

Defining the Federal Government's Role in Social Policy: The Spending Power and Other Instruments

With contributions by
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Biographical Notes

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Introduction

Limiting the use of the federal spending power in areas of provincial jurisdiction, particularly social policy, was on the agenda of most of the constitutional negotiations that began in the late 1960s. The issue was of particular interest to Quebec, but a number of other provincial governments also resented some of the ways the spending power had been used over time. Although all governments agreed to certain limits in the Meech Lake and Charlottetown accords, the rejection of the latter in 1992 ended attempts to provide for constitutional limits on the spending power.

In the 2006 election campaign, the Conservative Party promised to adopt an open federalism approach in its relations with the provinces. It is in this context that the issue of the spending power was revived, with the commitment in the 2007 Speech from the Throne to introduce legislation to place limits on its use for new shared-cost programs in areas of exclusive provincial jurisdiction. This prompted the IRPP to commission two research studies and to hold a roundtable in Ottawa on June 12, 2007.

The event brought together academics, senior government officials and representatives of a range of national organizations active in health, post-secondary education and other policy fields. Earlier versions of the studies by Hamish Telford and Peter Graefe were presented at the roundtable, and Keith Banting was the rapporteur on the discussion of those papers and other comments by participants.

Since the Harper government did not introduce legislation before the 2008 election, the scope of the spending power remains an unresolved issue, and it is hoped that this publication will inform any future effort to constrain its use. Moreover, these studies address broader issues that affect intergovernmental relations, including ways in which the federal government seeks to influence the shape of social policies and programs and the role of intergovernmental processes in this regard.

In his paper, Hamish Telford first reviews the basis of the long-standing attempts to limit the spending power, focusing on two theories of citizenship that help explain the continuing controversy on this issue. Successive Quebec governments have seen the uses of the spending power as an intrusion that undermines the province's efforts to

maintain its particularity in the Canadian federation, while the federal government has traditionally employed the spending power to facilitate what Telford labels “universality of citizenship.” Telford explores two options to reconcile these opposing views: 1) a constitutionally entrenched “social charter” that would, he says, obviate the federal government’s need to use the spending power to promote universality of citizenship; and 2) an intergovernmental agreement under which Quebec would have the right to opt out of shared cost social programs with unconditional compensation. Telford concludes that the government of Canada is unlikely to advance either option in the foreseeable future and that restricting the spending power will remain unresolved for some time yet.

Peter Graefe begins by assessing the commitment in the 2007 Speech from the Throne, and concludes that the proposal, if implemented, would not have made much of a difference because it is difficult to identify a federal initiative in the past 25 years that would have been covered by its criteria. The main part of Graefe’s paper is an analysis of how the federal approach to exercising leadership in social policy has evolved from shared-cost programs to direct transfers to individuals and organizations. In the intergovernmental realm, the past several years have seen greater emphasis on obtaining provincial government commitments to jointly develop indicators, share best practices and report to citizens. As Graefe notes, some Quebec nationalists still find federal initiatives too intrusive, while centralists claim that the federal government has lost much of the policy influence they believe its transfers should allow. The author closes by discussing how intergovernmental processes could be further adapted in light of these criticisms, including through additional program asymmetry for Quebec and more effective forums for governments to share agendas and innovations.

The final part of this publication is Keith Banting’s report on the roundtable. Banting’s report is based on the insightful overview that he provided at the conclusion of the event. In addition to reviewing the discussion on the Telford and Graefe papers, each of which was the focus of a session, he comments on the opening keynote address by Senator Hugh Segal. Banting’s observations are structured around four questions: 1) Do we have a problem? 2) What are the criteria for choice?

3) What are the options before us? and 4) What are the prospects for change? On the last question, Banting described the overall direction of the discussion as follows: Unless the government of Quebec supported federal legislation, the move might not enhance the legitimacy of federalism in that province; however, a stronger proposal than the 2007 commitment would risk sparking significant opposition from defenders of the federal role in the rest of the country. In Banting's words, "finding a magic formula that would contribute to reconciliation in the country as a whole remains a formidable challenge."

F. Leslie Seidle
Project Director

Introduction

L'encadrement du pouvoir de dépenser du gouvernement fédéral dans les domaines relevant de la compétence des provinces — les politiques sociales, en particulier — était à l'ordre du jour de la plupart des négociations constitutionnelles qui ont eu lieu à partir de la fin des années 1960. L'enjeu revêtait une importance toute particulière pour le Québec, mais d'autres provinces critiquaient également la façon dont le pouvoir de dépenser avait été utilisé dans le passé. Tous les gouvernements avaient accepté qu'il soit assujéti à certaines limites dans les accords du lac Meech et de Charlottetown, mais le rejet de ce dernier en 1992 a mis fin aux tentatives visant à imposer des limites constitutionnelles au pouvoir de dépenser.

Au cours de la campagne électorale de 2006, le Parti conservateur a promis d'adopter une approche axée sur le « fédéralisme d'ouverture » dans ses relations avec les provinces. C'est dans ce contexte que la question du pouvoir de dépenser est revenue à la surface : dans le discours du Trône de 2007, le gouvernement fédéral a annoncé qu'il entendait présenter un projet de loi visant à limiter le recours à cet instrument pour les nouveaux programmes à frais partagés touchant les domaines relevant de la compétence exclusive des provinces. C'est ce qui a amené l'IRPP à commander deux études sur le sujet et à organiser une table ronde, qui s'est tenue à Ottawa le 12 juin 2007.

Cette rencontre a réuni des universitaires, des hauts fonctionnaires et des représentants de plusieurs organismes nationaux actifs dans les secteurs de la santé, de l'enseignement postsecondaire et d'autres domaines de politique sociale. Hamish Telford et Peter Graefe ont présenté des versions préliminaires de leurs études respectives, tandis que Keith Banting y a joué le rôle de rapporteur des débats.

Comme le gouvernement Harper n'a pas déposé de projet de loi avant de déclencher l'élection de 2008, la question de l'ampleur du pouvoir de dépenser n'est toujours pas résolue. L'IRPP espère que la présente publication apportera un éclairage nouveau sur toute tentative visant à en restreindre l'utilisation à l'avenir. Les études de Telford et de Graefe abordent également des questions plus générales qui se répercutent sur les relations intergouvernementales, y compris les moyens employés par Ottawa pour influencer les politiques et les programmes sociaux, et le rôle que jouent les processus intergouvernementaux à cet égard.

Dans son étude, Hamish Telford examine d'abord le fondement des démarches visant à restreindre le pouvoir de dépenser. Il évoque deux théories de la citoyenneté qui aident à comprendre pourquoi cette question continue de soulever la controverse. Les gouvernements qui se sont succédés au Québec ont considéré le pouvoir de dépenser comme une intrusion compromettant les efforts de la province en vue de préserver le caractère singulier du Québec au sein de la fédération canadienne, tandis que le gouvernement fédéral s'en est servi pour favoriser l'application universelle de la citoyenneté, ce que Telford appelle *universality of citizenship*. Il examine deux options qui pourraient concilier ces positions opposées : 1) l'insertion dans la Constitution d'une « charte sociale », qui éliminerait la nécessité pour le gouvernement fédéral de se servir de son pouvoir de dépenser pour promouvoir l'application universelle de la citoyenneté ; 2) un accord intergouvernemental aux termes duquel le Québec pourrait se retirer des programmes à frais partagés et recevoir une compensation inconditionnelle. Il est peu probable, estime Telford, que le gouvernement fédéral se fasse le promoteur de l'une ou de l'autre dans un avenir prévisible, de sorte que la question de l'imposition de limites au pouvoir de dépenser risque de rester sans solution.

Peter Graefe rappelle lui aussi l'engagement pris dans le discours du Trône de 2007 et conclut que si cette proposition avait été mise en pratique, elle n'aurait pas changé grand-chose, car il est difficile de trouver même une seule initiative prise par le gouvernement fédéral au cours du dernier quart de siècle qui correspond aux critères envisagés. L'étude de Graefe examine le leadership exercé par Ottawa dans le domaine des politiques sociales et constate que le fédéral privilégie aujourd'hui les transferts directs aux particuliers et aux organisations, au détriment des programmes à frais partagés. Au niveau des relations intergouvernementales, Ottawa demande depuis plusieurs années que les provinces s'engagent à élaborer des indicateurs sociaux communs, à s'échanger des renseignements sur les pratiques les plus efficaces et à faire rapport à leurs populations respectives. Certains nationalistes québécois continuent de considérer les initiatives fédérales trop intrusives, tandis que les partisans de la centralisation jugent qu'Ottawa a perdu une part importante de l'influence qu'il devrait pouvoir exercer, compte tenu des montants transférés. L'auteur termine en montrant comment les processus intergouvernementaux pourraient être modifiés à la lumière de ces critiques, notamment en accentuant la dimension

asymétrique des programmes en faveur du Québec et en mettant en place des lieux de rencontre plus efficaces pour la mise en commun des priorités et des innovations.

Finalement, dans la dernière partie, on peut lire le compte rendu de la table ronde préparé par Keith Banting. Ce texte s'inspire du sommaire très perspicace que Banting a présenté à la fin de la rencontre. En plus de résumer les débats qui ont suivi les exposés de Telford et de Graefe (chacun avait fait l'objet d'une séance distincte), Banting commente l'allocution liminaire prononcée par le sénateur Hugh Segal. Banting articule ses observations autour de quatre questions : 1) Y a-t-il vraiment un problème ? 2) Quels critères faut-il utiliser pour faire un choix ? 3) Quelles options se présentent à nous ? 4) Quelles sont les perspectives de changement ? En réponse à cette dernière question, Banting décrit les conclusions générales de la discussion dans les termes suivants : si le gouvernement du Québec n'appuie pas la législation proposée par le gouvernement fédéral, il est peu probable qu'une telle loi accroisse la légitimité du fédéralisme au Québec ; une proposition qui irait au-delà de l'engagement pris en faveur des provinces dans le discours du Trône risquerait de déclencher une forte opposition parmi les défenseurs du rôle du gouvernement fédéral dans le reste du pays. C'est pourquoi, conclut Keith Banting, la recherche d'une formule qui aiderait à concilier les points de vue d'un bout à l'autre du pays continue de poser un défi qu'il sera difficile de surmonter.

F Leslie Seidle
Directeur du projet

The Spending Power
Revisited: Can Open
Federalism Bridge the
Divide between Quebec
and the Rest of
Canada?

Hamish Telford

Summary

The spending power has been one of the most intractable problems in Canadian federalism over the past half-century. The dispute over its constitutionality and political legitimacy has been waged primarily by the governments of Canada and Quebec. This study argues that the dispute stems from two different conceptions of the federal principle and, ultimately, two theories of citizenship. In brief, the government of Quebec has resisted the spending power in the name of provincial autonomy and from a desire to promote the province's particularity, while the government of Canada has employed the spending power to facilitate the universality of citizenship. Historically, efforts to address the problem politically have been less than satisfactory, while all attempts to resolve it constitutionally have failed.

The Conservative government led by Stephen Harper promised to place statutory limits on the spending power as part of its program of open federalism. The study argues that this prescription — as it was articulated by the Harper government — will not go far enough to satisfy the government of Quebec, and it may not do enough to reassure Canadians outside Quebec that the government of Canada is still committed to the universality of citizenship.

The last section of the study advances two alternative schemes to resolve the problem of the spending power. The first is a constitutionally entrenched “social charter,” which would effectively terminate the need for the federal government to employ the spending power to achieve the universality of citizenship, while still reassuring all citizens that the governments of Canada are still committed to the social programs that materially support the idea of universal citizenship. The second is a suggestion that the federal and provincial governments of Canada formulate an agreement under which Quebec would be afforded the right to opt out of shared-cost social programs with unconditional compensation, thereby ensuring Quebec's political autonomy.

The study concludes that neither of these options is likely to be embraced by the government of Canada in the foreseeable future, thus ensuring that the problem of the spending power will continue for quite some time yet.

Résumé

Le pouvoir de dépenser est au cœur de l'un des problèmes les plus tenaces qui aient marqué le fédéralisme canadien depuis un demi-siècle. C'est principalement entre le gouvernement du Canada et celui du Québec qu'est intervenu le différend concernant la constitutionnalité et la légitimité politique du pouvoir de dépenser. Selon l'auteur de l'étude, ce désaccord est attribuable à la présence de deux conceptions différentes du principe du fédéralisme et, au bout du compte, de deux théories de la citoyenneté : le gouvernement du Québec a invoqué l'autonomie provinciale et sa volonté d'affirmer le particularisme québécois pour s'opposer au pouvoir de dépenser du fédéral, tandis qu'Ottawa s'en est servi pour promouvoir le caractère universel de la citoyenneté. Les démarches visant à résoudre ce dilemme par des moyens politiques ont eu des résultats moins que satisfaisants, tandis que les tentatives d'y apporter une réponse constitutionnelle se sont soldées par un échec.

Le gouvernement conservateur de Stephen Harper s'est engagé à assujettir le pouvoir de dépenser à des limites législatives dans le cadre de son programme de fédéralisme ouvert. L'auteur croit que la formule proposée par le gouvernement Harper ne va pas assez loin pour répondre aux attentes du gouvernement du Québec et, peut-être aussi, pour rassurer les Canadiens du reste du pays quant à la détermination d'Ottawa de garantir le caractère universel de la citoyenneté.

Dans la dernière partie de l'étude, l'auteur présente deux modèles différents pour résoudre le problème rattaché au pouvoir de dépenser. Le premier consiste à intégrer une charte sociale dans la Constitution, de sorte que le gouvernement canadien n'aurait plus à se servir de son pouvoir de dépenser pour assurer l'universalité de la citoyenneté, tout en confirmant à l'ensemble de la population que les gouvernements restent déterminés à assurer la prestation de programmes sociaux qui concrétisent la notion de l'universalité. Le second modèle repose sur la formulation d'une entente entre le fédéral et les provinces en vertu de laquelle le Québec se verrait accorder le droit de se retirer des programmes à frais partagés, assorti d'une compensation inconditionnelle, et pourrait ainsi jouir de l'autonomie politique qu'il recherche.

Il est peu probable, dit l'auteur, que le gouvernement fédéral adopte l'une ou l'autre de ces options dans un avenir prévisible, de sorte que le problème entourant le pouvoir de dépenser n'est pas près de disparaître.

In its 2006 election platform, the federal Conservative Party promised a new era of open federalism. After years of intergovernmental conflict over transfer payments (not to mention the sovereignty referendum, the secession reference case, the *Clarity Act*, and the Social Union Framework Agreement), the Conservatives promised to establish a more harmonious relationship with the provinces, “while clarifying the roles of both levels of government within the division of powers of the Constitution” (Conservative Party of Canada 2006, 42). More specifically, the Conservatives promised to move toward an elected Senate, grant the provinces a role in foreign affairs (when their jurisdiction was affected), rectify the “fiscal imbalance,” fix the equalization program and limit the spending power by ensuring that “any new shared-cost program in areas of provincial/territorial responsibility have the consent of the majority of provinces to proceed, and that provinces should be given the right to opt out of the federal program with compensation, so long as the province offers a similar program with similar accountability structures” (43). Although the concept of open federalism was fairly vague, it was a carefully crafted double entendre, designed to resonate with Quebec’s historical demands for recognition and autonomy (Noël 2006), while sounding fresh and positive to the rest of the country (R. Young 2006).¹ The Conservatives’ program for reshaping the federation had no impact in most provinces, but it helped the party win 10 seats in Quebec, enabling it to eke out a minority government.

Now that the Conservatives have completed their first term of office, what is the status of open federalism? The record is mixed. Prime Minister Stephen Harper has been extremely wary about meeting with the premiers — he has met them collectively only twice for working dinners at 24 Sussex² — and he has openly feuded with some, notably Danny Williams of Newfoundland and Labrador and Dalton McGuinty of Ontario, and there have been tensions at times with others as well. While the Prime Minister is not solely responsible for these disputes, this level of animus is presumably not what the premiers expected when the Conservatives promised in their 2006 election platform to “establish a new relationship of open federalism with the provinces” (2006, 42). Yet the Harper government introduced a historic motion in the House of Commons in November 2006 recognizing that “the Québécois form a nation within a united Canada”;³ it also introduced legislation to reform the Senate.⁴

On the fiscal front, the new Conservative government pledged in the 2006 budget to honour the 10-year plan for stable federal health transfers negotiated by the previous Liberal government of Paul Martin, and in the 2007 budget it revamped the equalization program largely in accordance with the recommendations advanced by the Expert Panel on Equalization and Territorial Financing appointed by the Martin government. These measures entitled Finance Minister James Flaherty to boast that the Conservative government had delivered “an historic plan worth over \$39 billion in additional funding to restore fiscal balance in Canada,” although he obviously got carried away when he declared that “the long, tiring, unproductive era of bickering between the provincial and federal governments is over” (2007, 2). In the October 2007 Throne Speech, the Harper government announced its intention to advance open federalism further with the introduction of statutory limits on “the use of the federal spending power for new shared cost programs in areas of exclusive provincial jurisdiction. This legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs” (Government of Canada 2007).

The spending power has been one of the most contentious issues in Canadian politics over the past half-century, and solutions for it have been elusive. Although the term is not explicitly mentioned in the *Constitution Act, 1867*, the federal government historically has maintained that the spending power provides it with the authority to extend grants to the provinces to create and support programs that are matters of exclusive provincial jurisdiction. In this manner, the federal government was able to initiate a health care system with “national” standards, as well as a variety of assistance programs and support to families, among other things. Canadians cherish these programs. Quebec, however, has never accepted the constitutionality of the spending power, and it has long sought to limit — not to abolish — its use, at least with respect to that province.

The dispute over the spending power stems from two different conceptions of federalism espoused by the federal government and Quebec and ultimately two theories of citizenship. Many Canadians outside Quebec believe that “national” social programs are an integral element of universal citizenship. Many Quebecers, however, view the pursuit of universal citizenship, in part through the creation of social programs

established with the spending power, as a threat to their particularity — their language, culture and political identity.⁵ In short, the debate over the spending power has frequently been viewed as a zero-sum game: universality at the expense of particularity or particularity at the expense of universality.⁶ The Conservatives' plan to place statutory limits on the spending power does not adequately address the concerns of Quebecers or the majority of Canadians outside Quebec, and as such it likely will not be viewed as a lasting solution to the problem by either solitude.⁷

The last part of this study considers various options for resolving the spending power issue. In general, there are two options: constitutional and nonconstitutional. Nonconstitutional options — such as intergovernmental agreements, parliamentary resolutions or federal legislation — are easier to obtain, but generally are not viewed by Quebec as sufficient safeguards for its particularity. Constitutional options are more likely to meet Quebec's concerns, but they are more difficult, if not impossible, to obtain, largely because they are viewed by many Canadians outside Quebec as a threat to universal citizenship. The federal government's promise to introduce legislation to place statutory limits on the spending power is the most robust nonconstitutional option for resolving this long-standing issue, but it is still unlikely to achieve broad support in Quebec; even the Quebec Liberal Party ultimately would like to see limits on the spending power placed in the Constitution. At the same time, some Canadians outside Quebec fear that the legislation is a threat to social programs. I attempt to determine if there is any possibility for a mutually satisfactory agreement between the two solitudes on the spending power.

