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Constitutional Reform and the Spending Power of Parliament

by

Gregory Stewart Loyst 

A thesis submitted to the Faculty of Graduate Studies
and Research in partial fulfilment of the requirements
for the degree of Master of Arts.

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For David.
My friend, my brother.
The one who has always had faith
in my ability to succeed academically.

ABSTRACT

The exercise of the federal spending power in areas of exclusive provincial jurisdiction is one of the most contentious aspects of Canadian federalism. The federal government's use of its spending power has been responsible for the establishment and maintenance of national standards of social services across Canada. However this has also been a source of tension between the federal government and the provincial governments who seek to exercise their jurisdictions without interference from Ottawa.

This thesis examines the evolution of the spending power and recent efforts to limit it through the various attempts at constitutional reform. To this end I will consider: early attempts to constitutionalize the spending power; section 106A of the proposed Constitutional Amendment, 1987; proposals in the post-Meech period, including those in the Charlottetown Accord; and the move from constitutional to political reform in the 1995 federal budget.

I conclude that federal-provincial tensions in this area will continue regardless of what efforts are made to ease them.

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Ultimately, I would like to thank my best friend, Pamela Chamberlain. Pam's love and encouragement, as well as her proofreading, have contributed greatly to all of my work at the University of Alberta.

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CHAPTER ONE

INTRODUCTION

> *The unequal distribution of the national income as between people of different regions may excite feelings quite as different to national unity as those aroused by gross inequalities between different income groups. The provision of a national minimum standard of social services in Canada cannot (without complete centralization of all social services) be divorced from the assurance to every government of Canada of the revenues necessary for the adequate performance of its recognized functions. This assurance, which the Fathers of Confederation were able to give means a system of subsidies and debt allowances financed by taxation that was national in character, is infinitely harder to give now that the recognized functions of provincial governments become far larger than they were in 1867.*[1]

The Parliament of Canada has the authority to spend in policy areas thought by the Government of Canada to require a set of national standards, regardless of their constitutional allocation. This "spending power" is a financial lever for promoting equality of opportunity for all Canadian citizens through federal financing of universally accessible social services.[2] The federal government has consistently exercised this power since the early part of this century. Although in most social policy areas services are available to all Canadians, these services are still provided at different levels and at different costs to provincial residents.

Various federal governments have used the spending power to eliminate these differences. Over time, these efforts have elicited negative reactions from

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[1]Government of Canada, Report of the Royal Commission on Dominion-Provincial Relations (Ottawa: Queen's Printer, 1940), Book II, p. 10.

[2]Over the past decade, promoting the equality of opportunity for Canadians through national standards of social services has been championed by special interest groups rather than the Government of Canada.

some provincial governments. It is the clash of the federal and provincial views on the use of the spending power which has motivated this study. It cannot be denied that there is tension. The major premise of this thesis is that this tension will continue regardless of the efforts made to ease it. Over the years, the federal government and the provinces have tried to deal with this tension in various ways.

One method which has been of considerable effort over the past thirty years has been to constitutionalize the spending power. All attempts have failed for various reasons which will be outlined below. In the process, these attempts illustrate the drawbacks of the rigidity inherent in constitutionalizing the spending power, and the benefits of the flexibility that the status quo permits.

The framework for analysis is an examination of the federal spending power and constitutional reform between 1968 and the present. The importance of the exercise of the spending power in the establishment of national standards of social services in Canada will be discussed. However, it will not be argued here that the spending power is, or should be, the saviour of Canada's social safety net.

WHAT IS THE FEDERAL SPENDING POWER?

In a 1969 Government Working Paper on the constitution, the spending power was defined in part as follows:

> Constitutionally, ... the term "spending power" has come to have a specialized meaning in Canada: it means the power of Parliament to make payments to people or institutions or governments for purposes on which it [Parliament] does not necessarily have the power to legislate.[3]

The spending power manifests itself in three principal ways in Canada. First, the

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[3]Government of Canada, Federal-Provincial Grants and the Spending Power of Parliament (Ottawa: Queen's Printer, 1969), p. 4.

spending power provides the Government of Canada and Parliament with a means by which to eradicate the differences in net fiscal benefits (NFBs) between provinces.[4] This is achieved by making equalization payments, which are non-conditional, to the less prosperous provinces.[5] Without the use of the spending power in this redistributive role, service disparities could potentially widen in resource-poor, or *have-not* provinces.

The second use of the spending power is the promotion of equality of opportunity for individual Canadians through regional economic development.[6] Regional development programs cater to the interests of the individual participating provinces. Programs of this nature are common in Atlantic Canada[7], while Western Economic Diversification Canada is another example. Funding for these types of programs, which has both social and economic dimensions, almost always have an element of cost-sharing between the two orders of government. Federal and provincial contributions are rarely identical though, with the federal government generally providing the largest portion.[8]

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[4]Robin Boadway describes this condition as occurring when expenditures and taxation responsibilities are decentralized so that different provinces are able to provide a given level of services only at differing tax rates; that is, they are able to provide different net fiscal benefits (NFBs) to their residents. See, Robin Boadway, "Renewing Fiscal Federalism: Fundamental Principles," in Policy Options, Vol. 14, No. 10 (December, 1993), p. 7.

[5]Equalization was recognized in the Constitution Act, 1982. This section reflected the federal government's commitment to a principle.

[6]Canada, Spending Power (1969), p. 6.

[7]The Atlantic Canada Opportunities Agency, Enterprise Cape Breton, and the Cape Breton Development Corporation are three examples.

[8]Funding through regional economic development is changing in relation to the need for fiscal restraint. The Atlantic Canada Opportunities Agency (ACOA), for example, has announced that it is moving from grants to repayable loans. Furthermore, the 1995 federal budget has cut funding to some of these organizations by up to half.

The third major manifestation of the federal spending power, the one which will form the focus of this study, is the federal-provincial shared-cost program(s). The shared-cost program, as its name would suggest, is a program which is funded jointly by the federal and provincial governments. An example of a shared-cost program were grants made by Canada under the *Hospital Insurance and Diagnostic Services Act*, 1957, to the provinces to subsidize the provision of hospital services.[9] Section 92(7) of the Constitution Act, 1867 assigns the provinces jurisdiction over: "The Establishment, Maintenance, and Management of Hospitals...." However, through the exercise of the spending power, Parliament is able to assist the provinces in financing hospital programs. As a result, the provinces are more financially able to provide the service, and in turn Parliament is able to establish national standards within the provincial sphere.

CONSTITUTIONAL FOUNDATION OF THE SPENDING POWER

Legal scholar Peter Hogg argues that while the spending power is nowhere explicit in the Constitution Act, 1867, it must be inferred from Parliament's power to levy taxes (s. 91(3)), to legislate in relation to "public property" (s. 91(1A)), and to appropriate federal funds (s. 106).[10] Section 91(3) reads: "The raising of Money by any Mode or System of Taxation," and this provision gives Parliament an unlimited authority to raise taxes, both directly and indirectly. providing the federal government the necessary financial means to meet its jurisdictional responsibilities.

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[9]The 1977 Established Programs Financing program changed the way in which the program was financed.

[10]Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: The Carswell Company Limited, 1985), p. 124.

Section 91(1A), "The Public Debt and Property", gives Parliament the right to make laws in regard to the public debt and property of Canada only, and not that of the provinces.[11] Section 91(1A) is important to the foundation of the spending power in that its combination with s. 91(3) provides Parliament a powerful instrument for implementing policies otherwise falling outside of the scope of s. 91.[12] Section 91(1A) has been considered by the courts and appears to incorporate the spending power within its meaning. Dissenting in *Reference re Employment and Social Insurance Act* [1936], Duff C.J. and Davis J. stated that:

> Parliament may raise money by taxation and dispose of its public property in any manner it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and the gift may be accompanied by such restrictions and conditions Parliament may see fit to enact.[13]

The majority of the Supreme Court of Canada held, and was later affirmed by the Privy Council in *Attorney-General of Canada v. Attorney- General of Ontario* [1937], that the Employment and Social Insurance Act was *ultra vires* because:

> ...in pith and substance this Act is an Insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.[14]

In his analysis of the case, G.V. La Forest notes that the decisions of the Supreme Court of Canada and the Privy Council do not disagree with Duff C.J. and Davis J.

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[11]Gerald V. La Forest, Natural Resources and Public Property Under the Canadian Constitution (Toronto: University of Toronto Press, 1969), p. 134.

[12]La Forest (1969), p. 136.

[13]*Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427, at 457. Although the dissenting opinion has no legal weight, it is often considered when deciding future cases on the same issue. Thus, although not binding, the decision of Duff C.J. and Davis J. must be given adequate consideration.

[14]*Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 355, at 367.

that the federal government had the right to levy taxes and dispose of the money (its public property), in any manner it saw fit.[15] The problem was that the statute was regulation regarding unemployment insurance, not public property. In short, the right of Parliament to spend as it sees fit in relation to the public debt and property was affirmed by the decisions of this case, provided it does not lead to legislation or regulation in another area.

Section 106 of the Constitution Act, 1867, reads: "Subject to 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." This section allows for the appropriation of funds by Parliament in the *public interest*. Hence, it is also used in the justification of the use of the spending power.

LIMITATIONS ON THE SPENDING POWER

Although seemingly rooted in the constitution, the spending power is not without limitations. Despite the general taxing powers of Parliament[16], taxing for the purpose of spending outside federal jurisdiction is subject to exception. Lord Atkin stated, when striking down the Employment and Social Insurance Act in *Attorney-General for Canada v. Attorney-General for Ontario* [1937], that:

> ...Dominion legislation, even though it deals with Dominion Property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved Provincial Competence. If on the true view of the legislation it is found that in reality and in pith and substance the legislation invades civil rights within the Province, or in respect of other classes or subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To do otherwise would afford the Dominion an easy

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[15]La Forest (1969), p. 140.

[16]The power to tax is thought to include the power to spend.

passage into the provincial domain.[17]

The decision shows that there must be a clear demarcation line established between those regulatory effects caused by taxation for the purpose of federal spending which are tolerable, and those which are intrusive and intolerable.[18] It also affirms the presence of the spending power by limiting it with respect to unemployment insurance.

If federal funding is aimed at a program within an area of provincial jurisdiction, funding is admissible if that program or its effects do not lead to legislation or regulation.[19] Provincial governments, many of which are in favour of a rigidly defined distinction between what is tolerable and what is not, would argue that the federal presence, regardless of intention, leads to *de facto* regulation. Advocates of the use of the spending power, including social groups such as the National Action Committee on the Status of Women, or the Canadian Nurses Association, for example, would maintain that this is a legitimate use of the federal spending power notwithstanding its effect within the provincial sphere.

In the 1988 *Winterhaven Stables Limited v. Canada (AG)*[20] case, the

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[17]*Attorney-General for Canada v. Attorney-General for Ontario [1937], A.C.* at 367.

[18]Joseph A. Magnet, "The Constitutional Distribution of Taxation in Canada," in Constitutional Law of Canada: Cases, Notes and Materials, 4th ed. ed. Joseph A. Magnet (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1989), p. 410.

[19]In order for a programs effects to be considered legislation or regulation, participation in the program would have to be mandatory. While the conditions of a particular program may have regulatory effects — the *Canada Health Act*, for example — the voluntary nature of participation in this program precludes it from being deemed legislation or regulation in an area of provincial jurisdiction.

[20]In this case, the Alberta Court of Appeals considered the issue of whether or not the appellant was liable for the payment of income tax. The appellant contended that: the *Income Tax Act* represented direct taxation within a province in order to raise revenue for provincial purposes; that such a legislative purpose offended subsection 92(2) of the Constitution Act, 1867; and that it was *ultra vires* of Parliament. The appellant further contended that certain "spending" statutes were legislation in respect to matters of exclusive provincial jurisdiction.

appellant argued that through the power of the purse, Parliament could enter into areas of provincial jurisdiction and coerce the provinces into adopting programs devised by Parliament. The respondent replied, and the Courts agreed, that while the statutes in question may have ultimately affected matters within exclusive provincial jurisdiction, they were not legislation in relation to it.[21] Furthermore, it was found that federal contributions are now made in such a way that they do not regulate provincial control of them. The opting out arrangements available to provinces that choose not to participate in certain shared-cost programs is one example of this. Justice Irving of the Alberta Court of Appeals stated that:

> to hold that conditions cannot be imposed would be an invitation to discontinue federal assistance to any region or province, destroying an important feature of Canadian federalism.[22]

For now, at least, the federal spending power has not been formally limited outside of the vague restriction against legislation or regulation in a provincial domain. Interestingly, neither the federal nor the provincial governments have been anxious to take a spending power case to the Supreme Court of Canada. This is because a Supreme Court decision would likely either legitimize or limit

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The Court held that the main objective of the *Income Tax Act* is not to raise money by direct taxation for provincial purposes; it is to raise money by taxation. Parliament was not prohibited from raising money that may be used for provincial jurisdiction purposes. Canadian Governments have never restricted spending to matters within their respective legislative competence, and certainly not in areas in double aspect. *Winterhaven Stables Limited v. The Attorney General of Canada* 1988 53 D.L.R. (4th) 413 (Alta. C.A.).

[21]The respondents argued that while programs such as the *Canada Health Act, Canada Assistance Plan,* and *Established Programs Financing* may ultimately have an effect on provincial competence, they are not considered legislation in relation to these areas. They are statutes which authorize the allocation of federal funds to assist the provinces in providing services. If a substantial number of provinces chose not to accept the conditions, the effect on matters within the provinces would be minimal. *Winterhaven Stables Limited v. The Attorney General of Canada* 1988 53 D.L.R. (4th) 413 (Alta. C.A.).

[22]*Winterhaven Stables Limited v. The Attorney General of Canada* 1988 53 D.L.R. (4th) 413 (Alta. C.A.).

Parliament's power to spend. That is, a decision in favour of the spending power could be interpreted as constitutional recognition of Parliament's power to spend in areas of exclusive provincial jurisdiction. Conversely, a decision opposing Parliament's power to spend may limit its reach in the future.

> Alberta, for example, did not directly challenge the *Canada Health Act* even though the province had traditionally challenged similar exercises of the federal spending power. The Act prohibited practices like extra billing which Alberta then permitted. Despite the provincial concern, it was not in the province's interest to go to court. Why? Because it was a lose-lose situation. If the provinces *won* the case they might have succeeded in dismantling the national health care system and ending up by paying 100 percent of the costs. If the provinces *lost* the case — a more likely scenario — the federal spending power would have been clearly established within whatever limits were set by the courts.[23]

This question of legitimation or limitation of the spending power will be returned to later in the study when recent constitutional proposals for a change to the spending power are examined.

PROS AND CONS OF THE FEDERAL SPENDING POWER

Parliament's use of the spending power has often been controversial and subject to widely divergent interpretations. It has been argued that the spending power is simply the expansion of Parliament's taxing powers to the point that the federal government has sufficient revenues to finance national programs.[24] Alternatively, those who desire a more decentralized form of federation have asserted that spending outside of federal jurisdiction, regardless of federal fiscal

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[23]J. Peter Meekison, "Let There Be Light," in Canada: The State of the Federation 1993, eds. Ronald L. Watts and Douglas M. Brown (Kingston: The Institute of Intergovernmental Relations, Queen's University, 1993), p. 68. (emphasis original)

[24]Mollie Dunsmuir, The Spending Power: Scope and Limitations (Ottawa: Supply and Services Canada, 1991), pp. 4-5.

dominance, is a blatant violation of provincial jurisdiction. It would be incorrect to assume that the debate about the presence of the federal government in areas of exclusive provincial jurisdiction is merely constitutional. More accurately, the essence of the debate is political. The spending power dispute is about which order of government can determine and influence social policies in a number of different areas of exclusive provincial jurisdiction. It is about power and money.

Criticisms of the Spending Power

Most opposition to the use of the federal spending power in areas of exclusive provincial jurisdiction relates to shared-cost programs. The two main arguments in opposition to shared-cost programs were outlined in the 1969 working paper on the constitution and, in general, are equally applicable today. First, the provinces have traditionally believed that decisions about shared-cost programs are made by Parliament without formal consultation or negotiation with the provincial governments.[25] This includes a failure to discuss the levels of expenditure involved in the programs, the policy areas in which they would take place, as well as the timing of implementation of the programs. The claim commonly made by the provinces is that since they would operate the programs, they must be included in the developmental process.

The second argument against the use of the spending power is that shared-cost programs, seemingly "forced" upon the provinces, tend to alter provincial program spending priorities and pose a threat to provincial autonomy.[26] Each province has its own spending agenda with a particular set of priorities. The

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[25]Canada, Spending Power (1969), p. 16.

[26]Canada, Spending Power (1969), p. 16.

provinces contend that these priorities are distorted as a result of feeling obligated to enter into shared-cost programs in that federal funding allows them to provide a higher quality and more widely accessible services. Equally important, the lure of fifty-cent dollars encourages the provinces to spend money where they might not have otherwise.

If the provinces were to serve only their own priorities, situations could arise in Canada where programs thought to be in the national interest may be neglected. Prime Minister Trudeau commented that the extra-provincial or national effects of certain provincial public services would pose few problems if the interest of each province coincided with that of the nation. If this were the case, each time a province served its own interest, the national interest would be served simultaneously.[27] This, however, has often not been the case.

Shared-cost programs can also promote inequality. Depending on the nature of the program, those provinces which are affluent at the time of the program's announcement may benefit more substantially than revenue-poor provinces as they are able to make larger contribution, and thus receive more funding per capita for a particular program.

A third problem which might be added to this list is that intergovernmental transfers have a tendency to diminish accountability as well as blur the lines of electoral responsibility.[28]

> The question of accountability has two sides: on one side, Parliament may ask what it is buying with its money, and on the other side, voters must be able to identify the role of

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[27]Canada, Spending Power (1969), p. 22.

[28]Magnet (1989), p. 410.

each order of government.[29]

Notwithstanding conditional transfers, Parliament has less control over its money when it is being spent by the provinces. Also, when the cost of programs are shared between two orders of government, confusion arises as to which order is actually responsible for the provision of the program. Thus, it is difficult to hold one or the other accountable when a province's residents are dissatisfied with the services they are receiving. Moreover, the federal government forgoes any credit for its program expenditures when the provincial governments provide the services.

Support for the Spending Power

However many interpretations of the spending power's purpose there are, proponents consistently voice one belief: the exercise of the federal spending power is crucial to the development of a national standard of social services in Canada.

