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Judith A. Osborne

Colin S. Campbell

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Recent Amendments to Canadian Lottery and Gaming Laws: The Transfer of Power between Federal and Provincial Governments

Abstract

Through an examination of recent amendments to the lottery and gaming provisions of the Criminal Code and of the law reform process involved in those amendments, this article demonstrates the unique structure of Canadian gaming laws and challenges the constitutional validity of provincial regulation as an interdelegation of power.

Keywords

Gambling--Law and legislation; Delegation of powers; Canada

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RECENT AMENDMENTS TO CANADIAN LOTTERY AND GAMING LAWS: THE TRANSFER OF POWER BETWEEN FEDERAL AND PROVINCIAL GOVERNMENTS*

BY JUDITH A. OSBORNE** & COLIN S. CAMPBELL***

Through an examination of recent amendments to the lottery and gaming provisions of the *Criminal Code* and of the law reform process involved in those amendments, this article demonstrates the unique structure of Canadian gaming laws and challenges the constitutional validity of provincial regulation as an interdelegation of power.

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** LL.B., M.A., Assistant Professor, School of Criminology, Simon Fraser University.

*** B.A., M.A., Ph.D. Candidate, School of Criminology, Simon Fraser University.

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I. INTRODUCTION

More than any other branch of the law, criminal law rides at the forefront of public consciousness. It is not a field reserved exclusively for the legal experts. In 1985, there were two well-publicized amendments to the Canada *Criminal Code*¹ which altered the law on impaired driving² and prostitution.³ In both instances, the formal changes were preceded, if not galvanized by, extensive public pressure, debate, and consultation. Meanwhile, the government, the federal Law Reform Commission, lawyers, and legal scholars are involved in the lengthy process of a major, comprehensive revision of the *Criminal Code* (which last occurred in 1953).⁴ As P.H. Solomon indicates in his analysis of criminal justice policy, the federal government has, since the mid-1960s, faced increasing pressure to maximize rationality in decision-making by

¹ R.S.C. 1970, c. C-34.

² S.C. 1985, c. 19.

³ S.C. 1985, c. 50.

⁴ S.C. 1953-54, c. 51.

justifying initiatives with research and evaluation.⁵ It is against this background of a generally public and publicized process that this article will examine another recent criminal law amendment.

One of Parliament's final legislative acts of 1985 was to pass the *Criminal Code (Lotteries) Amendment Act*.⁶ Despite the fact that significant changes were made to the law regulating lotteries and gaming, they went virtually unnoticed. Gambling is certainly of no less prurient interest than other forms of criminal activity, yet the amending process was confined to a few federal and provincial officials. The exclusion of the academic community is perhaps understandable, as it has consistently given little attention to this area of the criminal law. Both the implications of the latest amendments and the amending process itself merit further scrutiny, for they reveal interesting insights into law reform, the criminal law, and the constitutional law of Canada.

II. GAMING LEGISLATION IN CANADA

In order to comprehend the import of the present state of the law pertaining to gaming, it is necessary to understand how it evolved.⁷ Part V of the *Criminal Code* ("Disorderly Houses, Gaming and Betting"), unlike much of Canadian criminal law, has its origins in English statute law rather than in common law. It is a legislative, rather than a judicial creation. Fencing, for example, was one of the earliest gaming pursuits and was prohibited by statute in 1285.⁸

⁵ P.H. Solomon Jr., "Government Officials and the Study of Policy Making" (1983) 26 *Can. Pub. Admin.* 420 at 422.

⁶ S.C. 1985, c. 52.

⁷ The most comprehensive survey of the legislative history of gaming laws is found in a R.C.M.P. in-house study: Royal Canadian Mounted Police, Gaming Specialist Field Understudy Program, *The History of the Law of Gaming in Canada* (Research Paper No. 1) by Sgt. R.G. Robinson (Edmonton: National Gaming Section, R.C.M.P., 1983).

⁸ 13 Edward I, c. 7.

Canadian legislation has its deepest roots in a 1338 statute⁹ passed when the monarch feared losing all his skilled archers to "idle" games of dice. As a result, all games, except for archery, were prohibited. As one commentator notes, it is that blanket prohibition, eroded by centuries of amendment and repeal, which is with us today, "a patchwork of fossilized law."¹⁰

In the colonial fashion, English legislation was extended to Canada. After Confederation, the various gaming laws were reduced to a general statute relating to lotteries and gaming,¹¹ and this was substantially re-enacted in the first *Criminal Code* in 1892.¹² Keeping common gaming houses, conducting lotteries (with limited exceptions), cheating at play, and gambling in public conveyances were prohibited. When the *Code* was revised in 1953, the only changes made to the gaming sections were definitional ones. The Criminal Code Revision Commission was certainly aware of inconsistencies and anomalies in the legislation, but advocated no substantive changes "because of the controversial nature of the matters involved."¹³ Shortly thereafter, however, a joint committee of both chambers of Parliament was struck with the curious mandate of reviewing capital and corporal punishment, and lotteries. Regarding the latter, it first noted that the law had always been dealt with piecemeal, never having been subjected to a thorough revision.¹⁴ Furthermore, the joint committee recommended new legislation providing workable laws capable of effective enforcement

⁹ 12 Richard II, c. 6.