Two Conceptions of the Federal Principle

The debate over the spending power stems from two very different conceptions of federalism, both of which were forcefully articulated in the Confederation debates. Sir John A. Macdonald — anxious to avoid the perceived “defects” of the US constitution — was determined to ensure that the federal government would have sufficient powers to prevail over the provinces. In Canada, he said, “we have strengthened the General Government. We have given the General Legislature all the

great subjects of legislation...We have thus avoided that great source of weakness which has been the cause of the disruption of the United States" (*Parliamentary Debates* 1865, 33). With respect to the division of powers, Macdonald explained that "all matters of general interest are to be dealt with by the General Legislature; while the local legislatures will deal with matters of local interest, which do not affect the Confederation as a whole, but are of the greatest importance to their particular sections" (30). Here, Macdonald seemed to imply that the federal powers are circumstantial: if "local" matters take on a "general" importance at some point in the future, they would become matters of legitimate concern for the federal Parliament.

This interpretation of the division of powers was later advanced by some very prominent constitutional scholars, particularly in the 1930s. For Frank Scott, a "clear and definite" conception of the division of powers emerged from the Confederation debates: "The basis for the distribution of legislative powers was to be this — all matters of national importance were to go to the national parliament, all matters of merely local importance in each province were to remain subject to exclusive provincial control" (Scott 1977, 36).⁸ Elaborating, he added, "The effect of these clauses will be that beyond the subjects attributed to each, the central legislature will have jurisdiction over all general matters, whatever they are, and the local legislatures over all local matters, whatever they are. The specifically enumerated powers in each case are examples merely of the sort of power contained in the residues" (38-9). Scott maintained that this was universally understood by all participants in the debate: "Both the opponents and the supporters of Confederation agreed upon what sort of federal arrangement was being made; they differed only about the outcome and the value of the arrangement" (36). While Scott's interpretation of the division of powers is theoretically plausible — it certainly has been embraced by Ottawa — his characterization of the Confederation debate is overly simplistic. It was a considerably more complex affair, with supporters and opponents of Confederation motivated by different concerns and interpretations of the proposed Constitution.

Antoine Aimé Dorion was the leading opponent of Confederation, and he was adamant that the proposed scheme was unacceptable to Quebec. In the Confederation debates, he was scathing in his condemnation of the proposed Constitution: "The whole scheme,

sir, is absurd from beginning to end,” he scoffed (*Parliamentary Debates* 1865, 255). He was primarily concerned with the broad residual power afforded to the federal government: “I find that the powers assigned to the General Parliament enable it to legislate on all subjects whatsoever...because all the sovereignty is vested in the general government” (689). As such, he argued, Parliament would be able to “trespass upon the rights of the local government without there being any authority to prevent [it]” (690). While Dorion rejected the proposed Constitution for the same reasons that Macdonald supported it, other Quebecers endorsed it because they believed that the interpretation advanced by Macdonald and Dorion was wrong.

One of the strongest supporters of the Constitution was Joseph Cauchon, a government backbencher and “one of the most powerful Conservative figures in Quebec” (Vipond 1991, 34), but he utterly rejected Macdonald’s interpretation of the division of powers. Under the Constitution, he argued,

there will be no absolute sovereign power, each legislature having its distinct and independent attributes, and not proceeding from one or the other by delegation, either from above or from below. The Federal Parliament will have legislative sovereign power in all questions submitted to its control in the Constitution. So also the local legislatures will be sovereign in all matters which are specifically assigned to them. (Parliamentary Debates 1865, 697)

In this conception of federalism, the responsibilities of the provinces are not dependent on external circumstances; they are contractually allocated to the provinces unless and until they are transferred to the federal realm by formal amendment of the Constitution. In this interpretation of the division of powers, the federal government cannot involve itself in matters that have been assigned by the Constitution “exclusively” to the provincial legislatures, irrespective of how important those matters might become over time. This theory of federalism has become an article of faith for successive Quebec governments. It offers a stronger guarantee that the province will possess the powers that are essential to ensure its cultural particularity and that it will not be overwhelmed by an expansionary federal government supported by the majority community in the federation.

Although the Judicial Committee of the Privy Council, the highest court of the British Empire, seemingly endorsed Cauchon's theory of federalism in a succession of judgments running from the 1880s to the 1930s, these mutually exclusive theories of federalism have continued to reverberate through Canadian politics as if these judgments had never been made. They were certainly on display when the issues of hospital and health insurance were being debated in the 1950s and 1960s, along with most of the other shared-cost programs that constituted the post-war social union. At the October 1955 federal-provincial conference, Prime Minister Louis St-Laurent stated that health insurance "is a matter, of course, which under our constitution falls squarely within provincial jurisdiction," but, he argued, "there may be circumstances in which it would be justified" for the federal government "to assist provincial governments in implementing health insurance plans designed and administered by the provinces" (Conference of Federal and Provincial Governments 1955, 9). Under what circumstances would federal involvement in provincial jurisdiction be justified? "In the view of the Federal government," St-Laurent answered, "the condition prerequisite to federal support of provincial programmes in respect of health insurance is that it can reasonably be shown that the national rather than merely or local section interest is thereby being served" (11). For St-Laurent, if a "substantial majority of provincial governments, representing a substantial majority of the Canadian people," were in favour of federal involvement in the establishment of a provincially administered system of health insurance, he would conclude that the matter was in the now in the national interest and no longer merely local (11).

Quebec premier Maurice Duplessis reacted angrily to St-Laurent's proposals. Like Cauchon, Duplessis argued that "the Canadian constitution consecrates the exclusive right of the provinces to legislate respecting matters of very great importance, notably in regards to education, hospitals, asylums, institutions and charitable homes, public works within the province, administration of justice and all which touches on property and civil rights" (Conference of Federal and Provincial Governments 1955, 38), and he insisted that the "federal authority and the provincial authority are both sovereign within the limits of their attributions" (36). In closing, he stressed the link between legislative and fiscal autonomy: "Of what use would it be for the

provinces to have the right to build schools and hospitals,” he asked rhetorically, “if they are dependent on another authority in order to obtain the necessary funds? Their sovereignty with respect to education and hospitalization would be meaningless” (36). It has been suggested that Quebec’s decision to introduce a personal income tax in 1954 “had everything to do with creating a source of taxation revenues in order to thwart the exercise of the federal spending power” (Courchene 2008, 5; emphasis in original).

Notwithstanding Duplessis’ objections, Health Minister Paul Martin Sr. announced the federal government’s proposed hospital insurance plan in January 1956. Ottawa offered to pay for half the cost of a province’s hospital services, on the condition that the services be universally available to all citizens of the province (Taylor 1978, 217). British Columbia, Saskatchewan and Alberta accepted the proposal immediately and, in March 1957, after much hard bargaining, so did Ontario and Newfoundland. With half the provinces on board, the *Hospital Insurance and Diagnosis Services Act* was presented to Parliament in April 1957. John Diefenbaker brought the plan into effect on July 1, 1958. Newfoundland and the four western provinces initiated their hospital insurance plans on that date; Ontario, New Brunswick and Nova Scotia followed in January 1959; Prince Edward Island joined in October 1959; and Quebec began its hospital insurance scheme in January 1961 (233-4). In 1966, Ottawa passed the *Medical Care Act*, which provided Canadians comprehensive health insurance. It took effect on July 1, 1968, with only Saskatchewan and British Columbia on board. “Unlike the case of hospital insurance,” interestingly, “there was no minimum requirement of a majority of provinces agreeing to the program before federal contributions could be made” (M. Taylor 1987, 374-5). Quebec did not join the scheme until November 1970, after it became apparent that the province would not be able to opt out with compensation even though it was committed to operating a comparable program. While the provinces were free to reject federal transfers, there was a political imperative to accept them, as Premier Jean-Jacques Bertrand explained when Quebec decided to accept the Act: “Either Quebec joins the programme, and thus flies squarely in the face of the Canadian constitution, or else we do not join up and thus deprive our people of a lot of money to which they have the right. What does one do in a case like this?”

(Quebec 1998, 18). While Quebec accepted transfers for health, it continued to reject the constitutionality of conditional federal grants.

As the federal government proceeded to create the postwar welfare state, it recognized that it had a political problem with Quebec, but it was not moved by Quebec's objections. After the war, Ottawa was anxious to establish new social programs to avoid the dislocation that had occurred during the Great Depression. The federal government's plans were detailed in a series of documents known as the Green Books. "In familiar terms," the government declared, "our objectives are high and stable employment and income, and a greater sense of public responsibility for individual economic security and welfare. Realization of these objectives for all Canadians, as Canadians, is a cause in which we would hope for national enthusiasm and unity" (Dominion-Provincial Conference on Reconstruction 1945, 7). Ottawa acknowledged that many of its proposed initiatives fell in areas of provincial jurisdiction, but it suggested ambiguously that the "division of responsibilities should not be permitted to prevent any government, or governments in co-operation, from taking effective action" (8).

The federal proposals were discussed with the provinces at conferences on reconstruction in 1945 and 1946. The conferences "had to decide," Keith Banting has written, "whether there would be a *pan-Canadian* welfare state or a series of distinctive *provincial* welfare states. The social union that emerged in those years was a compromise between these two poles" (1998, 40; emphasis in original). While the federal government championed a pan-Canadian welfare state, it was forced to retreat in the face of stiff opposition from Maurice Duplessis and the government of Quebec, as well as from some other provinces. When the Conference on Reconstruction ended in failure, Ottawa decided to pursue its policy objectives incrementally. It eventually secured the "cooperation" of the provinces with strong fiscal incentives — usually 50-50 cost sharing. This was the era of cooperative federalism, although it was more like "follow-the-leader" federalism: intrinsically hierarchical. The Duplessis government objected to almost every element of the new social union, but the federal government simply dismissed him as a reactionary. As far as Ottawa was concerned, justice required the establishment of robust social programs that would ensure a reasonable measure of vertical and horizontal equity across the federation.

Although the federal government found it easy to dismiss Duplessis, it was more difficult to ignore similar complaints from Jean Lesage, a progressive Liberal and former federal cabinet minister; the pressure increased when Daniel Johnson and the Union Nationale won the 1966 provincial election. Under relentless demands by successive Quebec governments to provide a constitutional justification for conditional grants, the Trudeau government advanced the doctrine of the spending power. Indeed, Trudeau defined the spending power for the very first time as “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” (1969, 4). Simply put, the federal government claimed that an unlimited power to spend was a natural corollary of its unlimited power under the Constitution to raise revenue “by any mode or system of taxation,”⁹ even though this argument was seemingly refuted by the Judicial Committee of the Privy Council in the 1937 *Employment and Social Insurance Act* reference case, and arguably was not consistent with Trudeau’s own writings on the subject before he entered politics (Trudeau 1968). Ever since the federal government unilaterally defined the spending power, its constitutionality has been debated vigorously by academics and governments alike.¹⁰

As prime minister, Trudeau justified the spending power as being in the general interest of the federation, just as St-Laurent had done with hospital insurance. Trudeau reasoned that “because the people of Canada will properly look to a popularly elected Parliament to represent their national interests, it should play a role *with* the provinces, in achieving the best results for Canada from provincial policies and programmes whose effects extend beyond the boundaries of a province” (Trudeau 1969, 34; emphasis in original). While Trudeau accepted that Parliament could not legislate on matters of exclusive provincial jurisdiction, he insisted that it could spend money on such matters if it deemed them to be in the “general” interest of the federation. Trudeau’s defence of the spending power was entirely consistent with Macdonald’s circumstantial theory of the division of powers and completely inimical to Quebec’s contractual understanding of the federal principle.

Quebec’s theory of federalism is inspired by its desire to maintain its particularity. When the federal government spends money in areas of exclusive provincial jurisdiction — either directly on individuals or

through provincial governments with conditional grants — Quebec believes that its ability to protect its particularity is jeopardized. Quebec's opposition to the spending power is thus fundamental. For the other provinces, the primary concerns are that the spending power can distort provincial policy priorities and the reliability of the federal government as a fiscal partner. These problems can be handled through effective intergovernmental relations, and since the late 1990s the provinces have tried to engage Ottawa in a more horizontal form of collaborative federalism (Cameron and Simeon 2002). Jean Chrétien refused to enter into a partnership of equals with the provinces, but Stephen Harper showed a receptiveness to it when he called for a more "open" form of federalism with the provinces.

The Spending Power and Rival Conceptions of Citizenship

The dispute over the spending power entails more than the definition of federalism. Ultimately, the debate stems from two distinct conceptions of citizenship and two associated theories of justice. In the latter half of the twentieth century, Canadians came to value the redistributive policies of the social welfare state, premised on a particular conception of equality, and to embrace cultural diversity in the form of official bilingualism and recognition of multiculturalism. Indeed, for many Canadians outside Quebec, these principles constitute core elements of *universal* citizenship. The universality of citizenship, however, may undermine particularity if care is not taken to protect minority groups. Because the intent of universal citizenship is positive, many Canadians outside Quebec cannot grasp how threatening it can be — but it is probably not coincidental that the sovereignist Parti Québécois was formed after Quebec had vigorously resisted the social policies the federal government had advanced (through the spending power) for more than two decades. While most Quebecers support the principles of redistributive justice, Quebec has (implicitly) advanced a theory of *differentiated* citizenship, which places greater emphasis on the preservation of the particularities of minority groups. This notion of citizenship has not been well received outside Quebec, because it appears to

contradict the conception of equality on which the universal conception of citizenship is premised. Most Quebecers and many Canadians outside Quebec want to see a high degree of redistributive justice and the preservation of cultural differences, but they balance these values differently. If there is to be a solution to the spending power, it will have to balance these values to the satisfaction at least of political majorities in each community.

Citizenship in liberal societies initially was premised on a set of civil rights, such as life, liberty and the protection of private property. The freedoms initially ensured by the liberal state were essentially negative: the state promised not to interfere with a man's thoughts, beliefs, religion or ability to express himself. This was freedom from the state, and as this sort of freedom had never been enjoyed before, liberal citizenship was inherently progressive, even though it was restricted initially to property-owning men. As that political class possessed comparable financial means, the liberal state felt no obligation to provide anyone the means to realize a good life or the freedom to do things — also known as “positive” liberty (Berlin 1969). As equality was self-evident, the state's only obligation was to apply the laws of the land to each citizen in the same way so as not to provide anyone an unfair advantage. This was the principle of procedural equality, and at a time when most states routinely played favourites with their subjects, it too was a progressive development.

While liberal citizenship was progressive, its exclusionary nature was difficult to reconcile with the belief that, as the US Declaration of Independence puts it, certain “truths” were “self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Very slowly, over time, women and minorities were granted civil and political rights — in other words, liberal citizenship was made universal. Unfortunately, the Great Depression made the idea of universal citizenship based only on civil and political rights look hollow. With the realization of universal citizenship, citizens no longer had comparable means. As such, the liberal state was required to take positive measures to ensure that all citizens possessed at least the basic means for subsistence. After the Second World War, social programs were introduced to provide some substantive meaning to the idea of

universal citizenship. This gave rise to the notion that citizens should possess social rights alongside civil and political rights (Marshall 1950). In Canada, the federal government stated explicitly in the Green Books that it hoped social security, including health care, “would make a vital contribution to the development of our concept of Canadian citizenship and to the forging of lasting bonds of Canadian unity” (Dominion-Provincial Conference on Reconstruction 1945, 28).

The inclusion of all individuals was clearly an advancement in the history of citizenship, but it was also more problematic than most people anticipated. The principles of citizenship that had existed for more than two centuries prior to the realization of universal citizenship — negative liberty and procedural equality — were premised on a culturally homogeneous society of property-owning men, not a heterogeneous society of men and women, rich and poor, and a multiplicity of cultural groups. In a heterogeneous society, if the state applies one standard for all in its application of the law, those with more means likely will benefit more from the state than those with less. In other words, the principle of procedural equality serves to perpetuate the advantage held by some. Any attempt to differentiate among citizens, however, raises concerns that the state is deviating from its commitment to equality. More fundamentally, the objective of universal citizenship is to “turn” the people into “one”: it is inherently assimilationist, which was not an issue when the political class was culturally and economically homogeneous, but it is problematic in a heterogeneous society. The assimilationist tendencies of universal citizenship are further exacerbated if social justice is comprehended exclusively in redistributive terms.

Iris Marion Young has argued that, in heterogeneous liberal societies, universal citizenship should give way to a differentiated conception of citizenship. She contends, “Modern political thought generally assumed that the universality of citizenship in the sense of citizenship for all implies a universality of citizenship in the sense that citizenship status transcends particularity and difference” (I. Young 1989, 250). While Young clearly supports an inclusive conception of citizenship, she maintains that the pursuit of universality through redistributive justice has tended to favour generality over particularity, often to the disadvantage of minority groups. As such, she argues, “where social group differences exist and some groups are privileged while others are oppressed, social

justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression” (1990, 3). Young does not want to forgo redistributive justice, but she very much wants to ensure the cultural particularities of a heterogeneous society: “A goal of social justice, I will assume, is social equality. Equality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in society’s major institutions” (1990, 173).

While Quebecers are well represented in Canada’s political institutions, simple inclusion is not sufficient to overcome fears of assimilation. Many minorities will still want a space to call their own, and as far as many Quebecers are concerned, this was the bargain of Confederation. As Peter Russell has written, “If English Canadians and French Canadians were to continue to share a single state, the English majority could control the general or common government so long as the French were a majority in a province with exclusive jurisdiction over those matters essential to their distinct culture” (1993, 18). For many Quebecers, the pursuit of universality through the spending power has transcended the division of powers in the Constitution and thereby threatened Quebec’s power to maintain its particularity.

Young believes that “group representation” in governing institutions is the best way to ensure that minorities are adequately incorporated in the policy process (1989, 263). Curiously, for an American, she makes no reference to the federal principle, but, when culturally distinct groups are situated in territorially defined clusters, federalism can be a useful instrument for the preservation of cultural differences (Livingston 1952). In federal societies, citizenship cannot be universal in the sense that it should not be an instrument for “turning the people into one”; rather, it must allow for a multiplicity of identities and loyalties (Vernon 1988). Relatedly, national social programs are deeply problematic in federations, particularly if the responsibility for social programming lies with provincial or state governments. If this is the case, the pursuit of universality through social programs overwhelms the division of powers in the Constitution and consequently threatens the particularity of minority communities in the federation. Although many Canadians outside Quebec believe that redistributive justice is culturally neutral, Young argues that “people necessarily and properly

consider public issues in terms influenced by their situated experience and perception of social relations. Different social groups have different needs, cultures, histories, experiences, and perceptions of social relations which influence their interpretation of the meaning and consequences of policy proposals and influence the form of their political reasoning” (1989, 257). Redistributive justice is obviously desirable, but the pursuit of universality can overwhelm particularity. Therefore, as Young argues, we must think beyond redistributive justice and recognize the importance of difference. I am confident that most Canadians do, in fact, value both redistributive justice and Quebec’s particularity, but I am not so sure that Canadians outside Quebec realize that these values sometimes interact in a zero-sum fashion.

