Note

Acts of Commission and Acts of Omission: Legal-Historical Research and the Intentions of Government in a Federal State

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The existence of interjurisdictional conflict in a federal state presents policy analysis with certain advantages. In Canada, for instance, the difficulties of divided jurisdictions have provided an historical record of the activities of government which is much more extensive, and more easily accessible, than that which exists in unitary states. This record, composed of court records, government reviews, and reactions to legislation proposed at different levels of government, can provide insights into the intentions of government which might prove difficult to discern in other types of states.

Conflicts between jurisdictions are an almost inevitable feature of a federal state. Typically, such conflicts fall into two types. They occur over the division of common resources at the margin of two otherwise distinct jurisdictional areas, and also over the delimitation of shared jurisdictions. In both cases, conflicts occur as a consequence of the existence of two legally autonomous levels of government within a given territorial area. Such conflicts occur, to a certain extent, regardless of the actual division of legislative powers within the state, and regardless of the existence or non-existence of a desire on the part of either level of government to co-operate with the other. Even if both levels of government attempt to fully co-operate in administrative matters, such co-operation presupposes a mutually agreed upon division of powers.

The operation of any federal system, then, involves the constant definition and re-definition of jurisdictional responsibilities between different levels of government. Whenever one level of government attempts to legislate in a particular policy sphere it necessarily presupposes some authority to do so. In a federation, this authority can never be taken for granted, but depends upon intergovernmental recognition of legislative legitimacy. Such legitimacy can grow out of

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negotiated agreements between governments or out of the acquiescence of governments to the results of constitutional arbitration.

In the case of agreements involving constitutional arbitration, some record of the policy matters involved will exist in the reports of the arbitrating authority. In any area in which a level of government attempts concrete policy initiatives, such initiatives involve some form of intergovernmental resolution of the question of jurisdiction. Given the legal nature of constitutional arbitration, a record of federal-provincial conflict in that policy area probably exists. What is significant for policy analysis, however, is the fact such records will exist not only in policy areas where governments undertake concrete legislative action, but also in those areas where governments choose to preserve the status quo.

By having a substantial and readily available record of these *acts of omission*, policy analysis in federal states differs from that in other types of states. In the case of unitary states, evidence of policy decisions usually exists only in the form of legislative acts, bills, statutes, regulations, and other *acts of commission*. Where a unitary government chooses not to alter existing policies, evidence of such acts of omission is difficult to find. Although in some republican systems a record may exist in the form of a presidential veto or congressional override, in many cases—unless a government in a unitary state publishes policy statements specifically rejecting alternate courses of action—it cannot be effectively established that a decision was made not to alter the status quo. Analyses can purport to demonstrate that equivalent conditions existed in other states and imply that a particular government *could* have acted as did the governments of those states, but, given the lack of identity of the conditions in the states concerned, the case can never be effectively established that a particular government did indeed act in such a fashion. As a final resort, analysts might turn to memoirs or reminiscences of government officials for evidence of such a decision, but this kind of evidence presupposes that these officials were prominent in the decision-making process and that their reminiscences are factually accurate and unprejudiced. Such papers pose additional problems for the researcher in terms of their ease of accessibility. In some cases, as with most cabinet documents, materials are often simply not available, while others may be kept from public view for extended periods of time ranging up to 50 years.

In the case of a federal state, however, the constant jurisdictional interaction between levels of government can provide an accurate record of acts of omission. Such a record exists in every case where one level of government attempts to legislate in an area which another level wished left alone. The only cases where no legal-historical records exist is where all levels either agree to preserve the status quo or do not recognize the need to deal with a problem. In the former case, some

Abstract. Interpretation of the intentions of government in policy matters is a crucial, if normally implicit, aspect of policy analysis. Canadian policy analysts enjoy a significant advantage in having at their disposal a large body of legal-historical evidence of policy conflict between levels of government, which, if properly interpreted, can aid the process of determining the intentions of government policy. Using an example of conflicting interpretations of government intentions contained in the literature on Canadian political economy, it is argued that the use of legal-historical records can aid policy analysts by providing evidence of policy alternatives not only in the case of policy decisions, or "acts of commission," but also in the case of nondecisions, or "acts of omission."

Résumé. L'interprétation des intentions gouvernementales en matière de politiques est un aspect primordial, bien qu'ordinairement implicite, de l'analyse des politiques. Les politicologues canadiens ont le grand avantage d'avoir accès à une quantité énorme de témoignages juridico-historiques des conflits entre les divers niveaux de gouvernement. Ces témoignages, s'ils sont bien interprétés, peuvent aider dans le processus de détermination des objectifs des politiques gouvernementales. Les documents traitant de l'économie politique canadienne donnent un exemple des interprétations divergentes des objectifs gouvernementaux. D'après cet exemple il est suggéré que les archives juridico-historiques fournissent aux politicologues des preuves de l'existence de choix réels, non seulement dans le cas de décisions, ou « actes de commission », mais aussi dans celui de non-décisions, ou « actes d'omission ».

other kind of record of intergovernmental agreement probably exists, while in the latter, the concept of a purposive act of omission does not apply.