To function with the greatest level of social harmony, Canada needs to have a universal set of standards so that all Canadians, regardless of province of residence, enjoy the same benefits of citizenship. Trudeau argued in 1969 that the nationally elected Parliament has a unique and legitimate role to play in determining the national interest, even when this involves entering provincial jurisdiction.[30] The federal government is elected democratically by the nation as a whole. It thus has some responsibility to the national constituency which transcends provincial responsibilities. D.V. Smiley asserted that federal

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[29]Government of Canada, Fiscal Federalism in Canada. Report of the Parliamentary Task Force on Federal-Provincial Arrangements (Ottawa: Supply and Services Canada, 1981), p. 153.

[30]Canada, Spending Power (1969), p. 34.

authorities have a moral, if not constitutional, responsibility to promote the national interest to the best of their abilities,[31] and that the judgement of the federal authorities on important functions is superior to that of the provinces.[32] For example, this would involve a policy area such as postsecondary education which is of interest to all Canadians, not simply the residents of a particular province. In short, without basic national standards of social services, like people in different provinces may not be treated alike.[33]

THESIS OUTLINE

While the spending power is more a political than constitutional question, there has been a concerted effort since 1968 to resolve the tension through the process of constitutional reform. Following the discussion of the federal spending power and its merits in this introductory chapter, Chapter Two provides a brief evaluation of early attempts to constitutionalize the spending power. The Constitutional Conferences in Ottawa in 1969 and Victoria in 1971 are considered; various other proposals and Parliamentary Committee reports leading up to 1987 are also noted. The third chapter examines Section 106A of the proposed Constitutional Amendment, 1987 (The Meech Lake Accord). Section 106A, its language, implications, and interpretations are considered singularly rather than as part of the comprehensive agreement. Chapter Four examines proposals in the immediate post-Meech period, and those leading up to and including those

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[31]Donald V. Smiley, "Conditional Grants and Canadian Federalism: The Issues," in Canadian Federalism: Myth or Reality? ed. J. Peter Meekison (Toronto: Methuen Publications, 1968), p. 256.

[32]Smiley (1968), p. 275.

[33]Nova Scotia, Nova Scotia Advisory Committee on Constitutional Issues, Report of the Nova Scotia Advisory Committee on Constitutional Issues (Halifax: 1991), p. 109.

contained in the Charlottetown Accord. In Charlottetown, the notion of the spending power is much more expansive than it was in Meech and its implications can be seen throughout the agreement; hence it will be examined both on its own and as an integrating feature of the larger agreement. The fifth chapter will consider the spending power in view of the present trend toward financial restraint, and the contents of the February 27, 1995 federal budget. From the forgoing, I will draw some conclusions and attempt to provide some preliminary thought on "where do we go from here?"

Chapter Two

Early Attempts to Constitutionalize the Spending Power

The first major expansion of federal spending into areas of provincial jurisdiction took place following the First World War, and continued throughout the Depression in the 1930s[1]. During this period, both orders of government were called upon to increase expenditures in a number of policy areas. Many provincial governments were unable to meet increased fiscal demands, and federal transfer payments were initiated in fields ranging from industry to relief and unemployment. In the thirties, approximately forty percent of the cost of relief, and up to one third of total provincial revenues, were now collected from federal transfers. This was more than three times the ratio of federal transfers of a decade earlier.[2]

By the mid 1930s, the Canadian economy was in a state of crisis. The relationship between constitutionally assigned spending responsibilities and the revenue raising capacity of the provinces was totally incompatible. As part of Parliament's response to the growing economic dilemma, The Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Commission), was appointed in 1937. The Commission was instructed to, among other things, reexamine the distribution

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[1]Conditional grants were first used in 1913, when federal assistance to the provinces for agricultural instruction was introduced. This type of aid was expanded as part of the reconstruction program at the end of the First World War when similar grants were provided for highways, technical education, control of venereal disease, and maintenance of unemployment offices. See, D.V Smiley, ed., The Rowell-Sirois Report: An Abridgement of Book I of the Royal Commission Report on Dominion-Provincial Relations (Toronto: McClelland and Stewart Limited, 1963), p. 148.

[2]Government of Canada, Federalism and Decentralization: Where do we stand? (Ottawa: Supply and Services Canada, 1981), p. 6.

of powers in light of the economic and social developments of the previous seventy years.[3]

The Report focused on the economic crisis of the Depression which saw some provinces unable to meet their financial obligations and to provide needed public services.[4] In their report, the Commissioners recommended redistributing existing obligations and taxing authority and providing financial aid to the provinces through a system of National Adjustment Grants. National Adjustment Grants would:

> ...provide for balanced provincial budgets after provision for expansion of education and welfare services to the national average where these services are below it, and the expansion of developmental expenditures to the 1928-31 averages of the individual provinces.[5]

The grants represented an irreducible minimum to ensure that all provinces could provide services equal to the Canadian average, without having to impose taxes above the Canadian average.[6]

To the Commission this transfer scheme marked "a radical departure from the existing system of statutory subsidies, supplemented by special and conditional subsides[7]". It also raised a number of interesting questions about provincial autonomy. National Adjustment Grants

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[3]Dominion-Provincial Relations (1940), Book I, p. 9.

[4]See remarks by Prime Minister W.L. Mackenzie King, *Dominion of Canada Official Report of Debates of House of Commons*, Volume 1, Second Session, Eighteenth Parliament, February 16, 1937, pp. 921-922.

[5]Dominion-Provincial Relations (1940), Book II, p. 126.

[6]S.A. Saunders and Eleanor Back, The Rowell-Sirois Commission Part II: A Criticism of the Report (Toronto: The Ryerson Press, 1940), p. 8.

[7]Dominion-Provincial Relations (1940), Book II, p. 126.

> ...illustrate the Commission's conviction that provincial autonomy... must be respected and strengthened, and that the only true independence is financial security.... They are the concrete expression of the Commission's conception of a federal system which will both preserve a healthy local autonomy and build a stronger and more united nation.[8]

The grants would be unconditional — that is, the provinces would be able to spend transfers without any federal constraints. However, not all provinces would receive National Adjustment Grants. Only those provinces that were below the national average would qualify, thus, there was little incentive for the province of Ontario, for example, to agree to this type of funding structure.

In return for the grants and for federal assumption of provincial debts which were available to some provinces, all provinces were expected to vacate key tax fields: personal income tax; taxes on corporations or corporate income; succession duties; as well as all existing subsidies in order to provide the central government with adequate revenue to sustain these transfers.[9] In short, this transfer system would have abolished the conditional nature of subsidies for relief and unemployment[10], however, the provinces would have to depend on federal transfers to provide services.

The recommendations of the Commission, presented in 1940, were not embraced enthusiastically by the provinces as the consequences for provincial autonomy were obvious to a number of provincial governments. The *have* provinces were not willing to give up their taxing powers, and the *have-not*

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[8]Dominion-Provincial Relations (1940), Book II, p. 125.

[9]Dominion-Provincial Relations (1940), Book II, p. 86.

[10]The pension system would be left undisturbed. See, Dominion-Provincial Relations (1940), Book II, p. 127.

provinces were not happy with being merely elevated to the national average by the adjustment grants.[11] World War II had commenced prior to the Commission's report, and both the economy and spending priorities had changed.

The federal government responded to the recommendations of the Commission indirectly in its "Green Book" submission to the 1945 Dominion-Provincial Conference on Reconstruction. The proposals in the Green Book were much more representative of the thinking of the day which favoured central controls more than the Rowell-Sirois Commission did.[12] Unlike Rowell-Sirois, the Green Book proposals would not have provided for unconditional equalization payments to the provinces. Rather, the federal government would provide subsidies to the provinces through a series of cost-sharing programs funded jointly by provincial revenues and conditional grants.[13] With regard to income tax, a series of intergovernmental agreements were reached beginning in 1941 which have continued in one form or another through to today.

The tax rental era began in 1941 with the passage of the *Wartime Tax Agreement*.[14] Like the Rowell-Sirois recommendations, provincial governments were requested to vacate the fields of personal income tax, corporation tax, and succession duties. A rental payment would be paid to the province in lieu of

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[11]Van Loon, Richard J.; Whittington, Michael S. The Canadian Political System: Environment, Structure and Process. 4th ed. (Toronto: McGraw-Hill Ryerson Limited, 1987), pp. 282-283.

[12]Edwin R. Black, Divided Loyalties: Canadian Concepts of Federalism (Montreal McGill-Queen's Printer, 1975), p. 53.

[13]D.V Smiley, "Public Administration and Canadian Federalism," in Canadian Public Administration, Vol. VII, No. 3 (September, 1964), pp. 371-378.

[14]Milton Moore, J. Harvey Perry, and Donald I. Beech, The Financing of Canadian Federation: the first one hundred years Canadian Tax Papers (Toronto: Canadian Tax Foundation, No. 43, April, 1966), p. 17.

revenue forgone. A series of agreements were signed between 1941 and 1957, each with increasing demands from the provinces over the value of the tax fields they had vacated. In 1957, tax rental agreements were replaced by a series of tax sharing agreements. Tax sharing was similar to tax rental in that the provinces vacated the fields of direct taxation, however, instead of receiving lump sum payments the provinces were given set percentages of the revenue collected in the three tax fields.

By the late 1950s, the period of *cooperative federalism*[15] which began in 1941 was coming to an end. Quebec's decision not to participate in the corporate income tax and personal income tax collection arrangements under the 1957 *Federal-Provincial Tax Sharing Arrangements Act* signalled the beginning of a period of economic decentralization.[16] Less than ten years later, Quebec established its own pension program which was made possible by the provisions of s. 94A of the Constitution. Under the opting out arrangements, any province that wished to could withdraw from a conditionally funded federal-provincial program. This was not enough as provincial governments continued to resist federal involvement in the development of new programs.

The changing nature of federal-provincial fiscal relations throughout the mid 1960s and the level of dissatisfaction with the existing funding arrangements

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[15]This period of *cooperative federalism* was marked by a high level of integration between the two orders of government. *Cooperative federalism* was characterized by federal-provincial taxation agreements on the revenue side, and a host of conditional and shared-cost programs on the expenditure side. See, Rand Dyck, Canadian Politics: Critical Approaches (Scarborough: Nelson Canada, 1993), pp. 368-373; Richard Simeon, Federal-Provincial Diplomacy: The making of recent policy in Canada (Toronto: University of Toronto Press, 1972). pp. 172-173.

[16]Ontario also opted out of the corporate income tax arrangement under this agreement. See, Robin Boadway and Paul A. R. Hobson, Intergovernmental Fiscal Relations in Canada Canadian Tax Papers (Toronto: Canadian Tax Foundation, No. 96, April 1993), p. 38.

led the provinces to seek other forms of agreement.[17] In November, 1967 the premiers gathered at the Confederation of Tomorrow Conference in Toronto to discuss the basic issues of federalism and to assert the provincial role in the federation[18]. Rather than recommend a revamped cooperative federalism, the established norm since Rowell-Sirois, discussions at this conference concentrated on constitutional change. Ottawa was left with little choice but to respond with constitutional initiatives of its own. Canada's first in a series of Constitutional Conferences took place in February, 1968 in Ottawa.

The first meeting of the Constitutional Conference achieved little in terms of reaching an agreement on proposed changes to the constitution, however, it did provide a forum for federal and provincial concerns to be raised which established a clear agenda for future discussions. In 1969, in response to the 1968 proceedings, the federal government presented two working papers at the preliminary officials' meetings which placed the taxing and spending powers of Parliament on the constitutional agenda.[19] Prime Minister Trudeau, in his opening

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[17]For a discussion of federal-provincial financial negotiations between 1964-1968 see, Moore, Harvey, and Perry, The Financing Canadian Federation (1966), pp. 65-95.

[18]The Conference, held November 27-30, did not examine specific proposals, but rather examined Confederation after its first one hundred years. It examined areas of agreement and disagreement and explored what could be done to ensure a strong and unified Canada. See, Simeon (1972), pp. 91-95.

[19]Government of Canada, Taxing Powers and the Constitution of Canada (Ottawa: Queen's Printer, 1969); Canada Spending Power (1969). The spending power of Parliament was placed on the agenda in 1969 as a result of extensive challenges to its authority during the 1960's. For example, in 1964, Quebec did not join the federal pension program; the federal Liberals proposed a more strictly defined line of division between federal and provincial responsibilities with less reliance on shared-cost programs in 1965; a Tax Structure Committee was established in 1966 to study the field of federal-provincial fiscal relations; equalization payments were considered by the Continuing Committee on Financial and Economic Matters; renegotiation of the manpower and training program took place; increased support for postsecondary education was called for; and a Social Development Tax used to collect revenue for medicare, not to be shared with the provinces, was also proposed. For a more complete discussion of this period, see Simeon (1972), pp. 66-87.

remarks to the conference in Ottawa, made clear the vast nature of the questions which would have to be answered in regard to Parliament's spending power.

> So the question I take it, on the constitutional question which is raised, is whether Parliament ought to have this power under the Constitution, this spending power, and if so whether there ought to be rules about how it is to be used. Should it only be to correct regional inequality or should it only be used to have equalization grants, or in areas which impinge on provincial jurisdiction? Should it be used in consultation with the provinces, and if so would unanimity amongst the provinces be needed for us to have it, or a majority, or what?[20]

In considering these questions, the existence of the spending power was not challenged, rather, the discussion centred on how best to limit it. The Conference focused on two fundamental issues that were raised in the federal working paper on the spending power. First, how to determine when there was sufficient support by the provinces' to declare a "national consensus" in favour of the introduction of new shared-cost programs. Second, the method(s) of compensation that might be adopted to avoid imposing a "fiscal penalty" on the residents of provinces whose legislature decided not to participate in a particular shared-cost program.[21]

IN SEARCH OF A FORMULA FOR CONSENSUS: OTTAWA, 1969

The 1969 Government Working Paper on the spending power discussed a number of different formulas for determining a national consensus prior to initiating federal-provincial shared-cost programs. It suggested that determination of the national interest warranting a new federal-provincial shared-cost program

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[20]Constitutional Conference 1969, Second Meeting, Proceedings, p. 153.

[21]Government of Canada, Constitutional Conference of December 1969: A Briefing Paper on Constitutional Review Activities and discussion within the Continuing Committee of Officials (Ottawa: Queen's Printer, December, 1969), p. 4.

should be decided jointly by Parliament and the legislatures of the provinces.[22] The federal proposal recommended that a provincial consensus in favour of shared-cost programs should be linked to the four Senate divisions provided for under s. 22 of the Constitution Act, 1867. An affirmative vote would be required in three out of the four Senate divisions and once obtained would represent a consensus in favour of the proposed program.[23]

The Senate division proposal met with immediate disapproval. Some provinces felt that it was too complex. In addition, requiring the approval of only two legislatures from either Nova Scotia, New Brunswick, or Newfoundland to secure an affirmative vote in Atlantic Canada was not indicative of consensus in that region.[24] It was also noted that with a certain combination of votes, it was possible for a consensus to be reached with the support of provinces representing less than half of Canada's population.[25] The only real consensus reached at the Conference with regard to a formula was that alternatives to the federal proposal were necessary. This task was referred to the Continuing Committee of Officials at the request of the Conference.

The Continuing Committee of Officials considered various alternative formulas. Listed below are a sample of their findings. The *Population Plus Provinces Formula* would see the initiation of a shared-cost program with the approval of seven out of the ten provinces, comprising at least sixty percent of the

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[22]Canada, Spending Power (1969), p. 38.

[23]Canada, Spending Power (1969), pp. 40-42.

[24]Under this formula, the vote of Prince Edward Island is inconsequential.

[25]Briefing Paper (1969), p. 9.

population.[26] It was felt that this formula was more representative of the regional factor than the Senate division formula. However, with the population percentage set so high, concerns were raised that the province of Ontario was in a position to disproportionately influence the future of shared-cost programs.

The *Population Plus Regions Formula* would achieve consensus if six provinces, including at least one from each of Western Canada, Central Canada, and the Atlantic provinces representing at least fifty-one percent of the population approved the proposal for a new shared-cost program.[27] This formula also gave priority to the regional factor, and with the reduced population requirement, the chance of Ontario having a veto over future programs was decreased.

Consensus would be achieved under the *Regional Formula* when Parliament and the legislatures (or a majority of the legislatures) in three out of the five regions (the Atlantic provinces, Quebec, Ontario, the Prairie Provinces, and British Columbia) agreed.[28] Here we see the introduction of British Columbia as a separate Canadian region. This separation would not only give British Columbia more power, but it would give more weight to the Prairie and Atlantic provinces. If these three regions were to vote in favour of a program, without a population requirement, the votes of the more populous Ontario and Quebec would be cancelled.

The *Provinces Formula* required the approval of Parliament and a majority of the provincial legislatures. The view was expressed that all of the provinces

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[26]Briefing Paper (1969), pp. 9-10.

[27]Briefing Paper (1969), p. 10.

[28]Briefing Paper (1969), p. 11.

were equal partners where matters under provincial jurisdiction were concerned, and a simple majority of the provincial legislatures would be an appropriate representation of consensus.[29] This formula raised the age old questions of whether or not the provinces are truly equal partners, or if provincial population should somehow be factored into the equation. An answer to these questions will not be proposed here; however, it is unlikely that this proposal would have met with approval in the more populous provinces or by the federal government.

Regardless of which of these formulas the two orders of government might have agreed to[30], the federal government would have been giving up a significant portion of its authority to act in the national interest through the exercise of the spending power. This loss of power would result from the need to obtain the support of a predetermined number of provinces prior to introducing a shared-cost program. Richard Simeon noted that the consequences of the proposals for determining consensus would likely have led to it being "much more difficult for Ottawa to engage in any massive extension of its efforts as it had been able to do since the end of the Second World War[31]".

Those in favour of the formula approach claimed that if a formula were entrenched in the constitution, consultation between the federal and provincial governments would automatically follow. It would seem highly unlikely that the federal government would dedicate the time and resources required to develop a

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[29]Briefing Paper (1969), p. 11.

[30]None were agreed to in 1969 or in Victoria in 1971 because of the lack of agreement among the provinces as to which formula best suits the needs of each individual province, and federal reluctance to agree to a formula that would reduce its influence.

[31]See, Simeon: (1972), p. 109.

program if it was not confident that a majority of the provincial legislatures would support such a program.[32]

Not all delegations were in favour of adopting a formula for determining a national consensus. Both the governments of New Brunswick and Manitoba were in favour of increased federal-provincial consultation rather than a constitutionally entrenched formula. New Brunswick, for example, felt that "a mathematical formula would tie the hands of Parliament as it would be cumbersome and inflexible[33]", and the Manitoba delegation argued that it was wrong to insist that there be uniformity between the central and provincial governments on all matters.[34]

COMPENSATION FOR NON-PARTICIPATING PROVINCES

A general agreement was reached at the second meeting of the Constitutional Conference in June, 1969 that there should be no "fiscal penalty" placed on the people of provinces whose governments chose not to participate in a federal-provincial shared-cost program. The primary method of compensation for non-participating provinces proposed by Canada was payments to individuals rather than to the provincial governments. Payments to individuals was outlined as follows:

> The aggregate amount of the grants to persons in the non-participating provinces would be calculated by multiplying the average per capita payment to the participating provinces by the population of the non-participating

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[32]Briefing Paper (1969), pp. 5-6.

