regulate" horseracing. By granting such a power, the legislature has retained for itself no vision of just what horseracing in the province might come to be. The delegate has a free hand to develop horseracing in the province, so long as it does so, purportedly, under the Act, and the Act has provided the delegate with all the justification needed to pass virtually any regulation regarding horseracing. There is virtually nothing in the enabling section that would preserve the accountability of the public authority in the making of the regulations. The delegate should, however, act only in a manner ancillary to the legislation. Indeed, *Hodge* stands for the proposition that subordinate legislation is ancillary only.

A non-delegation doctrine, should it be adopted, would prohibit a cabinet from delegating to itself or some other part of the executive power to make fundamental public policy choices outside the normal legislative process. Without the specificity regarding policy that the doctrine demands, the courts cannot impugn an action of a delegate either because there is no meaningful standard against which the courts can measure lawfulness or because

subjective open-ended enabling power is not susceptible to meaningful judicial review.³¹¹ Without this ability in the keeping of the courts, legislatures are no longer supreme: they have abandoned their supremacy to another, however well intentioned that other is. To say that a legislative body has retained its sovereignty because it can take back the delegated power is inadequate. It is inadequate for several reasons. First, it would mean that its intention is made manifest only after the fact, which is no guide to delegates at all. So much for the principle that the laws must be clear, open, etc.³¹² Second, legislatures do not and cannot in fact police these powers of delegates in any meaningful way, so that for the vast majority of cases, neither they, nor the courts, are able to uphold the supremacy of Parliament. Third, the *Constitution Act, 1867* is a fundamental law, which prescribes the

³¹¹ In non-*Charter* cases Keyes, *supra* note 6 at 241 observes that Canadian courts do sometimes rely on enabling provisions to strike down subordinate legislation on the grounds of uncertainty but more often do not "advert to the terms of the enabling legislation in discussing the uncertainty of executive legislation." The type of delegated legislation that was most frequently invalidated on the basis of uncertainty or vagueness prior to 1982 was municipal by-laws. See P.A. Coté, "Le règlement municipal indéterminé" (1973) 33 Rev. du Bar. 474. It is true of course that the Supreme Court of Canada has developed a "doctrine of vagueness" in a series of *Charter* decisions, the most recent of which is its unanimous decision in *Canada v. Pharmaceutical Society (Nova Scotia)* (1992), 139 N.R. 241, 15 C.R. (4th) 1. According to this doctrine, a vague law that deprives a person of life, liberty or security breaches section 7 of the *Charter* in that it violates the principles of fundamental justice protected by that section. A vague law also breaches section 1 of the *Charter* since that section requires that a limit on rights and freedoms must be "prescribed by law". However, it is the courts that determine whether a law is vague and as Keyes at 249 points out, they have generally refused to find subordinate legislation void for vagueness. This is not surprising given that the Court in the *Pharmaceutical Society* case held that the threshold for finding a law vague is relatively high. Furthermore, the doctrine can be triggered only when a *Charter* right or freedom is at issue. Interests which do not assume the form of rights but which seriously affect people in their daily lives are not protected. For example, there is no right to social welfare in the *Charter* but the interests at stake in social welfare legislation may be as important to certain individuals as any right or freedom they have protected under the *Charter*. See P. Craig, *Administrative Law*, 3rd (London: Maxwell and Sweet, 1994) at 16-17.

³¹² See the decision of Lamer., J. in *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 at 86, where he states that:

It is essential in a free and democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards... [emphasis added]

power to enact laws and gives that power to the elected legislative bodies in this country, not to the executive.

To say that the grant of a mere enabling power such as to "regulate horse racing in a province" is justifiable should a legislature simply ensure that the regulations are laid before it and are subject to a positive or negative resolution of that body,³¹³ is also inadequate.

