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The Tax Rentals — A Flaw in the Law?

J. L. CHERCOVER and D. G. M. COCK *

I THE AGREEMENTS

The Canadian citizen's existence is circumscribed by the bounds of man-made laws which operate beneath the canopy of the constitution. The fertile human mind has consistently rendered man capable of overcoming laws, be they natural or man-made. It is the scope of this article to examine the present Dominion-Provincial "Tax-Rental" Agreements in relation to our Constitution, and with regard to their effects on the individual citizen.

It becomes obvious at the outset that such a discussion necessarily involves a consideration of a host of collateral issues which, while of great interest to the student, cannot possibly be handled in any manner short of a text on the subject. The authors must therefore limit this work to a brief analysis of an expository nature which will answer the question, "What are these Agreements?" This will be followed by a discussion of the problems and history of the questions, "What do the Agreements purport to do?" and "What are their effects?" The interests of brevity require that no attempt be made to delve into the background of the extraordinary financial measures occasioned by the Wartime Tax Agreements, and their position as progenitors of the present tax schemes.

Therefore, this work is limited to the effects of the agreements on the parties and the individual citizen, the question of constitutional validity, and the correlative subjects of historical development of subsidies, the present-day subsidy structure, and the problem of constitutional amendment.

Perhaps the most productive way of representing these agreements is to summarize the provisions of a "typical" example. This side-steps the difficulty of setting out all the differences among all the contracts between each participating Province and the Dominion.¹ The document is in the form of a simple contract between Canada (of the first part) and the Province (of the second). After reciting the expiry of the Tax Rental Agreement 1952, and the resolve of the parties to enter into a new Agreement under which

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¹ The most important differences will be mentioned below. This article deals with the set of Agreements signed in 1957 and presently operative in all provinces but Quebec. Tax rental agreements of earlier years cannot be dealt with in any detail here.

Canada agrees to pay the amounts provided and the Province to refrain from levying and collecting the taxes set out, and that the Agreement shall not be deemed a surrender or abrogation by either party of any of its powers, rights, etc., under the B.N.A. Act, the Agreement provides:

- (1) Covenant by Canada: that for the five fiscal years (ending 31st March, 1962) Canada will pay annually the amount calculated in accordance with the Federal-Provincial Tax Sharing Arrangements Act,² the enabling legislation.³
- (2) Covenant by the Province: subject to further provisions⁴ the Province will not impose or permit any municipality to impose individual income taxes in respect of a five-year period ending 31st December, 1961, corporation income taxes and corporation taxes in respect of that period, or succession duties in respect of the death of persons during that period. The Province undertakes to ensure the above and to suspend or cause to remain suspended all enactments imposing the taxes above-mentioned⁵ and during the period to refrain from bringing them into operation or to permit imposition of new taxes of any kind which "would have the effect of evading the true intent and purpose of this agreement, which is . . . to secure to Canada the sole occupancy of the tax fields mentioned. . . ."
- (3) Natural Resources: notwithstanding Clause 2 above, the Province may impose royalties and rentals on natural resources and tax income derived from mining and logging operations and during the period, Canada will allow these royalties, rental and taxes to be deducted in computing income under the Income Tax Act.⁷
- (4) Manner and Time of Payments: The Minister of Finance calculates the amount of the payment due to the Province⁸ in respect of the several tax fields agreed upon by the parties. Provision is made for instalment payments, revision of the payments estimated by the Minister owing to receipt of more accurate information, recalculation of payments made during a fiscal year after the close thereof and

² 4-5 Eliz. II, c. 29.

³ *Ibid.*, Sec. 6 authorizes the Minister of Finance to enter into the agreements on behalf of Canada. The compensation payable under the agreements is provided for by Sec. 7: see *infra*, p. 22-3.

⁴ See especially clause 5, *infra*, p. 22-3.

⁵ Lists of these enactments appear in Appendices to the agreements.

⁶ Ontario is the only province which does not substantially conform with the above description of the covenant by the Province. Ontario's undertaking applies only to the Individual Income Taxes.

⁷ R.S.C. 1952, c. 148 and amendments. This provision is uniform in all the agreements.

⁸ These calculations are made according to the terms of the Federal-Provincial Tax Arrangements Act, *supra*, footnote 2; see especially sec. 7.

before the 31st day of December next following,⁹ payment of any amount outstanding after recalculation to fully discharge Canada's obligation or repayment by the Province of such amount as has been overpaid according to the recalculation, and finally a right of set-off for Canada in respect to any such "refund" due from but unpaid by the Province.

- (5) **Undertakings Re Certain Provincial Taxes:** The Province and Municipalities retain the right to collect the taxes of the types covered in the agreements, the liability for which arose prior to the time after which the Province agreed not to impose such taxes.¹⁰ The Province may also levy and collect succession duties respecting persons who died before April 1, 1947.¹¹ The Province is also permitted to enact legislation imposing taxes covered by the agreement, which enactments will take effect after termination (either as limited by Clause 2 or Clause 10) and apply to income earned or succession consequent upon death occurring after such termination.
- (6) **Undertakings Re Equal Treatment of Provinces:** If any two Provinces object thereto, Canada agrees not to contract to make payments to any third Province except as calculated under the relevant provisions of this agreement. The Province has the right to demand, in the case of an agreement with any other Province which differs from its own, that its own agreement be amended to conform with such other agreement. Canada further agrees to furnish the Province with a copy of any proposed agreement with any other province. Failure to object within 30 days is deemed acceptance of the proposed agreement.¹²
- (7) **Undertaking Re Calculation of Payments:** The Minister of Finance of Canada will notify the Province of any proposed amendment to the Regulations under the Federal-Provincial Tax Sharing Arrangements Act which would result in the annual amount payable to the Province being less than if calculated under that Act and Regulations as they stood at the date of the Agreement. Canada may make such amendment notwithstanding any objections, but must con-

⁹ Where recalculation cannot be made in this manner, then it is to be made at a time subsequently agreed upon by the parties, i.e., succession duties where applicable.

¹⁰ March 30, 1942, is the date for all provinces which signed the Wartime Tax Agreement except Nova Scotia, which is November 30, 1942. In the case of Newfoundland, it is the Tax Rental Agreement, March 29, 1950.

¹¹ April 1, 1949, is the date for Newfoundland. Ontario has no similar provision of course, since succession duties are not included in the Ontario agreement: see *supra*, footnote 6.