[33]Constitutional Conference 1969, Third Meeting, Proceedings, p. 134.

[34]Constitutional Conference 1969, Third Meeting, Proceedings, p. 147.

province.[35]

This formula presented immediate problems for some delegations. First, it would be difficult, if not impossible, to calculate the exact amount paid by each individual toward the program, thereby making it impossible to reimburse taxpayers accordingly. Also, there would have to be an escalation formula accompanying these payments so that as the cost of programs increased in the participating provinces, so too would the payments to the individuals of non-participating provinces.[36]

Compensation through payments to individuals was not without support. The federal logic was that it is responsible to the people from whom it collects taxes. It is these same taxpayers who are deprived of services when their provincial government chooses not to participate in a federal-provincial shared-cost program. Thus, it is the individual who suffers and deserves the compensation, not the provincial government.

A number of alternative approaches to compensation were considered at the Conference. Not surprisingly, the one receiving the most attention was the converse to the federal proposal, payments to the governments of non-participating provinces. The delegations supporting this approach (Quebec being the main proponent), asserted that it would be much more efficient to make one lump sum payment to the provincial governments rather than multiple payments to individuals. The provincial governments would then return this money to its

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[35]Canada, Spending Power (1969), p. 44.

[36]Briefing Paper (1969), pp. 13-14.

residents through increased levels of services and decreased taxes.[37] The main problem foreseen with this type of funding was that without any sort of restriction on the way in which the provincial governments could spend these lump sums of money, the allocation of funds could differ somewhat from the intention of the federal proposal.

Another form of compensation given attention at the Conference was the federal government levying additional personal income taxes for a particular shared-cost program in the participating provinces. The major drawback to this approach was that there would be different levels of taxation in different provinces. The wealthier provinces would be better able to support more extensive programs as a result of their greater tax base. Again, nothing was accomplished in concrete terms at this conference. The spending power remained as it was, and the debate about its future resumed in 1971 at the Victoria Conference.

VICTORIA, 1971

The Constitutional Conference in Victoria was expected to bring an end to the constitutional negotiations started three years earlier, and more importantly, to resolve some of the problems that had plagued intergovernmental relations since early this century. The focus of this conference was the development of an amending formula to "bring home the constitution." But even before the conference started, the focus shifted to social policy, and in particular, the interests

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[37]A further argument advanced in favour of funding non-participating provincial governments was the unequal redistribution of income funding individuals promotes. Some individuals who had not paid taxes toward a particular program would receive a grant, while others who had paid taxes might receive less than they contributed in respect of a particular program. Briefing Paper (1969), p. 16.

of Quebec.[38] The government of Quebec demanded that changes be made to s. 94A before it would support any type of constitutional deal.[39] The text of the proposed Quebec amendment for a new Section 94A is as follows:

> Revised Section 94A.
> (1) The Parliament of Canada may make laws in relation to the following classes of matters: A) Family allowances. B) Man-power training allowances. C) Guaranteed income supplement due to age. D) Youth allowances. E) Unemployment insurance. F) Old-age pensions and additional benefits to survivors and disabled persons without regard to age.
> (2) No bill in relation to these classes of matters may, however, be introduced in the House of Commons unless previous consultation concerning this law has been held with the Government of each province in which such bill would apply.
> (3) Wherever a law in relation to the classes of matters mentioned in subparagraphs (A) (B) and (C) of the first paragraph is passed by a provincial Legislature, any law of the Parliament of Canada in relation to these same classes of matters shall have effect in the territory of the province only to the extent that the Legislature makes provision therefore.
> (4) No law passed by the Parliament of Canada in relation to the classes of matters mentioned in subparagraphs (D) (E) and (F) of the first subsection shall affect the application of any present or future law of a Legislature.
> (5) The Parliament of Canada may make laws respecting the allotment of public moneys for purposes in income security in relation to other classes of matters than those mentioned in subsection (1). However, such laws if enforced after the coming into force of this section shall apply in a province only to the extent provided for in subsection (3).
> (6) Whenever a law of the Parliament of Canada in relation to a class of matters mentioned in subsection (1) is rendered

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[38]Quebec was not the only province concerned with social policy and the spending power. Premier Strom of Alberta called for existing shared-cost programs to be phased out, and that no new shared-cost programs were launched. He also noted that provincial governments must have control over social policy if they wish to retain any sort of autonomy. Victoria Constitutional Conference 1971, Proceedings, p. 41.; The government of Manitoba revived its position on the spending power from 1969: that the current shared-cost structure be replaced by a system of priority option grants. Manitoba wanted to see shared-cost programs continue rather than see a system of tax point credits. *Globe and Mail*, 5 June 1971.

[39]Section 94A reads: The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors, and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter. Constitution Act, 1867.

> inapplicable in whole or in part by any law made by the Legislature of a province, the Government of that province shall receive compensation according to the amount that would have been spent by the government of Canada in the territory of such province, had the law of the Parliament applied to its territory.[40]

In order to accommodate such demands, section 91 of the constitution would have to be altered. In particular, unemployment insurance would no longer be a matter of exclusive federal jurisdiction. Quebec also wanted assurance that when a province took over the provision of a program from the federal government, it also took over the money being spent on this program.[41] This was fundamental to the dispute.

Ottawa was ready to consider Quebec's proposal on social policy, however Prime Minister Trudeau made it clear that Ottawa "could not agree to any constitutional change that would curtail or negate the federal government's power to make direct payments to individuals through income security programs[42]". No province could be granted paramount power in social policy matters if this resulted in controlling or limiting the federal spending power.[43] Without control of the spending power, the federal government would not be able to ensure national standards and the redistribution of wealth in Canada.

The proposed 'Canadian Constitutional Charter, 1971' — the Victoria

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[40]*Globe and Mail*, 15 June 1971.

[41]*Globe and Mail*, 12 June 1971.

[42]*Globe and Mail*, 15 June 1971.

[43]*Globe and Mail*, 15 June 1971.

Charter — contained sixty one articles in ten parts.[44] There was a compromise on social policy which would have seen section 94A amended to add family allowances, youth allowances, and occupational training to this section.[45] However, it is important to note that there was no provision for financial compensation to non-participating provinces.

The Bourassa government was in a tough position. Throughout the negotiations, the demands on social policy were stated as the irreducible minimum to support any proposal. Ottawa did compromise by giving the provinces greater scope in three of the six fields, but was this enough? Premier Bourassa, after consultation with his caucus, cabinet, and extra-parliamentary party delivered a convincing no to Ottawa and the rest of Canada[46]. The Victoria Charter was dead, mainly because of a dispute over the extent of one limitation to the spending power.

SPECIAL JOINT COMMITTEE, 1972

The Special Joint Committee of the Senate and the House of Commons on the Canadian Constitution established in 1970 and reporting in 1972, studied the constitutional proceedings over the previous four years. With regard to the spending power, it made three recommendations which varied only slightly from those already considered. The recommendations were as follows:

> 56. The power of the federal Parliament to make conditional grants for general Federal-Provincial (shared-cost) programs *should be subject to the establishment of a national*

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[44]Simeon (1972), p. 118.

[45]Proposed 'Canadian Constitutional Charter, 1971,' Art. 44.

[46]Simeon (1972), p. 121.

> *consensus both for the institution of any new program and for the continuation of any existing one.* A consensus would be established by the affirmative vote of the Legislatures in three of the four regions of Canada according to the following formula: the vote of the Legislatures in the Atlantic region would be considered to be in the affirmative if any two of the Legislatures of Nova Scotia, New Brunswick or Newfoundland were in favour; the vote of the Legislatures of the Western region would be considered to be in the affirmative with the agreement of any two of the four Legislatures. The consensus for existing joint programs should be tested every 10 years.
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> 57. If a Province does not wish to participate in a program for which there is a national consensus, the Federal Government should pay the Government of that province a sum equal to the amount it would have cost the Federal Government to implement the program in the Province. However, a tax collection fee of 1%, equivalent to the cost of collecting the money paid to the Province, should be deducted from the amount paid to such non-participating Provinces.
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> 58. In order that the objectives of joint programs may be more efficiently realized, conditional Federal grants should preferably be based on the cost of the programs in each Province. However, since a 50-50 cost-sharing formula, when applied to the expenditures in each Province, constitutes too great an incentive in high-income Provinces, conditional Federal grants should not be made for that portion of Provincial expenditures which lies above the national average cost of the service. The maximum per capita amount to which a Province would be entitled would thus correspond to the per capita national expenditure, and conditional expenditures by a Provincial Government would in no way increase the Federal grant to that Province.[47]

Here, again, we see preference for a constitutional formula for determining whether or not a national consensus exists. This recommendation also made national consensus retroactive — that is, the continuation of existing programs

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[47]Government of Canada, The Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada: Final Report, by Senator Gildas Molgat and Mark McGuigan M.P., Joint Chairmen (Ottawa: Queen's Printer, 1972), p. 50. (emphasis added).

would also be subject to the support of a national consensus.[48] This would mean that a program such as Medicare could be reversed.

The Committee proposed that any dissenting province should have the constitutional right to opt out of shared-cost programs and receive financial compensation. In the committee's report, compensation for non-participating provinces was wholly unconditional. As a result, the government of a non-participating province was under no obligation to create a similar program. This set of proposals went much further than the Trudeau government had proposed earlier, and limited federal involvement in shared-cost programs as never before.[49]

Shared-cost programs should provide the federal government with an avenue for promoting a set of national standards. If non-participating governments have no obligation to operate programs similar to those proposed by the federal government, the federal government loses its ability to effectively promote these standards.

The Victoria Conference, and the Parliamentary Committee report that followed provided no proposals on the spending power which were acceptable to the parties. The inability to find a suitable solution at both Ottawa and Victoria shows the difficulty in resolving this particular constitutional question. It was considered again at the 1976 First Ministers Conference, at the Constitutional Conference in

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[48]Future proposals to limit the exercise of the spending power have not included existing programs. The proposals to limit the spending power in Meech Lake and Charlottetown, for example, applied only to those Canada-wide shared-cost programs that were initiated after the coming into effect of the particular sections contained within these agreements.

[49]It should be noted that the Report was never debated in the House of Commons. For all intents and purposes discussions on the constitution were at an end which left the report somewhat anti-climactic. While the spending power proposals can not be said to have been the sole determinant of this, it is fair to say that they were a contributing factor.

1978[50], by the Task Force on Canadian Unity (Pepin-Robarts), and by the Macdonald Commission. Once again, a lack of agreement on how or whether to limit the exercise of the spending power, and how to provide compensation for non-participating provinces prevented any real progress from being made on the spending power.

The intensity of the spending power debate declined somewhat in the early eighties. It was not until 1987, when the first ministers reached unanimous agreement on a comprehensive set of proposals that would bring Quebec to support the Constitution Act, 1982, that the spending power was again brought to the fore.

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[50]See in particular, Government of Canada, A Time For Action: Toward the Renewal of the Canadian Federation (Ottawa: Supply and Services Canada, 1978).

CHAPTER THREE

SECTION 106A OF THE CONSTITUTIONAL AMENDMENT, 1987.

During the 1984 federal election campaign, Progressive Conservative leader Brian Mulroney made it clear that, if elected, his government would address Quebec's demands in order to gain the province's support for the Constitution Act, 1982. Delivering a speech at a conference in Mont Gabriel in May, 1986, the Minister of International Affairs and Minister Responsible for Canadian Intergovernmental Affairs for the Government of Quebec, Gil Remillard, included the "limitation of the federal spending power" as one of the five necessary 'conditions' for Quebec to support the Constitution.[1] The combination of this speech and the Conservatives' commitment to the process of reconciliation led to a round of federal-provincial constitutional negotiations which became known as the Quebec Round, or Meech Lake.

After lengthy negotiations at Meech Lake where the First Minister reached an agreement in principle, they reconvened a few weeks later in the Langevin Block and signed the Constitutional Amendment, 1987 — the Meech Lake Accord. If passed, the amendment would have added s. 106A to Canada's constitution. Section 7 of the proposed amendment read:

> 106A(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of

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[1]For a more complete discussion of this Conference, see Patrick J. Monahan, Meech Lake: The Inside Story (Toronto: University of Toronto Press, 1991), pp. 54-59; Peter Leslie, "Rebuilding the Relationship: Quebec and Its Confederation Partners," in Report of a Conference, Mont Gabriel Quebec, 9-11 May 1986 (Kingston: The Institute of Intergovernmental Relations, Queen's University, 1987).

> **exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.**
> **(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.**

In its most basic form, the purpose of s. 106A was to limit the spending power of Parliament. This would have been accomplished by requiring the Government of Canada to provide *reasonable compensation* to the government of a province that chose not to participate in a *national shared-cost program* in an area of *exclusive provincial jurisdiction*. To qualify for such compensation, the non-participating province must carry on a *program or initiative* of its own that is *compatible with* the *national objectives*. Section 106A would have applied only to those national shared-cost programs initiated after its entrenchment in the constitution, and was not intended to alter the legislative powers of either Parliament or the provincial legislatures.

Programs in areas of concurrent or exclusive federal jurisdiction would have been unaffected by this clause.[2] Bilateral agreements would have been unaffected; tax expenditures would have been allowed, as well as programs in the provinces that are fully federally funded.[3] Keith Banting states that, in operational terms, "this section is more about procedure than jurisdiction as it attempts to eliminate "unilateralism" and the "*fait accompli*" from the arsenal of the federal

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[2]See, for example, Constitution Act, 1867. sec. 95.

[3]Pierre Fortin, "The Meech Lake Accord and the Federal Spending Power: A Good Maximum Solution," in Competing Constitutional Visions: The Meech Lake Accord, eds. Katherine E. Swinton and Carol J. Rogerson (Toronto: The Carswell Company Limited, 1988), p. 218.

government[4]". Words such as these tend to exaggerate and overstate the means by which the government exercises the federal spending power. They also assume that Parliament exercises its spending power without any reference to the provinces or considering provincial priorities. While the provinces might contend that this is often the case, it seems unlikely that Parliament would enact legislation without some input from the public including the provinces.

Section 106A did reflect the political reality that Parliament must respect provincial autonomy when developing future national shared-cost programs.[5] It also reflected the reality that Canada has a federal system, for while the provinces may have financial motivation to participate in these programs, they are not constitutionally required to do so.[6] The question is whether or not these realities would have been realized at the price of restricting the Government of Canada's capacity to act in the national interest? Section 106A would have affected only those programs that are introduced after its passage[7], however, these may be in areas where the national interest is thought to be identified; daycare provides an important example.

SEEKING INTERPRETATION OF 106A

The Special Joint Committee of the Senate and the House of Commons on

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[4]Keith G. Banting, "Federalism, Social Reform and the Spending Power," in Canadian Public Policy (September, 1988), p. 84.

[5]Peter Hogg, "Analysis of the New Spending Power Provision (Section 106A)," in Swinton and Rogerson (1988), p. 151; and J. Peter Meekison, Submission to the Special Joint Committee on the 1987 Constitutional Accord, August 20, 1987. Issue No. 10, p. 44.

[6]J. Peter Meekison, Submission to the Special Joint Committee on the 1987 Constitutional Accord, August 20, 1987. Issue No. 10, p. 44.

[7]Much debate was raised as to whether or not an old program such as medicare would be considered a new program if it were to be revamped. If so, would it then be subject to limitations of 106A?

the Constitutional Accord 1987 voiced two primary criticisms of s. 106A. First, the ambiguity of the language used throughout the proposal promoted uncertainty about the proposal's potential effects. Second, the provision had the capacity to result in the balkanization of major social and other programs.[8] Eugene Forsey suggested that the use of such vague language has the potential to cause problems for Parliament if the terms are left to be defined by the Court.

> ...there might be a provincial program that was not universally available, or that involved extra billing, and the courts may say: "well, it's day-care, and it doesn't contradict the White Paper or the Prime Minister's speech"; and Parliament will have to pony up. Parliament would again be subordinated to the courts and the provinces might be able to raid the federal treasury for support of mere tokenism.[9]

Although the provinces have not yet challenged Parliament's spending power before the Supreme Court of Canada, nothing in the clause would have prevented third parties from doing so.[10] The thought that the judiciary would decide what constitutes *national objectives*, or when a *program or initiative* is *compatible with* such federal initiatives so that the non-participating government is entitled to *reasonable compensation* is troublesome for two primary reasons.[11]

First, if 106A is interpreted by the Supreme Court, nine unelected and

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[8]Government of Canada, The Report of the Special Joint Committee of the Senate and the House of Commons on the Constitutional Accord 1987 by Senator Arthur Tremblay and Chris Speyer, M.P., Joint Chairmen (Ottawa: Supply and Services Canada, September, 1987), p. 73.

[9]Eugene A. Forsey, Written submission to the Special Joint Committee on the 1987 Constitutional Accord, July 21, 1987. Cited August 4, 1987. Issue No. 2A, p. 87. (emphasis original)

[10]Challenges of note to the spending power, none of which have been brought by the provinces, were to the *National Housing Act*, the *Mothers' Allowance Act*, the *Canada Health Act*, and the *Canada Assistance Plan*. For a brief summary of the conclusions of the courts in these cases, see, Canada, Special Joint Committee (1987), p. 72.

[11]Deborah Coyne, "The Meech Lake Accord and the Spending Power Proposals: Fundamentally Flawed," in The Meech Lake Primer: Conflicting Views of the Constitutional Accord, ed. Michael D. Behiels (Ottawa: University of Ottawa Press, 1989), pp. 246-247.

unaccountable officials would be making policy decisions. Although this is currently the practice with the Charter and other constitutional issues, directly involving the Court in areas of social policy rather than principle should not be encouraged.[12] Also, Court involvement precludes elected officials from fulfilling part of their duties. This challenges the accountability of both Parliament and the provincial governments. The second major problem with involving the Courts is the Court's composition. Many groups voiced concerns about the under-representation of women on the Court, and the effect this would have on spending power decisions.[13]

Reasonable compensation

Reasonable compensation was to be provided to the government of a province that chose not to participate in a *national shared-cost program* established in an area of *exclusive provincial jurisdiction*, providing that that government carried on a *program or initiative* that was *compatible with* the *national objectives*.[14] This differs from the compensation arrangements considered at the Constitutional Conferences in Ottawa and Victoria in that the federal government is prevented from funding individuals or institutions directly. Also, Parliament could not provide tax deductions or tax credits to provincial residents

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[12]Decisions on principle are those which involve the law, or the constitutionality of a particular action. Section 106A would have required decision affecting the way in which the programs would be developed.