¹⁰ G.E. Glickman, "Our gaming laws: conditions dicey, to say the least" (March, 1979) 3 *Can. Law.* 11.

¹¹ *An Act Respecting Gaming Houses*, S.C. 1886, c. 158.

¹² 55-56 *Vict. c.* 29.

¹³ Canada, Senate, *Debates of the Senate of Canada*, 6th Sess., 21st Parl., (1952) at 233, quoted in L.J. Ryan, "Commentary: Criminal Code Lottery Section" (1968) 11 *Can. B. J.* 470 at 473.

¹⁴ Canada, *Reports of the Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishment, and Lotteries* (Ottawa: Queen's Printer, 27 June, 11 July, and 31 July 1956).

and garnering public support. Clarity, the elimination of inconsistencies, and the supervision and control of permitted lotteries were the main thrust of its conclusions:¹⁵

The implementation of this policy will result in the effective prohibition and restriction of several types of lotteries now carried on in spite of their dubious legality. It will also result in some relaxation of existing prohibitions to permit adequate and workable control. It is precisely because the committee has concluded that the present prohibitory laws do not protect the public that it is disposed to recommend some relaxation in line with the same reforms introduced with respect to the control, sale, and consumption of alcoholic beverages. Prohibition proved unworkable and led to many serious abuses; but the present system of licensing and control ... has worked satisfactorily and on the whole appears to have contributed to efficient law enforcement.¹⁶

These recommendations were not acted upon until late in 1967,¹⁷ but this initial legislative proposal died when Parliament was dissolved for the 1968 election. In 1969, however, Justice Minister John Turner was successful in securing the enactment of major changes to gaming legislation.¹⁸

The relaxation proposed in 1956 was achieved, but in a rather unusual way. Section 190 of the *Code*, as amended, permitted the Government of Canada to conduct lottery schemes; more importantly, however, it also allowed the *provinces* to conduct or authorize lottery schemes.¹⁹ For example, it became lawful for a charitable or religious organization "under the authority of a licence issued by the Lieutenant Governor-in-Council of a province" to conduct and manage a lottery scheme in that province.²⁰

More will be said below on the constitutionality of this arrangement. For present purposes, it is sufficient to say that since

¹⁵ *Ibid.* at paras. 20-22.

¹⁶ *Ibid.* at para. 22.

¹⁷ Bill C-195 (1967).

¹⁸ S.C. 1968-69, c. 38.

¹⁹ It is important to note that that "lottery scheme" encompasses not only lotteries but other games of chance such as blackjack and roulette, although dice games are not included.

²⁰ *Supra*, note 1, s. 190(1)(c).

1969, the gaming provisions of the *Code* have been unique.²¹ Criminal laws generally conform to a pattern of prohibition plus sanction, with legally recognized excuses and justifications. With gaming, however, while there is a prohibition plus a sanction, these do not apply to a broad range of provincially regulated exemptions.

III. CRIMINAL CODE (LOTTERIES) AMENDMENT ACT, 1985

Since 1969, lotteries have become firmly entrenched in Canadian culture.²² They have proliferated at the provincial level. In some provinces, Alberta and Manitoba for example, bingo and casino gambling have also been well established.²³ At the federal level, however, developments have not been as smooth. The operation by the federal government of Lotto Canada and the Sports Pool Corporation provoked provincial opposition and litigation. In 1979, the short-lived Conservative government agreed with the provinces that it would no longer operate federal lotteries²⁴ but was unable to formalize the agreement until December, 1985. As a result, Parliament has divested the federal government of any capacity to conduct lotteries. The provinces now have sole jurisdiction over lotteries and other specific gaming operations, and that jurisdiction is much broader than in the initial grant of power in 1969.

This step was achieved largely by executive action. Parliament merely "rubber-stamped" an agreement negotiated by federal and provincial government officials. Following a conspicuous

²¹ There are only two remotely similar provisions: s. 81 exempts provincially authorized boxing matches from the prohibition against prize fights; s. 251 gives the provincial Minister of Health powers of supervision over therapeutic abortion committees.

²² Canadian culture has also become heavily dependent on lotteries for funding. See Canada Council, Research & Evaluation, *Lotteries and the Arts: The Canadian Experience 1970 to 1980*, rev'd ed. (Working Paper 600-13, July 1982).

²³ For an analysis of gaming in Alberta see C.S. Campbell and J.R. Ponting, "The Evolution of Casino Gambling in Alberta" (1984) 10 Can. Pub. Pol. 142.

²⁴ Canada, House of Commons, *Debates*, 1st Sess., 33rd Parl., Vol. VI at 8416 (6 Nov. 1985).

absence of public hearings or discussion, the lotteries bill was given first reading in the House of Commons on 10 October, second and third readings on 6 November, and finally passed after less than three hours of debate; in the Senate it was given first reading 7 November, second reading on 27 November, and third reading and assent on 20 December. It was proclaimed in force on the final day of the year.²⁵

The process and substance of this amendment will now be subjected to closer analysis.