The differentiated and universal conceptions of citizenship are closely connected to the contractual and circumstantial theories of federalism espoused, respectively, by Quebec and the rest of Canada. For many Canadians outside Quebec, the principles of universal citizenship require Ottawa to pursue policies of redistributive justice and social equality, and these can be achieved only through the spending power and a circumstantial understanding of the division of powers. For many Quebecers, this raises the prospect of the majority community’s determining the policy priorities of the minority community. For the government of Quebec, the province’s particularity can be assured only if it can exercise the powers accorded to the provinces under the Constitution without external interference. The theories of federalism and citizenship are deeply rooted in the political cultures of Quebec and Canada outside Quebec respectively. It is too much to ask either community to abandon its long-standing understanding of social justice. If the federation is to survive, it must find a way to reconcile these conceptions of justice without giving priority to one over the other.

A History of Futility: Attempts to Limit the Federal Spending Power

There have been numerous attempts to limit the federal spending power, with only modest success at best. In general, Quebec has rejected nonconstitutional measures because they do not adequately protect

the province's particularity, while these same measures find favour in the rest of Canada because they are not viewed as a threat to federally supported social programs and the universality of citizenship. At the same time, Quebec has viewed constitutional solutions as effective safeguards of its particularity, while Canadians outside Quebec generally have rejected these solutions out of fear that they would compromise the Canadian social union. To date, governments in Ottawa have not been able to square this circle; instead, they have muddled through with a series of ad hoc arrangements and one-off deals, interrupted by the occasional referendum on Quebec sovereignty.

The first solution to the spending power was the 1965 *Established Programs (Interim Arrangements) Act*, under which provinces were entitled to opt out of shared-cost programs and receive fiscal compensation (either cash or additional tax room), so long as they provided a similar program with comparable standards. For some, this arrangement eliminated the problem associated with conditional grants (Black 1975, 56), but opting out was a very modest solution as far as Quebec was concerned. Peter Hogg explains:

All that opting out really involves is a transfer of administrative responsibility to the province. It does not give the province the freedom to deploy resources which would otherwise be committed to the programme into other programmes. The province gains little more than the trappings of autonomy: the federal government "compensation" to an opting-out province is really just as conditional as the federal contribution to participating provinces. (1985, 123)

While recent opting-out agreements, such as the Martin government's child care plan, have provided Quebec with more policy autonomy, most provinces have still opted not to opt out, leaving Quebec as the only province that has made extensive use of the procedure. The terminology of opting out is problematic, for, as Courchene notes, "it is not *opting out to operate a program within one's own constitutional jurisdiction*. The institutional/constitutional reality is that the rest of the provinces are 'opting-in' to federally-run (or jointly-run) programs" (2008, 21; emphasis in original).

Opting out was envisioned only as an interim arrangement until such time as a permanent — constitutional — solution could be found. In *Federal-Provincial Grants and the Spending Power of Parliament*, which

was published in advance of the constitutional negotiations that culminated in Victoria in 1971, Pierre Trudeau proposed that the spending power be entrenched in the Constitution, with the proviso that the federal government would henceforth introduce a new conditional grant only if there was “a broad national consensus in favour” of the program (1969, 38). He suggested that a “national consensus” would exist if three of the four Senate regions supported a particular program initiative. By this formulation, a consensus could exist if as few as five provinces agreed to the initiative. As a gesture to Quebec, Trudeau indicated that any province would be able to opt out without fiscal penalty (34-6). Trudeau’s proposals, however, were unacceptable to Quebec: the spending power would be entrenched in the Constitution and majority rule would prevail, while opting out would provide only the illusion of autonomy. Not surprisingly, the first ministers did not reach an agreement on the spending power in the Victoria round of constitutional negotiations.

Later, in anticipation of another round of negotiations, Trudeau declared that “the division of powers between the two authorities must be clarified and made more functional” (1978, 11). And, he stressed, “some powers of the federal Parliament, such as the spending power, have a very broad scope and could be more carefully delineated in order to better ensure the internal sovereignty of the two orders of government” (23). However, the *Constitution Act, 1982* did not include any limitation on the spending power, while the Charter of Rights and Freedoms was a universalizing document par excellence and completely inimical to Quebec’s theory of citizenship. In 1984, the *Canada Health Act* effectively elevated the spending power to a statutory provision in Canadian law. The federal Liberal Party was viewed as the “natural governing” party of the twentieth century because it so effectively brokered a political coalition between Quebec and other parts of Canada, but its commitment to redistributive justice through the spending power was completely at odds with Quebec’s theory of federalism.

Whereas Pierre Trudeau had always resisted Quebec nationalism, Brian Mulroney was eager to satisfy the province’s “minimum” constitutional demands. In a meeting with premiers in April 1987 at Meech Lake, Mulroney secured unanimous consent to amend the Constitution to address Quebec’s concerns. The Meech Lake Accord recognized

Quebec as a “distinct society,” and it proposed to limit the federal spending power by inserting a new section (106A) in the *Constitution Act, 1867* that 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 an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

Quebec premier Robert Bourassa was delighted with the new provision: “The new section...is drafted so that it speaks solely of the right to opt out, without either recognition or defining the federal spending power...So Quebec keeps the right to contest before the courts any unconstitutional use of the spending power” (quoted in Trudeau 1988, 139-40). In conjunction with the recognition of Quebec as a “distinct society,” Bourassa believed he had obtained a constitutional settlement that would protect the province’s cultural particularity. On the other hand, many Canadians outside Quebec feared that limiting the federal spending power would undermine Canada’s social union or at least prohibit its expansion, and were relieved when the Meech Lake Accord finally failed. Mulroney then asked Joe Clark to resolve the constitutional impasse. While Clark was sympathetic to Quebec’s concerns, he also believed that Meech had been too narrowly focused on Quebec (1994, 5). Clark thus resolved to address the constitutional grievances of all Canadians in one fell swoop: the Charlottetown Accord.

One insider intimately involved in drafting the Charlottetown Accord has described the final agreement as a “dog’s breakfast.”¹¹ Ronald Watts — also deeply involved in the process as assistant secretary to the cabinet (constitutional affairs) in the Federal-Provincial Relations Office — disputes this notion. In his opinion, “The agreement was not, as some have described it, a grab-bag of sixty items, but rather represented an attempt to arrive at a coherent framework” (1993, 17). Virtually everything in Meech was carried over to Charlottetown, except that these concerns were now embedded in a more pan-Canadian vision. This led to concerns in Quebec that Charlottetown was “less than Meech,” with the inference that Charlottetown should be rejected.

With respect to the spending power, would Quebec have gotten less with Charlottetown than with Meech? Arguably, yes, but in some respects Charlottetown might have gone further. For example, there was some clarification of the roles and responsibilities of each order of government. In keeping with current practices, tourism, forestry, mining, recreation, housing and municipal/urban affairs were recognized as areas of exclusive provincial jurisdiction in a new section 93A of the Constitution. Like Meech, Charlottetown promised to provide reasonable compensation to any province that chose not to participate in a national shared-cost program in an area of exclusive provincial jurisdiction as long as the province offered a comparable program. Indeed, the new section 106A in Charlottetown was identical to that in Meech. Furthermore, in Charlottetown, the federal government committed itself to establishing a framework for the future use of the spending power:

A framework should be developed to guide the use of federal spending power in all areas of exclusive provincial jurisdiction...The framework should ensure that when the federal spending power is used in areas of exclusive provincial jurisdiction, it should: (a) contribute to the pursuit of national objectives; (b) reduce overlap and duplication; (c) not distort and should respect provincial priorities; and (d) ensure equality treatment of the provinces, while recognizing their different needs and circumstances. ("Consensus Report" 1992)

This framework was to be developed by the federal government as an intergovernmental agreement after the Constitution had been amended with the new section, although the framework agreement would receive constitutional protection, as per the provisions of the accord.

While Premier Bourassa (reluctantly) accepted Charlottetown, other Quebecers concluded that it did not meet Quebec's concerns. Jacques Frémont described the spending power provisions in Charlottetown as a "Trojan horse" (1993, 98). While I am not persuaded by Frémont's legal analysis, I tend to agree with him that the context of the Charlottetown negotiations may have re-established the political legitimacy of the spending power. Certainly, the spending power provisions in the accord cannot be understood without considering the provisions for the "preservation and development" of the social and economic unions. The federal and provincial governments agreed to a

variety of measures to enhance the economic union, including “the free movement of persons, goods, services and capital; the goal of full employment; ensuring that all Canadians have a reasonable standard of living; and ensuring sustainable and equitable development.” Correspondingly, they also adopted a social charter as follows:

The policy objectives set out in the provision on the social union should include, but not be limited to: providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible; providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities; providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education; protecting the rights of workers to organize and bargain collectively; and protecting, preserving and sustaining the integrity of the environment for present and future generations. (“Consensus Report” 1992)

Most of the policy areas mentioned in the proposed social union were areas of exclusive provincial jurisdiction, although neither the economic or the social union was justiciable. In the October 2007 Throne Speech, the Harper government resurrected the idea of an economic union, but presumably it would prefer to avoid a social charter.

Although there were internal tensions in the Charlottetown Accord, it was, as Watts (1993) has suggested, an honest attempt to establish a coherent response to concerns of all Canadians. It contained a framework for the spending power designed to protect Quebec’s particularity, while the social charter was included to assure Canadians outside Quebec that the federal and provincial governments were committed to universal social justice. It is possible that Charlottetown did not get the balance right, but it is also conceivable that Canadians rejected the accord more from constitutional fatigue and a palpable distrust of the country’s political leaders, most especially Prime Minister Mulroney. As we face these issues again, it might be helpful to reconsider the Charlottetown model, although the pattern of Ottawa’s social spending over the past decade arguably has moved the debate on the spending power beyond the terms of Charlottetown (see Graefe, in this volume).

After the Mulroney government failed to secure constitutional change, the new Chrétien government resolved to reform the federation through nonconstitutional means. After the 1995 referendum, Prime Minister Chrétien moved a parliamentary resolution to recognize Quebec as a “distinct society.” His government also passed the *Constitutional Amendments Act*, in which Ottawa agreed to lend its constitutional veto to each of the five regions of Canada, effectively giving Quebec a veto over constitutional change, along with Ontario and British Columbia. Ottawa also agreed to transfer responsibility for labour market training to the provinces along with appropriate fiscal resources, thereby meeting one of Quebec’s long-standing demands. When these initiatives failed to mollify the Parti Québécois government, the Chrétien government launched a reference case on the constitutionality of secession and ultimately adopted the *Clarity Act*, which specifies the conditions under which the federal government would be prepared to negotiate the terms of a province’s secession.

With respect to the spending power, Chrétien sought to restore a federal role in social programs in the Social Union Framework Agreement (SUFA), which was signed by the federal government, nine provinces and both territorial governments in February 1999. Quebec refused to endorse SUFA, although it participated in the negotiations that led to the final agreement. SUFA permits Ottawa to use its spending power to establish new social programs in areas of provincial jurisdiction. Indeed, it declares, “The use of the federal spending power under the Constitution has been essential to the development of Canada’s social union.” As a sop to the provinces, Chrétien agreed that new programs would be negotiated with the provinces, but under SUFA the federal government requires the support of only a majority of provinces to proceed with a new program. While the provinces were evidently seeking an opting-out provision with full fiscal compensation, including direct payments to individuals and organizations, the final agreement did not include a formal opting-out provision. The federal government was able to persuade the English-speaking provinces to drop that demand in exchange for enhanced health transfers, much to Quebec’s displeasure. In sum, the spending power provisions in SUFA are much more in accordance with theories of federalism and citizenship held by Canadians outside Quebec.

SUFA was a setback for Quebec and a missed opportunity for Canada. Claude Ryan — the former leader of the Quebec Liberal Party — noted that it was “the first time, to my knowledge, that a PQ government declared itself ready to accept the principle that the right to opt out should be accompanied by a commitment from the province involved to put into place a program or measure in the same area as the national program” (1999, 29). Alain Noël has argued that Quebec made two other significant concessions in the SUFA process: “It accepted much of the inter-provincial — and pan-Canadian — discourse on the social union; and it recognized implicitly a legitimate role for the federal government in social policy” (2000, 8). For Christian Dufour, it is telling that the whole project was cast as a “social union” rather than “social federalism” (2002, 7). The spending power provisions in SUFA were inconsistent with Quebec’s theory of federalism, and consequently the agreement was rejected by the Parti Québécois government with the support of the opposition Liberal Party led by Jean Charest. Although Quebec refused to endorse the agreement, Noël notes that the “new rules nevertheless apply to Quebec, and the collaborative process goes on as if, or almost as if, all agreed” (2000, 4).

The Federal Spending Power and Open Federalism

How does the Conservative plan to limit the spending power compare to the efforts described above? In many respects, it would appear to be a case of “back to the future.” The statutory approach favoured by the Conservatives seems highly reminiscent of the 1965 *Established Programs (Interim Arrangements) Act*. While the new legislation might play well in Quebec in the short term, the government of Quebec likely will view it only as an interim solution. In the longer term, Quebec likely will pursue its historical objective: a constitutional solution to the spending power, with the right to opt out with unconditional payments for all federal initiatives that fall in areas of provincial jurisdiction.

In order to understand the Conservative plan more fully, it is necessary to parse the language of the October 2007 Throne Speech very carefully:

Our Government believes that the constitutional jurisdiction of each order of government should be respected. To this end, guided by our federalism of openness, our Government will introduce legislation to place formal limits on the use of the federal spending power for new shared cost programs in areas of exclusive provincial jurisdiction. This legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs. (Government of Canada 2007)

First, the word “new” indicates that the impending legislation on the spending power will not apply to old shared-cost programs in areas of provincial jurisdiction, such as health care and social assistance. Indeed, the Conservatives promised in the 2006 election campaign to establish a patient wait-times guarantee even though health care is a matter of provincial jurisdiction. Furthermore, the Conservatives have been quite anxious to maintain the five principles of the *Canada Health Act*. Presumably, they do not want to set off alarm bells with potential voters in the centre of the political spectrum, but at the same time they presumably have no plans to introduce new shared-cost social programs.¹² As such, the plan has been greeted with yawns in some quarters in Quebec. As Alain Noël writes, “Or, Ottawa a cessé d’introduire de tels programmes depuis déjà quelques années et il est hautement improbable qu’il recommence dans l’avenir. Au Québec, les réactions sont donc demeurées tièdes, et la question est plus ou moins disparue de l’ordre du jour” (2008, 80).

Second, the emphasis on shared-cost programs does not preclude new programs in areas of provincial jurisdiction where costs are not shared, such as family allowances, grants for university students and financial support for municipalities. These are examples of the direct use of the federal spending power to benefit individuals and organizations. While previous federal governments reserved the right to use the spending power directly in aid of initiatives in areas of provincial jurisdiction on the grounds that they were matters of “national” or “general” importance, it is not clear how the current Conservative government reconciles this use of the spending power with its stated goal to respect “the constitutional jurisdiction of each order of government” or with open federalism more generally, which, according to the Conservative election platform, was supposed to entail “clarifying the roles of both levels of government within the division of powers of the Constitution” (Conservative Party 2006, 22).

While some Conservatives may view open federalism as a program of “disentanglement” from the provinces, the Harper government’s willingness to use the spending power directly in areas of provincial jurisdiction belies this belief. The direct use of the spending power avoids the problem of compelling provinces to abide by various conditions in order to receive transfer payments and thereby compromising provincial “sovereignty,” but it still creates a problem of intergovernmental policy coordination. With Harper’s reluctance to meet the premiers, it seems that the federal government has become involved in new areas of provincial jurisdiction without the benefit of coordination at the highest levels of government, even though the Conservatives promised in the 2006 election campaign to “support the important contribution the Council of the Federation is making to strengthening intergovernmental and interprovincial cooperation” (Conservative Party 2006, 22). Consequently, all the attendant problems of entanglement are exacerbated: a general lack of coordination, policy duplication, distortion of provincial priorities and provincial uncertainty about long-term federal spending commitments in these areas. If this is to be the reality of open federalism, the provinces will likely not tolerate it for very long. If open federalism also entails federal hectoring of provincial budget decisions, as Finance Minister Jim Flaherty seemed to indicate at the time of the last Ontario budget, Canada might be headed for a period of highly strained federal-provincial relations.

The Conservatives evidently have decided to pursue a statutory limitation of the spending power, on the assumption that constitutional options are not currently possible. But even if that is true, is the statutory approach the best alternative? It is not clear. The statutory approach is both more and less robust than an intergovernmental agreement such as SUFA. On the one hand, the new limits — however minimal — will be enshrined in law and therefore cannot be ignored like intergovernmental agreements when convenient. On the other hand, Parliament can change this law when convenient, whereas it cannot unilaterally change an intergovernmental agreement. As it stands, SUFA is not acceptable to Quebec because it did not contain a formal opting-out provision, but amending SUFA arguably might be a better solution to the problem. A revised SUFA would be more consistent with the principles of collaborative federalism and presumably with those of open

federalism as well, but Stephen Harper has shown little inclination to meet with the provinces collectively. The statutory approach is simply more compatible with his unilateral management style.

While the federal Conservative Party and Quebec have similar visions of federalism, they have different conceptions of citizenship. The Conservative Party adheres to a theory of universal citizenship, albeit one premised on negative liberty as opposed to the theory of positive liberty underlying the Canadian social union. By contrast, Quebec embraces a differentiated theory of citizenship, which is completely inimical to the populist reform origins of the new Conservative Party (Telford 2002), notwithstanding the party's surprise decision to support a parliamentary resolution recognizing Quebec as a nation. The ideological overlap between the Conservative Party and the political culture of Quebec is at best only partial. It would thus seem that the Conservatives' efforts to win support in Quebec on the federalism axis can go only so far, and it may have already reached its limit.

Squaring the Circle: Is an Overlapping Consensus on the Spending Power Possible?