[13]Ms Wendy Williams (Member, National Action Committee on the Status of Women), Submission to the Special Joint Committee on the 1987 Constitutional Accord, August 26, 1987. Issue No. 13, p. 23.

[14]This concept of reasonable compensation and opting out is not new, it is embodied in Canada's amending formula. See, Constitution Act, 1982. sec. 40.

under s. 106A.[15] What type of compensation would thus be considered reasonable? Cash is the traditional form, but the transfer of "tax points" is another possibility.[16]

The larger question to be answered is: how much compensation is reasonable? Is the compensation *reasonable* in relation to the federal programs running in other provinces, or should it be based on the particular province's fiscal capacity to meet the *national objectives*?[17] The courts could interpret the meaning of *reasonable compensation*[18] narrowly and only require the Government of Canada to match each dollar spent on the provincial program. Interpretation could also be as broad as to require Canada to pay its share of the program up-front, thereby giving Parliament less control over how the money is spent. The most logical interpretation of s. 106A is that reasonable compensation would be the equivalent of the amount the provinces would have received if it had participated in the program, provided the province agreed to spend its designated share.[19]

National shared-cost program

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[15]Peter Hogg, Meech Lake Constitutional Accord Annotated (Toronto: The Carswell Company Limited, 1988), p. 42.

[16]In the transfer of "tax points," the federal government would vacate an area presently occupied for tax collection. The provincial governments would take over tax collection in this area to increase their revenues. Cash transfers are the preferred method of compensation by the provincial governments because they allow for a service to be provided and political benefits derived from doing so without the appearance of an increased tax burden on residents.

[17]Stephan Dupre, "Section 106A and Federal-Provincial Fiscal Relations," in The Meech Lake Primer: Conflicting Views of the Meech Lake Constitutional Accord, ed. Michael D. Behiels (Ottawa: University of Ottawa Press, 1989), p. 277.

[18]Black's Law Dictionary defines reasonable as: Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. *Cass v. State*, 124 Tex. Cr.R. 208, 61 S.W. 2nd 500., in Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern 6th ed, by Henry Campbell Black (St. Paul, Minnesota: West Publishing Co., 1990), p. 1265.

[19]Hogg (1988), p. 42.

Would any program that involved joint funding between the federal and provincial governments have qualified as a *national shared-cost program*? Would there have to be a specific level of provincial contribution, or would the two governments have to be equal partners to meet the requirements of this designation? Hogg notes that s. 106A clearly defines a *national shared-cost program* as one *established by the Government of Canada* — one that is offered to all provinces thereby precluding bilateral programs offered to a single province, or several provinces.[20] Hogg also makes it clear that s. 106A only applies to programs established after the coming into effect of the section, and only those in areas of *exclusive provincial jurisdiction.* Although it is apparently clear where s. 106A applies and does not apply, what a *national shared-cost program* is remains somewhat uncertain. For example, would any multilateral program which involved an element of cost-sharing be considered a *national shared-cost program*? Moreover, would the federal and provincial governments have to make equal contributions? These types of questions would have to be answered before the section could take effect.

Compatible with

Defining the term *compatible with* makes developing a working definition of s. 106A especially difficult. The word *compatible* is defined in the Shorter Oxford Dictionary as:

> 1) sympathetic,
> 2) mutually tolerant; capable of existing together in the

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[20]Hogg (1988), p. 40.

same subject; accordant, consistent, congruous.[21]

In French, *compatible avec* means only "capable of working together."[22] The ambiguity of the English definition and the contradiction in meaning between the two official languages creates a situation where provincial governments may interpret these terms differently. The Government of Quebec, for example, may feel that *compatible with* should be interpreted loosely when considering the *objectives* of a *program or initiative* to be developed by the province to qualify for compensation. Canada, conversely, would likely adopt a more strict interpretation of *compatible with* meaning that a provincial program must be *consistent* or *congruous* with the federal program.

If compatibility was interpreted as it was in the opting out arrangements of the 1960s, the force of the provision would require the provinces to comply fully with the federal program in order to qualify for compensation.[23] In this case, only the nature of the method of funding would change as the *national objectives* would have to be met. The only sacrifice made by Parliament, one that is already being made in many programs, is giving up the political recognition it would receive if it were more directly involved in the programs provision.

The National Association of Women and the Law (NAWL) recommended that the terminology used throughout the proposed amendment infer that the word

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[21]Quoted in Hogg "Analysis of the Spending Provision (Section 106A)," in Swinton and Rogerson (1988), p. 160.

[22]A. W. Johnson, "The Meech Lake Accord and the Bonds of Nationhood," in Swinton and Rogerson (1988), p.148.

[23]Robin Boadway, Jack Mintz, and Douglas D. Purvis, "The Economic Policy Implications of the Meech Lake Accord," in Swinton and Rogerson (1988), p. 230.

compatible may be synonymous with the terms *not repugnant to* or *not inconsistent with.*[24] If this working definition had been adopted, a lack of conformity with the *national objectives* could be reflected in the service provided in the non-participating provinces. Programs would only have to be vaguely similar to those proposed by the Government of Canada and could thus vary greatly between provinces. It is unlikely that such a loose definition would have been employed. Canada would still demand that it has some say as to how its money is spent. This example does, however, illustrate the range of interpretations which provinces could have embraced in order to gain the greatest degree of flexibility from the proposal.

National objectives

Since *national shared-cost programs* are those *established by the Government of Canada*, the *national objectives* would be those determined by the Government of Canada and approved by Parliament presumably after some sort of intergovernmental negotiation. In spite of this, requiring non-participating provinces to carry a *program or initiative compatible with* the *national objectives*, in order to receive compensation, raises questions as to how closely the proposed federal program need be followed. The language is such that the provincial program does not have to be identical, but how much differentiation would be possible?

The drafters of Meech consciously used more general language on the spending power to give more flexibility to the provinces in policy development. For

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[24]National Association of Women and the Law (NAWL), Written Submission to the Special Committee on the 1987 Constitutional Accord, July 24, 1987. Cited August 4, 1987. Issue No. 2A, p. 59.

example, the word *objectives* is used in s. 106A instead of *standards*, or *criteria*. The term *objectives* provides non-participating provinces with the greatest amount of flexibility in developing their own program. However in the proposed section on immigration, s. 95B.(2), the terms *national standards and objectives* are used.[25] These terms represent a stronger limitation on provincial autonomy than *national objectives* does in s. 106A. Hence if *national standards* had been used in s. 106A, it would likely have been more restrictive on the provinces' freedom to develop their own programs by imposing irreducible conditions upon receiving compensation.

Gil Remillard stated that the intention of the spending power clause was "to give the provinces a free hand in opting out of national programs". He maintained that Premier Bourassa had been "instrumental in securing changes to the wording at Meech Lake, substituting *national objectives* for *national standards*". The effect of this wording, Remillard claimed was that "the province could opt out of a program and receive compensation, as long as it met objectives of a 'general nature'"[26]. If these changes had not been made, this might have also led to Quebec's failure to support the proposal, the intended purpose of the whole agreement.

The *Canada Health Act* is an example of a working program that requires provinces to comply to a set of five *criteria* to receive compensation. An argument could be made that the federal government would insist on similar conditions for

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[25]Section 3 of the proposed Constitutional Accord, 1987; proposed section 95B.(2), Constitution Act, 1867.

[26]See, *Toronto Star*, 16 May 1987, quoted in Monahan, Meech Lake: The Inside Story (1991), pp. 104-105; The difference in the language used in the two section was also noted briefly by the Special Joint Committee on the Accord. Canada, Special Joint Committee (1987), p. 75.

106A. The "purpose" clause of the Act's preamble states that the purpose of the Act is to establish *criteria* and *conditions* that must be met before full payment may be made. These include:

1) public administration;
2) comprehensiveness;
3) universality;
4) portability, and
5) accessibility.[27]

If the interpretation of *objectives* in s. 106A is strict, the federal government would increase its bargaining power vis-à-vis the provinces and could work toward promoting *national objectives*. A loose interpretation, conversely, has the potential to see provincial governments pursue the lowest common denominator. That is, a provincial government might perceive meeting the minimum *national objectives* in order to qualify for compensation as the maximum level of service it would provide. The minimum *national objectives* requirement for compensation should ensure an irreducible standard, not the peak of the service.

UNDERSTANDING THE EFFECTS OF 106A

Section 106A sparked a great deal of controversy. Stripped of all peripheral arguments, the fundamental debate over s. 106A was whether or not its passage would have legitimized or limited the exercise of the federal spending power in areas of exclusive provincial jurisdiction. Legitimation would have come in the form of constitutionally recognizing the federal spending power. This recognition was supported by the Select Committee on the Constitutional Accord in New Brunswick. The Committee felt that constitutional recognition of the spending

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[27]Canada Health Act, Statutes of Canada, 1984. See, Canada, Special Joint Committee (1987), p. 75. (emphasis added).

power is necessary if the federal government is to ensure reasonably comparable levels of public service across Canada.[28] The Ontario Select Committee noted that the new s. 106A "struck a good balance between the need for national standards, and the need for provincial variation in program implementation[29]."

Recognizing Parliament's ability to spend in areas of exclusive provincial jurisdiction is seen by some as a threat to provincial autonomy. Andrew Petter argued that giving recognition to Ottawa's power to set *national objectives* could actually encourage the federal government to tighten the conditions imposed on certain shared-cost programs.[30] This was not the intention of the section, and overstates the effect s. 106A would have had on the spending power. Section 106A guaranteed the provinces the right to opt out of Canada-wide shared-cost programs. If Parliament wished to introduce any new programs, this would certainly have to be taken into consideration.

The other side of the argument is that a lack of explicit constitutional recognition of the spending power has enhanced its utility by injecting flexibility into an otherwise rigid federal-provincial division of powers.[31] As Pauline Jewett stated at a meeting of the Special Joint Committee: "...at the very moment we legitimate the federal spending power, we also legitimate the watertight

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[28]Legislative Assembly of New Brunswick, Select Committee on the Constitutional Accord: Final Report on the Constitutional Amendment 1987 (Fredericton, New Brunswick: October, 1989), p. 59.

[29]Ontario, Legislative Assembly, Select Committee on Constitutional Reform, Select Committee on Constitutional Reform. Report on the Constitutional Amendment 1987, by Charles Beer, M.P.P., Chair (Toronto: June, 1988), p. 52.

[30]Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and the Spending Power," in Swinton and Rogerson, p. 198.

[31]Deborah Coyne (1988), in Behiels, p. 276.

compartment doctrine[32]". Entrenching the spending power through s. 106A would have only increased federal-provincial conflict over the provision of services.

Whether one sees entrenching s. 106A as legitimizing or limiting the scope of the federal spending power, the question of how new Canada-wide shared-cost programs would be established, and how the federal government would get people on side to raise support for these new programs remains.

First, the Government might choose to introduce a new program as part of its election campaign. If re-elected, this might be interpreted by the Government as a mandate to proceed with the program.[33] This would put added pressure on the provinces to support the program, especially in those provinces whose residents were in favour of the program.

Alternatively, the federal government could introduce a bill into Parliament and perhaps call for public hearings to generate support for the program. This method by-passes the provincial governments in the program's developmental stages thereby reducing provincial policy influence. The Government could also call for a federal-provincial conference to decide on a new program. This would involve consultation and negotiations with the provinces thereby enhancing provincial input into program design. In either case, the program must receive the support of a sufficient number of provinces before it would become viable. This raises the question of opting out.

At the time of 106A's introduction, Parliament had no constitutional or

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[32]Pauline Jewett, Special Joint Committee on the 1987 Constitutional Accord, August 31, 1987. Issue No. 15, p. 76.

[33]If the government was defeated, it is likely that the program would be as well.

other obligation to provide compensation to the government of a province that chose not to participate in a national shared-cost program.[34] Without a constitutional obligation to do so, Parliament could impose any conditions, strict or otherwise, on how compensatory transfers were spent or even if there should be such payments. Under s. 106A, a non-participating province would only be required to carry on a *program or initiative* that is *compatible with* the *national objectives* in order to qualify for *reasonable compensation*. This would make opting out of new national shared-cost programs easier for the provinces. But to what end?

How many provinces would take advantage of s. 106A and opt out? Quebec would be the most likely as it has voiced its disapproval for shared-cost programs since the Duplessis regime. For whatever reason (distortion of priorities, timing, administration) if other provinces choose to opt out, the question becomes how many non-participating provinces is too many?

In some instances, only two. If Quebec were to opt out of a federal-provincial shared-cost program, Ontario would gain a *de facto* veto over the program.[35] The reason for this is simple, if both Quebec and Ontario opt out, approximately two thirds of the country's population would not be participating in the program. In other words, while under s. 106A all provinces may have an equal opportunity to opt out, the effect of their doing so is quite different.

The opting out provision in s. 106A reflects less of a limitation on the

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[34]Regardless of the many attempts, this condition has not changed to present.

[35]This is similar to what happened with the Canada Pension Plan in 1964. Quebec chose to opt out and establish their own program, and the Government of Canada looked to Ontario for its participation or the program would have failed.

spending power than the consensus formulas considered almost twenty years earlier. Technically, Canada could proceed with a program without first having to obtain the permission of a specific number of provinces comprising a certain portion of the population. Nevertheless, this does not necessarily mean that the development of new programs would be more likely under this arrangement. As has been noted previously, there has to be suitable participation in the program for it to be considered viable.

The ability to opt out under s. 106A would have made the development of new programs increasingly difficult. Michael Behiels expressed his reservations to the Senate Submissions Group about the future of national shared-cost programs under s. 106A:

> I think it is going to be very difficult for the national government to move in the direction of getting any kind of agreement. I think that the political price to pay in order to get that agreement will be high enough that it will not move. So I do not envisage any new major shared-cost programs.[36]

How far should the federal government be willing to go to gain the necessary consensus to establish a new national shared-cost program assuming s. 106A had been approved? Some type of formula for determining consensus would have to be developed or emerge.[37] In addition, a legislative framework would have to be introduced by the Government of Canada that would outline a set of

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[36]Michael D. Behiels, Submission to the Senate Submissions Committee on the Meech Lake Constitutional Accord, February 29, 1988. Issue No. 4, p. 20.

[37]This might involve emulating Canada's amending formula where seven provinces representing a minimum of fifty percent of the population is required to amend the Constitution. This 7/50 formula was used in the proposal on the spending power in Shaping Canada's Future Together which followed Meech Lake. It must also be kept in mind attempting to agree on a formula for this purpose has been one of the major stumbling blocks at constitutional negotiations on the spending power in the past.

minimum conditions, similar to those put in place for the *Canada Health Act*.

Assuming that some sort of formula or framework could be agreed upon by the two orders of government and a program was established, what could the federal government do if it felt that a provincial program was not *compatible with* the *national objectives*? In all likelihood, it could refuse to transfer the money to the province. Regardless of the limitations imposed on the spending power by s. 106A, the federal government would continue to control the purse strings and it is unlikely to transfer money to a province it felt was not satisfying *national objectives*.

If the federal government were to withhold transfers for a program established under s. 106A, the provinces would have three options. First, they could take the federal government to court. History dictates that this option is unlikely at best. The federal government would not be in a hurry to resolve the impasse so it would be up to the province(s) to push for the case to be heard by the Supreme Court of Canada. The process could take years. Also, it is unlikely that the Supreme Court could make a decision that would force the Government of Canada to give money to the provinces.

This brings about the provinces' second and third options. A province could fund the entire cost of a program, or they could defer the program while it is in litigation. Either option would lead to reduced services in the province, and meet with little enthusiasm from the province's electorate. This would seem to indicate that under 106A the provinces have made only limited gains. The trade off for increased flexibility is the uncertainty of funding for future programs.

Section 106A would have limited the spending power in areas of exclusive

provincial jurisdiction in order to gain Quebec's support for the Constitution Act, 1982. However, this limitation of the spending power also provoked a significant backlash from a wide variety of interest groups. The National Action Committee on the Status of Women, the National Association of Women and the Law, and the Canadian Nurses Association (mentioned above), provide examples of a number of outspoken groups who were effective in their criticism of the spending power proposal, by raising questions about the viability of shared-cost programs in the future. If Meech Lake proved anything it was that consensus on this issue was far from being reached, and bridging the gap between the two sides of the debate would be difficult.

CHAPTER FOUR

THE CHARLOTTETOWN PROPOSALS

June 23, 1990, three years after its passage in the Quebec National Assembly, the Meech Lake Accord died when it failed to pass in the Manitoba and Newfoundland legislatures. The failure of Meech Lake disappointed both the federal Conservatives and the Government of Quebec, and dampened Quebec's ambition to seek further constitutional reconciliation. The no vote in Quebec and elsewhere on the 1992 constitutional referendum, and the rise in popularity of the Parti Quebecois and the Bloc Quebecois have illustrated Quebec's growing dissatisfaction with the current state of federalism and the inability to forge a renewed federalism through constitutional negotiations.

Following the demise of the Meech Lake Accord, a series of constitutional proposals were introduced in Quebec and by the federal government. Each of these proposals contained provisions regarding the federal spending power. This chapter examines these proposals and their impact on the spending power debate.

A QUEBEC FREE TO CHOOSE: THE ALLAIRE REPORT

The Allaire Committee was established by the Quebec Liberal Party in 1990, prior to the collapse of the Meech Lake Accord. The Committee's task was to develop Quebec's position and to set the stage for future negotiations should Meech Lake fail.[1] Reporting on January 28, 1991[2], seven months after the death of Meech

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[1]Quebec Liberal Party, Constitutional Committee, A Quebec Free to Choose: Report of the Constitutional Committee of the Quebec Liberal Party, by Jean Allaire, c. r., Chairman (Quebec City: January 28, 1991), p. 1. (Hereafter cited as, Allaire Report).

[2]The Allaire Committee was not a government committee but a Liberal Party committee. In the end, its report did not receive party approval. This showed that Premier Bourassa was taking no chances about Meech Lake being approved or rejected.

Lake, the Report represented a radical departure from the five minimum conditions put forward by the Quebec government in May, 1986 as a minimum for Quebec to support the Constitution Act, 1982.[3] In relation to the "limitation of the spending power" stipulated by Remillard in 1986, the Allaire Report called for a new Quebec-Canada structure based on the political autonomy of Quebec.

> To break the impasse, the Quebec Liberal Party proposes a new Quebec-Canada structure. The proposal stipulates political autonomy for Quebec. It will henceforth exercise full sovereignty in all areas of exclusive authority, in certain areas currently shared, and in all sectors not specifically listed in the current Constitution (i.e., residual powers). The central government's spending power in Quebec's areas of authority will be eliminated.[4]

The Allaire Report's new Quebec-Canada structure would require a redefinition of both the Canadian Constitution and the current institutional structure.[5] The Report represented the most drastic proposal to limit Parliament's influence in policy areas outside its own jurisdiction to date. If the proposed limitations in the report were adopted, the scope of Parliament's reach would be limited immeasurably, and Parliament would have been precluded from spending in most policy fields within Quebec. Equalization payments would have been the only element of the spending power to remain. In effect, the authority of Parliament in most areas have would almost totally disappeared.