IV. CONTRACTUAL CRIMINAL LAW

This heading, although apparently puzzling, is an accurate description of the most recent gaming legislation. A reading of the sparse discussion in the House of Commons and the rather more comprehensive enquiries of the Senate Standing Committee on Legal and Constitutional Affairs reveals that this was criminal law engineered largely by ministers responsible for lotteries, reduced to a contract containing a consideration clause.²⁶ In exchange for the federal government relinquishing any claim to conduct lotteries and reinforcing the provinces' control of lotteries and gaming, the provinces agreed to contribute one hundred million dollars to the Calgary Winter Olympic Games. The contract, dated 3 June 1985, was contingent on the amendments to the *Code* being proclaimed no later than December 31, 1985. This was achieved largely due to an all-party agreement in the House of Commons to have second and third readings on the same afternoon. A brief discussion in the Commons was substituted for a reference to the Standing Committee on Justice and Legal Affairs. The Senate gave the proposals a closer examination but, despite serious reservations,

²⁵ SI/86-5 (22 Jan. 1986), *Canada Gazette*, Part II, Vol. 120, No. 2 at 468.

²⁶ Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*. 1st Sess., 33rd Parl. Vol. 31, Appendix "Leg-31-C" (4 Dec. 1985).

ultimately concluded that they should be "approved without amendment."²⁷

Unquestionably, both levels of government may enter into contracts and may sue and be sued on the basis of them. Here, though, they are not contracting to have buildings constructed or to have office supplies delivered, but to terminate litigation and re-apportion governmental power in return for substantial consideration in accordance with strict time limits. This brings a new dimension to federalism in that its terms have become negotiable for cash.

The Senate Committee was concerned enough about this development to seek a legal opinion. Counsel expressed the following viewpoint:

In my opinion the subject matter of this agreement is clearly the exercise of powers of executive government. The contract is entered into by ministers who represent governments of which they are members. I would submit that the resulting agreement is not a private contract but a political arrangement.... [I]f there is a breach of those political commitments, the proper forum for the resolution would not be the Court; the proper forum would be in the political chambers of government.²⁸

In other words, the contract, being in reality a mere political commitment, was not legally binding and not justiciable. As events transpired, this opinion was not put to the test. The contractual format was eminently successful in the present case. Perhaps it matters little that, *de jure*, the governments were not bound by the contract so long as they and Parliament felt bound *de facto*.

V. THE TRANSFORMATION OF FEDERAL POWER

Law reform, in this instance, was either a bureaucratic or executive process, but not a legislative one. In large part, this results from the transformation of gaming legislation into a federal-provincial issue, and, as D.V. Smiley and others have pointed out,

²⁷ *Ibid.* vol. 35 at 15 (16 Dec. 1986).

²⁸ *Ibid.* vol. 34 at 12 (13 Dec. 1986).

federal-provincial relations in Canada are characterized by the dominance of the executive branches of both levels of government.²⁹

At Confederation, the criminal law power was reserved exclusively for the federal government.³⁰ It was to be a tool to promote national unity. Burgeoning provincial interest in the legal control of gambling, a sphere constitutionally allotted to the federal government, goes beyond a general concern over how the country is run. It may be attributable in part to the well-documented increase in provincial assertiveness.³¹ One observer notes that, apparently, the majority of federal systems are becoming more centralized; Canada, however, with the development of nationally oriented interest groups and nationally experienced needs, has moved in the opposite direction.³² Smiley, the doyen of Canadian political science, describes this development as the "explicit denigration" of the Canadian constitution and "the attenuation of federal power."³³ Thus, "Canada's ten provinces are vigorous, activist units, jealous of their powers and anxious to use them."³⁴

There is, however, little evidence that in the initial stages, the provinces as a group actively sought jurisdiction over lotteries and gaming, although Quebec had been advocating provincial control of lotteries since the 1930s and had gained the support, in 1963, of

²⁹ D.V. Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 91.

³⁰ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27).

³¹ A. Cairns, "The Other Crisis of Canadian Federalism" (1979) 22 Can. Pub. Admin. 175; F.J. Fletcher & D.C. Wallace, "Federal-Provincial Relations and the Making of Public Policy in Canada: A Review of Case Studies" in R. Simeon, ed., *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) at 125-205; R. Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972); Smiley, *supra*, note 29; and Solomon Jr., *supra*, note 5 at 422.

³² Simeon, *supra*, note 31 at 9.

³³ Smiley, *supra*, note 29 at 57.

³⁴ Simeon, *supra*, note 31 at 10.

the Canadian Federation of Mayors and Municipalities.³⁵ During the debates regarding the 1969 amendments which resulted in the first transfer of power, the Minister of Justice was asked if the provinces had made any representations to have the law changed. He responded:

To the best of our knowledge ... we have received no formal submissions either for or against this particular provision from any provincial government. We are assessing public opinion in this country. We feel that public opinion is not unanimous about it and that it might vary from region to region. We are, therefore, leaving it to the regions, as that public opinion may be interpreted by their provincial governments that their provincial Attorneys General have control over whether or not there should be lotteries permitted within provincial boundaries.³⁶

Thus, the conversion of gaming and lotteries from a matter of federal criminal law to a joint federal-provincial issue appears to have resulted from a federal initiative. At this point, it is interesting to note that a similar absence of unanimity regarding obscene publications has not led to a divestment of federal control.

Rationality notwithstanding, the provinces were granted a direct role in gaming control. Not only did the 1969 amendment expand their jurisdiction, but it also had a significant revenue generating potential which was soon realized.³⁷ Therefore, it is not surprising that since 1969 the provinces have been jealously guarding these interests within the context of federal-provincial negotiations, as well as in the courts from time to time.³⁸

³⁵ Canada, House of Commons, *Debates*, 1st Sess., 28th Parl., Vol. 5, at 5476 (13 Feb. 1969).