In sum, it would seem that the principles of open federalism — as presently articulated — are not sufficient to reconcile the competing claims for particularity in Quebec and universality in the rest of Canada. A mutually satisfactory agreement on the spending power will require a more robust solution. I propose two possibilities for discussion. In the past, Quebec has tended to favour constitutional solutions to the spending power, while the rest of Canada has preferred nonconstitutional options. In contrast, I advance a constitutional option that might appeal to Canadians outside Quebec and a nonconstitutional approach that might find favour in Quebec. The first option may err on the side of universality, while the second option leans toward particularity. Both options are problematic and potentially riskier than the status quo, and they would require the expenditure of considerable political capital before they could be adopted.

For the past 60 years, federal governments have defended the spending power as the only available instrumentality for the

establishment and maintenance of pan-Canadian social programs with comparable standards, in the belief that any limitation to the spending power would dampen their ability to instill vertical and horizontal equity in the federation.¹³ This is why federal governments have insisted that any province that chooses to opt out of a shared-cost program must offer a comparable program in order to receive fiscal compensation. As such, opting out with compensation is just as conditional as opting in: Quebec opts out in principle, while the other provinces see no advantage to opting out. On paper, the federation appears to be asymmetrical, but it is a soft asymmetry: it has little, if any, substantive meaning.¹⁴ If the federal government ever offered unconditional compensation, as Quebec has demanded, the other provinces would presumably avail themselves of the opportunity to opt out, eliminating the federal government's ability to instill equity in the federation. So we appear to be stuck. Solutions that satisfy Quebec are unacceptable to the federal government and many Canadians outside Quebec, but solutions that receive favour in the rest of Canada leave Quebec unsatisfied.

But is the spending power really the only instrument available to ensure pan-Canadian social programs? Perhaps it is time to reconsider the idea of a social charter. There is a relatively high degree of consensus in Canada on the principles of redistributive justice. Indeed, the federal and provincial governments drafted a fairly coherent vision of the social union in the Charlottetown Accord, committing themselves to providing Canadians the basic necessities of life, ensuring high-quality primary education and access to post-secondary education, labour rights, protection of the environment and the five principles of the *Canada Health Act*. As noted above, these provisions were to be nonjusticiable. If, however, the provisions of a social charter were justiciable, the provinces would be constitutionally obligated to offer broadly comparable social programs, although perhaps with a greater degree of diversity than currently exists. While a justiciable social charter undoubtedly would be difficult to codify, such a charter would largely terminate the need for the federal spending power. Federal transfers could thus be made unconditionally, in the form of either tax points or continued cash transfers. The latter would be more conducive to tax harmonization, as they would grant less fiscal space for interprovincial tax competition (Boadway 2006, 44). They would also enable the

federal government to redistribute revenue more easily across the provinces to address horizontal equity concerns. The constitutionalization of the equalization program in 1982 might be viewed as a precedent for the constitutional entrenchment of social policy.¹⁵

It is admittedly paradoxical to employ a universalizing instrument to ensure Quebec's particularity, but it might square the circle. A social charter would assure Canadians outside Quebec that the federal government was still committed to the social union, particularly with respect to established programs, but it would not necessarily preclude new programs.¹⁶ It would also conform to the theory of universal citizenship, including the procedural notion of equality. Would it meet Quebec's concerns? Admittedly, it would subject Quebec's social programs to possible challenges in the courts, including the Supreme Court of Canada, but Quebec is not currently immune from such challenges.¹⁷ While courts have been widely criticized for policy-making (see, for example, Morton and Knopff 2000; Manfredi 2001; Brodie 2002), they have a broad obligation under section 24.1 of the Charter of Rights and Freedoms to hear just about every case that entails an unresolved point of law, including those from citizens who believe their rights have been infringed by the legal statutes enacting the various social programs in the country. As such, it might be helpful to give the courts a framework to work with — such as a social charter. While theory suggests that charters have centralizing effects, there is reason to believe that the Supreme Court has been more sensitive to provincial particularity when interpreting the Charter of Rights than it has been in federalism cases (Kelly 2005). Moreover, a social charter enacted with the consent of Quebec would go some way to thwarting a domineering federal government's interfering in areas of provincial jurisdiction. Ultimately, Quebec will have to make some sort of concession to obtain unconditional federal transfers, and this option might maximize its political autonomy.

The prospects for a social charter, in the short run at least, are dim. It was presumably fairly easy for the federal and provincial governments to negotiate a nonjusticiable social charter in Charlottetown, but they would be much more wary of a justiciable charter. And any attempt to negotiate a social charter would likely open up the whole Pandora's box of constitutional reform, which would entail special recognition and a

veto for Quebec, Senate reform for the West, a provincial role in Supreme Court appointments and Aboriginal self-government, among other things. The process might also trigger referendums in some provinces and likely a national referendum, too. And there would be no guarantee of success — it would require a political leader with considerable courage to launch a national conversation on the Constitution at this time. As such, Canada is destined to address an essentially constitutional issue through ad hoc intergovernmental processes for the foreseeable future.

Toward a New Framework for Intergovernmental Relations

While it may not be possible to have truly harmonious intergovernmental relations in Canada, everyone would surely agree that the process could be improved. For starters, it has been noted that there is “a serious lack of coordination among first ministers at the peak of the intergovernmental hierarchy” (Meekison, Telford, and Lazar 2004, 25). Indeed, first ministers’ meetings have been described as “the weakest link” in Canadian intergovernmental relations (Papillon and Simeon 2004). The demand for an annual meeting of first ministers dates from at least 1940, when the Rowell-Sirois Commission concluded that “Dominion-Provincial conferences at regular intervals with a permanent secretariat...would conduce to the more efficient working of the federal system” (Royal Commission on Dominion-Provincial Relations 1954, 71).¹⁸ Exactly 45 years later, in the Regina Accord, Brian Mulroney committed the federal government to an annual meeting of first ministers, and attempted to entrench this commitment in the Constitution in both the failed Meech and Charlottetown accords. The scale and frequency of first ministers’ meetings declined under Jean Chrétien, and they show no sign of rebounding under Stephen Harper. Admittedly, federal-provincial conferences frequently have been opportunities for the provinces to gang up on the federal government, but the irregularity of the conferences exacerbates the problem.¹⁹ “If [first ministers’ conferences] were built into the normal political calendar,” Martin Papillon and Richard Simeon contend, “officials and ministers could set their activities around them, the agenda could be developed more co-operatively, effective preparation

could be carried out, and it would be much easier to develop regular delegation and reporting relationships with ministerial councils and others” (2004, 132). In short, a regular meeting would allow first ministers to meet in a more relaxed atmosphere and for trust ties to develop between federal and provincial officials and elected representatives. It would also give them the opportunity to settle upon effective decision-making rules before the onset of a crisis. The provinces moved in this direction with the creation of the Council of the Federation in 2003, and Stephen Harper promised in the 2006 election to work with it, but he has not followed through on this commitment.

A regular meeting of first ministers would be a useful practice, however, only if effective decision-making rules were established. Canada has been criticized for relying on the unanimity rule. Nicole Bolleyer argues that a “core feature of strong [intergovernmental] institutionalization is a formal decision-making rule that deviates from unanimity because the capacity to bind the substates to common positions or plans to which they did not agree demonstrates that the [intergovernmental agreement] is thought to represent more than the sum of its parts” (2006, 474). In the Canadian context, however, it would be unjust for the majority to bind a minority group to a plan over its objections. Indeed, it was precisely the application of the majoritarian principle during the establishment of the social union and ultimately the patriation of the Constitution that caused so much consternation in Quebec.

If the unanimity principle is too rigid and the majoritarian principle unjust, what other alternatives might be employed? At this juncture, it might be helpful to examine political practices in other democracies, particularly the consociational form of multi-party coalition government found in many diverse European countries. While some highly experienced players have indicated that party politics plays little role in the intergovernmental process (Segal 2002; Meekison 2004), Kenneth Carty and Stephen Wolinetz (2004) suggest that the federal-provincial management of the federation is akin to a coalition government. Consociationalism and federalism are the principal instruments for governing culturally divided societies; both have been successfully employed in Switzerland, and Canada’s system of brokerage politics arguably represents a form of intra-party consociationalism. But, as Canada’s intergovernmental “coalition” is multi-party, the brokerage

model of conflict management does not seem apropos. The principles of consociationalism, on the other hand, are specifically designed for multi-party coalitions.²⁰ Under these principles, the intergovernmental decision-making process in Canada ought to operate under the “concurrent majority” principle, with Quebec afforded a veto. While this might be appropriate for many intergovernmental decisions, it is not quite what is needed with respect to the spending power. Quebec does not want to participate in any shared-cost programs, but it has never had any desire to prevent the other provinces from opting in to such programs if they wish. As such, Quebec does not want a veto in these instances; it simply wants to be able to opt out with unconditional fiscal compensation.²¹

Marc-Antoine Adam (2007) raises the intriguing possibility that the Constitution — through section 94 — already facilitates hard asymmetrical federalism with respect to the spending power. Section 94 enables Parliament to establish the uniformity of laws in relation to property and civil rights in Ontario, New Brunswick and Nova Scotia — the three founding “English-speaking” provinces of Confederation — and presumably now all provinces save Quebec, so long as they consent or opt in to the federal law. For Adam, this is a constitutional means for “federal intervention in areas of exclusive provincial jurisdiction,” rather than the nonconstitutional or possibly unconstitutional means of the spending power, but it preserves Quebec’s autonomy. While I fully agree with Adam that the spirit of asymmetrical federalism underlies section 94, I am not sure that a provision for the uniformity of property and civil rights facilitates the uniformity of social policy in the rest of Canada, at least as currently worded.²² In the short term, it seems to me preferable to incorporate the principles of consociationalism in SUFA, along with a robust dispute resolution process, and to amass some experience with this form of decision-making. If it works well in practice, perhaps the Constitution could be amended accordingly sometime in the future, although by that point it might not be necessary.

The principles of consociationalism, however, are alien to Canada’s political culture. The other provinces might be reluctant to grant Quebec alone a veto: as it stands, special treatment for Quebec is viewed by many Canadians outside Quebec as crass political pandering or, worse, as capitulating under the threat of separation. It thus might be helpful to ground a Quebec veto in a recognized theory of democratic politics and

justice. To date, the idea of asymmetrical federalism has proven to be a nonstarter in Canadian constitutional politics, but that might be because it has usually been presented in terms of special recognition of Quebec as a distinct society (Laforest 1991; C. Taylor 1991; Gagnon and Lachapelle 1996), as opposed to practical decision-making rules in intergovernmental relations. Many Canadians outside Quebec are wedded to the procedural definition of equality and, consequently, cannot endorse constitutional recognition for Quebec. A Quebec veto in intergovernmental decision-making would surely be easier to sell to the rest of Canada than the idea of a distinct society. But it might not be necessary to sell the idea of a Quebec veto. The practice of executive federalism in Canada has long been criticized for its lack of transparency, but it is always possible to make a virtue out of a vice. If the principles of asymmetrical federalism were adopted in the intergovernmental process — rather than entrenched in the Constitution — Canadians likely would not notice and probably would not become very animated even if they did. Put another way, an attempt to entrench asymmetrical federalism in the Constitution would unnecessarily politicize the concept. As such, it might be desirable to resolve the spending power problem in the realm of normal politics and avoid the Constitution altogether.

Conclusion

The long-simmering dispute over the federal spending power stems from two very different conceptions of federalism and citizenship. For many Canadians outside Quebec, the original intent of the *Constitution Act, 1867* was to equip the federal government with the power to address matters of “general” concern, while the provinces would attend to “local” affairs. In this view, if a matter ceased to be local, it would become a matter of legitimate federal concern. This was how Sir John A. Macdonald interpreted the Constitution, and today many Canadians outside Quebec believe reflexively that “big” issues should be handled by the “big” government. Since the Great Depression, many Canadians outside Quebec have looked to the federal government to initiate and sustain a variety of social programs with so-called national standards. Since the legislative responsibility for most of these programs falls to the

provinces, the federal government has in many instances relied on its spending power to achieve its social policy objectives. These programs are viewed as integral elements of Canadian citizenship and are thus by definition matters of general concern. As such, many Canadians outside Quebec believe that the federal government is constitutionally entitled to spend money on these programs. In sum, the pursuit of universal citizenship has served to blur the division of responsibilities in the Constitution, much to the consternation of Quebec.

Quebec has advanced a very different conception of federalism, occasionally with the support of other provinces — particularly Ontario in the decades following Confederation and, more recently, Alberta. It argues that the federal government has a broad swath of power under the Constitution and can involve itself in any policy area, except those that the Constitution designates as matters of “exclusive” provincial jurisdiction. In this conception of federalism, the responsibilities of the provinces are not dependent on external circumstances; they are permanently allocated to the provinces, unless and until they are transferred to the federal realm by formal amendment of the Constitution. From this perspective, the spirit, if not the law, of the Constitution is broken when Ottawa extends conditional grants to the provinces for matters in the provincial domain or spends money directly on these matters. Quebec’s theory of federalism is closely tied to its desire to maintain its cultural particularity.

Rhetorically, at least, the federal Conservative Party has made a concerted effort to appear sympathetic to Quebec’s theory of federalism, but at this juncture I am not convinced that open federalism is so much a well-defined philosophy of federalism as it is an ideological aversion to shared-cost social programs and a well-calculated strategy to enhance the support of the Conservative Party in Quebec without raising too many alarm bells in the rest of the country. Its plan to place statutory limits on the spending power is so narrowly constructed that it is unlikely to meet Quebec’s concerns; at the same time, however, it might lead some Canadians outside Quebec to worry about the Conservative government’s commitment to the social union. In short, the plan is insufficient to bridge the very different conceptions of federalism and citizenship embraced by Quebec and the rest of the country. It does not go far enough in either direction.

Quebec generally has sought constitutional limits to the spending power, but Canadians outside Quebec have tended to fear that constitutional

solutions would threaten the social union and their preferred conception of citizenship. In this study, I have proposed both a constitutional option that might find favour in Canada outside Quebec and a nonconstitutional option that might meet Quebec's concerns. A social charter would reassure Canadians outside Quebec that their governments were still committed to the social union. Admittedly, without Ottawa's vigilant eyes, a social charter might lead to a greater diversity of programming options in some policy areas across the provinces, although in certain areas considerable diversity already exists. Ultimately, it would be up to the courts, rather than the federal government, to determine the acceptable degree of policy diversity under a social charter, and court cases would be rather more irregular than Ottawa's monitoring. In time, a social charter might also be a source of common pride and unity among all Canadians. But it might not be possible to adopt a social charter without considering a wide range of constitutional problems. Alternatively, Canada's federal and provincial governments could focus their attention on the decision-making rules in intergovernmental relations. While Canadians outside Quebec generally have resisted providing Quebec special constitutional status in the name of equality, it might be possible to grant Quebec — and Quebec alone — a (nonconstitutionally entrenched) veto in intergovernmental meetings and the right to opt out with unconditional compensation. This would require the other provinces to accept the legitimacy of differentiated citizenship and the principles of consociationalism. So long as these were not envisioned as constitutional principles, Canadians outside Quebec might be willing to accept this form of decision-making as a pragmatic solution to a long-standing problem.

In sum, a social charter would eliminate the need for the spending power, at least with respect to shared-cost social programs, while still ensuring the integrity of the programs and the universality of citizenship. Knowing its view of judicial decision-making, I do not imagine that the current Conservative government would view this option with much enthusiasm. The politics of constitutional change might also be too problematic at this time. On the other hand, a new intergovernmental framework based on the principles of consociationalism would require Prime Minister Harper, who has shown little inclination to engage in the collaborative process, actually to meet with the premiers. Thus, for the foreseeable future, the proposals I make here will remain purely academic, and the debate on the spending power will continue.

Notes

- 1 For a more extensive analysis of open federalism, see Harmes (2007).
- 2 The first meeting was in February 2006, shortly after Stephen Harper became prime minister, and he met them again in January 2008.
- 3 The motion easily passed through the House of Commons on November 27, 2006, with all-party support and a vote of 266 to 16.
- 4 The Conservative government introduced legislation in the Senate in May 2006 to limit senatorial terms to eight years (Bill S-4, *Senate Tenure*); six months later, the government moved legislation in the House to allow for an elected Senate (Bill C-43, *Senate Appointment Consultations Act*). Bill S-4 foundered in June 2007 when the Senate became concerned about which constitutional amending formula was required to enact the change in tenure; Bill C-43 died on the order paper when the House was prorogued in the summer of 2007. Both bills, however, were reintroduced in the House as Bills C-19 and C-20, respectively.
- 5 The idea of “particularity” has emerged in recent studies of citizenship, but it has historical resonance in Quebec, when one thinks back to the constitutional discourse of the 1950s and 1960s and the study of a “statut particulier.”
- 6 In this study, I use the term “universality” exclusively in connection with the idea of citizenship, not in the narrow technical sense of access to social programs. In my view, all *federally* supported social programs — administered either directly or through the provinces — are intended to facilitate the universality of citizenship, regardless of whether they are distributed to all citizens equally or on the basis of need.
- 7 When anyone writes about the Canada-Quebec relationship, there is always a danger of presenting each “solitude” as a monolithic and homogeneous block, unless one employs numerous and cumbersome qualifications at each turn in the discussion. The degree of heterogeneity in Quebec and Canada outside Quebec is abundantly obvious in the rapidly evolving party system in each community. On the other hand, there is a dominant discourse with respect to federalism and federal-provincial relations in each community; in this study, I attempt to follow the contours of this discourse at the risk of oversimplification.
- 8 This essay was first presented at the Canadian Political Science Association meeting in 1931.
- 9 The federal government buttresses its claims with section 91.1A (public debt and property), along with the provisions for the Consolidated Revenue Fund (sections 102 and 106). Tom Kent (2008) astutely notes that the federal power to tax is unconditional, whereas the provinces are empowered to tax only “for provincial purposes.”
- 10 See Dupont (1967); Driedger (1981); Petter (1989); Costi (1988); Blache (1993); Maher (1996); Leclair (2002-03); Tremblay (2000); Telford (2003); Adam (2007); and Kellock and LeRoy (2007). For the Quebec government’s perspectives on the spending power, see Quebec (1998); see also Quebec (2002a, 2002b).
- 11 Comment relayed to the author at Queen’s University, February 2000.
- 12 I emphasize social here rather than shared cost, because the Conservative Party has not been reluctant to enter into shared-cost *infrastructure* programs with the provinces. See Conservative Party of Canada (2006); see also www.buildingcanada-chantierscanada.gc.ca/index-

- eng.html. Tom Kent (2008, 12-16) reaches similar conclusions about the Conservative government's aversion to social programs, even though his interpretation of the spending power is considerably different than the one presented here.
- 13 While the federal equalization program undoubtedly provides a measure of horizontal equity among the provinces, it does not necessarily facilitate equity for individual citizens. Since equalization transfers are unconditional, they can be used for lowering taxes or paving new roads just as easily as for equity-establishing social programs.
 - 14 The 2004 Federal-Provincial Health Accord included an appendix entitled "Asymmetrical Federalism That Respects Quebec's Jurisdiction." While the agreement was heralded as a great advance in Canadian federalism, it was about semantics more than substance. For the most part, Quebec was required to accept the same conditions and obligations as all the other provinces.
 - 15 It should be noted that the equalization program would require the continuation of a vertical fiscal gap in the federation, although not necessarily a fiscal imbalance. For an explanation of this terminology, see Boadway (2005).
 - 16 A social charter would require a provision for the creation and protection of new programs. For instance, new social programs could be established with an intergovernmental agreement by means other than the general amending process, and the agreement could have constitutional status, as per the relevant provisions in the Charlottetown Accord with respect to intergovernmental agreements.
 - 17 See *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35.
 - 18 Brian Mulroney made it a point to hold a meeting with the premiers most years, and both the Meech Lake and Charlottetown accords contained provisions for an annual meeting of first ministers, but these meetings fell by the wayside with the failure of the accords.
 - 19 Meekison argues persuasively that there is considerable utility in having the premiers united in a common position before meeting with the prime minister: "It narrows down the issues and assists in focussing the federal-provincial policy agenda and priorities" (2004, 173).
 - 20 Indeed, the primary principle of consociationalism is the grand governing coalition. Other principles include the mutual veto or concurrent majority decision-making rule, proportionality as the principal standard of representation and a high degree of internal autonomy for each segment of the coalition (Lijphart 1977, 25).
 - 21 Some might object that this process would create the "West Lothian" problem in Parliament — that is, Quebec members of Parliament would vote on matters that affect Canadians outside Quebec but not their constituents in Quebec. This potential already exists in the *Constitution Act, 1982* with respect to the amendment of the division of powers. Any province is entitled to opt out of an amendment that would transfer responsibility for a matter from the provinces to the federal government. In this scenario, Parliament would obtain the power to *legislate* in certain matters, except in the province or provinces that opted to retain the power. The opting out of social programs, by contrast, does not change the legislative distribution of powers. As such, Parliament (including members from Quebec) would not be legislating something for Canada but not for Quebec. Rather, Parliament would be authorizing the transfer of money to the provinces, albeit perhaps for different

purposes in Quebec than in the other provinces. If this were to raise a West Lothian question, it would not, in my view, be as significant as the West Lothian problem already entrenched in the *Constitution Act, 1982*.