THE POLITICAL AND CONSTITUTIONAL FUTURE OF QUEBEC: BELANGER-CAMPEAU

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[3]Government of Canada, The Canadian Constitutional Debate: From the Death of the Meech Lake Accord of 1987 to the 1992 Referendum, by James Ross Hurley, Director, Constitutional Affairs Privy Council Office (Ottawa: Supply and Services Canada, 1994), p. 11.

[4]Allaire Report (1991), p. 1.

[5]Allaire Report (1991), p. 3.

The Belanger-Campeau Commission, established on September 4, 1990, under the authority of the Quebec National Assembly was set up to examine the political and constitutional status of Quebec and make recommendations to the National Assembly.[6] The Commission reported on March 27, 1991. In their report, the Commissioners commented on the current discussion of the federal spending power, and the effect that the rising federal debt and deficit were having on transfer payments. The Commission stated that:

> Overlapping actions by both levels of government have thus resulted directly, over the years, from the increasingly extensive use of the federal spending power. Similarly, the size of the federal debt and deficits has reduced, in a manner costly to Quebec, federal transfer payments, often put in place by Ottawa to encourage provinces to undertake spending programs in their own fields of jurisdiction.[7]

The Commissioners also noted that the standards the federal government imposes, which it maintains after its withdrawal from a program, place considerable constraints on Quebec's ability to adapt to fiscal restraint.[8]

Notwithstanding the specifics of the spending power proposals, the thrust of the report was a redefinition of the division of powers that would ensure Quebec exclusive authority over those matters already falling within its legislative jurisdiction. This would effectively eliminate federal spending and overlapping expenditures in these areas.[9] The report proposed two choices for Quebec. First,

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[6]Hurley (1994), p. 12.

[7]Commission on the Political and Constitutional Future of Quebec, Report of the Commission on the Political and Constitutional Future of Quebec, by Michel Belanger and Jean Campeau, Joint Chairmen (Quebec City: Secretariat de la Commission, March 27, 1991), p. 49. (Hereafter cited as, Belanger-Campeau)

[8]Belanger-Campeau (1991), p. 50.

[9]Belanger-Campeau (1991), p. 48.

an attempt should be made to secure a new status within the Canadian federation. If this were to fail, the second and only option would be the sovereignty of Quebec.[10]

The tone of the report shows Quebec's frustration with the lack of resolution to its constitutional demands since 1968; the patriation decision, and the failure of Meech Lake in 1990. The tone of the report also reflects a desire to have the constitutional impasse resolved one way or the other; renewed federalism or sovereignty.

SHAPING CANADA'S FUTURE TOGETHER: PROPOSALS

Shaping Canada's Future Together[11], developed in the months following Meech, was the federal government's response to the failure of Meech Lake. To avoid the criticism surrounding the lack of public participation in the Meech Lake process, the Shaping proposals were examined at length by the a Special Joint Committee which heard submissions from members of the public, governments, and experts from across Canada (hereafter Beaudoin-Dobbie)[12]. Provided below is a brief analysis of the spending power proposals in Shaping Canada's Future Together, and considerations of some of the arguments related to the spending power raised in Beaudoin-Dobbie.

The Federal Spending Power

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[10]Belanger-Campeau (1991), p. 73.

[11]Government of Canada, Shaping Canada's Future Together: Proposals (Ottawa: Supply and Services Canada, 1991).

[12]Government of Canada, The Report of the Special Joint Committee of the Senate and the House of Commons on A Renewed Canada, by Senator Gerald Beaudoin and Dorothy Dobbie M.P., Joint Chairmen (Ottawa: Supply and Services Canada, February, 1992). (Hereafter cited as, Beaudoin-Dobbie).

Shaping Canada's Future Together outlined the Government of Canada's position for constitutional renewal which went even further than Quebec's five conditions outlined prior to Meech. This was to be the Canada round!

With respect to the spending power, the document outlined the traditional arguments that have been raised since 1968. Proponents of the spending power — including many in Atlantic Canada — see it as being essential to bringing about a fair distribution of the economic benefits of union, and dealing with regional disparities. Those who object to the intrusive nature of the spending power — Quebec, in particular — state that the federal government has used this power to gain access to areas of jurisdiction not assigned to it in the constitution.[13]

The spending power proposal in this document was designed to accommodate both of these views by allowing provincial governments to carry out the policies desired by their electorate, while at the same preserving federal safeguards to ensure the provision of accessible social services. The federal safeguards are its continued ability to make transfers to individuals and organizations, as well as provincial governments.[14] The proposal on the spending power read:

> The Government of Canada commits itself not to introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction without the approval of at least seven provinces representing at least 50 percent of the population. This undertaking would be entrenched in the constitution. The constitutional amendment would also provide for reasonable compensation to non-participating provinces which establish their own programs meeting the objectives of the new Canada-wide

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[13]Canada, Shaping (1991), p. 40.

[14]Canada, Shaping (1991), p. 39.

program.[15]

The use of the 7/50 threshold for determining consensus on the introduction of a new Canada-wide shared-cost program varied greatly from the spending power proposal in Meech Lake. In Meech, any province could opt out of a new *national shared-cost program* and receive *reasonable compensation* if the government of that province carried on a *program or initiative* that was *compatible with* the *national objectives*. Under Shaping, this element would remain, however, establishing programs would become more difficult with the need for 7/50.

Some of the questions raised by the Continuing Committee of Officials in its analysis of formulas for determining consensus in 1969 would again have to be answered. For example, would the province of Ontario be given a veto because of its large population? Technically, no. However, the 7/50 threshold does require that either Quebec or Ontario participate in the proposed program. As noted earlier, the likelihood that Quebec would choose not to participate in future shared-cost programs is high. In these cases, Ontario would be given a veto over new programs.

A second question raised is whether seven provinces representing fifty percent of the population voting in favour of a program is indicative of a national consensus in more than a technical sense? Theoretically, a program could be undertaken with up to forty-nine percent of the population not participating. But what are the alternatives? If the population requirement were to be raised to eighty five percent, for example, Quebec would possess a veto over all new programs. Seventy five percent would give Ontario an automatic veto, and sixty

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[15]Canada, Shaping (1991) p. 48.

percent is not significantly different from fifty. As was the case in the past, entrenching a rigid formula was likely to meet with the disapproval of many provinces. Hence, it is unlikely this proposal would have been accepted as is, because the problems of twenty years earlier remain.

The Council of the Federation

Shaping Canada's Future Together also proposed the entrenchment of a *Council of the Federation.*[16] Composed of federal, provincial, and territorial governments, the objective of the *Council* was to create a more publicly visible, less confrontational body to improve the management of intergovernmental coordination inherent in the Canadian federal system.[17] Included in the new *Council's* mandate was a proposal

> to make decisions on the use of the federal spending power on new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction.[18]

All decisions of the *Council* would require the approval of the federal government and seven provinces representing at least fifty percent to the population.[19]

The *Council of the Federation* would have given the provinces a mechanism to influence the development of federal policy. It would have also provided the "checks and balances" provinces desire when developing new Canada-wide shared-cost programs. Through increased public input and scrutiny, the *Council* was intended to harness the existing system of executive federalism where the eleven

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[16]Canada, Shaping (1991), p. 41.

[17]Canada, Shaping (1991), p. 42.

[18]Canada, Shaping (1991), p. 42.

[19]Canada, Shaping (1991), p. 42.

first ministers decide the fate of future programs.[20]

The Shaping proposal on the *Council of the Federation* did not mark the first time such a body was considered. A similar proposal appeared in the report of the Task Force on Canadian Unity which reported in 1979. In this set of proposals, the *Council* would not coexist with a reformed Senate as was the case in Shaping. Rather, it was recommended that the Senate be abolished and replaced by a new second chamber of Parliament called the *Council of the Federation*.[21]

Shaping's inclusion of a proposal for an elected senate[22] was one of the main reasons the proposed *Council* was resoundingly rejected at a public forum in Calgary in 1992.[23] Thought to perform the same role as the Senate, the *Council* was seen as contradictory and conflictual. The proposed *Council* was dead. It did not resurface in any of the intergovernmental negotiations that followed Shaping.

THE RESPONSE TO SHAPING CANADA'S FUTURE TOGETHER: BEAUDOIN-DOBBIE

In Support of the Spending Power Proposal

Supporters of the Shaping proposal noted that with the 7/50 requirement,

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[20]Canada, Shaping (1991), p. 41.

[21]The proposal on the *Council* in 1979 was much more detailed than in 1991. This is because the 1979 proposals did not include a reformed Senate. See, Government of Canada, The Task Force on Canadian Unity: A Future Together. Observations and Recommendations, by Jean-Luc Pepin and John P. Robarts, Co-Chairmen (Ottawa: Minister of Supply and Services Canada, 1979), p. 128.

[22]For a discussion of the proposal on an Elected Senate, see, Canada, Shaping (1991), pp. 16-21.

[23]A series of public forums were held by the Government of Canada across the country. These forums consisted of the parliamentary committee, representatives of the provinces, experts, and members of the public. The proposed *Council* was rejected in Calgary because the conference participants disliked the appearance of another level of government; objected to further constraints on federal initiatives; thought it to be dominated by political executives; rejected it as inherently decentralizing; saw its powers as inconclusive and limited; felt it muddied the waters of Senate reform; and were not convinced it was necessary. See, Government of Canada, Constitutional Conference Secretariat, Renewal of Canada Conferences: Institutional Reform. Calgary Alberta, January 23-26, 1991, pp. 5,11.

the maximum number of provinces that could opt out of a program would be three. This would reduce the checkerboard of services that the Meech Lake proposal would theoretically have permitted.[24] Also, the political disincentive for the introduction of programs might have been reduced as the unlimited opting out of Meech Lake was no longer present.[25] Upon closer consideration however, the substance of these arguments is questionable.

First, it is true that having two thirds of the provinces with fifty percent of the population participating in a program would reduce the potential for checkerboard-like services. However, as mentioned earlier, while seven provinces may be participating, this does not necessarily mean that an overwhelming majority of the Canadian population has access to the service in question. Non-participating provinces, potentially comprising almost half of the population, would be required to provide similar programs, however the loose set of restrictions on how closely the provincial government has to follow the federal program might lead to service dissimilarities.

Second, the idea that the 7/50 rule would reduce the federal government's reluctance to initiate new shared-cost programs is false. The 7/50 threshold is not an easy formula to satisfy; that is why it was chosen as the requirement to amend Canada's constitution. The formula is strict enough that it prevents capricious

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[24]With the technically unlimited opting out of the Meech proposal on the spending power, services could be provided at different levels in the provinces. This type of service dissimilarity has been likened to a "checkerboard," and a "patch-work quilt." It is unlikely, however, that the federal government would have proceeded with a program if too many provinces chose to opt out.

[25]John D. Whyte (Dean of Law, Queen's University), Submission to the Special Joint Committee on A Renewed Canada, December 18, 1991, Issue No. 34, pp. 80-81; Honourable Roy Romanow (Premier of Saskatchewan), Submission to the Special Joint Committee on A Renewed Canada, January 21, 1992. Issue No. 47, p. 14.

decisions and requires significant agreement among the provinces. In the case of shared-cost programs, it is foreseeable that achieving enough provincial cooperation to satisfying the formula would be difficult. In short, the political disincentive of Meech Lake may have been increased as a result of the standard of 7/50.

Disapproval of the Spending Power Proposal

The main arguments raised against the spending power proposal is that it would be impossible to establish a new program under the 7/50 threshold. The three most prosperous provinces (Ontario, Alberta, and British Columbia), in addition to Quebec are most likely to opt out. If Ontario and Quebec opt out, the program is dead. If Quebec, Alberta, and British Columbia were to opt out, this would nearly kill the program. The point is, in order to start a program, there would first have to be sufficient support. In order to obtain such support, the federal government would have to modify its programs and perhaps its goals. In Meech, some level of negotiation was assured, but without an approved limit the federal government was afforded more flexibility in developing programs.

A constraint such as the 7/50 threshold would limit the federal government's ability to establish and maintain national standards because of its reduced bargaining position in developing new programs. The Manitoba Constitutional Task Force stated that:

> ...the Parliament of Canada should be able to utilize fully its spending power to address national concerns. Furthermore, such expenditures may extend into areas of provincial jurisdiction.... The Task Force supports the continued joint funding of such programs and seeks to ensure that there is a continued high degree of equity in the provision of services

across the nation.[26]

The federal spending power is crucial in the provision of universally accessible social programs for all Canadians. The Nova Scotia Working Committee on the Constitution agreed, and reported that:

> Nova Scotians do not want to see any erosion of the federal government's current role in providing social and economic programs with national objectives and standards. Nova Scotians want the federal spending power to remain undiminished respecting regional and personal and social disparities.[27]

The social safety net in Canada has depended heavily on the federal spending power. The future development of social programs might be placed in danger by the standard of 7/50 because the federal government might not be willing to make the compromises in program development that such a formula would require.

Both the Manitoba and the Nova Scotia position papers came out shortly after the federal proposals. What their positions on the spending power indicates is that there is clearly not an overwhelming support for fundamental change to the exercise of the spending power.

Recommendations of Beaudoin-Dobbie

The Report of the Special Joint Committee on A Renewed Canada called for a flexible approach to resolving the intergovernmental tension caused by the use of the spending power in areas of exclusive provincial jurisdiction. In particular, it was suggested that the issue of national shared-cost programs would be best

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[26]Manitoba Constitutional Task Force, Report of the Manitoba Constitutional Task Force, by Professor Waldron N. Fox-Decent, Chairperson (Winnipeg: October 28, 1991), p. 43.

[27]Nova Scotia Working Committee on the Constitution, Canada: A Country For All. The Report of the Nova Scotia Working Committee on the Constitution, by Eric Kierens, Chairman (Halifax: November 28, 1991), p. 31.

addressed if existing programs and new programs were reviewed separately.[28] The Committee's recommendation for existing shared-cost programs read:

> We recommend that the federal and provincial governments work together towards establishing procedures for implementing changes in terms and conditions of existing shared-cost programs. For example, we believe that one could consider fixing the program's conditions under a binding intergovernmental agreement for a period of, for example, four to five years. In our view, such an approach would not undermine Parliament's authority while addressing many of the provincial governments' concerns.[29]

The Committee felt strongly that since federal monies financed such programs, Parliament had to retain ultimate control over the program's terms and conditions.[30] However, the recommendations did provide a way for many of the provincial governments to address their concerns about the structure or administration of existing programs. The committee recommended an enhanced role in the modification of program conditions, and a binding intergovernmental agreement on these conditions for a period of time.[31] This might have been further than the Government of Canada was willing to go on shared-cost programs as it would lock Canada into a particular program and its funding structure for an established time period.

The Special Joint Committee further acknowledged that a balance was

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[28]Beaudoin-Dobbie (1992), p. 81.

[29]Beaudoin-Dobbie (1992), p. 82. This flows from the ceiling on CAP, and eventually led to s. 126A of the agreement.

[30]Beaudoin-Dobbie (1992), p. 82.

[31]Here, for the first time, we see a proposal that would bind the federal government to [illegible] in a particular areas for a given period of time. This is at variance with the province's traditional [illegible]aint that federal spending in areas of exclusive provincial jurisdiction is intrusive. This trend toward ob[illegible]gated federal spending will show itself in the Charlottetown agreement, and even more so in the post-Charlottetown period.

required between provincial and national concerns in developing new shared-cost programs. The opposing views presented to the Committee led them to seek a middle-ground solution: one that included provincial input into program design, and an option to withdraw with compensation if a similar program was implemented.[32] The Committee felt that subjecting federal initiatives to provincial approval would unnecessarily constrain the federal government.[33] In other words, the Committee wanted a proposal similar to that found in the Meech Lake Accord. The Committee made two recommendations regarding new shared-cost programs:

> i) that the *Constitution Act,* 1867 be amended, by adding a section stating that the Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a new Canada-wide shared-cost program that is established by the Government of Canada in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that meets the objectives of the new Canada-wide program; and
>
> ii) that any new Canada-wide shared-cost program be *constitutionally protected* from unilateral changes to the terms of the program over a jointly agreed-on period through the approval process for intergovernmental agreements discussed at pages 68-69.[34]

The Committee's first recommendation is almost identical to Meech Lake. This is somewhat surprising considering the many concerns raised about the Meech proposal during the negotiations at the Langevin Block, and in the three years between 1987-1990. The second recommendation is something new for

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[32]Beaudoin-Dobbie (1992), p. 82.

[33]Beaudoin-Dobbie (1992), pp. 82-83.

[34]Because of the constitutional principle of parliamentary supremacy, intergovernmental agreements are not binding on Parliament or the legislatures. This can result in uncertainty as to the future of certain programs. The Committee recommended that the Constitution be amended to prevent such uncertainty by providing a mechanism precluding unilateral amendment with regard to intergovernmental agreements. Beaudoin-Dobbie (1992), p. 83. (emphasis added); pp. 68-69.

shared-cost programs. This recommendation binds Canada into a particular program and provides constitutional protection for the provinces during the agreed-on time period. This safeguard ensures that once a program has been started, the federal government will not back out, or cut funding leaving the province to fund a program by itself. Why was this provision included? The cap on the *Canada Assistance Plan* (CAP).

Briefly, the CAP is the result of a 1966 agreement between the federal government and the provinces to share equally the cost of social assistance, given that that assistance is provided to people in "need." CAP transfers were open-ended. Whatever funds the provincial government contributed, the federal government would match.

This changed in 1990 when the federal government unilaterally altered the agreement and limited the growth in per capita transfers to the three wealthiest provinces, Ontario, Alberta, and British Columbia. An Act to amend certain statutes to enable restraint of government expenditures (Bill C-69), was passed after the cap on CAP was introduced in the February, 1990 budget of federal Minister of Finance, Michael Wilson.[35] The cap on CAP payments limited the

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[35]The *Act* reads:

1. This Act may be cited as the *Government Expenditures Restraint Act*.
2. The *Canada Assistance Plan* is amended by adding thereto, immediately after section 5 thereof, the following section:

"5.1(1) Notwithstanding sections 5 an 8 and any agreement, where no fiscal equalization payment is payable to a province pursuant to section 3 of the *Federal-Provincial Fiscal Arrangements and Post-Secondary Education and Health Contributions Act* for the year ending on March 31, 1991, the contribution to that province in respect of that year shall not exceed the product obtained by multiplying

(a) the amount of the contribution payable to the province for assistance and welfare services provided in the year ending on March 31, 1990

by

(b) 1.05.