³⁶ Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Proceedings*, No. 9 (11 Mar. 1959) at 331. This conforms to a development discussed by J.H. Skolnick and J. Dombrink: a shift from the relative conceptual simplicity of criminal prohibition to the subtlety and complexity of administrative regulation. See "The Legalization of Deviance" (1978) 16 *Criminology* 193 at 194.

³⁷ For example, in 1984-85, the members of the Western Canada Lotteries Foundation (B.C., Alberta, Saskatchewan, Manitoba, the Yukon and N.W.T.) generated net revenues of \$166.5 million on sales of \$483.5 million. Western Canada Lottery Foundation, *Eleventh Annual Report 1984-85* (Winnipeg: 1985).

³⁸ For example, a case launched by the Attorneys General of all Provinces and the Interprovincial Lottery Corporation against the federal Crown was dropped as part of the 1985 agreement to amend the *Criminal Code*.

VI. THE FEDERAL-PROVINCIAL PROCESS: LOTTERIES AND GAMING

The federal-provincial negotiation process, in recent years, has been characterized by the virtual exclusion of legislative bodies and of relevant non-governmental interests.³⁹ As F.J. Fletcher and D.C. Wallace observe, it is *de rigueur* to view with alarm the tendency for federal-provincial agreements to be made with little or no reference to legislatures. Where legislation is forthcoming (and many agreements can be implemented without it), governments are generally loathe to make changes in hard-won agreements in order to satisfy legislators. Any debate tends to be slight and inconsequential. They note further that members of opposition parties are nearly always completely blocked out of the process. Much of the time, therefore, federal-provincial interaction is "a closed bureaucratic loop."⁴⁰ Constitutional scholar P.W. Hogg comments that while it must be frustrating for legislators to find that their role is confined to ratifying arrangements made elsewhere, Parliament is too dominated by Cabinet and the party system to be a suitable forum for federal-provincial adjustment.⁴¹

It is important to recognize that executive federalism is more a consequence than a cause of the general weakness of legislatures in the face of the executive dominance of modern parliamentary systems. It seems clear, however, that joint programs do help to shield governments from effective legislative scrutiny.... There is little doubt that the practitioners of federal-provincial bargaining prefer secrecy.⁴²

This pattern certainly holds true for the 1985 amendments to Canadian lotteries and gaming legislation. Federal-provincial negotiations occurred primarily between the federal Minister of State for Fitness and Amateur Sport and provincial ministers responsible

³⁹ One of the most enlightening discussions of federal-provincial relations is found in Fletcher & Wallace, *supra*, note 31.

⁴⁰ *Ibid.* at 128-29, 186-88.

⁴¹ P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 108.

⁴² Fletcher & Wallace, *supra*, note 31 at 186.

for revenue and lotteries. It was only in the final stages of this process that there was any consultation with the federal Department of Justice and the provincial Attorneys General, which is noteworthy in itself, given the responsibility that these ministers have for criminal justice policy. As a result of their input, some amendments were made to the Bill, but none were inconsistent with the substance of the proposals contained in the federal-provincial lottery agreement signed in June, 1985. Within six months, as has been indicated, the Bill became law almost automatically.

The abbreviation of the legislative process was criticized before the Senate Committee on Legal and Constitutional Affairs. One witness contrasted it with the "normal criminal law amendment process." Although there was some overstatement on his part, as very few legislative changes go through all or even most of the steps outlined below, it is informative nonetheless to compare these steps with the actual process of the lotteries amendment. Ideally legislative reform would take the following form:

1. The generation of an idea for change coming from government, an interest group, or the Uniform Law Conference.
2. A study of the idea instituted by the federal Department of Justice.
3. Review by the Law Reform Commission or the Criminal Code Revision Committee.
4. Multilateral and bilateral consultation between the federal Department of Justice and the appropriate provincial ministers
5. The development of a position at the ministerial level.
6. A cabinet position based on the ministerial recommendation.
7. The preparation and circulation of a legislative draft followed by a draft bill.
8. Introduction of the bill in the House of Commons with referral to the Standing Committee on Justice and Legal Affairs.
9. Referral to and discussion in Senate.⁴³

Given that the criminal law is a blunt and weighty instrument of social control, any substantial curtailment of this process should give cause for concern. Is it appropriate, for example, for *Criminal*

⁴³ From the evidence of H. Morton, Ontario Ministry of the Attorney General. *Proceedings of the Senate Standing Committee, supra*, note 26, vol. 31 at 18-19.