¹² Further Provisions concerning the operation of this clause to the adaptation of time periods, selection of enactments to be suspended, and interpretation are omitted.

tinue to pay the amount calculated in accordance with the Act and Regulations as they stood when the Agreement was signed. This is expressed not to affect the right of the Minister of Finance of Canada to alter standard rates of taxes or duty as provided by the Act.¹³

- (8) Disputes and Differences: Where either party gives notice in writing that in its opinion there is disagreement as to interpretation or alleges contravention of any provision of the agreement, the Province will within 60 days cause the Lieutenant-Governor to refer the matter to the Court of Appeal¹⁴ of the Province. Such reference is in the form of a question for the opinion of the court in such terms as agreed upon by the parties or determined by the Chief Justice if they cannot agree. The reference shall include a question as to what steps, if any, ought to be taken "to place the parties in the position in which they would have been, had there been no such contravention or failure". It is provided that both parties shall take such steps necessary to give effect to the opinion of the court and failure to do so by either justifies the other party terminating the agreement under Clause 10 forthwith.¹⁵
- (9) Procedure on Reference: Procedure is governed by the Rules of the Court of Appeal or as the court determines. The parties agree to provide the court with such information as it may require and to accept and be bound by its opinion. Further, they agree to abide by the opinions of the courts of other Provinces given under corresponding Agreements insofar as they are applicable. The Province agrees to give notice to Provinces with similar agreements in order that they, too, may appear and be heard as if they were parties to the reference.¹⁶
- (10) Termination After Reference: Notice to terminate (for failure to comply with the judgment on the reference) is to be in writing between the Ministers of Finance¹⁷ of the parties and such notice operates to terminate the obligation of the Provinces with respect to income and corporation taxes from the end of the calendar year, and with respect to succession duties after the 1st of April in the calendar year following that in which the notice is given. The obligations of Canada are terminated regarding payments commencing in the calendar year following that in which the notice is

¹³ *Supra*, footnote 2: see Sec. 2(3).

¹⁴ Or equivalent tribunal in the province in question.

¹⁵ Appeal to the Supreme Court of Canada is also provided for on all such references.

¹⁶ Further provisions re parties bearing their own costs and each Province enacting legislation necessary to give its court jurisdiction, provide for appeals and hearing of other provinces on reference, have been omitted.

¹⁷ Or corresponding functionary in each province.

given, and regarding permitting deduction of provincial taxes on Natural Resources from computation of Income Tax, from the calendar year following that in which the Notice is given. All obligations mentioned above remain effective until the time provided for their termination.

- (11) Tax Deductions after Expiry: Unless the Province otherwise agrees, Canada will allow deductions from income and corporation taxes after December 31, 1961 and succession duties consequent on deaths after April 1, 1962 at the same rate as if the agreement had not been entered into.
- (12) Saving Clause: Nothing in this agreement shall be deemed to vary or terminate the rights or obligations of either party under any other agreement, or their authority to amend this one or enter into a new one.

There follows an exhaustive interpretation section and the Appendices referred to in the Agreement. These agreements in form and in principle are substantially similar to those of 1952 and would appear to be the product of a trend in financing both Provinces and Dominion by means of taxation. This historical development will be dealt with below.¹⁸

Now, any one of the agreements, on its face, would appear to be a simple contract within the powers of the parties and breaching no constitutional rules. Section 92(2) of the B.N.A. Act¹⁹ confers upon the provinces exclusive legislative jurisdiction with respect to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes", and one would conclude that a province is within its rights to refrain from exercising this right of taxation and to contract so to refrain. On the other hand, Parliament is assigned the power to legislate for "The Raising of Money by any Mode or System of Taxation."²⁰ Therefore, since the agreements expressly stipulate that there is no surrender or abandonment of any powers by either party to be implied from the agreement,²¹ thus ruling out the possibility of the province delegating its taxing powers to the Dominion,²² it is clear that the taxes imposed by the Dominion authorities fall under 91(3) and are in no way beyond the competence of Parliament.

However, the vital point is that suspension of provincial rights to a field of direct taxation, which would in fact net the province little or no revenue, in return for a grant which is grossly disproportionate to the possible revenue which might have been realized

¹⁸ *Infra*, p. 23 ff.

¹⁹ 1867, 30 and 31 Vict., c. 3 and amendments.

²⁰ *Ibid.*, sec. 91(3).

²¹ *Supra*, p. 18.

²² The powers of the Dominion and Province are plenary and absolute within their respective legislative spheres and cannot be delegated one to the other: see *A.-G. Nova Scotia v. A.-G. Canada*, [1951] S.C.R. 31; *P.E.I. Marketing Board v. A.-G. Canada*, [1952] 2 S.C.R. 392.

by that province, begins to smack of a direct gift, Dominion to Province. For example, consider the revenue given up by Ontario in withdrawing from the field of personal income taxes, when compared with that given up by New Brunswick in the same field.²³

With this in mind, one stops thinking in terms of "agreements" and "tax rentals" and begins to think in terms of "equalization" and "subsidies" to the financially weaker provinces at the expense of the taxpayers in the stronger. The whole complexion of the problem changes. If the apparently constitutional set of contracts is being employed to bring about a result which, *in pith and substance* is an equalization or subsidy scheme, then an attempt is being made to circumvent the necessity of an amendment to the B.N.A. Act.²⁴

Basically, the Agreements provide that the Provinces will receive

- (a) 9% Allowance on Corporations tax.²⁵
- (b) 10% of the total amount payable by individuals in the Province under the Income Tax Act, but not including the tax levied by sec. 10(3) of the Old Age Security Act.²⁶
- (c) 50% of the total amount payable under the Dominion Succession Duty Act.²⁷

So far, so good. The structure appears to be a straight rental of taxation functions, and no questions could be raised as to the validity of such payments. However, the payments do not cease here, and one other important section must be mentioned.

Section 3(1)(a)²⁸ provides that payment may be made to the Province of a "tax equalization payment". The method of computation is outlined in Section 4²⁹ of the Act. Here is a simple explanation of its operation:

Assume that New Brunswick's revenues outlined above are added together. The sum thus obtained shall be called "x". Now let us take the total returns from the two provinces from whom the per capita tax returns are greatest and total them to obtain a sum which we will call "T". Dividing this by the total population of the two provinces gives us a figure which we shall call "Y".