Thus the utility of legal-historical decisions in a federal state has two aspects. In the case of acts of commission, the record of constitutional decisions can supplement policy statements, statutes, and other concrete evidence of the intentions of government. Where one of the constituent governments of a federation succeeds in blocking attempts by another level to alter the status quo, the record of constitutional decisions can also provide evidence of intentional acts of omission.

The fact that evidence exists in a federation which documents acts of omission is significant for analyses which criticize governments for maintaining the status quo, and for failing to have adopted alternative courses of action at given points in history. In order for such criticisms to be justified, it must be established that an alternative course of action was rejected by the government. If proof of the rejection of an alternative course of action is not available, it is impossible to prove that the government acted *intentionally* in favour of preserving the status quo. In other words, in cases where the policy choice of government was an act of omission, proof of the government's intention to preserve the status quo is required.

Given the extensive nature of federal-provincial conflict in a federal state, evidence of such acts of omission may well exist in the record of constitutional arbitrations. By the very act of identifying a policy dispute between levels of government such records provide evidence that at least one possible alternative existed to the status quo, an alternative which was considered important enough by at least one level of government to have required investigation and adjudication. If there is

evidence of such a jurisdictional dispute, then, it is impossible to deny that the matter was not considered, or that at least one alternative was not present. Moreover, if the outcome of the adjudication resulted in no further policy action on the part of the level of government awarded jurisdiction, one has proof of the existence of an act of omission and of the intent of that level of government to preserve the status quo.

The Case of Monetary and Fiscal Policy, 1867-1914

Certain writers in the political economy tradition have suggested that the actions of the Canadian federal government at the turn of the century can best be understood as having the objective of creating and fostering the development of a national capitalist market economy. By limiting its own involvement in the economy and promoting private development, Tom Naylor has contended, the federal government ensured that the exploitation of all the regions of the country would benefit the interests of existing commercial enterprises located in central Canada.[1] This analysis presupposes that the federal government controlled the fiscal and monetary aspects of economic policy, and that federal financial policies actively encouraged the growth and development of a central Canadian economic establishment.[2] Against this view, other economists and historians argue that the federal government had no fiscal or monetary policy until after the First World War. As McIvor has put it,

> Until World War I, the Canadian monetary system remained extremely simple both in structure and operation. The gold standard had been adopted in the decade preceding Confederation, and for the following sixty years the preservation of the established external value of the dollar represented the sole monetary objective of the government. The possibility of pursuing any alternative monetary policy was simply not recognized, much less discussed.[3]

This is an instructive example, since both Naylor's and McIvor's arguments involve assumptions regarding acts of commission and acts of omission. On the one hand, McIvor ignores the possibility of the existence of acts of omission and concentrates his analysis solely upon an inspection of the record of federal acts of commission. Since he finds little evidence of federal legislation in the fiscal and monetary area between 1867 and 1914,[4] he assumes that the federal government did not

1 Tom Naylor, "The Rise and Fall of the Third Commercial Empire of the St. Lawrence," in Gary Teeple (ed.), *Capitalism and the National Question in Canada* (Toronto: University of Toronto Press, 1972), 1-42.

2 This theme is explored in Tom Naylor, *The Banks and Finance Capital*, vol. 1 of *The History of Canadian Business, 1867-1914* (Toronto: James Lorimer, 1975).

3 R. Craig McIvor, *Canadian Monetary, Banking and Fiscal Development* (Toronto: Macmillan, 1958), 101. See also Irving Brecher, *Monetary and Fiscal Thought and Policy in Canada, 1919-1939* (Toronto: University of Toronto Press, 1957), 240.

4 The *Bank Act* (1871) and its decennial revisions are exceptions. For a history of these changes see *Report of the Royal Commission on Banking and Currency* (Ottawa: King's Printer, 1933), 61-69.

have any policy in this area. Naylor, on the other hand, relies on the unstated assumption of the existence of acts of omission on the part of the federal government. His analysis rests on the notion that the federal government *could* have pursued some other alternative policy option to the centralized path it chose (for example, a decentralized, provincially-led development policy), but failed to do so.

The significance of McIvor's argument vis-à-vis Naylor's lies in the implications it has for understanding the intentions of government. Utilizing McIvor's analysis, it is possible to argue, against Naylor, that federal government financial policy between 1867 and 1914 could not have favoured the interests of any particular sector of Canadian society since no alternative to the status quo was considered.[5] For an argument such as Naylor's to succeed against this position, it must establish that the government was aware of the implications of its financial policies (or lack thereof) for the overall development of the national economy, yet consciously chose to retain its existing policies, thus intentionally favouring one path of development over another.