Code amendments to be made in exchange for cash payments and for the changes to be rationalized as representing "good fiscal responsibility"?⁴⁴

The 1985 lotteries amendment has set a disconcerting precedent both in terms of the process followed and the impact on the definition of criminal law in this country. Were the federal and provincial governments to agree, a similar process could be used to amend several areas of the criminal law — prostitution, obscene publications, food and drug, and anti-combines law being the more obvious examples. The federal government could pass legislation allowing the provinces to license and regulate aspects of these activities. Not only does this facilitate inter-provincial inconsistencies, but it also reduces governmental accountability. As G. Stevenson points out, a government cannot easily be held responsible for its actions if it can plausibly blame their consequences, or lack thereof, on another level of government that is either competitively or co-operatively involved in the same field of activity.⁴⁵

VII. CONSTITUTIONAL JURISDICTION OVER LOTTERIES AND GAMING

In addition to these concerns, there is a central issue arising out of Canadian gaming laws that has been largely ignored: the legality of the transfer of power between the federal and provincial governments commenced in 1969 and reinforced in 1985. Section 190 of the *Criminal Code* empowers the provinces to enact legislation and to administer licensing schemes authorizing lotteries and gaming. This limits the application of the *Code* while concomitantly expanding the jurisdiction of the provinces.

Were it not for the exemptions laid out in the *Criminal Code*, it is clear that provincial legislatures would have no

⁴⁴ *Ibid.*, vol. 29 (26 Nov. 1985) at 15, per Otto Jelinek, Minister of State for Amateur Sport and Fitness.

⁴⁵ G. Stevenson, "The Division of Powers" in R. Simeon, *Division of Powers and Public Policy*, *supra*, note 31, 71-123 at 114. See also Smiley, *supra*, note 29 at 53.

jurisdiction to permit the operation of lottery schemes otherwise prohibited by the *Code*.⁴⁶ Attempts by the provinces to create additional regulation of gaming practices have also been struck down as being *ultra vires*. In *R. v. Lamontagne*,⁴⁷ for example, a majority of the Ontario Court of Appeal found the Ontario *Gaming and Betting Act, 1942*⁴⁸ to be invalid. The *Act* provided that a court could order the closing, for a period of up to a year of premises in respect of which there had been, within the previous three months, a conviction under the disorderly house, betting, and bookmaking provisions of the *Code*. The Court found that the statute operated essentially as criminal law in a field already covered by the federal *Code*. Similarly, in *Johnson v. Attorney General for Alberta*,⁴⁹ a majority of the Supreme Court of Canada found that the *Slot Machine Act*⁵⁰ was outside the jurisdiction of the province of Alberta. That Act provided for the confiscation of slot machines, relying on the provincial power over property and civil rights, and matters of a local or private nature.⁵¹ This contention was rejected by the majority. Rand J. stated that the *Code* dealt comprehensively with the subject matter of the provincial statute, which patently was that of gambling. Deploring this attempt to displace the *Code*, he concluded that any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would amount to interference with the exclusive power of Parliament.⁵² More important for present purposes is the opinion expressed by Locke J.:

⁴⁶ *Supra*, note 14 at para. 3. See also *Re Morrison and Kingston*, [1937] 4 D.L.R. 740 (Ont. C.A.); *R. v. Stanley* (1952), 104 C.C.C. 31 (Alta. S.C.).

⁴⁷ [1945] 4 D.L.R. 161 (Ont. C.A.).

⁴⁸ S.O. 1942, c. 19.

⁴⁹ [1954] S.C.R. 127.

⁵⁰ R.S.A. 1942, c. 333.

⁵¹ *Supra*, note 30 at ss. 92(13) and 92(16).

⁵² *Supra*, note 49 at 138.

The determination of this matter does not, in my opinion, depend alone upon the fact that if the provincial legislation was lawfully enacted there would be a direct clash with the terms of the *Criminal Code*; rather it is my opinion that the main reason is that the exclusive jurisdiction to legislate in relation to gaming lies with Parliament under head 27 of section 91.⁵³

The courts have been quite clear on the matter: the regulation of lotteries and gaming is a federal responsibility. A.S. Abel points out, however, that this federal authority in relation to criminal law comprises not only the creation of new crimes, but also the legalization of conduct which was criminal at Confederation or which was subsequently proscribed as criminal.⁵⁴ What must be explored here is whether conduct can be "legalized" by explicitly transferring regulatory control to the provinces, or whether such transfers amount to a misuse of the federal criminal law power? It is helpful to look to another section of the *Code* for guidance.

In 1969, the Canadian government relaxed its prohibition against abortion by exempting abortions approved by provincially regulated therapeutic abortion committees. In *Morgentaler v. R.*,⁵⁵ the Supreme Court had to address, *inter alia*, a challenge to the constitutionality of the abortion law and its transfer of power, a challenge which it ultimately dismissed. The Chief Justice alone addressed himself to the transfer issue and was of the opinion that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation."⁵⁶ In P.W. Hogg's view, this interpretation seems too broad since it would permit the kind of regulatory scheme in the guise of criminal law that has been consistently nullified in the past.⁵⁷

⁵³ *Supra*, note 49 at 155.

⁵⁴ A.S. Abel, ed., *Laskin's Canadian Constitutional Law*, 4th ed. (Toronto: Carswell, 1975) at 825.

⁵⁵ [1976] 1 S.C.R. 616.

⁵⁶ *Ibid.* at 626-27.

⁵⁷ Hogg, *supra*, note 41 at 417.

In a number of cases, the courts have declared that the criminal law will not sustain the establishment of an elaborate regulatory scheme in which an administrative agency or official exercises discretionary powers, this being within provincial jurisdiction.⁵⁸ While Hogg characterizes section 190 of the *Code* as including a power of dispensation granted to an administrative agency (the Lieutenant Governor-in-Council), he expresses no opinion as to its validity.⁵⁹ Instead, he posits, but does not apply, a test of "colourability": "[T]he more elaborate the regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal."⁶⁰ It is debatable whether this or a similar test would result in section 190 being struck down as beyond the federal criminal law power.