- 22 While the Judicial Committee of the Privy Council determined that unemployment insurance was a matter of “property and civil rights” under section 92.13 of the *British North America Act* in the 1937 “new deal” case, it is not clear that Canadian courts today would recognize other social programs, such as health care, as matters of “property and civil rights.” It is also not clear that section 94 requires fiscal compensation for provinces that choose not to opt in. On the other hand, the Fathers of Confederation clearly envisioned a degree of asymmetry in the Constitution; it thus would not alter the original intention of the Constitution if section 94 were amended in accordance with contemporary realities and requirements.

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The Spending Power
and Federal Social
Policy Leadership:
A Prospective View

Peter Graefe

Summary

The federal spending power has been an important tool in building pan-Canadian social policies and, by extension, a sense of Canadian social citizenship. Attempts to set rules for its use, such as those proposed by the Conservative government in the 2007 Speech from the Throne, therefore affect the federal government's involvement in crafting policies and, more broadly, citizenship. This study argues that the federal government's use of the spending power has moved well beyond the traditional focus on shared-cost programs, rendering the Conservatives' proposal ineffective, while still provoking criticism for marginalizing important visions of Canada.

The study highlights the weakness of the Conservatives' proposal taken on its own terms, and contends that it is actually beside the point: it covers the use of the spending power to impose conditions on new shared-cost programs in areas of exclusive provincial jurisdiction, yet it is hard to pinpoint a federal initiative in the past quarter-century that responds to those criteria. The spending power enables federal social policy leadership in different ways than in the immediate post-Second World War period.

This claim is not original, as others have argued that the use of the spending power has shifted from shared-cost programs to direct transfers to individuals and organizations. Indeed, this study points to a number of initiatives in social policy fields where direct transfers have been used. In many cases, however, the use of transfers has required negotiations with the provinces to prevent them from treating federal funds as a windfall. As such, the use of direct transfers shades into a broader array of intergovernmental social policy agreements where the federal government exercises its spending power, but not to impose program conditions or standards. Instead, the power is used to provide the federal government a seat at the table in setting policy agendas and priorities, as well as to extract provincial commitments to develop indicators jointly, share best practices and report to the public. A number of federal-provincial agreements have been made from this mould, including the major health care and child care accords, as well as developments in housing and disability policy.

For some, this new form of federal leadership is to be embraced for marrying ongoing federal policy leadership with provincial

participation and with forms of provincial flexibility tailored to the country's variable geometry. Others are more critical. Quebec nationalists dislike how it contravenes the constitutional division of powers and limits provincial autonomy, while centralists bemoan the limited control it provides the federal government in return for its transfers. Ultimately, no political actors appear poised to change radically the new form of federal leadership. That said, the study closes by discussing changes that could be considered within the existing processes in order to soften these critiques, such as the creation of "meeting places" to set agendas and share innovations or the elaboration of emerging practices concerning Quebec asymmetry.

Résumé

Le pouvoir de dépenser du gouvernement fédéral est un outil important pour l'élaboration des politiques sociales pancanadiennes et, dès lors, pour le développement d'un sentiment de citoyenneté sociale au Canada. Aussi les démarches visant à formuler des règles régissant l'exercice de ce pouvoir, comme celles qui ont été proposées dans le discours du Trône du gouvernement conservateur en 2007, ont-elles des répercussions sur le rôle que joue Ottawa par rapport à la formulation des politiques et, à un niveau plus général, par rapport à l'approfondissement de la citoyenneté. Selon l'auteur, l'utilisation actuelle du pouvoir de dépenser va bien au-delà de son point d'impact traditionnel, c'est-à-dire les programmes à frais partagés, de sorte que, en plus d'enlever toute pertinence à la politique proposée par les conservateurs elle suscite des critiques du fait qu'elle marginalise une dimension importante de la société canadienne.

L'étude met en lumière la faiblesse de la proposition des conservateurs, considérée en elle-même, et affirme que, en fait, elle passe à côté du sujet. La politique proposée envisage de se servir du pouvoir de dépenser pour imposer des conditions aux nouveaux programmes à frais partagés qui relèvent de la seule compétence provinciale, mais il est difficile de discerner, parmi les initiatives fédérales lancées depuis le dernier quart de siècle, une mesure qui répond à ces critères. Aujourd'hui, la façon dont Ottawa se sert de son pouvoir de dépenser pour assurer son leadership en matière de politique sociale diffère sensiblement de ce qu'elle était dans les années qui ont suivi immédiatement la Deuxième Guerre mondiale.

L'argument n'est pas nouveau : d'autres auteurs ont montré que le pouvoir de dépenser est axé de plus en plus sur les transferts directs aux particuliers et aux organisations, au détriment des programmes à frais partagés. L'étude renferme d'ailleurs des exemples de l'utilisation des transferts aux particuliers dans divers domaines de la politique sociale. Toutefois, il est souvent arrivé que le recours à ces mesures nécessite des négociations avec les provinces afin d'éviter qu'elles ne considèrent ces fonds fédéraux comme une manne inattendue. On peut dire que, de ce point de vue, l'emploi des transferts directs fait partie d'un ensemble plus vaste d'ententes intergouvernementales sur la politique sociale, dans le cadre desquelles Ottawa exerce son pouvoir de dépenser sans

imposer de conditions ou de normes particulières. Le gouvernement fédéral se sert plutôt de ce pouvoir pour réclamer un rôle dans la définition des priorités de la politique sociale et pour obtenir des provinces qu'elles s'engagent à se consulter sur la mise au point des indicateurs de rendement, à s'échanger des renseignements sur les pratiques les plus efficaces et à faire rapport à leurs populations respectives. C'est cette formule qu'on a utilisée dans le cadre de plusieurs ententes fédérales-provinciales, notamment les principaux accords relatifs à la santé et à la garde des enfants, ainsi que certains aspects importants des politiques visant le logement et les personnes handicapées.

Certains observateurs ont accueilli favorablement cette nouvelle forme de leadership fédéral, qui allie les responsabilités traditionnelles d'Ottawa dans la formulation des politiques à la participation des provinces et aux éléments de souplesse qu'elles incarnent du point de vue de l'adaptation à la diversité du pays. D'autres ont adopté une position plus critique. Des nationalistes québécois s'insurgent contre cet accroissement à la répartition constitutionnelle des pouvoirs et à l'autonomie provinciale, tandis que les centralisateurs regrettent que le gouvernement fédéral ne se voie accorder qu'un contrôle restreint en échange de ses transferts. Il reste qu'aucun acteur politique ne semble prêt à modifier radicalement ce nouveau modèle de leadership fédéral. L'étude se termine par un examen des changements qui pourraient être apportés aux processus actuels afin d'atténuer ces critiques : par exemple, la création d'espaces de rencontre permettant d'établir les priorités et de s'échanger des renseignements sur les innovations, ou encore la mise au point de nouvelles pratiques qui respectent l'asymétrie québécoise.

In the five years since Jean Chrétien stepped down as prime minister, the scope of the possible in terms of federal statecraft has changed considerably. Kenneth McRoberts, in his presidential address to the Canadian Political Science Association (2001), could conclude that the Canadian public was tone deaf to the language of multinationalism and that the major political parties had largely converted to the mantra of a mono-national Canada composed of equal provinces. Yet, under Chrétien's successor, Paul Martin, we witnessed the signing of a health accord that openly provided different treatment for Quebec.¹ Then, the subsequent Conservative government under Stephen Harper adopted a motion recognizing that the Québécois form a nation within a united Canada. This motion was in a sense forced on the government by the scheming of the Bloc Québécois, but this bold response was only possible on the basis of the Conservatives' decision to court Quebec francophone voters aggressively in the 2006 election with a program of "open federalism" that responded to some long-standing grievances with the workings of Canadian federalism.

At the same time, more than a decade after the watershed 1995 federal budget, it is clear that the federal government's participation in social policy is not going to wither away. Regardless of what was written about its declining moral authority to participate in setting directions in health, post-secondary education and social services policy, given the budgetary cuts in its financial support, the federal government is still active in all these areas and can point to a decade of social policy redesign. While at times seemingly ad hoc and usually incremental, the overall result has some coherence and philosophical consistency (Battle 2001; Jenson 2004). This social policy participation nevertheless involved ongoing tensions and conflict with the provinces, as well as bitter negotiations widely seen as eroding the trust necessary for productive exchanges (Council of the Federation 2006b). Again, first under Paul Martin and then with Harper's open federalism, attempts were made to signal a willingness to improve the climate of intergovernmental relations in fiscal and social policy.

We therefore seem to be at a point where there appears to be more leeway to reimagine and redefine the Canadian political community and the appropriate relationships between the constituent parts. While this leeway is welcome in allowing for new ways to confront and manage

persistent problems, it is also daunting, particularly as changes in Quebec nationalism (Salée 2002) and in the resource economy (especially oil in Alberta and Newfoundland and Labrador) further confuse attempts to read the political landscape. Politicians attempting to intervene in this environment are likely, in the first instance, to fall back on a “vocabulary” of institutions and verbal formulations inherited from the past. Some of these will have some purchase and provide leverage in solving problems. Others will sound painfully out of sync, like parents trying to keep up with teen lingo, and yet others will have some rhetorical value even as they prove largely useless in intervening in the world.

When we turn to the issue of the Conservative government’s proposed law on the spending power, described in the 2007 Speech from the Throne, we are faced with this last possibility, at least from the viewpoint of social policy-making. A law specifying the use of the spending power might have useful rhetorical value, both in terms of the Conservatives’ political calculus and in terms of signalling a readiness to engage in more amicable relations with the provinces. However, the manner in which it is conceived and phrased is out of phase with how the spending power is currently being employed in social policy-making. It speaks more to the cooperative federalism of the shared-cost programs that dominated (but not monopolized — see Banting 2006a) postwar social policy-making than the current forms of policy-making, often referred to as “collaborative federalism” (Lazar 2000; Cameron and Simeon 2002). As such, the Quebec government has criticized the current proposals as entirely unacceptable.

I elaborate this argument in three parts. After a brief discussion of why the Conservatives might have a partisan interest in limiting the spending power and how the spending power relates to federal leadership, I consider the formulation of the spending power law, at least as described in the 2007 Speech from the Throne. Without rehearsing the debates about earlier attempts to limit the spending power in the Meech Lake and Charlottetown constitutional accords or the 1999 Social Union Framework Agreement,² this consideration does underline the fuzziness and weakness of the proposal taken on its own terms.

In the second part, I look at the use of the spending power to make direct transfers to individuals and organizations in the health, post-secondary education and social services fields, a use that has

become more visible and important over the past decade (Quebec 2002; Boismenu 2007).

In the third part, I examine recent intergovernmental agreements in health, housing, disability and child care to argue that the spending power is being used not to impose conditions on the provincial governments, but to enable the federal government to set the agenda and develop standardization in planning and reporting. In both cases, the spending power legislation seems out of phase with how the spending power is enabling federal leadership. As such, it is unlikely to change a form of policy-making that seems likely to persist into the medium run.

If the Conservatives' spending power initiative was meant to affect the manner of the federal government's social policy leadership but failed to do so, should we consider other means to do so? The answer ultimately depends on one's normative evaluation of the current forms of intergovernmental policy-making. In the extended conclusion, therefore, I survey four views of the current collaborative model, ranging from celebrations of its efficiency and functionality, to critiques coming from Quebec and pan-Canadian nationalists, to concerns about its democratic underpinnings. Overall, the critiques suggest this model of policy-making is unlikely to persist forever, as it does not solve enduring territorial and national cleavages inherent in Canada's makeup, but they also point to some "rough edges" that could be smoothed over within the bounds of the current consensus.

Constraining the Spending Power: Partisan Strategy and Statecraft

The Conservatives' electoral promise and subsequent 2007 Throne Speech commitment to constrain the federal spending power arose from the party's electoral strategies and its sense of Canadians' vision of the political community. As part of the Conservatives' program of open federalism, the commitment was made first and foremost to gain the support of Quebec francophones. Limiting the spending power responds to long-held views about Canadian federalism in Quebec, particularly the idea that the provincial autonomy protected by the *Constitution Act, 1867* should not be eroded by the ability of one order of government to

spend in the jurisdiction of another. A spending power commitment might also hold some relevance for shoring up Conservative support in western Canada, as it echoes the calls for rebalancing that emerged from conferences of western finance ministers and premiers in the early to mid-1990s (see, for example, Western Finance Ministers 1991). The arguments for rebalancing did put forward some points about the importance of respecting federal diversity, but they justified the limits mostly on the grounds of how constraining overlap and duplication was efficient and saved money. The Conservative government's interest in rebalancing was signalled in the 2006 budget paper on fiscal imbalance (Canada 2006, ch. 3), although it would be hard to portray subsequent changes to federal transfers as reflecting much commitment on this front.

In light of the importance of the western and Quebec constituencies to the Conservatives' electoral calculus, it is surprising to see the weakness of the commitment in the Speech from the Throne (as will be discussed in the next section). I leave it to others to explain whether the institutionalized outlook and strategy of the federal bureaucracy overwhelmed the Conservative program, or whether the Conservatives revised their sense of the level of citizen attachment to federal government policy involvement.

If one moves from the level of partisan strategy to that of statecraft, any proposal to regulate the spending power is nevertheless of immense interest in terms of how it might reshape federal-provincial relationships in policy-making and, indeed, more broadly in terms of how Canadians think about their citizenship and their identity. In a federation with a division of powers, citizenship is likely to be complex and territorially differentiated, as different provinces adopt different mixes of rights and responsibilities in their areas of jurisdiction (Choudhry 2001). The spending power provides the federal government with one means of controlling the extent of interprovincial differentiation, by providing financial incentives for provinces to adopt similar policies. Put another way, the spending power has proven to be a mechanism that allows the logic of pan-Canadian social citizenship to prevail over the logic of territorial diversity (Banting 2006b). The use of the spending power, however, does run up against the legitimacy of the constitutional division of powers, and this has provided space for provinces to

contest the use of the power, or at least to demand greater flexibility in and less constraint on the conditions linked to its use. As such, the previous use of the spending power enabled the federal government to create a sense of pan-Canadian citizenship while retaining a space of provincial diversity, at least compared to the alternative of constitutional amendment that was used to allow federal participation in unemployment insurance and old age pensions (Courchene 2008).

I use the term “leadership” in the context of this statecraft, which gives it a particular meaning. It is important that the federal government *be seen* to be encouraging the development of common social policies across the country, but that does not necessarily mean that it was the first mover in a policy field. Indeed, given the importance to the federal government of creating and maintaining a sense of pan-Canadian social citizenship, one might expect innovation in one or several provinces to be a spur to federal policy involvement in order to limit the extent of provincial diversity (see Théret 2002). Leadership, as used here, refers narrowly to strategies that bring the provinces around a particular agenda of policy change. At times, the federal government is proactive in setting the policy content of that agenda; at other times, it is more reactive. In the post-1995 cases discussed below, a good portion of recent leadership has been reactive, as the federal government tried to counter the Parti Québécois government’s (1994-2003) strategy of developing a distinctive social citizenship, while absorbing provincially defined alternatives coming from the Ministerial Council reports of 1995 and 1996 (Vaillancourt 2002; Warriner and Peach 2007). Some will take issue with this definition of leadership — for some, this is the “fake leadership” of someone seeing a parade coming and marching in front of it; others argue that this leadership involves subverting or changing the original provincial innovations as the pan-Canadian initiative lines up poorly with a pre-existing provincial one. Nevertheless, the sort of strategic action referred to is sufficiently close to the *Oxford English Dictionary* definition of leadership as “the action or influence necessary for the direction or organization of effort in a group undertaking” that I use it in this discussion.

Traditionally, studies of the federal spending power have emphasized the negotiation of the trade-off of money and control, of “pay for play.” In other words, to what extent does the federal government’s

contribution allow it to shape provincial policies through conditions or standards? How closely can the federal government scrutinize specific provincial expenditures and programs to determine whether they are eligible for cost sharing? In this view, Ottawa's ability to shape policy in areas of provincial responsibility rested on its ability to impose conditions and standards, and so limitations on this power weakened this standardization. The taken-for-granted nature of this relationship explains the debates over the 1995 federal budget and the introduction of the Canada Health and Social Transfer (CHST): if the federal government was no longer willing to contribute to social programs at the same rate as in the past, how could it justify maintaining national standards in those programs (see Courchene 1995; Phillips 1995)?