²³ This is merely one example of the inequity produced by agreements designed expressly to "establish a more equitable system of taxation throughout Canada". Many other obvious examples come to mind, e.g., the exemption with respect to taxation of Natural Resources is of greater value to some provinces than others.

²⁴ *Supra*, footnote 19.

²⁵ *Supra*, footnote 2, secs. 2(d) and 7(1)(b).

²⁶ *Ibid.*, secs 2(f) and 7(1)(a).

²⁷ *Ibid.*, secs. 2(h) and 7(1)(c).

²⁸ *Ibid.*

²⁹ *Ibid.*

$$\frac{\text{Returns from the two Provinces}}{\text{Population of those two Provinces}} = Y.$$

$$\text{expressed as } \frac{T}{P} = Y$$

We are now ready to present the formula for the additional payment to New Brunswick, the "tax equalization payment", which we will call "E".³⁰

$$Y = E + \frac{x}{\text{Pop. of N.B.}} \quad \therefore \quad E = Y - \frac{x}{\text{Pop. of N.B.}}$$

It is evident from this formula that a weaker province is getting a payment designed to equalize its returns with the level of the wealthier provinces. This is a Parliamentary way of describing an outright subsidy.

II SUBSIDIES

In order to evaluate properly the implications of the finding that the Tax Rental Agreements appear to be a guise for subsidies, it is necessary to gain some understanding of the subsidy structure under the Constitution. It is impossible to achieve this without examining the historical background. A brief coverage of the more important events in the stormy record should serve to throw the anomalies of the situation into clear focus.

Any analysis of the problem must go back to the Quebec Conference of 1864. The American Civil War was no longer in doubt, but citizens of the British North American Colonies had severe qualms whenever they thought of what the northern army might do after it had finished crushing the rebels. The concept of "Manifest Destiny" was more than just a political cry in the burgeoning United States, and no decade had gone by since the War of 1812-14 in which some American politician had not expressed the view that conquest of the British Colonies was inevitable.³¹ Internecine problems and expansion to the South and West had heretofore prevented these threats from being realized, but the spectre of the mightiest army assembled in history had fundamentally altered the picture.³²

³⁰ *Ibid.*, sec. 4.

³¹ For example, President Polk had been elected on the chauvinistic platform of "54'40 or Fight!"

³² Donald G. Creighton: *John A. Macdonald*, Toronto, 1952; I-358.

The border raids³³ had a particularly strong effect on the Maritimers who had previously lived in snobbish, if not splendid, isolation from the Province of Canada, a troubled union of present-day Ontario and Quebec.³⁴ Unionist sentiment thus began to develop, although a few dissenting voices were raised when the idea of union for strength was first mooted; Joseph Howe, the colourful Nova Scotian, had sneered at the "mighty" army that might be assembled by the unified Colonies; after totalling up the number of men available for fighting, he pictured them spread across the thousands of miles of American boundary—a single thin red line of stalwarts "only 37 yards apart, (who) may occasionally catch a glimpse of each other where the country is not thickly wooded."³⁵

The impetus towards Confederation had come from Canada with its miserable political deadlock.³⁶ The leading proponent was a man blessed with a genuine vision (not in the modern connotation) of a unified North American power. John A. Macdonald was thus ready to capitalize on Maritime worries about the Americans; he pressed unity of the Colonies and pointed scornfully to the Civil War as an inevitable result of strong States power, urging Legislative Union as a remedy to such fatal federalism.³⁷

Although his plan for Legislative Union was early scuttled, he had succeeded in influencing many of the Canadian delegates to the Quebec Conference in this direction. Sir Alexander Galt's opening address on the morning of October 10 is illustrative of the strongly centralist view:³⁸

Provision must be made for the Local Governments. All the revenues from Customs and Excise would go to the General Government. The expenses of the Local Government would be lessened by the works they now have to provide being lessened.

There are two ideas implicit in this statement: the first is that the "Local Governments" are viewed as distinctly inferior to the "General Government", rather like Municipal Councils; the second is that it is blandly assumed that a removal of the chief source of revenue from all the Colonies will produce equal effects. It should be realized that at this time Customs Revenue was the source of well over half Colonial Revenues.³⁹

³³ The incident in St. Stephen's, N.B., was a particularly notorious example.

³⁴ The union had taken place during the governorship of Lord Sydenham, and was based on the recommendations in Lord Durham's famous *Report*.

³⁵ *The Speeches and Public Letters of Joseph Howe*: Joseph Chisholm ed., Halifax, 1909, II, 486.

³⁶ *Supra*, see footnote 32, pp. 323-350.

³⁷ *Ibid.*, p. 351.

³⁸ No minutes were kept of the Conference. This is a report by A. A. Macdonald, Prince Edward Island delegate. See *Canadian Historical Review*, March, 1920, at p. 30, A. G. Doughty ed., "Notes on the Quebec Conference".

³⁹ The figures for 1866 are as follows: Customs revenue formed 60% of Canadian revenue, 80% of Nova Scotia's, 78% of New Brunswick's, and 75% of Prince Edward Island's. See "British North America at Confederation", Appendix 2, *Rowell-Sirois Report*; Donald G. Creighton, Ottawa, 1939, 72.

Galt had it quickly brought home to him that the reduction in revenues would not be equally compensated by a decline in expenditures. The Maritime Governments were spending far more on roads, docks, and schools than were the Canadians⁴⁰ who generally left such outlays in the hands of the municipalities. Under the original Canadian proposal, the new Federal Government would have assumed 77% of the existing expenses of the Canadas as against only 45% of those of Nova Scotia, 49% of New Brunswick and 28% of Prince Edward Island.⁴¹ Brown and Galt urged the Maritimers to foist many of these responsibilities on the shoulders of their municipalities but were signally unsuccessful.

It thus became obvious that some form of handout, which must be euphemistically termed an equalization measure, was necessary if the union of Forest and Sea was to be consummated. Subsidies were agreed on.