VIII. FEDERAL-PROVINCIAL INTERDELEGATION

Is the lotteries amendment valid on the grounds that the federal government has merely delegated its power to the provinces? To an increasing extent, legislative bodies are unable to enact all necessary legislation for effective government. The common pattern is for Parliament or a provincial legislature to legislate a skeletal legislative scheme and delegate to a subordinate body the power to enact the details.⁶¹ In the *Criminal Code*, Parliament has outlined general exemptions from the prohibition of gaming and lotteries, leaving the authorization, licensing, and control of the exceptions to the provinces. The latter, however, are not subordinate to the federal authority; they are co-ordinate or equal in status.⁶²

⁵⁸ For example, *Re Board of Commerce Act*, [1922] 1 A.C. 191; *Attorney General of Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.).

⁵⁹ Hogg, *supra*, note 41 at 417.

⁶⁰ *Ibid.*

⁶¹ This was judicially approved in *Hodge v. The Queen* (1883), 8 A.C. 117 (P.C.).

⁶² *Ibid.* at 80.

Unlike its Australian counterpart, the Canadian constitution has no express power of interdelegation between federal and provincial authorities. One view is that there is in fact a constitutional prohibition against it; the inclusion of "exclusively" in section 91 of the *Constitution Act, 1867* precludes the authorization of a delegation of legislative power to any body including a provincial legislature.⁶³ The courts, however, have been somewhat more ambivalent, moving from an absolute rejection to the creation of exemptions.

During argument in *C.P.R. v. Notre Dame de Bonsecours*,⁶⁴ Lord Watson is reported to have stated:

The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.⁶⁵

A Royal Commission on Dominion-provincial relations, reporting in 1940, supported the idea of delegation;⁶⁶ but, a decade later, in the so-called *Nova Scotia Interdelegation* case, the Supreme Court rejected as unconstitutional an interdelegation of powers between Parliament and a provincial legislature.⁶⁷ The decision was, in P.W. Hogg's opinion, based on the view that such interdelegation would disturb the scheme of the distribution of powers as set out in the *Constitution Act, 1867*. Parliament and the legislatures should not be permitted to agree to alter that pattern in the absence of

⁶³ E.A. Driedger, "The Interaction of Federal and Provincial Law" (1976) 54 Can. B. Rev. 695 at 698.

⁶⁴ [1899] A.C. 367 (P.C.), quoted by Driedger, *supra*, note 63 at 697. This remark of Lord Watson was made in argument. Although not technically binding, it has been highly persuasive in subsequent cases.

⁶⁵ *Ibid.* at 373.

⁶⁶ Referred to in Abel, *supra*, note 54 at 2. Interestingly, a more recent government-commissioned study took a similar position: Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Hull: Supply and Services Canada, 1979) at 104.

⁶⁷ *Attorney General for Nova Scotia v. Attorney General for Canada*, [1952] S.C.R. 31.

explicit constitutional authority; there being none, the Court would allow none to be implied.⁶⁸

Nonetheless, it soon became clear that this decision was to have a restricted application. The Nova Scotia statute at issue in that case concerned the delegation of powers between legislative bodies. It would have authorized the provincial government to delegate to Parliament the power to legislate with respect to employment in areas under provincial jurisdiction. Reciprocally, the Nova Scotia legislature was to receive from Parliament the power to make laws in relation to employment in industries under federal jurisdiction.⁶⁹ What was struck down was an interdelegation of law-making power that was beyond the delegate's legislative authority. Thus, as Abel indicates, there is no unconstitutional delegation involved where there is no enlargement of the legislative authority of the referred legislature, but rather a mere borrowing of provisions "which are within its competence and which were enacted for its own purposes."⁷⁰

In relation to section 190 of the *Criminal Code*, therefore, the issue is whether it extends provincial powers or merely borrows them. Can the control of gambling be brought under one of the provincial heads of power laid out in the constitution? On the one hand we have seen the judgement of Locke J. in *Johnson*⁷¹ which maintained that Parliament has exclusive jurisdiction to legislate in relation to lotteries and gaming. On the other hand, the decision in *Provincial Secretary of P.E.I. v. Egan*⁷² upheld the right of the province to enact a licensing scheme for motor vehicles and

⁶⁸ Hogg, *supra*, note 41 at 296.

⁶⁹ P.H. Russell, *Leading Constitutional Decisions*, 3d ed. (Ottawa: Carleton University Press, 1984) at 470-71. See *P.E.I. Marketing Board v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392, where the Supreme Court held that Parliament may delegate to a board of another legislature's creation.

⁷⁰ Abel, *supra*, note 54 at 3; G.V. La Forest, "Delegation of Legislative Power in Canada" (1975) 21 McGill L.J. 131 at 138; *Attorney General of Ontario v. Scott*, [1956] S.C.R. 137.

⁷¹ *Supra*, note 49.

⁷² [1941] S.C.R. 396.

penalties for contravention of licensing conditions. Thus, as long as provincial gambling regulations can be characterized as a licensing scheme rather than as an extension of punishment for a criminal offence, it would appear arguable that they would be valid as pertaining to the regulation of business within a province.