(2) Notwithstanding section 5 and 8 and any agreement, where no fiscal equalization payment is payable to a province pursuant to section 3 of the *Federal-Provincial Fiscal Arrangements and Post-Secondary Education and Health Contributions Act* for the year ending on March 31, 1992, the

growth of CAP transfers at five percent. Prior to the announcement, they had been growing at approximately six and a half percent annually.

British Columbia initiated legal action based on the federal government's unilateral alteration of the terms and conditions of the *Canada Assistance Plan*. A lower court ruled in favour of British Columbia, and Alberta and Ontario joined British Columbia in taking the case to the Supreme Court of Canada where it was overturned.

The federal government now covers only about 28 per cent of Ontario's welfare costs and 34 per cent of British Columbia's. The cap on CAP has had the least effect in Alberta as welfare cutbacks have meant the cost of providing assistance has not increased noticeably.[36] The cap on CAP has served notice to the provinces, especially those directly affected, that the federal government is either unable or unwilling to fund shared-cost programs as it has in the past. This has led the provinces to seek constitutional protection as noted above, and below in the discussion of the Charlottetown Accord.

CONSENSUS REPORT ON THE CONSTITUTION: CHARLOTTETOWN

The Charlottetown Accord's proposal on the spending power was an attempt to strike a balance between provincial jurisdiction over social programs, and the

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contributions to that province in respect of that year shall not exceed the product obtained by multiplying

(a) the amount of the contributions payable to the province for assistance and welfare services provided in the year ending on March 31, 1990

by

(b) 1.1025."

See, The House of Commons of Canada, Bill C-69 An Act to amend certain statutes to enable restrain of government expenditures, 2nd Session, 34th Parliament, 38-39 Elizabeth II, 1989-90.

[36] *Globe and Mail*, 9 February 1995.

benefits of national programs.[37] The negotiators of the Charlottetown agreement endorsed the proposals of Meech Lake and Beaudoin-Dobbie, and the Charlottetown proposal varies little from these two.[38] The reason for this is twofold: Quebec agreed to Meech; Quebec did not participate in the discussions leading up to Charlottetown, therefore it was felt that the Meech Lake provision had to be adopted without change.[39]

Under Charlottetown, the provinces could opt out of new shared-cost programs if a program or initiative compatible with the national objectives was carried out. This is where the similarities between the Meech, Beaudoin-Dobbie and Charlottetown proposals end. A third subsection was added to s. 106A in Charlottetown which reaffirmed the commitment of the Parliament and the Government of Canada set out in section 36 of the Constitution Act, 1982[40]. A careful reading of the balance of the Draft Legal Text of October 9, 1992, finds that proposals related to the spending power were not limited to s. 106A alone. The effect that these proposals would have on the spending power went much further than either Meech or Beaudoin-Dobbie. Three relevant sections are considered

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[37]Saskatchewan, Constitutional Unit, Saskatchewan Justice, The Charlottetown Agreement: A Saskatchewan Perspective (Regina: 1992), p. 17.

[38]The proposal read: The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in areas of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

Subsection 106A. (2) remained unchanged, and a third subsection was added. 106A. (3) read: For greater certainty, nothing in this section affects the commitment of the Parliament and government of Canada set out in section 36 of the *Constitution Act*, 1982. Government of Canada, Draft Legal Text of the Charlottetown Accord of August 28, 1992, October 9, 1992, s. 106A.

[39]Interview with J. Peter Meekison, University of Alberta, Edmonton, Alberta, 13 January 1995.

[40]Draft Legal Text, s. 106A.(3)

below.

Exclusive provincial authority

Section 93.A of the Charlottetown agreement, as was the case in the Allaire Report, Shaping Canada's Future Together, and Beaudoin-Dobbie[41], would have affirmed that the following matters come within the exclusive legislative authority of the provincial legislatures:

> (a) urban and municipal affairs;
> (b) tourism;
> (c) recreation;
> (d) housing;
> (e) mining; and
> (f) forestry.[42]

Seemingly in response to the Allaire Report, general agreement and acceptance of these areas was reached during the discussion of Shaping by the federal government. It was made clear in Beaudoin-Dobbie that the Constitution already gives the provinces explicitly or implicitly legislative power over these areas.[43] What, then, was the purpose of including this section? Politics.

Since these subject areas already fall within exclusive provincial jurisdiction, there is no constitutional requirement or obligation for the federal government to spend money in these areas. The federal government could stop spending in these areas, or modify the programs in some way if it so desired. Affirming the exclusivity of these areas serves no real purpose unless that affirmation was linked to something else. That something else was the spending

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[41]Allaire Report (1991), pp. 37-39.; Canada Shaping (1991), pp. 36-37.; Beaudoin-Dobbie (1992), pp. 72-74.

[42]Draft Legal Text, s. 93A.(1).

[43]Beaudoin-Dobbie (1992), p. 73. See, for example, s. 92, 92A, 109 of the Constitution Act, 1867.

power.

Under this section a provincial government could request that the Government of Canada withdraw, either partially or fully, from programs operating in these areas. Upon doing so, compensation was to be paid to the province. Alternatively, a province may request that the Government of Canada maintain its spending in relation to a particular program.

It is important to remember that these six policy fields involve relatively modest amounts of money and have frequently been taken care of through regional development programs. Also, Canada is not constitutionally required to spend in these areas. Thus the provision both limits and encourages the spending power in balancing the interests of the *have* and the *have-not* provinces — a classic Canadian compromise.

Section 92(12A) of Charlottetown added *Labour Market Development and Training* as a new head of power.[44] The provinces sought to develop this area as an area of exclusive provincial jurisdiction.[45] The federal government's response to acknowledging this area as within the exclusive legislative authority of the provinces was quite different from that of the six policy fields noted above. Why? Money. The federal government spends more in this one area than it does in the other six fields combined. Granted, s. 93B. does provide that the Government of Canada shall withdraw from a program at the request of the provinces and provide reasonable compensation. It also provides that Canada continue to spend in this area at the provinces' request. The conditions of this agreement, however, are

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[44]Draft Legal Text, s. 92(12A).

[45]Draft Legal Text, s. 93B.

noticeably different from those in s. 93A.

Section 93C. was added to ensure that when the Government of Canada does withdraw under s. 93B.(1), labour market development programs in the provinces are compatible with the national objectives (similar to the spending power).[46] The conditions necessary to receive compensation are less flexible under this section because of the increased number of federal dollars being spent, and the perceived need for national standards is clearly greater in this area than the other six policy fields. One possible conclusion is that the Government of Canada is only willing to withdraw when the funding involved is modest. Another observation is that the federal government is not willing to turn over a policy area completely which is closely linked to the economy, and where it believes national standards are important.

Social and Economic Union

Part III.1 of the Draft Legal Text, *The Social and Economic Union*, would have added s. 36.1 to the constitution. Section 36.1(1) would have entrenched a non-justiciable commitment to the social and economic union of Canada in the constitution. A similar commitment to the *Social Covenant*, and the *Declaration of the Economic Union* are found in the recommendations of the Beaudoin-Dobbie Committee.[47] The Charolttetown proposals on the *Social and Economic Union* are modeled after the Beaudoin-Dobbie recommendations and the differences between

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[46]Draft Legal Text, s. 93C.

[47]Beaudoin-Dobbie (1992), pp. 89-90; The Government of Ontario, in its Select Committee on Ontario in Confederation report proposed the entrenchment of a Social Charter in the Constitution which would provide protection for economic and social interests. For example, programs and services related to health, education, social security, adequate housing, and an adequate standard of living. See, Ontario, Legislative Assembly, Select Committee on Ontario and Confederation, Final Report of the Select Committee on Ontario and Confederation, by Dennis Drainville, M.P.P. (Toronto: February, 1992), p. 49.

the two are minimal. Charlottetown merely provides a more detailed set of amendments based on those recommended in Beaudoin-Dobbie.

Of particular relevance to the spending power in the Charlottetown proposal on the *Social and Economic Union* was the proposed s. 36.1(2). Selected aspects are listed below:

> 36.1(2) The preservation and development of the social union includes, but is not limited to, the following policy objectives:
> (a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible;
> (b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;
> (c) providing for high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education....[48]

Championed by the Government of Ontario as the minimum requirement necessary for the province to support Charlottetown[49], this section represented a commitment by the governments of Canada and the provinces to the principle of the preservation and development in the policy areas of health care[50], social assistance, and education. However, it did not represent a constitutional obligation to spend money in these areas. The federal spending power was thus neither strengthened nor weakened by this section, which begs the question: why then is this section significant? The answer is twofold.

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[48]Draft Legal Text, s. 36.1(2).

[49]It should also be noted that the drafting of this section on the social and economic union is similar to s. 36(1), and 36(2) of the Constitution Act, 1982. As is with the case of equalization, this section represent only a commitment, not an obligation for the federal government to spend money.

[50]The five conditions listed in s. 36.1(2) are the same as those that are put in place by the *Canada Health Act*.

First, s. 36.1(2) illustrates the degree to which the "social system" is fused to the economy. With the current trend toward economic globalization — e.g. the Free Trade Agreement, and the North American Free Trade Agreement — a commitment to the principle of developing and preserving a social system as well as the economy is essential if national standards are to be recognized across Canada. Furthermore, if the fiscal situation of the Government of Canada and the provincial governments continues to deteriorate, maintaining accessible social services that conform to national standards will require increased commitment at least.

Equally important, it must be kept in mind that unlike Meech Lake and Shaping, Charlottetown would only be adopted if it received the support of Parliament, the provincial legislatures, *and* the general public. Inevitably, this means that there is a certain amount of "politicking" within the agreement.

This section was included so that provincial governments like Ontario, hit hard by the cap on CAP and other federal measures such as the Free Trade Agreement, could report to its residents that a commitment to the social and economic union was included in the agreement. Conversely, the federal government, or those provincial governments not in favour of this section could tell their supporters that s. 36.1 was non-justiciable and that no action would be required by its passage. In short, s. 36.1 is a consensus building mechanism which, politically, gives each side what it wants. In reality, the section would have had little effect on federal spending one way or the other.

Framework for Certain Expenditures of Money

Also included in Charlottetown was a section which would have developed a

Framework for Certain Expenditures by the Government of Canada. The inclusion of s. 37.(1) was demanded in Charlottetown by Quebec Premier Robert Bourassa. In essence, s. 37.(1) was an enabling section that permitted the discussion of its contents, in particular the spending power, in the future. The proposed framework was set out as follows:

> 37.(1) The Government of Canada and the governments of the provinces are committed to establishing a framework to govern the expenditures of money in the provinces by the government of Canada in areas of exclusive provincial jurisdiction that would ensure, in particular, that such expenditures
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> a) contribute to the pursuit of national objectives;
> b) reduce overlap and duplication;
> c) respect and not distort provincial priorities; and
> d) ensure equality of treatment of provinces while recognizing their different needs and circumstances.
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> 37.(2) After establishing a framework pursuant to subsection (1), the Prime Minister of Canada and the first ministers of the provinces shall review the progress made in achieving the objectives set out in the framework once each year at conferences convened pursuant to section 37.1.[51]

The framework represented a set of guidelines for discussion of the future use of the spending power in areas of exclusive provincial jurisdiction. Recognizing the possible interpretations and limitations of such parameters is important.

The demand that the pursuit of national objectives be included in the agreement illustrates two things: Premier Bourassa's commitment to federalism, and possibly his foresight about the direction the spending power is taking. In the first case, a commitment to the pursuit of national objectives would permit continued federal spending and some degree of federal influence in policy development in areas of exclusive provincial jurisdiction. Of course, some type of

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[51]Draft Legal Text, s. 37.(1). Section 37.1 reads: A conference of the Prime Minister of Canada and the First Ministers shall be convened by the Prime Minister of Canada at least once each year, the first within twelve months after this part comes into force.

formula, be it 7/50, regional, or some other form of population plus provinces would have to be negotiated if the federal presence were to remain in these policy areas.

As for the notion of foresight, a commitment to the pursuit of national objectives might have also provided the provinces with a mechanism to ensure the continuation of federal spending in areas of provincial jurisdiction. Decreased federal transfers is a distinct possibility given that the federal debt and deficit have increased markedly in the past twenty years. This was the case with the cap on the *Canada Assistance Plan*. This concern is crystallized elsewhere in Charlottetown in s. 126A.

Section 126A would have added a provision to prevent unilateral action by the Parliament of Canada with regard to altering a program or its funding structure.[52] Provincial governments are unable to assume greater financial responsibility in the provision of social services. Without adequate federal funds, the programs could suffer.

Reducing overlap[53], and respecting, rather than distorting provincial priorities[54], is not so much a cry for provincial autonomy as it was in the past, now

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[52]This concern was addressed earlier in the 1992 report of the Select Committee on Ontario in Confederation where it was suggested that bi-lateral federal-provincial agreements be entrenched in the Constitution. Security for participating provinces would be provided by ensuring that the federal government could not unilaterally revoke or alter an agreement. See, Final Report of the Select Committee on Ontario and Confederation (1992), p. 41. This type of amendment on intergovernmental agreements was also included in Beaudoin-Dobbie. See, s. 95AA Draft Constitutional Amendments, Appendix A, Beaudoin-Dobbie (1992), p. 116.

[53]Ontario's Select Committee on Ontario in Confederation recommended that a review of the existing division of powers should be undertaken with the purposes of, among other things, identifying areas of overlap and duplication in the administration of powers, and areas in which a different level of government might more effectively administer power. See, Final Report of the Select Committee on Ontario and Confederation (1992), p. 46.

[54]Alberta's Select Special Committee on Constitutional Reform recommended that: The ability of the federal government to spend in areas of provincial exclusive jurisdiction should be limited in order to prevent the distortion of the division of responsibilities as entrenched in the Constitution.... See, Alberta,

it is a matter of economic necessity.[55] The provincial governments might argue in future negotiations that if allowed more flexibility in the development and provision of services, provided they have sufficient funds, program levels could be maintained more efficiently. Coming from the Premier of Quebec, respect for provincial priorities was not a unique request. It should be remembered that this was one of the major points of contention which led to the failure of the Victoria Charter in 1971, and Mr. Bourassa, as he had to then, needed to retain the support of a dissatisfied people.

The final aspect of the framework calls for ensuring equal treatment of the provinces while recognizing their different needs. Would this be interpreted as the continued need for equalization payments? No, this is covered under s. 36 of the Constitution Act, 1982. Would this involve spending on regional economic development? No, this is covered under s. 93D of Charlottetown.[56] What it would mean is that if the federal government spends in one area in one province, it must spend in this area in all provinces.[57]

Section 37.(2) raises an interesting point about the proposed framework and

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Legislative Assembly, Select Special Committee on Constitutional Reform, Alberta in a New Canada: Visions of Unity. Report of the Alberta Select Special Committee on Constitutional Reform, by James Horsman, M.L.A., Chairman (Edmonton: March, 1992), p. 19.

[55]This is a key criticism of the Parti Quebecois. The PQ feels that through separation, social programs will be maintained at a lower cost to the provinces residents as a result of eliminating the duplication and overlap present when two governments are involved in the provision of one service.(this assumes that Quebec will recover all taxes currently collected within its jurisdiction if it were to separate). See, The National Executive of the Parti Quebecois, Quebec In a New World, trans. Robert Chodes (Toronto: James Lorimer and Company, Publishers, 1994), p. 52.

[56]Draft Legal Text, s. 93D.

[57]The Clause reflects the equality of provinces and is found throughout Charlottetown. This is also captured in s. 36.2(2) of the Accord. This section reads: Parliament and the government of Canada are committed to making equalization payments so that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

the federal spending power. First, it unequivocally strengthens the role of the first ministers conference. Since the framework of s. 37.(1) was subject to the yearly review of the first ministers, as priorities within the province change, so too can the expenditure arrangements of particular programs. This would allow a province to better assess whether it is being treated equally or not. The by-product of this is that the role of executive federalism would be firmly entrenched in the constitution by this action.

In short, this section focused the spotlight on the spending power and would have provided some flexibility in future spending power negotiations. It is vague enough to encompass the major components of the spending power debate now, and those which are likely to remain in the near future. However, what effect it would have is left to speculation because it was subject to negotiations.

UNDERSTANDING CHARLOTTETOWN

If passed, Charlottetown would have affected the federal spending power in more ways than either of the proposals in Meech Lake or Beaudoin-Dobbie. More importantly, it would have represented the beginning of a change in the way the spending power would be exercised in Canada.

Charlottetown proposed to establish the spending power and affirm its use in a number of areas of exclusive provincial jurisdiction through a requirement to spend in those areas. However, it then limited the scope of the spending power under s. 106A [illegible] possibly under section 37.1. What is important to note is that in those se[illegible]here the spending power and a commitment to spend would have been established, it was usually at the request of the provincial governments.

[illegible]he end of Charlottetown, one is left with the impression Quebec is the

only province which continues to seek constitutional limitation of the spending power. In fact, after examining the period of 1968-1992, it seems that if it were not for Quebec's persistence, the spending power would not have been on the agenda at Meech or Charlottetown.

The different positions adopted by different provincial governments indicated a lack of consensus on whether to entrench a limitation to the spending power. As noted above, smaller provinces such as Manitoba and Nova Scotia were not in favour of constitutionally limiting the spending power, while Canada's largest province, Ontario, sought constitutional protection against federal action which would further increase the expenditure responsibilities of the provinces. One of the most notable changes in position on the spending power was in Alberta. In 1978, the Government of Alberta recommended:

> ...that limitations be placed on Parliament's ability to spend in areas of provincial jurisdiction.[58]

In 1992, the Alberta Select Special Committee on Constitutional Reform stated that:

> Canada's network of social security and social service programs are an integral component of the Canadian identity, and maintenance of programs is essential to the well-being of Canadians. *The majority of the Committee believes that these programs are best accomplished by flexible legislative and other arrangements, rather than by constitutional entrenchment.*[59]

This represents a one hundred and eighty degree turn for the Alberta government.

In short, the idea of a solid provincial front on the spending power, at least

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[58] Alberta, Harmony And Diversity: A New Federalism for Canada, Government of Alberta Position Paper on Constitutional Change (Edmonton: October, 1978), p. 16.

[59] Alberta in a New Canada: Visions of Unity (1992), p. 20. (emphasis added)

today, is exaggerated. This does not suggest that the spending power is dead as a manifestation of Canadian federalism. It does, however, indicate that a new approach to negotiating the spending power is necessary.

CHAPTER FIVE

BEYOND CHARLOTTETOWN: WHAT LIES IN STORE FOR THE FEDERAL SPENDING POWER?