First, the *Constitution Act, 1867* is the supreme law and must be given effect to as fundamental law: that Act gives the power to enact laws to specific bodies and no others. Second, such a procedure is on a slippery slope of parliamentary timetabling and is subject to being dealt with in a summary fashion: primary legislation will inevitably take priority with respect to parliamentary time and attention, so that in practice there will invariably be no real, effective scrutiny of the regulations at all. It is simply, in our current state of parliamentary affairs, not within the realm of the possible that the delegated legislation should be subject to intense scrutiny: that is one of the rationale for delegated legislation in the first place. The historical baggage influencing how we view delegated legislation makes this inevitable and this mindset is not one that will be easily overcome. That is why it is all the more important, for pragmatic reasons, that basic policy be set out in the parent act. Moreover, to continue to allow legislatures in this country to do otherwise would be to

³¹³ Section 39 of the *Interpretation Act* provides that any regulation that is subject to an affirmative or negative resolution of Parliament or the House of Commons shall be laid before Parliament or the House fifteen days after it is made. A regulation subject to an affirmative resolution cannot come into force until it is affirmed by both Houses of Parliament or the House of Commons, as the case may be. The negative resolution procedure allows both Houses or the House of Commons to annul a regulation subject to the procedure. Once such a resolution is adopted the regulation is revoked. Most subordinate legislation made under federal statutes are not subject to this procedure.

continue the illusion of parliamentary supremacy when the political accountability mechanisms of collective and individual ministerial responsibility have broken down.

At the end of the day, a non-delegation doctrine by insisting that fundamental policy choices be made by elected legislative bodies and not by executive bodies would allow the courts to ensure that any delegated discretion be exercised in furtherance of those choices or at least in a way that is compatible with those choices. Vague and open-ended language in a statute could not be used by the executive to change those choices.³¹⁴ According to the *Constitution Act, 1867*, Parliament and the provincial legislatures are the only bodies that can do that. Only they have the constitutional power "to alter the status quo".³¹⁵ When they do so via legislation, their policy choices leave the realm of politics and enter the realm of law. That policy is as much a part of the law as is each provision in the legislation. Power delegated to the executive to make "ancillary" policy choices should, it is submitted, never be exercised in a way incompatible with that policy. If the executive uses such delegated power to replace the goals or purposes adopted by the legislative process, it is acting in as *ultra vires* a fashion as if it were acting beyond the scope of a particular provision of the legislation.³¹⁶ In such an event, it is not only appropriate but necessary that the courts call

³¹⁴ H.N. Janisch in "At last! A New Canadian Telecommunications Act" (1993) 17 *Telecommunications Policy* 691 at 692, observes that such phrases as "just and reasonable rates" and "unjust discrimination" in the *Railway Act*, R.S.C. 1985, c. R-3, which prior to the enactment of the *Telecommunications Act* covered telecommunications matters, were used to effect shifts in policy without the need for parliamentary sanction. He states that "...[t]hus, when... responsibility for telecommunications was transferred from the Canadian Transport Commission to the CRTC in 1976, the latter was able to adopt a far more rigorous and demanding approach to regulation than its predecessor without there being a need for statutory change".

³¹⁵ Aman, *supra* note 53 at 1237.

³¹⁶ *Ibid.* Aman argues at pages 1229 and 1230 that when the courts refuse to examine the overall substance or nature of a challenged regulation and the value conflicts that underlie it, they are assuming a bright line between questions of law that are subject to judicial review and questions of discretion that are not subject

the executive to account. The rule of law demands nothing less. The Constitution of Canada is fundamental law. It cannot be side-stepped by executive practices. Courts have not only the obligation but also the power to fill the democratic deficit created by such practices. It is the rule of law that authorizes and demands their intervention.