This is certainly in keeping with the tenor of the major Canadian constitutional law texts in which there is an assumption of validity.⁷³ It is also consistent with the widely accepted presumption of the constitutional validity of provincial legislation.⁷⁴ Nonetheless, on close examination, section 190 is perilously close to constituting an invalid interdelegation. After all, the provinces have jurisdiction over lottery schemes solely because the federal Parliament has granted them the power to make exemptions from the general prohibition. Strictly speaking, this provision does not merely "borrow" independently valid provincial enactments. The latter would be invalid but for the terms of section 190 itself. Nonetheless, it has been characterized as permissible referential or conditional legislation as permitted by the constitution and can be more fully explored in that context.

IX. REFERENTIAL AND CONDITIONAL LEGISLATION

These are two techniques of legislative co-operation between the federal and provincial governments that have been frequently used in the past and which, in principle at least, were not affected by the *Nova Scotia Interdelegation* case. As defined by P.H. Russell, referential legislation incorporates the *valid* enactments of another legislative body; conditional legislation makes the carrying out of the policy stated in a statute conditional upon the act of another governmental agency.⁷⁵ The distinction between the two is not

⁷³ Abel, *supra*, note 54 at 825; Hogg, *supra*, note 41 at 47.

⁷⁴ See the majority decision of Ritchie J. in *Re Nova Scotia Board of Censors and McNeil* (1978), 84 D.L.R. (3d) 1 at 20.

⁷⁵ Russell, *supra*, note 69 at 471.

always clear-cut. Neither is the line always obvious between these two mechanisms and interdelegation.

The key cases in this area concern the federal *Lord's Day Act*. In 1903, the Judicial Committee of the Privy Council, then the Canadian court of last resort, struck down Ontario's *Lord's Day Act* as an encroachment on the federal criminal law power.⁷⁶ Hogg notes that, prior to this decision, it had been widely assumed that Sunday observance was within provincial competence as a matter of "property and civil rights in the province" or as a matter of a "merely local or private nature in the province."⁷⁷ The federal *Act*, which followed shortly thereafter, prohibited a number of activities on Sundays, but the principal sections created exemptions.⁷⁸ For example, section 8 made it a punishable offence to run or conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force." An Act passed in Manitoba in 1923 to amend the *Lord's Day Act* enacted in section 1 that it should be lawful to run or conduct Sunday excursions to resorts within the province.⁷⁹ The validity of this legislation was challenged in *Lord's Day Alliance of Canada v. Attorney General for Manitoba*.⁸⁰ The Privy Council deemed it relevant to ask "whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all," in order to determine if this was a statute "in force" within the meaning of the reservation.⁸¹ This meant it had to be classified as other than criminal law, which seemed unlikely in light of the Privy Council's

⁷⁶ *Attorney General of Ontario v. Hamilton Street Railway*, [1903] A.C. 524 (P.C.).

⁷⁷ Hogg, *supra*, note 41 at 305.

⁷⁸ *Lord's Day Act*, R.S.C. 1906, c. 153.

⁷⁹ R.S.M. 1913, c. 119.

⁸⁰ [1925] A.C. 384 (P.C.).

⁸¹ *Ibid.* at 392, per Lord Blanesburgh speaking for the unanimous five member bench.

decision in *A.G. for Ontario v. Hamilton Street Railway*.⁸² Nonetheless, the Privy Council managed to find that the Manitoba statute was valid provincial legislation, although the rationale is far from convincing or comprehensible:

Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province."⁸³

Speaking for a unanimous Court, Lord Blanesburgh continued:

[W]hat the Parliament of Canada may do in this matter it may also forbear to do, and permissive Provincial legislation effective for its purpose, because the Parliament of Canada has not previously intervened at all, can be no less effective after such intervention if by its very terms the previous liberty of the Provinces in this matter remains unaffected. In each case, the Provincial Legislature is exercising a power which, in the one case by silence and in the other case in words, the Parliament of Canada has left intact.⁸⁴

What the Privy Council seemed to be saying here is that because Sunday activities were not criminal until the federal legislation was passed in 1906 and because that statute *preserved* provincial powers in this sphere, the federal Act did not expand provincial jurisdiction as a true interdelegation would, and it therefore constituted valid referential legislation.

As E.A. Driedger indicates, the decision has inherent weaknesses.⁸⁵ First, the form was delegation. That is, the statutory formula "except as provided by any provincial Act or law now or hereafter in force" constituted an express invitation to the legislatures to make exceptions to criminal offences. Further, to determine the competence of a provincial statute enacted after the federal Act, the statute should be read in its whole context which must include that federal Act. That fact, in Driedger's view, is

⁸² [1903] A.C. 524 (P.C.).

⁸³ *Supra*, note 81.

⁸⁴ *Ibid.* at 394.

⁸⁵ Driedger, *supra*, note 63 at 706.

relevant in determining the "pith and substance" of the provincial legislation. Even if it is an Act that the province could enact apart from the federal statute, it might not in this context be related to any of the stated heads of provincial powers. Looked at from this perspective, the Manitoba statute, standing alone, hardly made sense. Examined rationally, what it did was define what is not a crime.⁸⁶ Accordingly, the province was exercising a delegated power.