The first was the simple 80¢ per capita annual grant. In retrospect this sum chosen was unfortunate, since it allowed that efficient propagandist, Joseph Howe, a chance to harangue his legion of Nova Scotian worshippers with the slogan "that Nova Scotia has been sold for the price of a sheepskin."⁴²

It had been promptly agreed that the Federal Government was to assume all Colonial debts. The equalization medium, so that the profligate would not be rewarded at the expense of the thrifty, was the debt allowance. If a colony had less than \$25 debt per capita, it received 5% annually on the difference. If it had greater debts, then the Dominion was to receive 5% on the excess annually.⁴³

This had the superficial appearance of equalization, but, as Tupper pointed out, the Maritimes' debt was largely accumulated in building railways, so they had distinct assets to hand over to the Federal Government.⁴⁴ In Canada, the railways were largely privately owned, but liberally aided by Government subsidies.⁴⁵

Exceptional grants were agreed upon, but only after bitter wrangling. New Brunswick received \$63,000 per annum in order to balance her budget.⁴⁶ Newfoundland was promised \$150,000 annually in compensation for her public lands.⁴⁷ These concessions were only wrung out of the Canadians after bitter debate; furthermore, the Canadians only relented on the basis that such special grants

⁴⁰ Per Capita Expenditures for 1866: Canada, \$.46 and \$.35 for Public Welfare and Education; Nova Scotia, \$1.58 and \$.71, respectively; New Brunswick, \$.85 and \$.59 respectively. *Ibid.*, 66.

⁴¹ James Ackley Maxwell: *Federal Subsidies to the Provincial Governments in Canada*, Cambridge, 1937; 7.

⁴² J. W. Longley: *Sir Charles Tupper*, Toronto, 1916; 71.

⁴³ British North America Act, 1867, s. 112, 114, 115-116; also see *supra*, footnote 41, pp. 9-11.

⁴⁴ *Supra*, see footnote 41: 11. Also see *Canadian Confederation Debates*, Ottawa, 1951: 94.

⁴⁵ *Supra*, see footnote 41: 11.

⁴⁶ British North America Act, *supra*, footnote 19, s. 119.

⁴⁷ *Supra*, see footnote 41: 13.

merely equalized the subsidy payments to the Provinces. It is hard for an observer today to appreciate how important this principle of equality of treatment was to men of the day.⁴⁸ Even the Maritime delegates who fought for the concessions seemed to agree with this fundamental ideal in the drafting of the Confederation Resolutions. No conception of levelling out the economies of the respective Provinces seems to have occurred to them. Equality of treatment from the Central Government was to be the byword of the Union.

It was on this very point that the Resolutions were unfairly beneficial to the Canadas at the expense of the Maritimes that opposition struck. Premier Tilley of New Brunswick decided to do the honourable thing (in spite of Tupper's pleas), and was roundly trounced in an election on the issue.⁴⁹ Dr. Tupper thoughtfully postponed any test of strength in Nova Scotia.⁵⁰ Prince Edward Island had effectively withdrawn from the discussions after the first day of the Conference, and her rejection of Confederation was never in doubt.⁵¹

As a result of strong pressure from the Colonial Office, the Lieutenant-Governor of New Brunswick was instrumental in achieving a speedy dissolution, and after a heated campaign in which loyalty to the British connection was named as the central issue, the electors of New Brunswick gave Tilley his mandate.⁵²

As a result of the lengthy agitation in the Maritimes, further subsidies were inserted at London, and on July 1, 1867, the Marriage, however morganatic the Maritimers may have considered it, was proclaimed.

The honeymoon was scarcely over before articulate Nova Scotian opposition began to make itself felt. It was forcefully pointed out that Confederation had taken away 90% of the Province's revenues, but only 55% of its expenses.⁵³ Joseph Howe was rebuffed when he went to London to try to remove Nova Scotia from Confederation, even though he had just won an overwhelming victory over the unionists in the election. However, it was obvious to Macdonald that something had to be done.

The "something" arrived at was an inducement to the aging Nova Scotian hero. If the financial terms could be settled equitably, then, as symbol of the end of strife and the beginning of a glorious era of partnership in forging a new nation, Mr. Howe could join the Federal Cabinet. The daring of this idea may be more fully appreciated if one considers the possibility that Mr. St. Laurent

⁴⁸ *Canadian Confederation Debates*, pp. 92-94, where George Brown outlines the viewpoint.

⁴⁹ *Supra*, see footnote 32: 399.

⁵⁰ R. G. Trotter: *Canadian Federation*, London, 1924: 125.

⁵¹ See Duncan Campbell, *The History of Prince Edward Island*, Charlottetown, 1875, for a complete discussion.

⁵² James Hannay: *History of New Brunswick*, St. John, 1909: 247-255.

⁵³ *Supra*, see footnote 41: 27.

ever had of inducing Mr. Duplessis to forget the past and join his Federal Cabinet. The analogy, it is submitted, is fair. Historians have debated ever since the sudden capitulation of the grand old man, but the most likely explanation is that he saw that these terms were too favourable to reject.⁵⁴

Having determined on this course, there remained only the problem of justifying special treatment of Nova Scotia, because the Grits of George Brown would inevitably be wrathful at any further grants, the conception of strictly equal treatment being deeply imbedded in the minds of the Upper Canadians.

The "precedent" was found in the special grant to New Brunswick of \$63,000 per annum which had been incorporated into section 119 of the British North America Act. After some mathematics and negotiation, it was decided to grant Nova Scotia \$82,698 per annum as an additional subsidy to rectify the injustice.⁵⁵ The historic "Better Terms" agitation of Nova Scotia had succeeded.

There remained only the small matter of passing the Bill through the Federal Parliament. On June 11, 1869, the day after revised offers to Newfoundland had been approved, Mr. Rose moved, seconded by Sir John Macdonald, that the House resolve itself into committee to consider "certain proposed resolutions relative to the affairs of the Province of Nova Scotia."⁵⁶

Edward Blake rose to move an amendment, which was seconded by Mr. Mackenzie. Instantly the opposition to the plan acquired a new character. Instead of opposing the resolution on the mere ground that additional subsidies were unfair, Mr. Blake confronted the Government with a thorny problem: *Was any revision of the subsidy structure constitutional?* Blake's amendment was as follows:⁵⁷

That all the words after "that" to the end of the question be left out, and the words "the British North America Act, 1867, has fixed and settled the mutual liabilities of Canada and of each Province in respect of the public debt, and the amount payable by Canada for the support of its Government and Legislature;

"That the said Act does not empower the Parliament of Canada to change the basis of Union thereby affixed and settled; That the unauthorized assumption of such power by the Parliament of Canada would imperil the interests of the several Provinces, weaken the bond of Union, and shake the stability of the Constitution;

"That the proposed Resolutions on the subject of Nova Scotia involve the assumption of such power.