The preceding chapters have examined attempts over the past quarter century to reform the spending power by means of a constitutional amendment. To date, success has proven elusive. Does this mean that the spending power debate is insolvable? Does it mean that past proposals were fruitless? Not at all. What it does indicate is that a new approach to modifying the spending power must be taken.

The spending power debate has changed greatly over the past three decades, even since the Charlottetown agreement of 1992. Over the past ten years, there has been a noticeable trend toward the "offloading" or transferring of expenditure responsibilities from the federal government to the provinces. The partnership that enabled the establishment of modern social programming in the 1960s and 1970s is now disappearing.[1] The provinces have become dominant in program spending in the areas of health, education, and social assistance[2], while the federal government has maintained its constitutional dominance in the field of taxation.[3] Underlying the "crisis in Canadian fiscal federalism is the deteriorating

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[1]Michael Butler, "The Current Predicament in Fiscal Federalism in Canada: A Perspective from British Columbia," in Policy Options, Vol. 14, No. 10 (Montreal: Institute for Research on Public Policy, December 1993), p. 22.

[2]For Example, the ratio of federal spending (excluding grants to provinces) to provincial spending fell from 1.71:1 in 1950 to 0.83:1 in 1987. Over the same period, the ratio of federal own-source revenues to provincial own-source revenues fell from 3.13:1 in 1950 to 1.11:1 in 1987. For a more complete discussion, see Boadway and Hobson (1993), p. 5.

[3]This is known as "horizontal imbalance".

financial position of the federal government[4]", which, in turn, has led to increased pressure on provincial governments and some uncertainty about the future of social programs.

A result of federal offloading is that a large portion of the annual federal deficit could be turned over to the provinces.[5] For example, if the federal government were to eliminate cash transfers for health care, the increase in the provincial deficit (assuming the provinces would replace federal dollars without a tax increase, and not cut services), would offset the reduction in federal deficit. If, on the other hand, the federal government were to give the provinces an equivalent amount of tax room to finance the newly acquired expenditure responsibility, the respective deficits would remain essentially unchanged, as would the cost of the service to residents.[6] In brief, unless the provincial governments are given adequate means to deal with new expenditure responsibilities, social programs would have to be cut, or tax revenues would have to be increased.[7] The impact of transferring expenditure responsibilities merely changes who is politically responsible for financing social programs and accumulating the debt to do so.

Federal offloading could also have long term effects on the exercise of the spending power. Future reductions in conditional transfers could limit the federal

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[4]Peter M. Leslie, "The Fiscal Crisis of Canadian Federalism," in A Partnership in Trouble: Renegotiating Fiscal Federalism, eds. Peter M. Leslie; Kenneth Norrie; Irene K. Ip (Winnipeg: Kromar Printing Ltd., 1993), p. 12.

[5]Interestingly, of the provincial debt accumulated between 1987-88 and 1993-94, approximately 80 percent can be attributed directly to cuts in major transfers. See, Butler (1993), p. 23.

[6]Irene K. Ip, "Putting a New Face on Fiscal Federalism," in A Partnership in Trouble: Renegotiating Fiscal Federalism eds. Peter M. Leslie; Kenneth Norrie; Irene K. Ip (Winnipeg: Kromar Printing Ltd., 1993), p. 139.

[7]Boadway and Hobson (1993), p. 141.

government's ability to influence policy development. Any resulting increase in tax room for the provinces to make up for the reduction in cash transfers is also important. Once the federal government creates tax room for the provincial governments, it becomes difficult, if not impossible, to regain it. The federal government's redistributive role and ability to harmonize the tax system could be seriously reduced. As a result, the potential for significant service dissimilarities among provinces may be heightened. This potential service dissimilarity is at odds with the national equity objectives of previous federal governments.

Canadians have reached the point where some difficult decisions must be made about the future of intergovernmental fiscal transfers. The federal government is no longer in a position to contribute to the mega programs that make up the social safety net. Kenneth Norrie has outlined three options for the future of federal involvement in these areas:

> ...one is to let current fiscal trends play out or even take steps to accelerate them, thereby removing the federal government from social policy fields. A second is to bring about a renewed role for the federal government through the resurrection of shared-cost arrangements. The third option, if the federal government is to continue its involvement in the social policy area, is to alter its form so that fiscal transfers could go directly to individual Canadians rather than indirectly through their provincial governments.[8]

Current fiscal trends cannot be permitted to play out themselves out, nor can the offloading of fiscal responsibilities be accelerated. Further removing the federal government from social policy fields could permit the development of a *market place* economy which could leave those who most need the safety net in

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[8]Kenneth Norrie, "Intergovernmental Transfers in Canada: An Historical Perspective on Some Current Policy Choices," in A Partnership in Trouble: Renegotiating Fiscal Federalism, eds. Peter M. Leslie; Kenneth Norrie; Irene K. Ip (Winnipeg: Kromar Printing Ltd., 1993), pp. 124-129.

jeopardy. The principles of universally accessible and portable social services in Canada could be undermined. This is not to say that services should be identical in all provinces — Canada is, after-all, a federal system — but there should be an irreducible minimum level of service available to all Canadians.

Resurrecting the federal role in social programs through shared-cost programs is a viable option. The services provided by current shared-cost programs are still in demand, the programs themselves are merely out of date. Values have changed since the last major shared-cost program, Medicare, was instituted in 1966. Programs must also change to reflect present values. At present, provincial governments might be more inclined to accept this type of funding arrangement based on their need for continued federal funding to maintain social programs. The major obstacle to such a restructuring is the federal government's inability to finance these types of programs.

The third option proposed by Norrie, funding individuals rather than governments, is a concept which has been considered on numerous occasions since the 1969 Constitutional Conference. In the past, the provinces rejected this type of proposal outright because it would have taken money out of their hands, and added to administrative costs.

Gone are the days (with the exception of Quebec), when the provinces staunchly defended their autonomy and complained of a distortion of priorities. If social programs are going to survive, the provinces will have to find a way to keep the federal government and its money involved. The question is how will the provinces do this, in light of the federal Liberal Party's commitment to reduce Canada's involvement in the social policy field?

AGENDA JOBS AND GROWTH: THE GREEN PAPER

On September 18, 1994, Prime Minister Jean Chretien outlined the components of the government's Jobs and Growth Agenda.[9] Mr. Chretien stated that our social safety net, "whose primary purpose is to protect those in our society that need protection, must be recast[10]." Government spending has risen at a rate faster than growth of the economy. The level of debt and deficit in Canada is now unsustainable, and has led to a corresponding decrease in the federal funds available for services government has committed itself to provide.

On October 5, 1994, Minister of Human Resources Development Lloyd Axworthy tabled a discussion paper in the House of Commons entitled Improving Social Security in Canada.[11] The four key components of the Green Paper included: reforming social security; ensuring a healthy fiscal climate; reviewing government programs and priorities; and strengthening the performance of the Canadian economy in investment, innovation and trade.[12] The objective of the Paper was to facilitate discussion on a redefined social safety net. The parameters of the discussion paper are extensive. Examining the proposed changes to the funding structure of the *Canada Assistance Plan* and postsecondary education, both major shared-cost programs, is crucial to understanding the changing role of

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[9]Government of Canada, Office of the Prime Minister, Speech by Prime Minister Jean Chretien to the Canadian Chamber of Commerce (Quebec City, September 18, 1994), 1994.

[10]Canada, Speech by Prime Minister Jean Chretien (1994), p. 2.

[11]Government of Canada, Human Resources Development, Improving Social Security in Canada: A Discussion Paper (Ottawa: Supply and Services Canada, October 1994), p. 5. (Hereafter cited as Green Paper).

[12]Green Paper (1994), p. 5.

the federal spending power in areas of exclusive provincial jurisdiction.

Reforming the Canada Assistance Plan

The federal government considers the *Canada Assistance Plan* (CAP) to be out of date. The belief is that the program no longer effectively meets its objectives, which were designed almost thirty years ago.[13] The money for CAP has not disappeared. On the contrary, the federal contribution continues to be approximately $8 billion annually. The Green Paper merely considers options for distributing these funds differently.

The first option proposed was a universal Guaranteed Annual Income. This would guarantee all families a basic minimum level of income whether they worked or not. However it was concluded that limited federal money could be spent more effectively through programs targeted at problem areas. Child poverty and unemployment are two examples.[14]

A long-term approach of redirecting funding to new priorities was also examined.[15] This redirection of funds would develop only if Canadians and their governments could agree on the nature of this reallocation. For obvious reasons, such as the need to build consensus between the federal and provincial governments as well as the public, the outcome of this proposal was by no means

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[13]As noted in the previous chapter, under the CAP legislation, the federal government agreed to share up to fifty percent of the cost of providing social assistance to people "in need", as well as social services for those "in need" or "likely to be in need".

[14]Green Paper (1994), p. 75.

[15]The Green Paper provides a number of possible priority initiatives which might be considered. These include: better income support for low income families; working income supplement for working poor families; child care and child development initiatives; child support initiatives; employment development services for social assistance recipients; improving access to disability-related supports and services; and continuing support for social assistance. See, Green Paper (1994), p. 76.

certain.

The third option proposed in the Green Paper to reform CAP was the replacement of the current shared-cost funding structure with block-funding. This proposal was endorsed in the February 8, 1995 Report of the Standing Committee on Human Resources Development. In the report the Committee recommended that:

> ...the federal government initiate discussions with the provinces and territories on changing CAP to a block-funded program with more flexible provisions that would enable it to be used for more preventative social services.[16]

Under this arrangement, money would be transferred to the provinces in a single unconditional block, as it is for health and post secondary education under Established Programs Financing (EPF). One of the advantages of block-funding is that the provinces have greater flexibility in the design and implementation of programs because of few, if any, federal conditions. The provinces feel that if they are going to have to cope with less money, it is imperative that they be given the flexibility to do so. Newfoundland Premier, Clyde Wells, stated that:

> ...the federal government should end decades of intrusion into social programs that fall to the provinces in the constitution.... There should be few strings if any attached to the way provinces spend federal transfer payments for health, welfare, and postsecondary education. They have to let the provinces run the programs as they see fit.[17]

The major disadvantage of block-funding, for the federal government, is the loss of its leverage in the design and implementation of social programs because of the

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[16]Government of Canada, Security, Opportunities and Fairness: Canadians renewing their social programs. Report of the Standing Committee on Human Resources Development, by Francis G. Leblanc, Chairperson (Ottawa: Publishing Services, February 8, 1995), p. 44.

[17]*Edmonton Journal*, 16 February 1995.

unconditional nature of the transfers.[18]

Why would the federal government want to make CAP transfers block-funded? The answer is unmistakable, and will reappear throughout the remainder of this chapter — fiscal restraint!

If federal transfers under CAP were a one-time block-fund, the federal government would be freed from the escalating nature of the current open-ended CAP transfer. For example, if (most likely when) the Canadian economy were to enter into another period of major recession, the increased cost of providing assistance to those in need would be borne by the provincial governments alone. This is advantageous to the federal government, but not for the provinces or its residents who could see a reduction in services coincide with the reduction in federal funds.

Postsecondary Education

As a nation, "we spend the equivalent of 2.6 per cent of the value of our entire economy on postsecondary education."[19] This represents a greater share of Gross Domestic Product (GDP) than is spent by any other nation.[20] Federal transfers for education total approximately $8 billion annually, supporting almost half of the system's $16 billion cost. The largest component is the $6.1 billion EPF transfer, consisting of $3.5 billion in non-recoverable tax points and $2.6 billion in

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[18]There remains the *Canada Health Act* as a model for determining how funds are to be spent. Also, there have never been strict conditions on postsecondary education funding other than funds could not be spent on buildings.

[19]Green Paper (1994), p. 57.

[20]Green Paper (1994), p. 57.

cash.[21]

The 1994 federal budget froze EPF transfers to the provinces at the 1993-94 level, beginning in the fiscal year 1996-97. This means that over time the cash portion of the transfer will disappear. The Green Paper proposed that rather than adopting a "hands-off" approach to declining federal cash transfers for postsecondary education:

> ...action could be taken promptly to shift that spending from support to institutions via the provinces, to a system of expanded student loans and restructured grants to individuals.[22]

This would be accomplished through a new system of Income Contingent Repayment loans (ICR). ICR payment schedules would be based on an individual's ability to repay after graduation.[23] This is intended to increase fairness and access to government funding for education.

The Standing Committee on Human Resources Development

> ...endorses the income contingent repayment loan (ICR) principle as part of a comprehensive approach to improved student assistance. It recommended that concrete proposals for a contingent repayment loan scheme be developed in consultation with all stakeholders, including provinces, PSE institutions, and particulary, students.[24]

At first, this proposal seems attractive to students. Individual students would have a stable and predictable source of funding, and student loan repayments

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[21]These numbers are derived from the Green Paper. See, Green Paper (1994), p. 60. It must be noted that the federal government takes credit for tax points collected by the provincial governments, and uses this amount in tallying the federal contribution for postsecondary education. However, this amount does not show up in the federal governments budget.

[22]Green Paper (1994), p. 62.

[23]Green Paper (1994), pp. 63-64.

[24]Canada, Security, Opportunities and Fairness (1995), p. 86.

would be geared to future earnings. The implications of this proposal are not all positive, however.

By replacing the existing system with a redefined student loan program, the federal government is erasing the cash portion of the EPF transfer immediately without any change to tax points. Income contingent repayable loans are just that, repayable.[25] The decrease in federal funds to the provinces will, in theory, leave the universities in the same position if they increase tuition. This would shift the burden of payment to the students through higher fees.

The Standing Committee on Human Resources Development acknowledged that the policy would lead to tuition increases. They answered concerns about increased tuition as follows:

> ...it is important to stress again that, *while phasing out PSE transfers will likely have an impact on tuition ranges, the federal government does not establish tuition policy...* where provinces desire to restrain tuition increases, *it will be up to them to reorder their priorities*, helping universities and colleges discover efficiencies through the use of technology and better administrative practices. It is not the federal government's place to prescribe the outcome of these issues.[26]

The new policy would have been a major reversal of the federal government's assumed responsibility to promote universally accessible postsecondary education to Canadians.[27]

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[25]The federal government is accountable for the initial expenditure, but it will be reimbursed. Reimbursement might not be in full as a result of default, but the federal government will regain a substantial portion of this expenditure.

[26]Canada, Security, Opportunities and Fairness (1995), p. 84. (emphasis added).

[27]If tuition does not stay within an acceptable variance across the country, the principle of portability in postsecondary education will be gone. Students may be forced to stay in a particular province because of high tuition elsewhere, or, alternatively, they may be forced to move to another province because of the affordability of education there.

Why, then, are postsecondary transfers being cut? J. Robert S. Prichard, President of the University of Toronto, ventured some reasons in his submission to the Standing Committee on Human Resources Development. He said:

> The Government of Canada gets no visibility. The Government of Canada gets no credit. The Government of Canada gets disproportionate blame. The Government of Canada lacks an instrument of public policy to express its views because grants are unconditional, unaccountable and invisible, as they are made in the form of cash to the provinces.[28]

This line of argument would have been more appropriate in the late 1970s, or early 1980s. It is very clear what the federal government sought to achieve through the Green Paper proposals. It is getting its fiscal house in order and is prepared to see postsecondary education move to a user pay system.

The Green Paper served notice of the federal governments withdrawal from the social policy field. The Paper noted that:

> Crucial elements of the system, notably education and social assistance, are the mandate of the provincial and territorial government's. The federal government has no intention of intruding where it should not.[29]

This must have been a very difficult statement for the Liberal Party. First, it was this party that fostered the massive expansion of social programs in the post-war era. Second, these areas have always been matters of exclusive provincial jurisdiction — why the sudden respect for this fact? The answer is twofold.

First, the Green Paper was designed before the election of the Parti

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[28]Dr. J. Richard S. Prichard (President, University of Toronto), Submission to the Standing Committee on Human Resources Development, November 29, 1994. Issue No. 49, p. 112.

[29]Green Paper (1994), p. 11.

Quebecois in Quebec. Devolving powers to the provinces through block-funding would have been a way for the federalist forces in Quebec to show that federalism works. The hope was that this devolution would appeal to the soft nationalists in Quebec, and perhaps turn the tide on separatism.

The second reason for the quasi-respect for provincial jurisdiction is that the federal government is no longer financially capable of supporting social programs in areas of provincial jurisdiction. This begs the question: is the type of reform proposed in the Green Paper possible with the state of the Canadian economy? The answer is both no, and yes. Mr Axworthy himself stated that:

> To secure social policy, you have to have a reasonably secure fiscal system, which we don't right now. Therefore, the government will have to deal with its budgetary problems before it will be able to get on with reforms.[30]

This would seem to indicate that federal fiscal problems, the motivating factor behind the Green Paper review of the safety net, have overtaken the proposed reform.

THE 1995 FEDERAL BUDGET

On February 27, 1995, Minister of Finance Paul Martin delivered an historic budget to the House of Commons. In it, Mr. Martin drastically altered the way in which the federal government transfers money to the provinces for social programs. It was said that Mr. Martin delivered notice to Canadians that "the government responsible for giving the country old-age pensions, family allowances, unemployment insurance, and medicare will no longer protect the safety net[31]."

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[30]*Globe and Mail*, 31 January 1995.

[31]Edward Greenspan, *Globe and Mail*, 4 March 1995.

While this may overstate the changes, the centralized fiscal federalism that is characteristic of the post-war era and the Liberal Party appears to be in its twilight.

The budget announced that, beginning in 1996-97, the two remaining major federal provincial shared-cost programs, Established Programs Financing[32] and the *Canada Assistance Plan*[33], will be amalgamated into a single transfer — the Canada Social Transfer (CST).[34] The CST will be made up of cash transfers and to date unspecified tax points. It will be provided to the provinces in the same way that EPF is, unconditionally in a single block-fund. Under current EPF arrangements, the only conditions are those found in the *Canada Health Act*. The CST will function much the same. There will be no distinct envelopes for health, postsecondary education, or social assistance (CAP), but provinces must observe the principles of the *Canada Health Act*, and the CAP requirement of no minimum residence requirements for social services.

Under the Canada Social Transfer, funding to the provinces will be reduced from the $29.4 billion in 1994-95. In 1996-97, the CST to the provinces "will be reduced from what it would otherwise have been by $2.5 billion to $26.9 billion[35]". In the following year "it will be reduced from what it would have otherwise been in

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[32]This program is comprised of health and postsecondary education. The EPF transfer is an unconditional block-fund.

[33]Up to this point, the cost of providing assistance in the provinces was shared equally between the federal government and the provinces since 1966. This is with the exception of Ontario, Alberta, and British Columbia whom, as a result of Bill C-69 which took effect February 1, 1990, have had a ceiling of five percent put on their CAP transfers.

[34]This effectively killed the social reform of the Green Paper. The section on unemployment insurance, however, was unaffected.