VI. The Non-Delegation Doctrine Stifled?: Procedural and Legislative Responses Considered

(A) Parliamentary Privilege: Controlling the Legislative Process

If one of the reasons underlying the development of a non-delegation doctrine in Canada were executive accountability via parliamentary deliberation, should one be concerned that cabinet in this country, unlike its counterpart in the United States, controls both the legislative product and the legislative process? The Standing Orders of the House of Commons and of the various provincial assemblies that regulate procedure in those bodies are in the keeping of cabinet. The legislative process could be changed in such a way as to effectively undermine a primary reason for developing such a doctrine in the first place. However, given the force of public opinion, it is highly unlikely that cabinet would attempt to use its power in this way. But were it to do so, what, if anything, could the courts do about it? If nothing, then the parliamentary accountability rationale for developing such a doctrine could ultimately be undermined by the very body whose *de facto* sovereignty the courts were attempting to constrain in developing such a doctrine. A consideration of the recent Supreme Court of Canada decision in *New Brunswick Broadcasting Co. v. Nova*

to such review. Aman does not believe that such a line exists.

Scotia (Speaker, House of Assembly) [hereinafter *Donahoe*]³¹⁷ suggests that the courts do have the jurisdiction to prevent this from occurring.

The main issue before the Court in *Donahoe* was whether the *Charter* applied to prevent the Nova Scotia House of Assembly from excluding the media from televising its proceedings. One of the reasons for this exclusion was the concern that setting up cameras on the floor of the small House would interfere with its proceedings. The respondent in the case, New Brunswick Broadcasting Company claimed that it was possible to film the proceedings from the public galleries with hand held cameras that were not only silent but required no special equipment. The Speaker of the House, Mr. Donahoe, insisted in his evidence that the use of such portable equipment would interfere with the decorum and orderly proceedings of the legislature. The respondent argued that the real reason for excluding television cameras from the House was to limit public scrutiny of what occurred there and submitted that such a rule violated the right to freedom of the press guaranteed by section 2(b) of the *Charter*. One of the arguments advanced by the appellants was that the *Charter* did not apply to the House since its parliamentary privilege of being able to control who attended in its chamber enjoyed a constitutional status and so could not be abrogated by another part of the Constitution. McLachlin J., speaking for the majority, not only agreed but found that the preamble to the *Constitution Act, 1867* conferred on Canadian legislative bodies those inherent privileges historically recognized and necessary for their proper functioning.

³¹⁷ [1993] 1 S.C.R. 319.

Exclusive control by Canadian legislative bodies of their internal proceedings has been one of the inherent privileges recognized as proper to their functioning. Erskine May³¹⁸ states that one of the privileges of the British House of Commons is the right to be the sole judge of its own proceedings, which includes the collective right of the House to settle its own code of procedure:

This is such an obvious right—it has never been directly disputed—that it is unnecessary to enlarge upon it except to say that the House is not responsible to any external authority for following the rules it lays down for itself, but may depart from them at its own discretion.³¹⁹

Madame Justice McLachlin at page 270 of her judgement identified this as one of four specific privileges that arose in the United Kingdom but never specifically discussed the status of this privilege in Canada. However, the mere fact that she singled out exclusive control of internal proceedings may be taken to imply that it has constitutional status. This, combined with McLachlin, J.'s warning against using the test of necessity as a way of judging the content of the privilege being claimed, thereby interfering unduly with the independence of the legislative branch of government, would not appear to bode well for any judicial protection of the public accountability rationale underlying a Canadian non-delegation doctrine. However, other statements by Madame Justice McLachlin would strongly suggest that the courts are particularly concerned with protecting what is essential to that rationale—the deliberative aspect of parliamentary democracy.

³¹⁸ C. Gordon, ed., *Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament*, 20th ed. (London: Butterworths, 1983).

³¹⁹ *Ibid.* at 89.