It is here that the possibility of presenting evidence of acts of omission is crucial. The existence of constitutional arbitration in the area of jurisdiction over financial policy would imply that alternatives to the status quo had existed. If no further action was taken by the level of government awarded jurisdiction in these cases, this would be evidence of an act of omission favouring the preservation of the status quo. Such a finding would serve to refute McIvor's contention of a lack of monetary and fiscal policy, and would support Naylor's analysis by confirming the existence of some federal policy oriented towards the preservation of the existing financial situation. Although a complete survey of the evidence is beyond the scope of this note, an examination of the legal-historical record of interjurisdictional disputes in the area of monetary and fiscal policy can help to evaluate the conflicting arguments put forward by Naylor and McIvor. It also points out the more general utility of such evidence to investigators involved in the pursuit of the elusive goal of determining the intentions of government policy.

The Dominion of Canada entered into the first years of Confederation with at least a rudimentary policy regarding control over

5 For McIvor, this inaction is excused by lack of knowledge. This sort of argument, in fact, is implied in the orthodox interpretation of the role of the Canadian state in the depression. Against supporters such as Curtis and Knox, who argue the state acted in an objective, rational manner, critics such as Plumptre argue only that the government failed to adopt Keynesian policies as quickly as it should have. See C. A. Curtis, "Credit Control in Canada," in Canadian Political Science Association, *Papers and Proceedings* 2 (1930), 101-22; F. A. Knox, *Dominion Monetary Policy, 1929-1934*, Study prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa, 1934); and A. F. W. Plumptre, "Canadian Monetary Policy," in A. F. W. Plumptre and H. A. Innis (eds), *The Canadian Economy and Its Problems* (Toronto: Canadian Institute of International Affairs, 1934), 159-69.

money and the economy.[6] Under the terms of the *British North America Act*, the federal government was provided with almost exclusive control over the finances of the country. It received control over the public debt (section 91[1]), the raising of money by any mode or system of taxation (91[3]), the borrowing of money on the public credit (91[4]), currency and coinage (91[14]), banking, incorporation of banks and the issue of paper money (91[15]), savings banks (91[16]), bills of exchange and promissory notes (91[18]), interest (91[19]), and legal tender (91[20]).[7] This contrasted with the limited control provided the provinces, which included direct taxation within the province in order to raise revenue for provincial purposes (section 92[2]), and the borrowing of money on the sole credit of the province (92[3]).[8]

Even in the case of such an apparently clear-cut federal predominance, however, the existence of two autonomous levels of government provided numerous opportunities for federal-provincial conflict. In terms of intra-jurisdictional disputes, opportunities were easily provided by the divided jurisdictions of taxation and borrowing; while in terms of cross-jurisdictional disputes, federal economic and financial powers conflicted with provincial jurisdiction over property and civil rights.

As in all cases of federal-provincial conflict in Canada, legal-historical records are available from four main sources. These include records of cases involving the federal powers of disallowance and reservation of provincial bills,[9] cases brought before the Supreme Court of Canada and the Judicial Committee of the Privy Council for arbitration,[10] the comments made on provincial legislation by federal ministers of justice in their annual reports,[11] and the records of federal-provincial and interprovincial conferences of ministers.[12]

6 See R. F. McWilliams, "The Constitution and Banking," *The Canadian Banker* 46 (1939), 279-87; and W. R. Lederman, "Division of Powers to Incorporate and Regulate Financial Institutions," *The Canadian Banker* 76 (1969), 12-14.

7 Canada, Department of Justice, *A Consolidation of the Constitution Acts 1867 to 1982* (Ottawa: Minister of Supply and Services Canada, 1983).

8 Ibid.

9 For a discussion of these powers see Eugene Forsey, "The Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusals of Assent by Lieutenant-Governors Since 1867," *Canadian Journal of Economics and Political Science* 4(1938), 47-59. For a summary of federal-provincial interaction in these areas, see Canada, Department of Justice, *Disallowance and Reservation of Provincial Legislation*, G. V. La Forest (ed.), (Ottawa: Queen's Printer, 1955).

10 For a record of these cases, see Canada, Department of Justice, *Decisions of the Judicial Committee of the Privy Council Relating to the British North America Act 1867 and the Canadian Constitution 1867-1954*, Richard A. Olmsted (ed.), (Ottawa: Queen's Printer, 1954).

11 See Canada, Department of Justice, *Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation 1867-1895* (Ottawa: Government Printing Bureau, 1896).

12 For the period 1867-1914, the best source is Canada, *Dominion-Provincial and Interprovincial Conferences from 1867-1926* (Ottawa: King's Printer, 1951).