⁵⁴ *Supra*, see footnote 35, II, 584-6. These are Howe's own reasons, as given in an address to the electors of Hants. For a discussion of the events from Macdonald's point of view see Donald G. Creighton: *John A. Macdonald*, Toronto, 1955, II, 16-22. This policy has been called "striking off the tallest heads." See J. Murray Beck: *The Government of Nova Scotia*, Toronto, 1957: 152.

⁵⁵ R. MacGregor Dawson: *The Government of Canada*, Toronto, 1954: 120. Also the statute: 32-33 Vict., c. 2.

⁵⁶ *Journals of the House of Commons*, 1869.

⁵⁷ *Ibid.*, p. 232.

"And that therefore this House, while ready to give its best consideration to any proposals to procure in a *constitutional* way any needed changes in the basis of Union, deems it inexpedient to go into Committee on the said proposed Resolutions", inserted instead thereof. (Italics are ours.)

Section 118 of the British North America Act had outlined the sums payable to the Provinces and included the words "Such grants shall be in full settlement of all future demands on Canada". Admittedly, these words were superfluous for Blake's purpose, because the very fact that the sums were named meant, he felt, that *revision, upwards or downwards constituted a power beyond the competence of the Federal Parliament. Expressio unius est exclusio alterius.*

Sir John's fund of political shrewdness was equal to the occasion. Ignoring Blake's thoughtful constitutional argument, and Mackenzie's quiet logic, he launched into a blistering indictment of Mackenzie, saying that he had at last revealed his true colours as a secret plotter against Confederation.⁵⁸ He rephrased the issue to a somewhat simpler question: those who are loyal to Canada and the Queen will vote against the amendment, those who still try to destroy Her Majesty's Union will vote for it.

The Globe came out with a three column editorial on June 15, headed, "The Constitution in Danger", which contained some prophetic passages. The following excerpts from the lengthy criticism of the Government's stand may be cited.⁵⁹

The doctrine promulgated by the Ministers in this debate . . . throws wide open the door of the Federal Treasury to the plotting promoters of every scheme, delusive or otherwise, for purely local purposes. It proclaims a new era of jobbery and log-rolling, and strikes, we deeply regret to believe, a deadly blow at the future peace and prosperity of the Dominion. The effect of the vote is to destroy the federal character of the union, and restore that system, with all its demoralizations, from which the people of Upper Canada were so rejoiced to believe they had forever escaped. The power arrogated to itself by the Ottawa legislature in this vote sets at defiance the fundamental principles of the Imperial Constitutional Act (i.e., the B.N.A. Act)—namely, that the people of each province shall have exclusive control over their own affairs, *that the revenues of the General Government shall be applied to general purposes only*, and that beyond the sums specially stipulated to be paid "in full settlement of all future demands upon the General Government for local purposes", the whole burden of Provincial expenditure shall be borne from exclusively local revenues. If the Ottawa legislature has the power to do this thing, then is the Imperial Act of 1867 a delusion and a snare,—for it affords no protection against injustices to the several provinces that were induced to join Confederation on the basis of its provisions. . . . Let the precedent which this Act involves be once established and there is no limit to the demands that may be made upon the Dominion by the Provinces. Let it once be admitted that the financial provisions contained in the Union Act may be set aside by a mere Parliamentary majority, and we shall never be done with Provincial raids upon the Dominion Treasury. (Italics are ours.)

The day previous, Blake had risen again in the House to review the arguments on the issue. Ignoring the political fogging, he dealt

⁵⁸ *The Globe*, June 14, 1869.

⁵⁹ *Ibid.*, June 15.

specifically with the only constitutional defence that had been raised, namely that the Federal Government could do as it liked with its own money:⁶⁰

Has the Legislature of Ontario the power to do what it liked with its own money? Has it the right to subsidize the judges of the Superior Courts with its own money? Has it the right to provide for services which the Imperial Act provided should be paid for by the Parliament of Canada? No; it might fling its money into the lake if it liked, but it could not divert any of it into a channel which was within the jurisdiction of this Parliament.

In spite of further amendment attempts, the Bill carried. However, Blake, who was also a member of the Ontario legislature, did not give up the cause. He moved an address to the Queen in the Ontario legislature, which was transmitted to Joseph Howe, by now Secretary of State for the Provinces in Macdonald's Cabinet. It is a lengthy review of the financial background to the subsidy provisions, but the following sections are interesting:⁶¹

7. That the financial arrangements made by the Union Act, as between Canada and the several Provinces, cannot, and ought not, to be changed by the Parliament of Canada.

8. That the financial arrangements made by the Union Act, as between Canada and the several Provinces, ought not to be changed without the assent of the several Provinces.

9. That the Parliament of Canada, at its last session, passed an Act, whereby the amount of debt, at which Nova Scotia entered the Union, was increased by \$1,188,756, and her subsidy was increased by an annual payment of \$82,698 for ten years, making altogether, an alteration in favour of that Province of over \$2,000,000, of which Ontario pays over \$1,100,000.

12. That an humble address be presented to Her Most Gracious Majesty, embodying the foregoing resolutions, and praying that she will be pleased to disallow the said Act.

This was referred to Macdonald, who transmitted it to the Secretary for the Colonies. In reading the correspondence that went on during that year, an interesting anomaly becomes apparent:⁶²

The Secretary of State for the Colonies to the Governor-General.

Downing Street, 23rd August, 1869.

Sir,—As I observed that a doubt was entertained during the passing of the Act "respecting Nova Scotia" . . . whether it was competent for the Legislature of Canada to pass such a measure, I thought it desirable to take the opinion of the Law Officers of the Crown upon the point and I have been advised that it was competent for the Parliament of Canada to pass under powers vested in it by the 31st section of the British North America Act, 1867.

I have, &c.,
Granville.

In the letter from the Governor-General to the Secretary of State, dated January 11th, 1870, the last sentence of the above letter is quoted verbatim, including the key words "by the 31st section of the British North America Act, 1867."⁶³

⁶⁰ *Ibid.*, June 15.

⁶¹ *Sessional Papers*, 1869, No. 25.

⁶² *Ibid.*

⁶³ *Ibid.*

Yet, in a letter dated January 5th, 1870, from Sir John Macdonald to the Governor-General of Canada, we find the following statement:⁶⁴

That opinion was conveyed to your Excellency by Lord Granville's despatch, dated the 23rd of August last, and was, shortly, that the Act was one which it was competent for the Parliament of Canada, to pass under the powers vested in it by the 71st section of the British North America Act, 1867.