The fact that a privilege has been upheld for many centuries both in England and Canada is, as McLachlin, J., points out, some evidence that it is generally regarded as essential to the proper functioning of a legislature, but it is not determinative of the issue. The test of necessity must be asked in the context of a "modern Canadian democracy".³²⁰ Having determined that the right to exclude strangers is as necessary today in Canada as it ever was, Madame Justice McLachlin then goes on to consider whether the particular exercise of this privilege in the case before the court is necessary. In her judgement she states:

The legislative chamber is at the core of the system of representative government. It is of the highest importance that the *debate in that chamber not be disturbed or inhibited in any way*....[emphasis added] The rule that the legislative assembly should have the exclusive right to control the *conditions in which that debate takes place* [emphasis added] is thus of great importance, not only for the autonomy of the legislative body but to *ensure its effective functioning*. [emphasis added]

This lends support...to the proposition that it is necessary...that the Assembly possess the absolute right to exclude strangers from its proceedings, *when it deems them to be disruptive of its efficacious operation*. [emphasis added]

What then of the right of the *public to attend the debates* [emphasis added] of the legislative body? It is not necessary on this appeal to consider the case of an attempt to exclude all members of the public, or certain groups of the public, and conduct the business of the House in private...*The issue here is the power of the legislative assembly to restrict what members of the public attending the proceedings may do while in the chamber, and to expel them if they refuse to comply*.³²¹ [emphasis added]

³²⁰ *Donahoe, supra* note 317 at 271.

³²¹ *Ibid.* 271-272.

It is clear that underlying Madame Justice McLachlin's reasons for giving constitutional status to the privilege in issue in this case is her concern that parliamentary debate not be impaired in any way.³²² She seems to accept as a given that debate and the House go hand in hand. Furthermore, while she leaves open the question of whether a legislative body could exclude all members of the public, the very fact that it is raised at all when it need not have been, is telling. It suggests that the Court is particularly concerned about public knowledge of the debates that occur in Canadian legislative bodies. This concern is particularly significant given that the primary constitutional function of these bodies is to legislate. In view of the fact that the test of necessity set out in *Donahoe* must ultimately be determined in a modern democratic setting, it would be difficult to see how it could be argued effectively (except perhaps in exceptional circumstances such as war or some national emergency) that conducting the business of the House of Commons in private or in such a way as to seriously erode the rules of parliamentary procedure in respect of the legislative process—rules that are designed to provide important democratic safeguards—is necessary in a modern Canadian democracy. In fact, the opposite would appear to be the case if an "informed public is the essential bedrock of a successful democratic government".³²³

³²² It is interesting to note the Supreme Court of Canada's reliance on parliamentary debate as part of its reasoning in denying a judicial remedy in *Auditor General*, *supra* note 203. The Court pointed out that the reporting remedy provided in the *Auditor General Act* was not to be underestimated. At page 104 Mr. Justice Dickson stated :

A report by the Auditor General to the House of Commons that the government of the day has refused to provide information brings the matter to public attention. It is open to the Opposition in Parliament to make the issue part of the public debate.

³²³ *Donahoe*, *supra* note 317 per Mr. Justice Cory at 250.

(B) Unilateral Constitutional Amendment of the Law-Making Power

In the face of a non-delegation power in Canada, could Parliament, under section 44 of the *Constitution Act, 1982* and the provincial legislatures, under section 45 of that Act, simply amend the law-making power conferred on them by sections 91 and 92 of the *Constitution Act, 1867* to allow for the delegation of primary legislative power. At first blush, one might be tempted to answer in the affirmative.

Under section 44 of the *Constitution Act, 1982*, the federal Parliament can by an ordinary Act of Parliament amend the Constitution of Canada in relation to the federal executive and both Houses of Parliament. Section 45 confers a corresponding power on the legislature of each province to amend the constitution of the province. However, both these sections are subject to section 41(a), which provides that any amendments made in relation to the office of the Queen, the Governor General and the Lieutenant Governor can only be made with the unanimous consent of the federal government and all eleven provinces.