The record of these interactions shows that the area of financial policy was a very active one throughout the period 1867-1914. More importantly, this remains true even if the issue of federal subsidies (which dominated federal-provincial and interprovincial conferences of the era) is discounted.[13] The federal government objected to 25 provincial acts relating to financial powers between 1868 and 1893, forcing their reconsideration by provincial governments under threat of possible reservation or disallowance.[14] Four acts were actually disallowed between 1873 and 1910 and two others reserved, one in 1877 and one in 1892.[15] Three disputes involving jurisdiction over economic policy were heard by the Judicial Committee of the Privy Council between 1887 and 1912.[16]

It is clear from this record that the federal government carefully guarded its right to control the financial system of the nation. Throughout the period, the federal government objected to seemingly innocuous provincial acts enabling municipalities and companies to raise funds through bond issues or allowing municipalities to levy punitive interest rates on tardy taxpayers. Although for the most part the federal government chose only to register formal objections to these acts, it did not hesitate to invoke its powers of reservation and disallowance whenever provincial acts threatened federal control over banks and banking.[17] Federal control over banking was also the central issue in all three financial cases sent before the Judicial Committee of the Privy Council. Although the Judicial Committee ruled in *Bank of Toronto* v. *Lambe* to allow the provinces to tax federally incorporated banks, in all of the other cases the exclusivity of the federal powers over banking was expressly upheld.[18] The legal-historical record of

13 The best description of federal-provincial conflict over subsidies is found in J. A. Maxwell, *Federal Subsidies to the Provincial Governments of Canada* (Cambridge: Harvard University Press, 1937).

14 These acts ranged from an 1868 Ontario bill concerning provincial bankruptcy laws to an 1893 New Brunswick bill dealing with the regulation of banking in that province. Primarily, however, the federal government consistently objected to provincial attempts to regulate interest rates or to allow municipalities or joint stock companies to issue bills of exchange.

15 Both reserved bills and two of the disallowed bills dealt with provincial attempts to regulate banking, including two attempts by the government of Quebec to incorporate banks. The two remaining disallowed bills dealt with provincial attempts to set interest rates.

16 These were: *Bank of Toronto* v. *Lambe* [1887] 12 A.C. p. 577, in which federal banking powers were upheld but provinces allowed to tax bank property; *Tennant* v. *Union Bank of Canada* [1892] A.C. p. 459, which ruled federal banking powers superseded provincial powers over property and civil rights; and *Royal Bank* v. *Rex* [1913] A.C. p. 283, which held the provinces could not legislate within federal banking jurisdiction.

17 A good example of this is provided by federal disallowance of Manitoba legislation allowing the City of Winnipeg to both borrow and lend money: [1889] 52 Vict. Ch. 45 (Man.).

18 The limitations of provincial restrictions over federal banking powers established in

federal-provincial interaction suggests that throughout this period the federal government acted in a manner so as to preserve the status quo. The record clearly indicates that provincial legislative initiatives altering the status quo were continually resisted by a federal government determined to prevent the provinces from interfering with federal control over money, banks, and interest rates.

With regards to McIvor's and Naylor's arguments, then, this preliminary survey of legal-historical evidence strongly suggests that, at least in the negative sense of an act of omission, the federal government did have a monetary and fiscal policy prior to the First World War. Although a more extensive analysis of other source material would undoubtedly further illuminate the position, the evidence supports the conclusion that McIvor's contention that the federal government did not have such a policy until after the First World War is incorrect. By pointing out the existence of a fiscal and monetary act of omission, the legal-historical evidence tends to support Naylor's argument that the federal government pursued a financial policy with direct and foreseeable consequences in terms of favouring certain interests over others. The evidence supports this conclusion by indicating the extent to which the federal government was forced to defend its policy against provincial alternatives over an extended period of time.[19]

Conclusion

This example demonstrates the importance to policy analysis of the investigation of both acts of commission and acts of omission. It also shows the utility of legal-historical documents concerning federal-provincial interaction for determining whether or not an act of omission occurred. Evidence of continual federal-provincial interaction in the area of financial policy tends to refute McIvor's arguments and provides support for Naylor's thesis. By determining the existence of an act of omission, the analysis shows not only that the maintenance of the status quo was not the sole policy choice open to the federal government, but that it was the preferred alternative. A full analysis of government policy must thus consider acts of omission as well as acts of commission. Given the extensive legal-historical record of federal-provincial jurisdictional conflict, policy analysts in a federal state enjoy an advantage over their colleagues in other types of states by having at their disposal a simple and economic method by which to determine the intentions of government.

Bank of Toronto v. *Lambe* were clearly demonstrated in *Attorney General for Alberta* v. *Attorney General for Canada* [1939] A.C. p. 117.

19 It is true, of course, that the government did not have a *Keynesian* monetary and fiscal policy until after the First World War. In the final analysis this may be all McIvor is saying.