The difference in authorities cited for the action is itself quite fascinating, but confusion is deepened when one considers the two sections of the British North America Act that are cited with such assurance. Section 31 of the Act is the Section that outlines the modes by which the place of a Senator may become vacant, including treason and if a Senator is "convicted of Felony or any infamous crime".⁶⁵ Section 71 is imbued with a similar lack of relevance: it described the bicameral composition of the Legislature of the Province of Quebec.⁶⁶ The "Law Officers of the Crown", of course are the Attorney-General and Solicitor-General. Their opinion serves to shed no light on the problem whatever. Could it be that they were unable to discover a proper Constitutional authority?

It is more likely that the Law Officers of the Crown intended to cite sec. 91. The next problem which arises concerns what parts of sec. 91 they might have meant. The following possibilities are conceivable. First, the "peace, order and good government" clause would seem to be the most likely authority. It must not be forgotten that at this time the clause was viewed as the wide residual power which the Fathers of Confederation had no doubt intended it to be. Although *Russell v. Queen*⁶⁷ was eleven years away, it is illustrative of the tenor of opinion. However, even without arguing the obvious fact that the *Russell* case was severely abridged by subsequent

⁶⁴ *Ibid.*

⁶⁵ The Place of a Senator shall become vacant in any of the following cases:

- (1) If for two consecutive sessions of the Parliament he fails to give his attendance in the Senate;
- (2) If he takes an Oath or makes a declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the rights or privileges of a Subject or Citizen of a Foreign Power;
- (3) If he is adjudged Bankrupt or insolvent, or applies for the Benefit of any Law relating to insolvent debtors, or becomes a public defaulter;
- (4) If he is attainted of treason or convicted of Felony or of any infamous crime;
- (5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his presence there.

⁶⁶ There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

⁶⁷ (1881) 7 App. Cas. 829.

decisions of the Judicial Committee,⁶⁸ it would appear that the residual power may not be relied upon in support of legislation of "a merely local or private nature".⁶⁹

Secondly, sec. 91(1)⁷⁰ "public debt and property", might have been considered. There are strong arguments against this view. The use of the word "public" clearly differentiates such legislation from provincial debt allowances, referring as it does to the national body politic of Canada. This section is the result of the decision at the Quebec Conference that the new nation would assume provincial debts. Nor can the word "property" be relied on, for it is submitted that this word must be read *ejusdem generis* with the preceding phrase "public debt" which we have shown to refer to matters national in scope.

More properly it would seem that the law officers should have referred to the provisions of the B.N.A. Act authorizing the appropriation of moneys. Section 102 of the B.N.A. Act provides:

All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the manner and subject to the Charges in this Act provided.

Sections 103-105 charge the Consolidated Revenue Fund of Canada with certain charges. Section 106 then provides:

Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

The Provincial power of appropriation is provided by Section 126:

Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

There is a curious omission from these sections in relation to the Government of Canada. No reference is made to revenues to be raised by Canada under the special powers conferred on it. Possibly the power of appropriation was intended to be covered by "Public Debt and Property" in Section 91. More probably, it would seem that Section 106 is the general power of appropriation by Parliament.

If this is the case, there are strong grounds for arguing that Section 118 as originally enacted prescribing the subsidy settlements

⁶⁸ *Fort Francis v. Manitoba Free Press*, [1923] A.C. 695. See also *Toronto Electric Commissioners v. Snyder*, [1925] A.C. 396.

⁶⁹ See *supra*, footnote 19, sec. 91, concluding paragraph.

⁷⁰ Now sec. 91(1)A.

with the Provinces as being "in full settlement of all future demands on Canada" would be an implied restriction on the power of appropriation for the public service of Canada.

Moreover, the exclusive power of the Province to impose "Direct Taxation within the Province in Order to the Raising of the Revenue for Provincial Purposes", conferred by head 2 of Section 92, implicitly restricts the Federal Parliament from raising money by direct taxation in order to pay moneys to the Provinces for provincial purposes.

A substantial argument against these views is that "Public Services of Canada" in Section 106 could be construed to include payments made to the Provinces to advance *national* purposes. The 1942 taxation agreements were based on a desire to permit the Federal Government to impose a one hundred per cent excess profit tax to control profiteering during wartime. In order to achieve this end, it was necessary for the Provinces to refrain from taxation in the chosen fields, or the Dominion would have to provide alternative revenues. The 1947 taxation agreements are based on a different philosophy, namely, the Keynesian view that taxation is not only a matter of revenue, but also a weapon of fiscal policy. National purposes, therefore, require complete freedom in the economically dynamic fields of income and corporation taxes to permit a national fiscal policy. This argument should not prevail over legislative restrictions in the Act, and the expression "Public Services of Canada" read in the light of the subsidy settlements and the exclusive provincial power of taxation in Section 92(2) would seem to have been limited from the outset.

To return to the historical analysis which was being considered above, if Macdonald did not have the constitution on his side, he had something of almost equal value: politics. By the time the above correspondence was placed before the House of Commons in the Sessional Papers, an election was near. The retirement from the House of Joseph Howe meant that a fertile field for Liberal votes would probably be found in Nova Scotia. Under the circumstances, with the solid Quebec vote for the Tories being already accepted as inevitable, then Liberal hopes would seem to be centred on Southern Ontario and the Maritimes. Blake and Mackenzie dared press the issue no further. They had already lost support by their stand in 1869 and so they were impotent to challenge the Government on its manœuvres.

Why was this issue not raised when the Liberals took power after the Pacific Scandals? The answer lies in the fact that they did not dare to upset a system which was due to expire within three years anyway. Blake had sought to pass a Bill declaring that the Nova Scotia revision was the last that would ever come along, but he had been unsuccessful.

Furthermore, the tide was turning in Upper Canada. People were beginning to realize that Provincial revenues were inadequate and the cry soon became "Greater Subsidies". The longest depression in modern history had hit Upper Canada with a vengeance, while not damaging the Maritimes quite as severely.⁷¹ Politics and economics had become more important than the Constitution, and each passing year seemed to hallow the Act more. What seemed atrociously illegal in 1869 had become accepted practice ten years later.