[35]Government of Canada, Department of Finance, Fact Sheets (Ottawa: February 27, 1995).

1997-98 by $4.5 billion to $25.1 billion[36]". (See, Table 5.1)

Table 5.1

	1993-94	1994-95	1995-96	1996-97	1997-98
	(millions of dollars)				
Current arrangements					
CAP	7,719	7,952	7,952		
EPF-PSE	6,108	6,177	6,251		
EPF-Health	15,128	15,299	15,483		
Total	28,955	29,428	29,686		
Canada Social Transfer				26,900	25,100
Equalization	8,034	8,332	8,870	9,270	9,618
Total major transfer entitlements of which[1]	36,212	36,974	37,745	35,351	33,889
Tax point transfers[1]	11,290	11,729	12,572	13,248	13,968
Cash transfers	24,922	25,245	25,173	22,103	19,921
Change in entitlements from 1994-95 levels				1,623	3,085

[1]Equalization associated with EPF/CST tax points appears on both Equalization and EPF/CST entitlements. It has been subtracted from "Total major transfer entitlements" and "Tax point transfers" to avoid double counting.[37]

The reaction of the provinces to the changes in the budget focused on how the cuts would effect each provincial treasury. Only the province of Alberta has applauded the cuts, and even this was only a lukewarm reception.

The major selling point of the CST to the provinces is the same as that of the Green Paper's proposal on block-funding; freedom from federal restrictions and more flexibility in the development and implementation of programs. The CST will also avoid the costly overlap and duplication characteristic of programs being administered by two orders of government. It should be noted, however, that

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[36]Government of Canada, Department of Finance, Fact Sheets (Ottawa: February 27, 1995).

[37]Department of Finance, 1995.

equalization payments to the *have-not* provinces will not be reduced.

Furthermore, money can be shuffled between the three programs as the CST does not designate a particular portion of the transfer to each of the three programs (postsecondary education, health, or CAP). This means that a province can shift funds among programs to meet provincial priorities.[38] This is similar in intent to the National Adjustment Grant proposed in Rowell-Sirois over fifty years ago.[39]

One of the primary concern raised by the CST is whether or not the principles of the *Canada Health Act* will be upheld. The budget says that:

> The conditions of the *Canada Health Act* will be maintained: universality, comprehensiveness, accessibility, portability, and public administration. For this government, those are fundamental.[40]

This position has since been reinforced by the Minister of Health: "We are going to monitor what provinces are doing. We are going to continue to enforce the *Canada Health Act*[41]."

Alberta provides an illuminating example of what may happen to health care in the future. At present, there are between 15 and 17 semi-private[42] health clinics operating in Alberta. Albertans paid between $3 million and $4 million

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[38]This is beneficial unless a particular province feels that education, or social services, for example, are not included in the province's priorities.

[39]National Adjustment Grants are discussed briefly in Chapter Two.

[40]Canada, House of Commons Debates, Volume 133, Number 160, 1st Session, 35th Parliament (Ottawa: Monday, February 27, 1995), p. 10099.

[41]*Globe and Mail*, 18 March 1995.

[42]A semi-private clinic is one that is funded by the individual through facility fees, and by the government.

dollars in facility fees last year. Facility fees limit access to these services to those who can afford to pay for them. This results in differential access to government funded health care, and may lead to a two-tiered health care system.[43]

Federal Minister of Health Diane Marleau has threatened to deduct the amount collected by delinquent provinces from the transfer Ottawa currently pays under the *Canada Health Act*, or claw back equalization payments. In Alberta, these threats can be seen as weak, at best. First, Alberta contributes to, it does not receive equalization payments.[44]

Second, if Albertans were to pay $5 million dollars in facility fees next year, the corresponding deduction from the transfer under the *Canada Health Act* would have little fiscal impact on the provincial treasury. The province has already saved the $5 million expenditure by having people pay fees; reducing the federal transfer by the equivalent would leave the province even (provided the service is something that is covered by the *Canada Health Act).*

To ensure that the principles of the *Canada Health Act* are upheld, a stronger disincentive may be necessary. If federal transfers were reduced at a ratio of 2:1 (federal dollars to facility fees paid), the offloading province might be more inclined to comply. Until then, why would they? Moreover, as cash transfers to the provinces decrease so to will federal leverage. It is therefore entirely possible that at some time, the provinces will have a free hand to spend as they

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[43]As an interesting side note, on February 15 1995, Bill 215, the *Alberta Health Care Entitlement and Accountability Act* was introduced and defeated in the Alberta legislature. This Bill would have ensured the right to basic health care for Albertans and would have ensured that the government is held accountable for providing health care services effectively. See, Alberta, Alberta Hansard, The 23rd Legislature, Third Session, Number 4 (Edmonton: Wednesday, February 15, 1995), pp. 46, 69.

[44]*Globe and Mail*, 18 March 1995.

please and contravention of the *Canada Health Act* would become immaterial.[45]

The budget further established that:

> the Minister of Human Resources Development will be inviting all provincial governments to work together on developing, through mutual consent, a set of shared *principles* and *objectives* that could underlie the CST.[46]

The terms *principles* and *objectives* are very familiar to the student of fiscal federalism. In any case, they do not represent standards. Analysis of the Meech Lake Accord's spending power proposal, Beaudoin-Dobbie, and Charlottetown have proven this. *Principles* and *objectives* are political concepts which are unenforceable.

The federal government is now back-peddling about what its commitment to programs such as Medicare should be. Prime Minister Chretien has since said that: "Medicare is not intended to pay for dental care, eyeglasses or even ambulance trips, but to protect people from catastrophic medical bills[47]." Mr. Chretien sounds like a 1950s politician campaigning for a bare minimum coverage in health care, not the standard the Liberal Party has helped to develop over the past four decades. The direction the budget has set out for social programs is clear. Economic and political responsibility will lie with the provinces.

WHERE DO WE GO FROM HERE ?

The 1995 federal budget has accomplished legislatively what more than

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[45]The only leverage Parliament will retain is the fact that it can deduct funds from any source for a contravention of the Act — e.g. equalization in the *have-not* provinces, or any other transfer in the *have* provinces. Whether this power would be used, one can only speculate.

[46]Canada, House of Commons Debates, Volume 133, Number 160, 1st Session, 35th Parliament (Ottawa: Monday, February 27, 1995), p. 10099. (emphasis added).

[47]Quoted form an interview on CBC's *Morningside* in, *Edmonton Journal*, 2 March 1995.

thirty years of constitutional negotiation could not — it has effectively limited the use of the federal spending power in areas of provincial jurisdiction. The spending power ends as it began, through federal initiatives. Canada's fiscal realities have forced the federal government to modify its position since World War II and return to a period more resembling that of classical federalism. The federal government has been forced to disburse (or offload) the majority of the cost of providing social programs amongst the provinces. The question is not only what effect this change will have on these services, but also what effect will it have on Canadian fiscal federalism?

One of the defining principles of Canadian fiscal federalism over the last quarter century has been its redistributive character. The taxpayers of the more affluent, or *have* provinces, have provided equalization payments to the less affluent *have-not* provinces. This redistributive aspect may be adversely effected by the changes brought about by the 1995 federal budget. As early as October 1994, Premier Bob Rae warned that Ontario intends "not to remain a silent partner in Confederation that willingly subsidizes another provinces' social programs[48]." Economist Paul Boothe noted that:

> Mr. Martin's budget is fundamentally changing the federal fiscal system by reducing transfer payments while equalization rises. Transfer payments go to all of the provinces while equalization payments go to the *have-not* provinces. On balance, Martin's plan will take more and more from the provinces of Alberta, British Columbia, and Ontario.[49]

How much longer can the *have* provinces be expected to subsidize social programs

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[48]*Globe and Mail*, 7 October 1994.

[49]*Edmonton Journal*, 28 February 1995.

in other provinces? Premier Rae, as yet the most outspoken premier of the *have* provinces, warned that residents of Ontario "may one day decide to say no to equalization grants to the *have-not* provinces if the trend established by the federal budget continues[50]." Whether or not Ontario residents actually have a direct say in this, through a provincial election, is questionable, but it does raise the point that the "sense of community" in Canada is wearing thin. This sort of provincial self-interest (or self-preservation, depending on one's perspective), could be the direction in which fiscal federalism is heading.

> The more we become driven into ourselves as provinces, the harder it is going to be for us to find within the provinces... the wellspring of generosity that's helped bring this country together.[51]

One cannot ignore the realities of the Quebec sovereignty question in influencing federal policy making. Nevertheless, federal withdrawal from national social programs through the 1995 budget may, in the long-run, pose a greater threat to Canadian unity.

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[50]*Globe and Mail*, 6 March 1995.

[51]*Globe and Mail*, 6 March 1995; A 1994 Ontario government publication set out the basis for this argument as follows: Sharing Canadian tax revenue ensures that people in all provinces receive similar levels of services. Ontario... does not seek to receive money under this program. But the evidence shows that, in many respects, Ontario taxpayers have not been getting their fair share of the federal spending pie. Ontarians pay about $15 billion more in federal taxes than they receive in federal spending. Some of this is a legitimate reflection of sharing wealth; some of it is not. See, Ontario, Ontarians Expect Fairness From the Federal Government (Toronto: January, 1994), p. 1.

Chapter Six

Summary and Conclusions

Parliament's use of its spending power has been a source of continuous tension between the two orders of government since the 1930s when its use became widespread. A major premise of this thesis is that regardless of what direction efforts take to ease these tensions, they would disappear only to reappear in a different form.

The debate over the spending power is, and always has been, political. The tension caused by federal presence in areas of exclusive provincial jurisdiction is not about the constitutional allocation of jurisdiction. If it was, it is certain that by now a provincial government would have taken Canada to court over its use of the spending power. The debate combines elements of principle and power, and the right to control the resources necessary to determine policy development within the federation.

Historically, governments have addressed the spending power politically.[52] From the proposals of the Rowell-Sirois Commission in 1940, to the series of shared-cost programs which emerged in the post-war period, political means have been sought to resolve the tension inherent in the exercise of the spending power (examples of this are the *Established Programs (Interim Arrangements) Act*, 1965, and *Established Programs Financing* (EPF) in 1977). In 1968 the focus of the debate shifted to constitutional reform. This lasted until the failure of Charlottetown in 1992, after which political reform reemerged in the form of the

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[52]There have been constitutional amendments directly linked to the spending power. Unemployment insurance, and old-age pensions are two examples.

Canada Social Transfer.

As early as the 1968-1971 constitutional negotiations, cleavages began to appear among provincial governments due to their differing positions on the spending power. It became clear that every government had its own priorities, producing diverse perspectives on the federal spending power. Those provinces less able to finance social programs felt that the role of the federal government was essential. On the other hand, the more affluent provinces (in particular Alberta and British Columbia), sought the highest degree of autonomy by limiting the spending power.

Quebec's position was more linked to its desire to be *maîtres chez nous*, and its goal to preserve and promote its cultural identity. Quebec's principle concern was the effect federal presence in areas of provincial jurisdiction would have on its advancement as a society, rather than the federal government acting unconstitutionally. The latter argument was used to support the former. It was this position that motivated Quebec to reject the proposed limitations to the spending power at Victoria in 1971, an action which led to the demise of the Victoria Charter. In short, this first attempt at reforming the spending power by constitutional amendment revealed that intergovernmental tensions go beyond federal-provincial, they also exist at the interprovincial level.

Proposals to limit the spending power continued throughout the 1970s. The stumbling block during this period was a lack of agreement among the provinces whether or not to limit the spending power, and if so, how to compensate non-participating provinces. A proposal to meet these concerns was accomplished in the 1987 Meech Lake Accord.

In studying the Meech Lake Accord, it is apparent that outside of Quebec, there was not a groundswell of support for constitutionally entrenching a limitation to the spending power. In fact, there were criticisms from a number of groups on any limitation. Provincial governments supported the spending power proposal for one reason — to get Quebec's support for the Constitution Act, 1982.

Meech reflected compromise between the constitutional and political approaches to reforming the spending power. Entrenching the section would have constitutionalized the spending power, but political negotiations would have been necessary to give the provision any meaning. This would include: determining a formula for consensus; establishing the minimum conditions of the program, and ascertaining when a provincial program met national objectives. Each involves further intergovernmental negotiations, either multilaterally or bilaterally, and underscores the inescapably political nature of the debate. Reaching a consensus does not guarantee that intergovernmental tensions will be eased, in fact, they could be increased.

Parts of the Charlottetown Accord are clearly a political exercise rather than constitutional reform. In drafting the agreement, the emphasis placed on the likely political reaction seemed in places to surpass the constitutional implications of the particular sections. The Charlottetown proposal on the spending power resembled those proposed in Meech Lake, and in Beaudoin-Dobbie, yet the agreement went far beyond either. The fact of the matter is that other parts of Charlottetown addressed the spending power. The agreement reached on the six policy fields, and Labour Market Training and Development shows the very real cleavage between the *have* and *have-not* provinces. Only in Canada can one find a

clause both limiting and requiring the spending power.

This leaves one to ask: would constitutional reform of the spending power be possible if it were dealt with alone? The answer is, probably not. The *have-not* provinces, those in Atlantic Canada, Manitoba, and Saskatchewan, would not approve an amendment to limit the federal spending power as they are most in need of federal transfers in the social policy area. This was demonstrated in their reluctance to support proposals on a formula for determining consensus in 1969, and in their demand for the maintenance of a federal presence in the various policy fields in Charlottetown.

Although the Quebec Liberals have endorsed a constitutional amendment on the spending power, it is extremely unlikely that the current Parti Quebecois government would support an amendment that would constitutionally entrench the spending power, regardless of the limitations such an amendment would bring. Endorsing any amendment on the spending power would represent a recognition of the legitimacy of the spending power, and an acknowledgement by the Parti Quebecois that Quebec's needs could be met within the federal system.

Between these two groupings of provinces, the six *have-not* provinces and Quebec, the success of a separate amendment requiring seven provinces comprising fifty percent of the population is extremely unlikely.[53] Other than Quebec, it is hard to conceive of any of the *have-not* provinces leading the charge for constitutional reform which would limit or eliminate the federal spending power.

Canadian fiscal federalism has changed markedly since 1969. Fiscal

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[53]It is recognized that Quebec is considered a *have-not* province, but this has not deterred it from pursuing its constitutional agenda.

restraint is the order of the day, and the federal government is withdrawing from the social policy field. The 1995 federal budget marks the return of change through the political process to the spending power. With one federal initiative, the limitation sought by some for over thirty years has been achieved. The provinces should be happy then, right? Wrong.

The differing reactions of the provinces to the budget reiterate the political, rather than the constitutional nature of this debate. If the debate were strictly constitutional, the provinces would be happy with the current situation. The federal government is withdrawing from areas of exclusive provincial jurisdiction, and giving the provinces more flexibility in the way they may spend federal funds. The problem is that federal funds are also being reduced, hence, intergovernmental tensions are maintained. Interprovincial tensions could also increase should the incidence of negative spillovers result from reduced services in some provinces. This is manifest in the position adopted by Premier Bob Rae. Mr. Rae stated that: "When the watering hole gets smaller, the animals tend to look at each other a little differently[54]".

The advantage of dealing with the spending power politically is that the arrangements arrived at need not be permanent, and are therefore alterable as economic conditions change. Future federal governments could modify the current arrangements if they so desire. This could be achieved through further budgetary measures, or they could increase spending — i.e. return to a shared-cost approach.

The lack of permanence in the political approach is one reasons why constitutional reform was so unsuccessful. If an amendment had been achieved,

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[54]*Globe and Mail*, 25 March 1995.

the flexibility to redefine the spending power to reflect changing circumstances would have been reduced. Granted, under Meech, there was nothing in the provision that would have prevented the federal government from dismantling current programs and starting new ones when the economy was healthier. However, the rigid conditions for establishing programs, if entrenched in the constitution, would have made doing so extremely difficult.

THE FUTURE OF THE SPENDING POWER

What will the role of the federal spending power be in the future? The spending power may reemerge as it first did during the Depression in the 1930s when some provinces were unable to cope financially with the increased expenditure responsibility. Furthermore, potential service dissimilarities resulting from the Canada Social Transfer might create a situation where segments of the public demand federal presence in an area of exclusive provincial jurisdiction to maintain national standards.

After Established Programs Financing took effect in 1977, the principles found in medicare were modified in some provinces to the point where the public demanded federal action. The result was the *Canada Health Act*, 1984 which was passed to ensure that provincial governments continued to meet a certain minimum standard in order to preserve their funding.

One thing is clear, as long as the term "deficit financing" sours the mouths of Canadians, there is reason to believe that the devolution of expenditure responsibilities from the federal to provincial governments will continue. This has the potential to create service dissimilarities, which may in turn lead to a trend known as "social dumping". Social assistance in Alberta provides an example of

social dumping. It is estimated that "more than 42,000 people have disappeared from Alberta's welfare rolls" since the province began slashing its social assistance budget over eighteen months ago.[55] Approximately 700 to 800 of these welfare recipients show up in British Columbia every month.[56] Thus, Alberta reduces the cost of providing social assistance in the province at the expense of neighbouring British Columbia, and other Canadian provinces with higher levels of social assistance (namely Ontario). While devolving expenditure responsibilities would achieve the federal government's objective of reducing its annual deficit, it may create a whole different set of problems to be dealt with by a different order of government.

Regardless of the potential change offloading may have on the level of services available in different provinces, the need for national standards in social services has not disappeared. The use of the spending power remains the most valuable means the federal government has to promote national equity objectives.[57] However, the federal government is voluntarily relinquishing this power, and with it the ability to establish and maintain national standards and foster national unity. What is not known is whether the federal government has abandoned the field permanently or temporarily.

Programs such as CAP, health care, and postsecondary education have been, and continue to be an important part of Canada's social fabric. Has the

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[55]*Globe and Mail*, 9 February 1995.

[56]*Globe and Mail*, 4 March 1995.

[57]Boadway and Hobson (1993), p. 159. The tax system also remains important in promoting national equity.

federal government completely relinquished its controls? They say not, however, as the cash portion of transfers declines their leverage is reduced. Even though federal financial transfers account for only 25 percent of the total cost of some programs, the continued threat of fiscal penalties are still tough enough to make or break a program in some provinces. But for how long? How small can the federal contribution get before this threat becomes ineffective? This is hard to predict because the provinces are still dependent on these funds. Even here there may be a difference between the *have* and the *have-not* provinces should the potential reductions be applied to equalization payments. If this were the case, it would serve to increase the difference between rich and poor fostering further tensions within the federation.

The new direction for social programs undertaken by the introduction of the Canada Social Transfer may lead away from national standards and the sense of nationhood provided by universally accessible social programs. Social Canada as we have known it has been changed, for how long is unknown.

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