While the exchange of money for conditions is an important vector of influence, the emphasis on "pay for play" ignores other ways the spending power gives the federal government the ability to contain territorial variation and fragmentation. Even in the postwar period, the standards attached to federal spending in Canada were often less specific and conditional than in other federations (Watts 1999) — leading, for instance, to 10 provincial social assistance systems following distinct trajectories in terms of their goals and logics (Boychuk 1998). As I argue below, the spending power, in fact, can be employed in different ways to achieve some semblance of a pan-Canadian social space. The most obvious is the use of direct transfers to individuals and organizations, bypassing the provinces. But the spending power can also be used to structure forms of accountability that do not look like the conditions of old. Most recently, this has taken the form of participating in new forms of collaborative governance. Studies to date have mostly emphasized the federal government's attempt to exercise control over the provinces through setting up new forms of reporting to the public on outcomes, as well as attempts to improve interprovincial comparisons by developing baselines and common indicators (Phillips 2003; Saint-Martin 2004; Boismenu 2007). By requiring provinces to make public their use of federal transfers and the outcomes of federally funded programs, the federal government can try to enlist the public to blame and shame provinces that do not live up to their promises in intergovernmental agreements. The possibility of thereby creating interprovincial beauty contests has led to provincial attempts to limit aspects of reporting.³

While perfectly understandable given the adversarial nature of inter-governmental relations, these efforts are also somewhat unfortunate, since well-organized reporting can also serve a policy-learning function (Jenson 2004; Saint-Martin 2004).

The use of the spending power in collaborative governance provides another, less remarked, source of federal influence and leadership — namely, a seat at the social policy table and the capacity to set the agenda. Indeed, one of the most important vectors of power in seemingly collaborative and nonhierarchical systems of governance is precisely the ability to define priorities and the agenda (Pierre and Peters 2005, 92-3). As long as the federal government's willingness to spend money serves to gather the provinces together to discuss, negotiate and set common policy directions, the spending power can serve to create a pan-Canadian social space, even in areas of provincial jurisdiction. This last, agenda-setting role, is certainly not new, but it has been overshadowed by the emphasis placed on national standards and conditions as mechanisms for integrating the Canadian social space.

Therefore, as one turns to consider the Conservatives' spending power commitments, one needs to pay attention not only to how the spending power traditionally has been analyzed, but also to the whole spectrum of leadership that the spending power potentially enables. The next section does the former, while the two subsequent ones tend to the latter.

Parsing the 2007 Speech from the Throne

As with previous proposals for limiting the federal spending power, one approach to evaluating its impact is to parse the wording. The 2007 Throne Speech included the following statement:

Our Government believes that the constitutional jurisdiction of each order of government should be respected. To this end, guided by our federalism of openness, our Government will introduce legislation to place formal limits on the use of the federal spending power for new shared-cost programs in areas of exclusive provincial jurisdiction. This legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs. (Government of Canada 2007)

This is a remarkably weak commitment: it is solely prospective, it applies to a fuzzy subset of initiatives and it penalizes opting out. In terms of its being solely prospective, note that it applies only to *new* programs, leaving all the waterfront already covered by federal-provincial programs outside its remit. Plausibly, then, the renegotiation and renewal of existing interventions in health care, post-secondary education and social services would not be governed by this proposal, even if that renewal served to transform the goals, purposes and structures of those programs. Would the addition of a home care program to medicare, as proposed by the Commission on the Future of Health Care in Canada (CFHCC 2003), count as the updating of an old program or as a new one?

The issue of when an old program becomes a new one thus provides one example of the proposal's fuzziness. But there are at least three additional aspects of the wording that might give Ottawa the means to circumvent the legislation's limitations. The first two reside in the expression "shared-cost program." What counts as cost sharing? Introductory primers on Canadian fiscal federalism distinguished cost-sharing agreements, where the federal government agrees to pay an open-ended share of eligible provincial expenditures, from block grants, where federal expenditure is fixed, regardless of actual provincial expenditures in the area. The Conservatives' proposal arguably covers only the first case, yet examples of new shared-cost programs built on that model are all but nonexistent over the past quarter-century. Indeed, the major agreements in social policy since the watershed 1995 budget have involved federal contributions with a maximum cap, often presented as time limited and therefore lacking an explicit escalator formula.⁴ Beyond the issue of sharing costs is the issue of defining a "program." In interviews with officials from various provinces about the Labour Market Agreements for Persons with Disabilities, a recurring critique was that the federal government saw these agreements as creating a program (which therefore required higher standards of oversight and evaluation), whereas they saw them simply as "cost-sharing agreements." When does a cost-sharing agreement become a cost-shared programs?

A final issue involves the definition of "exclusive provincial jurisdiction." The experience of the CFHCC exemplifies the extent to which a watertight compartment view of jurisdiction has been displaced by

arguments about interdependence and joint responsibility. Whereas the Royal Commission on Dominion-Provincial Relations, reporting in 1941, argued that provincial jurisdiction in health care was basic and residual, the report of the CFHCC (2003, 3, 53) argued instead that health was an “amorphous topic” that could not be divided neatly into federal and provincial boxes. If one were to adopt this view of the world, then no program could be seen as falling into an exclusive jurisdiction, as a federal responsibility no doubt would be bound up somewhere in the chain of interdependence between policy fields and constitutional heads of power. An example was Paul Martin’s defence of federal involvement in child care, where he noted that it was a concern for the federal government, in part, since immigrants and Aboriginal people, for whom the federal government has some responsibility, use these services (see Boismenu 2007). In short, if the federal government could make a plausible claim to having some iota of jurisdiction in a field, even if the provincial jurisdictional claim was much stronger, then the Conservatives’ proposed spending power provision could be skirted.

There is no point over-exaggerating the significance of this exercise in semantics. The wording of the eventual legislation, coupled with intergovernmental practice and judicial review, eventually would remove some of the fuzziness around these terms. By applying only to new programs, and only to a specific set of new programs, however, the legislation’s scope of application is much reduced. It is difficult to think of a significant program introduced in the past quarter-century that clearly would qualify.

Even if a program were to qualify, however, the opting-out provision is extremely limited. Such a provision is central to any spending power measure, because provinces can always opt out of any shared-cost program by refusing the money. The question is whether they can opt out and be compensated — put another way, whether they can spare their taxpayers from paying for a program to which they cannot have access. In the Conservatives’ proposal, reasonable compensation is to be provided to provinces *if* they offer compatible programs. A spending power provision that sought to safeguard the value of federal diversity would have an unconditional opting-out provision, allowing provinces the freedom to do what they choose in areas of exclusive provincial jurisdiction. To require “compatible” programs in order to

receive compensation is to require provinces to develop programs of a certain nature — that is, sufficiently similar to the federal one to be compatible with it — within their fields of jurisdiction. Although the promise of compensation limits the extent to which the spending power dictates provincial policy-making, it enables the federal government to shape significant contours of provincial activity in the exclusive jurisdictional fields of even those provinces that opt out. I argue further below that the current form of federal-provincial negotiations makes it exceedingly difficult to imagine a program that would not fit within a federal-provincial agreement, but that was nevertheless compatible. For the time being, it is sufficient to note that the proposal is very weak from the perspective of limiting the influence of the federal spending power, and might indeed be seen to strengthen it given the wording of the opting-out clause.

Comparison with earlier proposals

Given the weakness of the Conservatives' commitment with respect to the spending power, it is not surprising that federal Liberal leader Stéphane Dion had no trouble accepting it, with the argument that he had supported a stronger limitation — which Alain Noël (2000) still assessed as a “virtual” control — as part of the Social Union Framework Agreement (SUFA). Without rehashing the Meech, Charlottetown and SUFA debates about which spending power formulation was the strongest, one nevertheless can highlight two particularities about the proposal in comparison with these earlier examples.

First, at least as worded in the 2007 Throne Speech, there is no threshold for provincial consent such as that of six provinces in SUFA. It might be that this aspect was too technical, or that the exact formula remained to be considered at the time the Throne Speech was written. However, without a provincial consent formula, the use of the spending power in areas of provincial jurisdiction is left wide open, particularly in light of the weakness of the opting-out provision.

Second, the institutionalization of the provision is somewhat ambiguous. As a law, it stands somewhere between the constitutional entrenchment proposed for Meech and Charlottetown and the status of intergovernmental agreement in SUFA. It is an instance of the federal government's binding itself, which arguably makes it more legally

accountable than in the case of a simple intergovernmental agreement. Of course, this should not be overstated. The *Canada Health Act* similarly provides an instance of the federal government's regulating when it can transfer money to provinces, yet, as Sujit Choudhry (2000) has demonstrated, Ottawa has not felt itself bound to comply with its strictures in a number of cases. The fact that this law is self-imposed, and therefore can be repealed unilaterally, also raises questions about how seriously it will be treated in intergovernmental policy-making. The Chrétien Liberal government's legislation on the constitutional amending formula, adopted following the 1995 Quebec referendum, is somewhat analogous as a self-imposed restraint that does not seem to have had much impact. Since the provision aims to regulate federal-provincial relationships, and since previous spending power proposals presumed federal-provincial agreement on what the rules would be, the federal government's unilateral move to restrain itself is curiously one-sided. The provinces are likely to treat this restraint with suspicion, if not to question Ottawa's right to define unilaterally the legitimate use of the power. Indeed, the negotiation of SUFA involved considerable wrangling precisely over the wording of "exclusive jurisdiction" versus a plainer "provincial responsibility," of "cost shared" rather than "every new federal program" and of compensation for "compatible" programs or for programs that "address priority areas" (Warriner and Peach 2007, ch. 7).

A simple reading of the proposal is therefore instructive. The weakness of its commitments signals some competing priorities on the part of the Conservative government that would be fascinating to untangle,⁵ but that are not central to this study. Indeed, one could be provocative and claim that the intended legislation would serve to strengthen the use of the spending power, to the extent that the law barely constrains the federal government even while lending an aura of procedural legitimacy to its use. The limitation of reading the provision in this way is that it is overly formalistic and ignores its relationship to the current form of intergovernmental negotiations and to the role of the spending power in those negotiations. Such a reading assumes that the spending power is still all about a federal-provincial bargaining dynamic that trades money for conditions — all about "pay-for-play." In the next two sections, I argue that, regardless of the strength or weakness of

the spending power provision, its focus on conditionality ignores how the spending power has been used in recent intergovernmental agreements, and is thus somewhat anachronistic.

The Spending Power as a Direct Transfer

Over the past decade, much attention has been given to the federal government's use of direct transfers to individuals and organizations. As the Commission sur le déséquilibre fiscal (Commission on Fiscal Imbalance) noted, while this use of the federal spending power is not new, it has recently taken on much greater importance, and there are reasons to believe it will be an important area for spending power growth (Quebec 2002). Controlling the use of this form of spending power was an element of Quebec's negotiating position around SUFA, and some reflection of this concern can be seen in section 42b of that agreement, where the federal government promises to give provinces three months' warning and an offer to consult before implementing new direct transfers. The other provinces also came to object to this use of the spending power, and developed the line that it involved investing money in high-visibility, low-impact "boutique programs" (see, for example, Western Premiers' Conference 2001) that would be better transferred to provinces to support existing health, post-secondary and labour market programs.

The significance of direct transfers should not be exaggerated. Many involve relatively small sums compared with those involved in the health care accords or even the 2004-05 child care agreements — although the federal subsidy to registered education savings plans (RESPs) and the endowment of the Canada Millennium Scholarship Foundation (CMSF) can be counted as relatively substantial. Direct transfers are perhaps better portrayed as part of a broader federal negotiating strategy. They play a role in setting and shaping the agenda for intergovernmental relations by deflecting existing federal-provincial interactions onto new agendas favoured by the federal government. In areas with long-standing federal-provincial agreements and mature programs, such as health care, direct transfers can help frame a reform agenda by highlighting particular issues and

objectives and by laying out a philosophy of how they are to be resolved. Similarly, for newer areas such as early childhood education,⁶ such transfers can play a role in developing priorities and in marking territory for future negotiations. In both cases, transfers can create public constituencies in favour of certain approaches, as well as administrative capacities for implementing particular policy agendas (see also Hobson and St-Hilaire 2000).

I provide a few examples of these initiatives in core social policy areas below, but one could add examples from other fields to the list. The Commission sur le déséquilibre fiscal, for instance, pointed to various national objectives related to post-secondary education and labour market training in the federal innovation strategy (Quebec 2002, 123-4). Various urban and environmental strategies, such as the Green Municipal Funds, also develop increasingly direct funding linkages between cities and the federal government, although some provincial mediation and oversight remains in approving municipal funding requests (Turgeon 2006). Indeed, the federal government has attempted to move money to municipalities through a variety of initiatives — such as the goods and services tax rebate, the transfer of gas tax monies and the infrastructure programs brought together in the 2007 Building Canada Fund (which includes the Gas Tax Fund). To these one might add the creation of specific time-limited trusts and funds in areas such as public transit and affordable housing. As I discuss below regarding the Millennium Scholarships and the National Child Benefit, much of this funding falls between a direct transfer and a cost-sharing arrangement. This is so, in part, because the federal government needs to negotiate bilateral agreements with the provinces that prevent them from reaping a windfall by reducing their infrastructure spending while Ottawa increases its own (Bradford 2004). The bilateral agreements signed around these various funds (such as the Building Canada Fund and the Public Transit Capital Trust) share some features of the new forms of federal-provincial inter-governmental agreements, in the importance of the federal government's setting the agenda by identifying loosely defined priority areas of investment, but it is not clear whether this reflects a similar leadership strategy or simply the nature of infrastructure programs. This discussion, however, moves us away from the more straightforward and direct use of transfers to organizations and individuals, to which I now return.

Health care

Health care is the field where it is easiest to make the case that direct transfers are about steering intergovernmental negotiations by preparing reform themes and administrative capacity. Here, a series of direct transfers has set up and supported arm's-length entities that nevertheless shape policy by developing particular kinds of ideas and expertise. The 1996 federal budget, for instance, set up a Health Services Research Fund (HSRF), with \$65 million in funding over three years, to examine the results of accepted procedures, the effectiveness of health services and variations in modes of service provision. This was followed in 1997 with \$50 million to improve the Canada Health Information System and, in 1999, another \$95 million for the Canadian Institute for Health Information (CIHI) to develop health indicators and data standards, fill data gaps and generally build capacity. In 1998, the federal government spent an additional \$60 million (over two years) to renew the national HIV/AIDS strategy. The 1999 budget also added \$90 million in endowment funds (including \$25 million specifically for nursing research) and \$2.5 million in operating funds for the HSRF. At greater arm's length, the Medical Research Council-cum-Canadian Institutes of Health Research (CIHR) has seen annual increases to its budget, while the Canada Foundation for Innovation (CFI), endowed by the federal government in 1997 and renewed in 2000, has earmarked 45 percent of its funds for the health sector. The 2003 budget added \$500 million to the CFI endowment in support of research hospitals.

These investments in research have been complemented by some funding in support of innovation in health management and delivery, although some of it has shaded away from direct transfers to involve some provincial participation. Examples of such initiatives include the commitment in the 1997 budget to invest \$150 million in a Health Transition Fund to help provinces move toward new forms of delivery, and the 1999 budget's investment of \$75 million in the National Health Surveillance Network and the Canadian Health Network. The 1999 budget also earmarked \$115 million for pilot projects using technologies such as Telehealth and Telehomecare. A further \$287 million was promised for preventive measures such as the Canada Prenatal Nutrition Program, a modernized food safety program and innovation in rural and community health. The 2003 budget added \$45 million

(over five years) to develop a Canadian Strategy for Technology Assessment and \$205 million (again, over five years) for work on governance and accountability measures. In 2005, \$300 million was committed over five years for an Integrated Strategy on Healthy Living and Chronic Disease.

While these expenditures are pocket change compared with the billions that were at play in the concurrent federal-provincial negotiations over the CHST, they are not just “boutique programs,” in that they do more than simply buy the federal government some cheap public visibility. Rather, they have created organizations to develop policy expertise and capacity that, in turn, inform policy-making and shape the reform agenda. This is not to say that the various research organizations and administrative innovations that the federal government has funded have predetermined conclusions, or indeed conclusions that will necessarily favour the federal government’s position on all issues. But to the extent that Ottawa is interested in ensuring some pan-Canadian commonality in policy, it is enough to create this network of organizations to develop a series of best practices and promising ideas on which the federal government can draw to engage the provinces.

Post-secondary education

Direct transfers in post-secondary education fit the above discussion perhaps least well, although that might also reflect the relative thinness of intergovernmental interaction on this file compared to health. Overall, federal direct transfers have supported or accentuated provincial changes, rather than led change, in the university sector through two sets of initiatives.

One set involves transfers to students. Some of it is a bit gimmicky, and might be better treated as candy for voters than as purposive social policy. One can point here to decisions over the past decade to quadruple the monthly education amount (from \$50 to \$200), to provide Canada Learning Bonds to children in low-income families, to make scholarships fully tax exempt, to rejig limits and contributions to RESPs, to create the Canada Graduate Scholarships and now to provide a textbook tax credit. The most controversial initiative was the endowment of the Canada Millennium Scholarship Foundation with \$2.5 billion (for 10 years) in 1998, with the goal of increasing access to

postsecondary education. The CMSF's main function has been to provide bursaries to students deemed to be both needy and meritorious, although 5 percent of bursaries are awarded for academic merit and leadership. While negotiations between the CMSF and the provinces were not always friendly, the CMSF did manage to secure agreements with all provinces on selection criteria and payment modalities, as well as loose provincial commitments for reinvesting provincial student aid money freed up by the federal scholarships (Institute of Intergovernmental Relations 2003). Put together, these initiatives largely accommodate provincial decisions to increase tuition fees and to tackle accessibility issues through greater use of scholarships and bursaries. Indeed, to the extent that there was audible and sustained provincial opposition to these initiatives, it came from Quebec and its view that the CMSF scholarships were a misuse of resources in a province that had not followed the path of increased tuition fees. The winding down of the CMSF and the repackaging of the Canada Student Loans and Canada Student Grant programs announced in the 2008 federal budget seem to confirm this trajectory of accommodating provincial policy choices.

The second set of changes involved new funding initiatives for university research. The two major initiatives here were the Canada Research Chairs (CRC) program, announced in 1999 with an initial five-year, \$900-million price tag (slightly augmented in 2008 by the \$21-million Canada Global Excellence Research Chairs program), and the CFI, announced in 1997, which has received \$3.15 billion to support awards until 2010. These initiatives have given the federal government some high-profile visibility for supporting the university sector, even after base funding for the sector was cut by a third in the 1995 federal budget. They have helped shape the university sector in several ways. They have required universities to develop strategic plans and identify research priorities, while the attribution of chairs is proportionate to success in attracting money from the three national granting councils. In the process, they have accentuated the trend to greater differentiation and hierarchy both between disciplines within universities, and between universities (Polster 2002). Beyond these, one could point to the creation of a further series of programs (such as the National Centres for Excellence and the Centres of Excellence for Commercialization and Research) and

semi-arm's-length bodies (such as the Advisory Council on Science and Technology), which, in their own way, complement provincial strategies for the commercialization of research and the participation of business in setting research directions (Polster 2003-04).