Even accepting the judgement in *Lord's Day Alliance* at face value, it is arguably of questionable worth in assessing the validity of s. 190 of the *Code*. In that section, there is no question of Parliament coming fresh to the field of prohibiting lotteries and gaming and preserving "intact" a valid provincial power. The prohibition of gambling has been part of Canadian criminal law since the colonial era. Thus, although Driedger maintains that section 190 is not delegation because, in the absence of the prohibition, a legislature could regulate lotteries as being property and civil rights,⁸⁷ if one applies his criticisms of *Lord's Day Alliance*, his position is untenable. Existing by itself, the provincial regulation of lottery schemes tells only half the story. The federal legislation enables the provinces to act in a sphere from which they would otherwise be excluded.

A more recent examination of the format of the Canadian *Lord's Day Act* by the Supreme Court of Canada basically duplicated the Privy Council position. In *Lord's Day Alliance of Canada v. Attorney General for British Columbia*,⁸⁸ the court unanimously upheld the validity of a Vancouver by-law exempting the municipality from the operation of part of the *Lord's Day Act*. It was adjudged to be a "misconception" of the operation of the *Act* to say that its effect was to create a delegation of federal power to the provinces. In Rand J.'s view, it could not be open to serious debate

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 705.

⁸⁸ [1959] S.C.R. 497.

that Parliament may limit the operation of its own legislation and may do so upon any event or condition.⁸⁹

P.W. Hogg and P.C. Weiler, both eminent constitutional scholars, are critical of this decision in a way that is also relevant for section 190 of the *Code*. For example, Hogg comments that, if the making of a Sunday observance law is a matter of criminal law outside provincial competence, as was decided in *Hamilton Street Railway*, then the repeal of a Sunday observance law is equally a matter of criminal law outside provincial competence. The Vancouver by-law had no significance except as a removal of a criminal prohibition that is outside provincial competence as surely as the imposition of a criminal prohibition. He concludes that the decision is inconsistent with the *Nova Scotia Interdelegation* case.⁹⁰ Similarly, Weiler characterizes the opting-out clause in the *Lord's Day Act* as amounting, functionally, to Parliament delegating to provincial legislatures the power to amend its criminal law in accordance with different and changing sentiments in the respective provinces.⁹¹

In true referential legislation, where Parliament adopts a particular piece of existing provincial legislation for its own use, it is easy enough to distinguish it from an interdelegation. It is, in K. Lysyk's words, "a legislative short-cut."⁹² Where future provincial enactments are involved, however, the incorporation is, in reality, delegation by another name. Judicial ingenuity has, however, confined the prohibition against interdelegation to a narrow range. As a result, "the doctrine is one which may test the ingenuity of, but seems unlikely to confound, a careful legislative draftsman."⁹³

⁸⁹ *Ibid.* at 509-510.

⁹⁰ Hogg, *supra*, note 41 at 306-307.

⁹¹ P.C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307 at 315.

⁹² K. Lysyk, "The Interdelegation Doctrine: A Constitutional Paper Tiger?" (1969) 47 Can. B. Rev. 271 at 274.

⁹³ *Ibid.* at 277.

Nonetheless, Weiler cautions us that, because the distinction between referential or conditional legislation and interdelegation is essentially one of name rather than substance, the Supreme Court has left itself free to resurrect the latter when and if it may wish to do so some time in the future.⁹⁴ Section 190 would be an interesting test case.

X. CONCLUSION: CONSTITUTIONAL FLEXIBILITY

By limiting the interdelegation doctrine to such narrow confines, the courts have facilitated constitutional flexibility. In effect, they have conceded that the executives of federal and provincial governments are primarily responsible for the distribution of legislative authority where there is mutual agreement.⁹⁵ One viewpoint is that this means of effecting informal constitutional change is essential to national survival. Co-operative federalism through federal-provincial negotiations and agreements allows an ongoing redistribution of powers without recourse to the courts or the formal amending process.⁹⁶

In contrast to this are the costs associated with constitutional flexibility. *De jure* or *de facto* delegation runs the risk of creating either an overpowerful central government or a toothless federation. It may encourage pressure by one level of government on the other to transfer powers.⁹⁷ As previously stated, constitutional flexibility, in the guise of co-operative federalism, reduces the accountability of governments to their legislative bodies and electorates and gives politicians plausible reasons for failing to act when action is clearly needed.⁹⁸ The fundamental defect of flexibility is, as Smiley

⁹⁴ Weiler, *supra*, note 91 at 317-318.

⁹⁵ *Ibid.* at 317.

⁹⁶ Hogg, *supra*, note 41 at 106-107.

⁹⁷ Canadian Bar Association, *Toward a New Canada* (1978) 66-67, quoted in J.E. Magnet, *Constitutional Law of Canada* (Toronto: Carswell, 1983) at 93.

⁹⁸ Smiley, *supra*, note 29 at 53.

indicates, "that the federal system is cut adrift from its constitutional base and becomes a regime shaped decisively by the bargaining powers of the federal and provincial governments rather than by legal norms."⁹⁹

The transfer of power over lottery and gaming law concretizes these concerns. Public discussion and consultation in the law reform process was precluded by federal-provincial executive action; federal control over an area of criminal law was exchanged for provincial cash; but the dubious constitutional validity of this transaction appears virtually irrelevant and unnoticed in public fora.

⁹⁹ *Ibid.* at 54.