In addition, special treatment was now the rule, rather than a grimly swallowed exception. When Manitoba joined Confederation in 1870, she was granted terms that appeared roughly equal to those granted the original members: 80¢ per capita annual subsidy, debt allowance of \$27.77 per head, and the annual grant for the legislature.⁷² However, the population for the purpose of these grants was assumed to be 17,000, whereas it was really 12,200, of whom only 1,600 were white.⁷³ Since she had no debt, this meant a return on her debt allowance of \$23,604 annually. The Legislative Grant was \$67,204, which amounted to more than eight times as much per capita as Ontario was getting, and four times as much as Nova Scotia and New Brunswick.⁷⁴ Manitoba ceded her Public Lands to the Dominion, because the route of the Canadian Pacific Railway had not been settled.⁷⁵

British Columbia in 1871 received a debt allowance of \$27.77 per capita on a population named at 60,000,⁷⁶ while it in reality was only 34,000, of whom only 9,000 had political rights.⁷⁷ An amount of \$100,000 was granted in perpetuity in return, allegedly, for a strip of land twenty miles wide on each side of the C.P.R.⁷⁸

Prince Edward Island had rebuffed all attempts at Union, but an over-sanguine railway budget pushed the tiny colony to the verge of bankruptcy. With an air of condescension, she joined the Union in return for a debt allowance of \$50 a head or \$4,701,050, \$45,000 annually in regard to absentee landlords, the eighty cent per capita grant, and a Government grant of \$30,000.⁷⁹

When Saskatchewan and Alberta joined in 1905, they gave up their natural resources in return for grants which now amount to

⁷¹ Carl Wittke: *A History of Canada*, Toronto, 1935: 214-219. Also see Creighton, *supra*, footnote 54, II, 208-209. For Nova Scotia's problem with regard to decline of wood ship-building, see Creighton, *supra*, II, 452.

⁷² 33 Vict., c. 3, ss. 23-25.

⁷³ See *supra*, footnote 55: 119.

⁷⁴ *Supra*, see footnote 41: 34.

⁷⁵ *Ibid.*, p. 36.

⁷⁶ See Order in Council, April 5, 1871, I XXXVI and also at I XXXVIII.

⁷⁷ *Supra*, see footnote 55: 119. The rest were Indians and Orientals.

⁷⁸ *Supra*, see footnote 41: 40.

⁷⁹ *Ibid.*, pp. 41-50. Also see Order in Council, June 26, 1873, 36 and 37 Vict., IX, particularly at p. XI.

\$750,000 per annum.⁸⁰ The resources were returned in 1930, but the payments have been increased, not eliminated.⁸¹

When Newfoundland joined in 1949, she received the ordinary grants, and an additional subsidy of \$1,100,000 per year.⁸²

Other subsidies have been granted from time to time. New Brunswick was granted \$150,000 for repeal of export duties on lumber, and this carries on.⁸³

It would thus appear that the *Globe's* fears have been realized, because, in special grants alone in 1957, (the latest year for which figures are available) \$6,081,000 was dispensed from the Federal Treasury.⁸⁴

When it is considered that most of these moneys were disbursed as a result of legislation passed in the same way as the original "better terms" granted Nova Scotia in 1869, grave doubts may well be entertained as to the authority for the payment of such large sums. Naturally, those sums named in the Acts admitting new Provinces to the Union are constitutional, because such Acts form part of the Constitution under section 146 of the British North America Act.⁸⁵

However, the large sums that are still being granted constitute, it is submitted, an infringement of the Constitution. The sections of the Constitution are explicit as to the amounts to be granted, and admit of no discretion. It is specious to argue that these are mere minima, because there are no words anywhere in the Act that suggest this interpretation. The repeal of section 118, which includes the words "full settlement" does not alter the sections which remain.⁸⁶ Although zealous politicians have attempted to bury them, the bars to subsidy revision seen by Blake stand unrelenting.

III THE DEBT PROBLEM

The sad part about this system is not just that it is unconstitutional, but that it is inadequate. Although 24.9% of Provincial

⁸⁰ For Alberta see 4-5 Edw. VII, c. 3. For Saskatchewan, see 4-5 Edw. VII, c. 42.

⁸¹ *Supra*, see footnote 55: 120.

⁸² 13 Geo. VI, c. 1, particularly s. 26(b). Note that Newfoundland was offered \$150,000 annually in 1864. See *supra*, footnote 47. Such are the ravages of inflation.

⁸³ *Supra*, see footnote 55: 120.

⁸⁴ *Canada Year Book* 1957: 1103.

⁸⁵ This section notes the names of the specific Provinces-to-be.

⁸⁶ Repealed by the *Statute Law Revision Act*, 14 Geo. VI, c. 6 (U.K.).

revenues in 1955 came from Federal subsidies and Tax Rental Agreements, this did not stem the tide of Provincial indebtedness.⁸⁷

One weakness, of course, of the present system is that the equalization method used under the Agreements is grotesque in that Alberta is receiving tax dollars from Ontario because of her "poverty". In view of the fact that Alberta is able to pay dividends to its citizens while Ontario is burdened with one of the highest debt loads on the continent, it is apparent that a revision of the formulas used is in order.

The clearest indication that a radical overhaul of the system is needed may be seen by comparing the debt per capita figures:⁸⁸

	1947	1956
Ontario	175	370
New Brunswick	208	348
Alberta	185	75
Canada (Federal Government)	1009	701

These figures show that even with the large handouts, which we have shown to be at best of doubtful constitutionality, the Provinces other than Alberta are going deeper into debt while the Federal Government in the same period was cutting its debt.

Thus it is seen that even sacrificing constitutionality for expedience has failed to halt the serious inroads being made on Provincial resources by swelling expenditures. Nor is there reason to believe that further subsidies or equalization in the guise of tax-rental agreements will change this tendency which has developed since Confederation was but two years old. As long as our prosperity holds out, the day of reckoning can be postponed. However, the huge amount of borrowing that is being carried out has the inevitable effect of raising costs for everyone else, particularly municipalities.⁸⁹

A solution within the terms of the British North America Act must be found. If there seems to be no way out, then let us amend it, not defy it.

IV THE PROBLEM OF AMENDMENT

The writers take no issue with the fact that the Tax-Sharing arrangements may be extremely beneficial to Canada and the several

⁸⁷ Total Provincial Revenues: \$1,414,828. Payments under Tax Rental Agreements totalled \$327,954,000, and subsidies were \$24,358,000. *Supra*, see footnote 80: 1108.