Social services

The use of direct transfers has been less visible in the field of social services and social assistance, with the exception of the National Child Benefit (NCB). As with the CMSE, federal investment has freed up provincial monies — with respect to the NCB, the child portion of provincial social assistance benefits. In contrast to the CMSE, the form of this reinvestment was the subject of multilateral negotiations and agreement. The use of a direct transfer in this instance operated a bit more like a hybrid of a direct transfer and a shared-cost program. The federal government was not so much leapfrogging the provinces to get directly at citizens as negotiating a means of more efficiently rejigging roles and responsibilities around the welfare wall. It is worth noting that Quebec did not participate directly in the discussions, finding efficiency to be an insufficiently compelling justification for ignoring constitutional jurisdiction. The federal investment in the NCB, therefore, could be seen to leverage provincial action in the agreed areas of reinvestment — namely, children's benefits and earned-income supplements; child care; early childhood services and children-at-risk services; and health benefits. The NCB was extended into the realm of disability in 2003 with the addition of a Child Disability Benefit.

Alongside the launch of the NCB in 1997, the federal government funded the creation of five Centres of Excellence in child welfare, with \$20 million earmarked over five years. The announced objectives were to increase the understanding of child welfare and development and to improve the capacity to respond to children's needs. This research mission nevertheless had some policy-related functions, such as advising governments, providing information to a broad audience and organizing networks of groups working in the child welfare sector (Canada 1997).

In their recent child care initiatives, the Conservatives have also used direct transfers, in terms of providing a universal taxable child benefit (ostensibly for making child care choices) and giving businesses or nonprofit organizations start-up funding for creating child care spaces (Prince and Teghtsoonian 2007).

Looking across health, post-secondary education and social services, then, the role of direct spending as a tool of federal leadership appears overstated. That is not to say that such spending is unimportant, but it seems to be too blunt an instrument for the exercise of leadership. If the federal government wishes to gain much leverage with such transfers, it often is required to negotiate with the provinces, be it with respect to the CMSF, the NCB or the Green Municipal Funds. The contribution of these transfers to federal leadership might well be largely indirect, by shaping agendas and reform options in intergovernmental negotiations. For all that, it is *part* of the federal leadership strategy, and its use falls outside of the purview of the Conservatives' spending power commitment. Its use is thus likely to persist.

The New Shape of Social Policy Agreements

In recent intergovernmental negotiations on social policy, the federal government appears to be using the spending power in a manner consistent with ideas drawn from the literature on governance and new public management (Phillips 2003; Saint-Martin 2004). Rather than seeking to use hierarchical measures, such as the imposition and policing of standards, Ottawa is attempting to shape policy through setting priorities and developing reporting mechanisms, the idea being that this combination can compensate for the relative neglect of the formal planning and procedures involved in implementation (Boismenu 2007).

Evaluation and reporting can contribute to developing shared directions in social policy in two ways. One is through social learning, by encouraging the exchange of best practices and successful experimentation and by wishing to avoid public embarrassment, either for misusing funds or for not achieving strong results in terms of outcome indicators. The second way is through "discursive regulation": the very act of developing indicators and preparing reports has an impact on what bureaucracies prioritize and how they think about questions (Jacobsson 2004). The production of reports also keys provincial departments into a shared pan-Canadian timeframe and language with departments in other provinces. This second effect is subtle and should not be overstated, but neither should it be ignored.

The potential and limitations of reporting as a form of accountability — and, by extension, a tool of leadership — has garnered most of the attention in the literature on recent negotiations and agreements (see, for example, Saint-Martin 2004; Kershaw 2006; Anderson and Findlay 2007). This work is highly skeptical that reporting will produce common policy directions, either through emulating best practices or through citizens shaming governments that do not spend the money in priority areas or that do not achieve strong results. Even in the best of possible worlds, this form of accounting assumes that citizens are budding social scientists with the resources and inclination to compare outcomes (Phillips 2003). The sanction for noncompliance is ultimately the ballot box, which makes the accountability link problematic in that questionable use of funds in one area, such as employability assistance for people with disabilities, is unlikely to register in the main themes of a provincial election campaign. As provinces are aware of how reporting could be used to blame and shame them, however, and since preparing reports is costly and time consuming, they have worked hard to limit reporting requirements (Graefe and Levesque 2006). In addition, the quality of reports produced to date has been heavily criticized. Reports on early childhood education and development are frequently late, missing or hard to locate, and there is significant difficulty in making the numbers add up, both within years and across reports (Anderson and Findlay 2007). While it is easy, therefore, to be skeptical about reporting, it is too early to write it off as a diversion. The potential for discursive regulation — how discussions about indicators and the preparation of reports affect bureaucratic priorities and thinking — has not been studied, and the institutionalization of reporting over time might lead to better practices, particularly where there are advocacy organizations with the capacity to gather and disseminate such information.

For all the debate about the “back end” of reporting, the “front end” of governance — namely, agenda setting and priority definition — probably deserves as much attention. The federal spending power enables Ottawa to signal priorities and suggest solutions, and to gather the provinces together to commit to addressing them. While the provinces can negotiate by introducing other priorities and solutions, they must do so within the realm of federal engagement and agreement or risk Ottawa’s deciding not to spend. The control and leadership that

this agenda-setting ability provides is coarse grained, but when paired with evaluation and reporting it provides some ability to set the direction of policy change and to ensure some interprovincial similarity.

The use of the spending power for agenda setting and for setting up forms of public reporting seems largely outside the scope of the Conservative government's proposed spending power measure. Yet this appears to be the dominant manner in which the federal government has been exercising social policy leadership in recent years. The promise to spend money brings the federal and provincial governments together in negotiations that usually result in multilateral framework agreements setting out a broadly shared philosophy of policy reform and enumerating priority areas for investment and policy development. The agreements also include a number of engagements around reporting, be they the development of annual plans and progress reports, the development of shared indicators and baseline measures or commitments to consult and share best practices. Some examples from health, post-secondary education and social policy (disability, housing, child care) are detailed below and summarized in table 1.

It is noteworthy that, of the big programs cut in the mid-1990s, it is only in social assistance that the federal government has not returned funds, through either direct transfers or new initiatives. This probably reflects the federal government's success in shaping the agenda in that field around an employability focus through unemployment insurance reform in the early 1990s and the Labour Market Development Agreements of 1996-98, coupled with attempts to tear down the welfare wall through child benefits (see Graefe 2006). Renewal in this sector eventually might come by engaging the provinces on poverty reduction, given provincial initiatives on this front in Quebec, Newfoundland and Labrador, and Ontario.

Health

The health policy field has seen four major reinvestments (in February 1999, September 2000, February 2003 and February 2004), which, at least on the surface, show the progression of the federal government's capacity to set priorities and reporting requirements.

The 1999 investment simply drew provincial promises (through the exchange of letters) to invest an \$11-billion top-up of the CHST

Table 1
Recent Intergovernmental Agreements

Agreement	Main Provisions	Reporting Requirements
Health		
<p>February 1999: CHST to be increased in budget (see Warriner and Peach 2007, 150)</p>	<ul style="list-style-type: none"> • Federal government increases CHST floor by \$2 billion to \$14.5 billion for two years, and \$15 billion for subsequent three years 	<ul style="list-style-type: none"> • Premiers promise, by exchange of letters, to spend the money on core health services and to make information available to the public
<p>September 2000: Communique on Health (First Ministers' Meeting 2000b)</p>	<ul style="list-style-type: none"> • \$20.6 billion over five years, mostly as CHST top-up, but with earmarked funds for medical equipment (\$1 billion), health transitions (\$800 million over four years) and health information technology (\$500 million) • Includes action plan on timely access to services, health promotion, primary care reform, recruitment and retention, home care, prescription drugs, technology and information 	<ul style="list-style-type: none"> • Governments to report annually to public on progress in meeting action plan priorities
<p>First Ministers' Accord on Health Care Renewal, February 2003 (First Ministers 2003)</p>	<ul style="list-style-type: none"> • \$21.1 billion over five years, with the majority earmarked for Health Reform Fund (primary care reform, home care, catastrophic drug coverage) (\$16 billion) and diagnostic/medical equipment (\$1.5 billion) 	<ul style="list-style-type: none"> • Provinces commit to goals in primary health reform, minimum home care services and access to catastrophic drug coverage, and to report annually to public on these areas (expenditures, service levels, outcomes) • Provinces to report annually on enhancements to diagnostic/medical equipment and more generally on a set of comparable indicators

Table 1
Recent Intergovernmental Agreements (cont'd)

Agreement	Main Provisions	Reporting Requirements
Health		
<p><i>A 10-Year Plan to Strengthen Health Care</i>, September 2004 (First Ministers' Meeting 2004)</p>	<ul style="list-style-type: none"> • \$41 billion in new federal funding over 10 years, including money earmarked for wait times reduction (\$5.5 billion) and medical equipment (\$500 million) • Sets out agendas on various priorities including wait times, health human resources, home care, primary care reform, pharmaceuticals, public health and innovation 	<ul style="list-style-type: none"> • Governments agree to report to public on system performance, including wait times, comparable indicators, evidence-based benchmarks and targets to achieve priority benchmarks
Disability		
<p><i>Employability Assistance for Persons with Disabilities (EAPD)</i>, 1997 (Federal-Provincial-Territorial Ministers Responsible for Social Services 1997)</p>	<ul style="list-style-type: none"> • Funding agreement for labour market programming for people with disabilities, replacing Vocational Rehabilitation for Disabled Persons and marking shift in policy philosophy toward full participation through direct support of employability (from pre-employment support to short-term assistance to ongoing active employment supports) • Federal cost sharing capped at \$168 million 	<ul style="list-style-type: none"> • Provinces to prepare a program and expenditure plan for HRDC review and annual report on types of programs and services, numbers served and outcomes and expenditures by programs • Parties commit to ongoing evaluation activities and the sharing of evaluations
<p><i>Labour Market Agreements for Persons with Disabilities</i>, 2003 (Federal-Provincial-Territorial Ministers Responsible for Social Services 2003b)</p>	<ul style="list-style-type: none"> • Largely a renewal of the EAPD • Federal cost sharing capped at \$223 million 	<ul style="list-style-type: none"> • Provinces to share annual plan (for information purposes only) with HRDC setting out priority areas, descriptions of programs to be funded and projected expenditures

Table 1
Recent Intergovernmental Agreements (cont'd)

Agreement	Main Provisions	Reporting Requirements
	Disability	<ul style="list-style-type: none"> • Provinces to release baseline reports to public on objectives, descriptions, target populations and planned expenditures in 2004, and annual reports on program and societal indicators starting in 2005 including number of participants in programs, number of completions, number of participants who obtained or were retained in employment • Jurisdictions commit to ongoing improvement of reporting • Includes framework for demonstration or bilateral evaluations
<p>Framework agreement, November 2001 (Federal-Provincial-Territorial Ministers Responsible for Housing 2001)</p>	<ul style="list-style-type: none"> • Agreement for negotiating bilateral agreements • Federal cost matching limited to \$680 million over five years • Aimed at affordable housing supply, but with much provincial flexibility (construction, renovation, rehabilitation, conversion, home ownership, rent supplements, supportive housing) 	

Table 1
Recent Intergovernmental Agreements (cont'd)

Agreement	Main Provisions	Reporting Requirements
Child Policy		
<p>Early Childhood Development Agreement, September 2000 (First Ministers' Meeting 2000a)</p>	<ul style="list-style-type: none"> • \$2.2 billion in federal money over five years, to be spent in one or more of four priority areas (healthy pregnancy, early childhood development and care, parenting, community support) 	<ul style="list-style-type: none"> • Governments to report annually to public on investments and progress in enhancing programs in priority areas, beginning with a baseline • Governments to develop a shared framework for reporting, including jointly agreed indicators
<p>Multilateral Framework on Early Learning and Child Care, March 2003 (Federal-Provincial-Territorial Ministers Responsible for Social Services 2003a)</p>	<ul style="list-style-type: none"> • \$900 million over five years to be invested in early learning and child care, broadly defined in terms of setting (centre- or family-based care, preschools, nursery schools) and interventions (capital or operating funds, fee subsidies, wage enhancements, training, quality assurance, parent information and referral) • Based on principles of accessibility, affordability, quality, inclusiveness and parental choice 	<ul style="list-style-type: none"> • Governments to report annually to public with descriptive and expenditure information, indicators of availability (such as number of spaces), affordability (such as number of children receiving subsidies) and quality (such as child/caregiver ratios)

(over five years) in core health services in accordance with the provinces' health care priorities.⁷ The 2000 reinvestment went further, with the federal and provincial governments signing a document setting out an action plan that committed them to provide timely access to services, investment in health promotion, primary care reform, better recruitment and retention of health professionals, investment in home care, reduced prescription drug prices and investment in equipment and technology, as well as to work on a health "infrastructure" and inter-jurisdictional compatibility. To back this priority-setting exercise, a small portion of the total reinvestment (\$2.3 billion out of \$21.2 billion over five years) was earmarked to acquire diagnostic equipment (\$1 billion over two years), accelerate access to primary care innovations (\$800 million over four years) and develop cutting-edge health information technologies (\$500 million). Work on the front end of priority setting was also matched by work on the back end of reporting. The plan was tied to an accountability framework whereby governments agreed to produce progress reports on meeting the action plan's priorities. Consistent with the new use of the spending power, the framework was explicit that accountability was to be to the public, not to other governments, and thus funding would not be tied to performance in meeting priorities (First Ministers' Meeting 2000b).

The 2003 Health Accord provided a further demonstration of the priority-setting function of the spending power. While it invested a \$2.5-billion cash supplement (over three years) in the CHST base, this amount was dwarfed by a \$16-billion investment (over five years) in a Health Reform Fund that the provinces are obliged to spend on primary care reform, home care and catastrophic drug coverage. Although the objectives of the accord are vague — such as to provide "reasonable access to catastrophic drug coverage" — the provinces are required to prepare annual reports on progress and outcomes using comparable performance indicators such as those specified in the appendix to the accord. Money is also earmarked for diagnostic equipment, again with the requirement of annual reports to the public on progress and outcomes compared with baseline program and expenditure levels (First Ministers 2003).

Finally, the 2004 document, *A 10-Year Plan to Strengthen Health Care* (First Ministers' Meeting 2004), laid out a broad statement of

principles followed by commitments regarding specific problems such as waiting times, human resources, home care and primary care reform. The agreement commits the provinces to develop plans for overcoming these problems, and again to report annually to the public on their progress and to share best practices.

These four reinvestments demonstrate Ottawa's use of the spending power to shape provincial activity and to create some sense of pan-Canadian concerted action. Federal leadership is of a "soft" variety, shying away from establishing and policing firm standards. The Harper Conservative government seems content to operate within the framework of these agreements — for instance, in trying to achieve progress on waiting times through the mechanisms and funding contained in the 2004 agreement (Boychuk 2007).

From the perspective of 2008, the provinces' success in meeting the commitments of the 2003 and 2004 agreements is, at best, mixed. The provinces have not produced reports and data on agreed indicators in a manner that allows for interprovincial comparisons, while the extent to which targeted funds have been spent on identified priorities also varies across provinces and across specific reform priorities. The result is a "patchwork of pilot projects, not system-wide change" (Health Council of Canada 2008, 36). The body that was meant to partner the Health Council on such issues — namely, the Federal/Provincial/Territorial Advisory Committee on Governance and Accountability — has been disbanded. For many, this might signal the weakness of federal leadership implicit in the recent use of the spending power; from another point of view, however, it is remarkable how, by simply reinvesting an amount approaching its original share of medicare expenditures, the federal government has bought a seat at the table in defining specific reform agendas and is assumed to be a central player in any subsequent plans to remedy the shortcomings of these agreements.⁸

Post-secondary education

In the process of federal reinvestment following the 1995 budget and the creation of the CHST, postsecondary education has been in the shadow of health care. It also stands apart from the social services in that there has not been a renewal of multilateral negotiations and

agreements. Even here, however, one can see that the pieces are slowly being aligned to create agreements in the post-secondary sector that fit with the models in health and social services. The scission of the CHST into a Canada Health Transfer and a Canada Social Transfer (CST) nevertheless served to put the question of what the federal government intended to do with the CST (Mendelson 2003; CCSD 2004).

The March 2007 budget signalled that Ottawa hoped to take a few steps toward shaping post-secondary education through engaging the provinces around its transfers. The budget proposed to start identifying federal support within the CST for the three “priority areas” of post-secondary education, social assistance and social services and support for children, based on current provincial-territorial spending patterns. This strategy is correctly labelled as a means of increasing accountability and transparency, in the sense that future top-ups of the CST can be targeted more directly to specific priority areas and that provincial uses of the money can be monitored. By tying new federal investment to multilateral agreements and public reporting, the move enables a degree of federal leverage and, in conjunction with the scission of the CHST, it removes much of the provincial flexibility that was a selling point of the CHST. With federal reinvestment and the establishment of an annual escalator (effective fiscal year 2009/10), the federal government seems determined to backtrack unilaterally on that flexibility. The identification of funding streams within the CST echoes a similar move in the late 1980s to distinguish health and post-secondary education within Established Programs Financing, even if this did not have much practical impact.

The 2007 budget also committed the federal government to increase CST transfers for post-secondary education from \$2.4 billion in fiscal year 2007/08 to \$3.2 billion in 2008/09, following discussion with the provinces on how the transfers were to be used and on the appropriate accountability and reporting to Canadians. Again, there is a clear signal of an emphasis on agenda setting and monitoring of results through public reporting. Anticipating this move, the provinces prepared their own negotiating position with respect to priorities (access, quality, participation, skills training, research and innovation) and strategies for meeting them (Council of the Federation 2006a). Ottawa’s pledge to discuss the use of these transfers with the provinces represents

a step in engagement that goes beyond the 2006 budget's creation of a Post-Secondary Education Infrastructure Trust, which simply earmarked \$1 billion over two years for provincial post-secondary education infrastructure needs.

Disability policy and housing policy

Federal government policy-making with respect to persons with disabilities provides a narrative similar to that with respect to health, but starting a couple of years earlier. The change here was the transition from the cost-shared (although capped in 1994) Vocational Rehabilitation for Disabled Persons program to the Employability Assistance for Persons with Disabilities (EAPD) program in 1997. The latter program had a closed-ended federal contribution, and gave the provinces the flexibility to choose services across a number of specified fields, such as pre-employment supports, short-term assistance and ongoing active employment supports. The provinces were required to draw up one- to three-year implementation plans as the basis of a cost-sharing agreement with the federal government, and would otherwise be accountable to the public through annual reports. There were also provisions for learning through the sharing of best practices and evaluation activities (see Federal-Provincial-Territorial Ministers Responsible for Social Services 1997).