A non-delegation doctrine would mean accepting that the term "to enact laws" within the meaning of sections 91 and 92 of the *Constitution Act, 1867* has substantive content: it is not just procedural. It would be a judicial recognition that the 1867 Act vests in Parliament and provincial legislatures primary legislative power that only they may exercise. Any legislation resulting from the exercise of this power would, of course, according to section 55 of that Act, require royal assent before it could become law. Any amendment to section 91 or 92 of the 1867 Act that would allow Parliament or a provincial assembly to delegate its primary law-making power to another would mean that such power could then be exercised free of the requirement of royal assent that is a constitutionally mandated part of the

legislative process in Canada. Delegated legislation does not, of course, need royal assent since it derives its authority from its assented to parent statute. Accordingly, it is argued that such an amendment to section 91 or 92 would be unconstitutional.

It is clear from the *Re Initiative and Referendum decision* that the term "office" involves more than dealings with the office holder. It also encompasses the powers relating to that office, one of which is the requirement of royal assent. It is submitted that in the face of a non-delegation doctrine, Parliament or a provincial legislature would be obliged to comply with the amending formula set out in section 41(a) before it could amend section 91 or 92 to allow for the delegation of its primary law-making power. In short, in recognizing that primary legislative power is exclusive to the legislative branch, a non-delegation doctrine would demand that its exercise be constitutionally entrenched.

Conclusion

The limitations imposed on Canadian legislatures by the non-abdication doctrine raise important questions about the nature of legislative power in the Canadian Constitution. If the courts' refusal to develop a non-delegation doctrine is based on parliamentary supremacy, then it is difficult to see why any Canadian court should ever speak of a prohibition against a legislative body "abdicating" its legislative power. *Hodge* and *Re Gray* have been accepted in Canada as establishing that the legislative powers of provincial legislatures and the federal Parliament, subject to sections 91 and 92 of the *Constitution Act, 1867*, are as ample as those of the British Parliament. Any court in England that reviewed a British statute on the grounds

that it purported "to abdicate" Parliament's functions would be a revolutionary court. British parliamentary supremacy demands that the courts recognize as legitimate every statute passed by Parliament.

In a federal state such as Canada, statutes will of course be reviewed on division of powers grounds to protect the federal structure of the country, but this does not really modify the principle of parliamentary supremacy. The only real difference between British parliamentary supremacy and Canadian parliamentary supremacy, the *Charter* aside, is that the latter is disjunctive while the former is unitary. In the end this appears to amount to a distinction without a difference. If this is true, then upon what basis have the courts refused to allow Parliament unlimited scope to delegate? The answer is that Canadian parliamentary supremacy is not, and never has been, equivalent to British parliamentary supremacy. The abdication doctrine is a recognition of this fact. It is a recognition that our constitutional arrangements are not simply historically descriptive as they are in Britain. They rely for their life and legitimacy on a fundamental written Constitution whose very supremacy gives primacy to the rule of law. This principle requires that legislatures must conform with every provision of the Constitution, and it is for the courts to ensure that they do so. Adopting an English law approach in interpreting the ambit of the law-making power in the *Constitution Act, 1867* is inappropriate in the post-1982 era, if indeed it ever was appropriate.

The courts have a responsibility to reassess the nature of the legislative power in our Constitution in light of the immense legislative power cabinet has come to exercise in this country. Under our Constitution, the executive is meant to govern the country; only legislatures are meant to enact primary legislation. To allow this power to be delegated to the

executive is to allow it to become, *de facto*, a sovereign and pre-eminent power in the state, thus endangering the maintenance of the rule of law. Accumulation of both executive and legislative power in the same body, even if that body is elected, is dangerous. It allows that body the opportunity to enact law outside the spotlight of effective parliamentary scrutiny according to its will, not that of the legislature. Ultimately, the purpose of developing a non-delegation doctrine would be not to involve the courts in questioning the substance of legislation but rather to involve them in determining the extent to which Parliament rather than a delegate should determine the substance of the law. Insisting on a limited separation of powers between the executive and legislative branch would simply amount to ensuring that primary legislative power remains where the Constitution mandates that it remain—with Parliament. Whether the courts can be persuaded to this view will ultimately depend upon their willingness to re-examine long-standing, fundamental assumptions about the nature of legislative power in our Constitution.

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