⁸⁸ *Supra*, see footnote 84: 1111.

⁸⁹ Municipalities and small businesses are particularly hampered due to high interest rates.

provinces but it is submitted that this does not justify the use of unconstitutional expedients.⁹⁰ The subsidies provisions of the B.N.A. Act are clear⁹¹ and any change or alteration will necessarily require amendment. Here is the crux of the problem. The question of amendment to the B.N.A. Act has been faced with mixed success in the past, and consequently, rather than meet the situation squarely, schemes are devised to get around it. It is submitted that such an attitude leads to mistrust and the chaos of an unamendable Constitution. Some way must be found of resolving the different interests involved and developing a comprehensive amending procedure. The use of expedients to avoid the thorny issue will merely add to the morass of confusion born of the conflict between "centralists" and exponents of the "compact theory".

In form, only the British Parliament can amend the B.N.A. Act, a statute of the Imperial Parliament. It is clear that since the statute of Westminster,⁹² the Imperial authorities will grant any amendment in response to a proper request.

However, no one knows what constitutes a "proper request". There is no question that the Fathers of Confederation envisaged a strong central government,⁹³ and the advocates of this position maintain that the federal government and only the federal government possesses the amending power. However, a majority of political leaders contend that unanimous consent of the Provinces is required and if the decisions of the Judicial Committee of the Privy Council are any indication, it would appear that the Imperial authorities favour this view. Thus we have not a legal, but a political problem causing the stalemate and forcing the use of such expedients as Tax Agreements rather than such obviously preferable solution as that in the Rowell-Sirois report outlined below. Attempts have been made to divide the various sections of the B.N.A. Act into categories and agree on an amending procedure for each⁹⁴ but the result was deadlock over the actual distribution of powers between the two levels of government. No agreement could be reached on a procedure for amending this most fundamental portion of the Constitution, and there the issue stands. It would be unfair to contend that the individuals involved in the conferences which considered the problem exhibited political immaturity or selfishness in any degree. They

⁹⁰ See *R. v. Eastern Terminals*, [1925] S.C.R. 434, especially per Atkin L.J., and *Natural Products Marketing Act case*, [1937] 1 D.L.R. 691, A.C. 377.

⁹¹ *Supra*, footnote 19, sec. 118, repealed by Statute Law Revision Act, 1950, 14 Geo. VI, c. 6. This is the famous "80 cents per head" subsidy referred to above which had been rendered obsolete by the 1907 amendment, 7 Edw. VII, c. 11, which set out a system of grants according to population. It must be clearly understood that since these subsidies are expressed in terms in the B.N.A. Act, *any variation thereof means amendment*, and if, as is submitted here, the tax agreements are in part, at least, subsidies, they are unconstitutional as explained *supra*.

⁹² 21 and 22 Geo. V.

⁹³ *Supra*, p. 24 ff.

⁹⁴ For reproduction of these categories, and the conferences generally, see Laskin, *Canadian Constitutional Law*, pp. 23, 24.

brought to their deliberations sincerity and vigour, and stood with deep conviction for their respective points of view. However, their inability to agree cannot be excused since it presents to Canada and her citizens a legacy of monumental constitutional inadequacy.

In the realm of financial relations the upshot of the amendment issue is the agreements here dealt with. The magnificent Rowell-Sirois Report tabled in the House of Commons in 1939 had recommended that the principal direct taxes should be given over permanently and exclusively to the federal government. This would bar the provinces from the three basic fields of taxation covered above, in return for regular payments which would reflect their fiscal needs and emergency grants in times of stress.⁹⁵ However, all this would require amendment to the B.N.A. Act. The intervention of World War II and the virtual impossibility of amendment in any case gave rise to financial conditions resulting in the negotiation of the first set of agreements.⁹⁶

V CONCLUSION

It has been suggested that the judgment of Manson J. in *Alworth Jr. v. A.-G. British Columbia*⁹⁷ weakens the basic proposition of this article, viz.: that the validity of the agreements is questionable on constitutional grounds. This case dealt with the situation in which the B.C. authorities purported unsuccessfully to tax a non-resident under the Logging Tax Act,⁹⁸ passed under a Natural Resources clause similar to that reproduced in the "typical agreement" above, clause 3. This case in no way refutes the authors' contention merely because the court *considers* the agreements. On the contrary, the learned judge expressly leaves the question of their validity wide open, saying:⁹⁹

Assuming that the Dominion and the Province have the power to enter into the series of agreements with regard to taxation which they did, *as to which I express no opinion*. . . . (Italics are ours.)

It is obvious, therefore, that the learned judge simply assumed the validity of the agreements for the purpose of deciding the case at

⁹⁵ The tax agreements are *not* an effective substitute for the Rowell-Sirois recommendations because they do not in fact achieve equalization, *supra*, footnotes 24, 87, 88, and because they are neither permanent nor universal.

⁹⁶ See J. H. Perry, *Federal-Provincial Tax Negotiations*, No. 10, Canadian Tax Papers.

⁹⁷ (1959) 20 D.L.R. (2d) 544 (B.C. S.C.).

⁹⁸ 1953 (B.C. 2nd sess.) c. 33 amended 1955, c. 79.

⁹⁹ *Supra*, footnote 97, at p. 557.

bar, but he in no way even attempted to touch on the question here in issue.

The position of Quebec in the system of tax rental agreements has been alternately supported as a vindication of provincial rights and condemned as a thorn in the financial side of Canadian tax relations. If in fact these agreements are nothing more than agreements, then Quebec is perfectly within her rights to refuse to deal with the Dominion on any terms of which she does not approve: however, if these agreements represent an ingenious device by which Ontario and British Columbia are pumping out the sinking ship of the Maritimes and keeping the sails of a faltering Manitoba and a politically tragic Saskatchewan, then it is unquestionably the duty of the taxation authorities to consider these problems in conference in order to devise a method by which Quebec will bear her full share of support. Again, this leads back to the best solution, yet the most difficult of achievement—amendment to the B.N.A. Act.

Taxation agreements, which are not in fact taxation agreements but a “blind” for aid to the needy, no matter how workable or beneficial to the economy, are unconstitutional. A subsidy by any other name is still a subsidy.¹⁰⁰

¹⁰⁰ *Montague v. Capulet (sub-nom R. v. J.)*, 34 Shakespear 1.

NOTE: The writers express their appreciation to Mr. Julian Porter for his assistance in research.