The EAPD was renewed in 2003 with the signing of the Multilateral Framework for Labour Market Agreements for Persons with Disabilities (LMAPD). The LMAPD framework is more detailed in terms of spelling out priority areas and defining annual plans and accountability indicators. This includes much clearer instructions about the content of annual plans (setting out priority areas, describing programs to be funded, laying out projected expenditures and providing a list of program and societal indicators to be reported on and a list of programs to be evaluated), even if these plans were “for information purposes only, and not for determination of program eligibility” (Federal-Provincial-Territorial Ministers Responsible for Social Services 2003b).

In practice, the provinces have resisted reporting since they understand how it could be used against them; they also resent the time and money they would have to spend on reporting, in view of what they consider the small size of the federal contribution. In negotiating the LMAPD, the provinces managed to soften some aspects of reporting.

For instance, they now release information directly to the public rather than having it batched in a single national report, as under the EAPD. Some of the more cumbersome reporting, such as detailed information on a per-client or per-service-delivery-worker basis, is no longer required, and the provinces managed to insert a “where possible” disclaimer in their obligation to report. Yet the lack of quality information in the reports renders them useless for learning across provinces or for the public’s ability to hold their provincial governments to account. Similarly, while both the EAPD and LMAPD extol the importance of evaluation in improving interventions and contain detailed provisions on how to conduct evaluations, the provinces have preferred instead to spend the money on programs and services — only two evaluations have been conducted under the LMAPD (Graefe and Levesque 2006).

These agreements on employability were of a piece with broader federal-provincial discussion papers on disability (see Federal-Provincial-Territorial Ministers Responsible for Social Services 1998; 2000) that likewise set out shared principles and objectives, as well as three policy building blocks (disability support, employment and income) with policy directions for each. These papers again emphasized the importance of reporting, collaboration and sharing data and best practices as means of making progress in removing barriers.

In housing policy, too, many similar elements recur, following Ottawa’s re-entry into the field. These include a November 2001 framework agreement for negotiating bilateral deals, and the federal government’s 2004 decision to accept a provincial framework to guide current and future negotiations. These frameworks appear to be more flexible than those on disability or health and fail to be specific about accountability measures, but they do set out eligible initiatives with respect to, for example, construction, conversion, rent supplements, supportive housing and so on (see Federal-Provincial-Territorial Ministers Responsible for Housing 2001; 2004).

Child policy

At the risk of drowning the fish, one could repeat the exercise for federal-provincial negotiations on child policy. To the half-transfer/half-shared-cost National Child Benefit, one could add the 2000 Early Childhood Development Agreement and the 2003 Multilateral Framework on Early

Learning and Child Care. The former involved a \$2.2-billion federal transfer over five years, which provinces could use to invest in four broad priority areas (healthy pregnancy, early childhood development and care, parenting and family support). Accountability involved both public reporting and joint work on developing indicators and sharing information and best practices. The 2003 framework likewise gave the provinces leeway to define their investment priorities, but required annual reports to the public on how money was spent and on indicators of availability, affordability and quality.

The 2005 bilateral agreements on Early Learning and Child Care follow this general line. While a multilateral agreement could not be struck, the bilateral agreements follow the so-called QUAD principles (quality, universally inclusive, accessible and developmentally appropriate) adopted at the federal-provincial-territorial meeting of February 2005. The agreements committed the provinces to develop action plans on early learning and child care (or to implement such plans if they already exist) to address agreed-upon priorities and goals. In return for the federal money, the provinces were required to report annually to the public on accessibility, affordability and quality. These agreements were an initiative of the Martin Liberal government, and were cancelled, with a year's notice, by the subsequent Harper Conservative government.

In child care, as in health care, some critics have questioned whether the use of the spending power to set agendas and develop public reporting amounts to much compared to the more forceful use of imposed national standards — particularly given reporting that often verges on bad faith (see, for example, Kershaw 2006; Anderson and Findlay 2007). When one looks at the policy fields through time, however, one can observe both an institutionalization of reporting and development indicators and the ability of the federal government to tighten the focus of the agenda. This is the case if one compares the 1999 health deal (an exchange of letters) with the 10-year plan of 2004 or the scope of allowable reinvestment in the NCB agreement with that in the 2005 bilateral child care agreements. These are still loose controls, but they have allowed the federal government to continue to participate in areas of provincial jurisdiction and, indeed, to ensure that the provinces move in a similar direction on pressing issues.

Looking at these agreements, one sees the limitations of the proposed spending power initiative coming back to the fore. Given the

relative flexibility granted to the provinces in terms of specific programs and initiatives, the opt-out provision (reasonable compensation for provinces offering compatible programs) verges on the meaningless. It is hard to imagine a program compatible with the objectives and priorities of these agreements that would not fit within them. An opting-out formula that might have some purchase in this context would be a fully unconditional one. As the federal government is using the spending power to set agendas of reform and public accountability, the protection of provincial autonomy would seem to require the right to refuse the agenda or the priorities, and thus also the outcome measures, as meaningful metrics of performance.

Is it the spending power or spending levels?

One could argue that a spending power law, although it would be out of touch with the form of recent agreements, nevertheless would inflect intergovernmental relations by changing the negotiating power of the different orders of government, making it easier for provinces to resist the imposition of federal constraints, even in terms of priority setting and reporting. That would be unlikely, given the weakness of the commitment in the 2007 Speech from the Throne, but a more constraining version with a high provincial consent threshold and a meaningful opting-out provision would plausibly change the bargaining dynamic around setting priorities and reporting guidelines.

The problem with the argument for weakening federal bargaining power is that it once again proceeds from the idea of the spending power as a constraint on the provinces, which would therefore resist it, not as an enabler of provincial action. It assumes that the provinces are at all times and in all places opposed to its use. Even in negotiating SUFA, however, Newfoundland and Labrador at one point backed out of the provincial consensus on the grounds that it wished to maximize the inflow of federal funds (Warriner and Peach 2007). Saskatchewan likewise elaborated a position favourable to the widespread use of the power, albeit with some provisions to limit its unilateral withdrawal (“the disspending power”) and to ensure provincial participation in elaborating its use (Romanow 1998). Provincial resistance to federal initiatives might then reside not only in the *principle* of constitutional jurisdiction, but also with respect to the *price* of federal involvement. In

this alternative view, then, provincial resistance has been heightened by the lack of financial lubrication in the system.

It is worth remembering that an important subject of provincial claims-making from the late 1980s to the late 1990s — through such forums as annual premiers' conferences, provincial budgets and Throne Speeches — was the federal government's use of its disspending power. In removing full indexation of Established Programs Financing, in capping its contributions under the Canada Assistance Plan for equalization-receiving provinces, in renouncing responsibility for social assistance for Aboriginal people living off reserve and so on, the federal government was seen to be shifting expenditure responsibilities onto the provinces without shifting corresponding tax room. It is therefore understandable why the provinces have resisted federal initiatives and have sought to limit accountability, at least as long as money to backfill the earlier cuts is not on the table (Smith 2004). In the field of labour market programs for persons with disabilities, for instance, officials from some have-not provinces have underlined their great difficulty in undertaking the new goals of the EAPD and LMAPD, given the need to continue paying for programs that were cost shared with the federal government as part of the now-defunct Vocational Rehabilitation of Disabled Persons program. Officials in some of the have provinces conversely argue that the federal contribution is too small to warrant wasting resources on extensive reporting and evaluation, especially as Ottawa's funds are simply a subset of provincial programs for people with disabilities (Graefe and Levesque 2006). It is precisely when the federal government begins to put serious money on the table that it gets some leverage on provincial priorities. The greater specification of goals and allowable programs under the 2004-05 child care agreements compared to the 2000 Early Childhood Development Agreement provides some backing to the view that provincial resistance to the federal spending power is due not only to the invasive power it provides the federal government, but also to the lack of spending attached to its recent use. This would be consistent with the history of Canadian federalism and the welfare state; as Richard Simeon and Ian Robinson (1990) demonstrate, the fortunes of the Canadian welfare state have been tied largely to the willingness of Canadians to support welfare state expenditures and the accompanying tax burden. In other words, while the

institutional configuration of Canadian federalism affects the shape of social policies and the timing of their introduction, it has not historically prevented the translation of broad shifts in public philosophy about the welfare state into policy change.

Looking Forward

The discussion to this point has developed two lines of argument. First, the federal government's participation and leadership in provincial social policy jurisdictions continues to be reliant on the spending power, but the leverage provided by that power is more one of "steering" the provinces through agenda setting and public reporting than one of compelling provincial behaviour through conditionality. Federal leadership is less about "national standards" and more about action on common priorities. Setting and policing standards becomes less important than setting the priorities. It may be that this has long been the case — for instance, with the launch of the Canada Assistance Plan (Graefe 2006) — but now it is transparently so with the disappearance of much of the language of national standards. Second, the Conservatives' spending power legislation is unlikely to have much impact on the federal role in social policy, not only because of the fuzziness and weakness of its wording, but also because it remains wedded to the idea that the spending power's leverage is in setting standards.

It is also plausible to expect this form of social policy participation and leadership to persist into the medium term. The Chrétien and Martin Liberal governments honed the use of direct transfers and new forms of federal-provincial agreements, but there is little evidence of change under the Harper Conservatives. True, the Conservatives' tax and spending plans to date have greatly reduced the budgetary leeway that drives the spending power. The fiscal imbalance created by the 1995 federal budget, which lay behind the raft of spending power initiatives under the later Chrétien and Martin governments (Courchene 2008), is greatly attenuated. Yet, despite this loss of fiscal room to manoeuvre, as well as of a thin program for social policy innovation, the federal government has not done a great deal to disentangle and sort out roles and responsibilities. It has not moved to rejig the philosophy of intergovernmental relations,

such that one might expect that the existing form of policy-making will be revived when budgetary circumstances allow. Over time, one might expect a Conservative government to make more use of direct transfers and tax expenditures than of federal-provincial agreements, reflecting a preference for consumer decision-making over state planning (see, for example, Prince and Teghtsoonian 2007). As evidence, one could point to the plethora of minor tax credits in the first two Conservative budgets, be they for child care, labour force attachment, textbooks or children's sports, but to date these have been more gimmicks than coherent policies. More generally, as Keith Banting's (2006a) reading of the Conservatives' 2006 platform illustrates, the Harper government's enthusiasm for direct transfers does not exclude promises to work through shared-cost instruments in health care, post-secondary education and policing.

Collaboration as creative and efficient

So, if this is the current pattern of federal social policy participation, and if the spending power law promises to do little to change it, should we celebrate or denounce this trend? Certainly, a number of features of this pattern could be lauded. After the acrimonious and poisonous intergovernmental relations accompanying the failures of constitutional renewal and Ottawa's reduction of transfers to provinces, the federal and provincial governments have found a manner to work together productively (if not yet amicably) again. In addition, they have shown some creativity in doing so, in terms of developing a set of principles and practices to work around the variable political geometry of the country. Quebec's ability to negotiate asymmetric side deals to certain agreements (such as the health accord) or bilateral agreements that depart from those of other provinces in terms of reporting and accountability (such as in labour market programs for persons with disabilities or child care) provides a means of recognizing national duality even while enabling pan-Canadian concerted action. Doing so through a formula of de jure symmetry but de facto asymmetry opens two doors for future practice. As Tom Courchene (2008) points out, there is the opting-out door of "concurrency with provincial paramountcy" and the opting-in door of passing power to the federal government, which could be considered a near application of section 94's "uniformity of laws" provision. The agreements also go some way to assuaging

provincial concerns about the federal spending power, in providing a good deal of leeway to make choices about policies and programs that meet the objectives of social policy agreements. There is plenty of room within this framework for a banal asymmetry — in the sense of provinces doing things differently from one another — even as this variation is moving in a common direction that allows for interprovincial coordination and learning.

Work on collaborative federalism (see, for example, Lazar 2000; Cameron and Simeon 2002) takes a similarly optimistic view. It presents collaborative federalism as the maturation of the cooperative federalism of the postwar period. The two orders of government have been able to work together to develop and implement new social policies that speak to a pan-Canadian sense of identity, but in a manner that provides space for significant provincial participation in policy development and provincial autonomy in more detailed policy design. The maturation in this instance is the federal government's recognition that it must govern in collaboration with the provinces, and thus adopt a less unilateral and hierarchical approach to policy development. There is a strong taste of “what ought to be” in this view, but proponents such as Harvey Lazar (2006) also argue that much of the post-1995 social policy-making, particularly in areas insulated from high politics — that is, policies other than health care — fits this collaborative model. Consistent with the dominant traditions of the English-language literature on Canadian federalism, this work gives pride of place to the criteria of efficiency and functionality (Rocher 2006), and there is certainly enough evidence to consider collaborative federalism a success so far on these grounds.

Critiques from Quebec nationalists and centralists

From the normative perspectives of Quebec nationalists, on the one hand, and of centralists, on the other, however, the current approach is problematic in that it does not respect the division of powers (as understood by the nationalists), but neither does it create a clear sense of national purpose or sufficient pan-Canadian uniformity in social rights (for the centralists). I consider each in turn.

For the nationalists,⁹ current intergovernmental relations lack legitimacy as they do not have a robust sense of the division of powers. They argue that, if Canada is to be considered a multinational entity, the

division of powers is a central element defining the relationship between constituent nations and should not be open to unilateral change (Gagnon and Iacovino 2007). The spending power has long been criticized for contributing to a “federative deficit” (Caron, Laforest, and Vallières-Roland 2006) in that it has allowed the federal government to interfere in provincial fields of jurisdiction. It has thereby robbed Quebec of full policy autonomy within its fields of jurisdiction, even if this autonomy was the price of Quebec’s entry into Confederation (Noël 2000). The use of direct transfers to individuals and organizations is obviously galling in this respect. Likewise, the shift from using the spending power to enforce national standards to using it as a tool for agenda setting and public reporting does not negate this critique. True, the degree of flexibility within the new agreements means they are less constraining on autonomy. True, as well, the reporting and accountability requirements of recent agreements in health, child care and labour market programs for persons with disabilities have shown a degree of asymmetry that allows Quebec to stand apart and that renders its participation in interprovincial beauty contests less likely. On the other hand, these are less “gains” than the ability to “save the furniture” in a situation where the federal government, often with a strong dose of support from other provinces, is participating in provincial fields of jurisdiction. Indeed, the use of the spending power in these new agreements presents new dangers as it risks erasing the importance of the constitutional division of powers, and thus the basis of provincial negotiating power in resisting federal intrusion. Many agreements start with a blanket statement about recognizing the constitutional jurisdictions of both orders of government, but then proceed to lay out provisions that run roughshod over them (Boismenu 2006). In the long run, this can only affect how the constitutional division of powers is understood and interpreted (see, for example, Poirier 2004; Trench 2006).

In this view, Quebec’s ability to negotiate different terms — for instance, in the 2004 health agreement or the subsequent child care agreement — cannot be treated as a victory. While its openness to asymmetry might contain some promise, the federal government continues to act in spheres of provincial jurisdiction. The agreements still compel Quebec to undertake certain forms of reporting and accountability to obtain federal funds, even if that reporting is to a different body or otherwise looks

slightly different. Similarly, while Quebec's nonparticipation can be seen as openness to a form of asymmetry, Gérard Boismenu (2006) notes that it is hard to believe that an asymmetry that was stoutly refused in constitutional negotiations could somehow come to take a robust form simply through Quebec's ongoing practice of standing on the sidelines. The more likely outcome is the further development of functional and collaborative federal-provincial relations that are impervious to Quebec's concerns, and eventually to an institutionalization of a new vision of Canada in which Quebec finds no place. If asymmetry is to fulfill its promise, it will need a fuller expression at the political and/or constitutional level than can be given by a series of intergovernmental agreements.

For nationalists, the preferred alternative is to find a means of solving the fiscal imbalance so that the provinces have sufficient revenue to meet their constitutional responsibilities and the federal government does not have additional funds that it can use to intervene in areas of provincial jurisdiction. Short of that, one could imagine an unconditional right to opt out of pan-Canadian initiatives with full compensation so that Quebec would not be financially penalized for upholding the division of powers in the face of federal initiatives in fields of provincial jurisdiction. The historic weakness of this perspective, as François Rocher (2006) underlines, is its thin vision of shared rule: of how provinces that wish to follow their own policy path nonetheless might build some common sense of purpose or identity. That weakness applies in the case of recent federal-provincial agreements, as they give few indications of what forms of information and exchange and networking with other provinces might be both acceptable and valuable in shaping how Quebec exercises its autonomy in its own fields of jurisdiction. In other words, the agreements are vague on what aspects of current practices might be salvageable, or even expanded, if the federal government were pushed out of the picture, or in what areas Quebec might cede autonomy to interprovincial decision-making forums to manage interdependencies with other provinces.

For centralists, the main problem with the recent agreements is their lack of enforceable national standards, without which it is hard to point to any rights that all Canadians hold as a result of them and thus hard to speak of "social citizenship" (Cameron 2004; Day and Brodsky 2007). The new mechanisms of federal leadership are likewise felt to be

lacking. On the one hand, the description and definition of priority fields for investment is so broad that provinces are scarcely bound by commitments to invest in those fields. What some might label “flexibility” centralists portray as lowest-common-denominator solutions designed to accommodate recalcitrant provinces (Friendly 2001; Yalnizyan 2005). Reporting and accountability are also dismissed as tools for leadership, both for having an unrealistic expectation of the public’s capacity to use the reports and in light of experience to date. Even though reporting to the public is meant to replace accountability to the federal government, provincial reports are often hard to locate and not always produced on time. As noted earlier, the information they contain is sometimes suspect, internally contradictory and insufficiently explained, making it difficult even for social scientists to make sense of them, let alone to compare them over time or across jurisdictions (Kershaw 2006; Anderson and Findlay 2007). As such, reporting cannot hold a candle to national standards when it comes to ensuring that provinces provide comparable services. Overall, centralists see the social policy initiatives of the past decade as thin and disappointing on their own terms, and they argue that it is irresponsible to employ the spending power without imposing firmer conditions on the provinces (Mendelson 2003).

The culprit here is the ability of the provinces to resist the federal spending power, but this really masks the federal government’s lack of political will to use the spending power to force recalcitrant and ideologically opposed provinces to implement more substantial policies. The child care agreements of 2004-05 are instructive for centralists, as they came about from a more aggressive use of the spending power to gain bilateral agreements (in part, for the Liberals’ electoral purposes) after more collaborative attempts at concluding a multilateral framework had failed (see Friendly and White 2008). If this is the case, then the solution to the problem of creating social rights is to develop that social will and return the spending power to the role of enforcing national standards. It is indeed the centralists, tied closely to the relative bargaining power of the federal and provincial governments and the need to enforce standards, who are most likely to view the Conservatives’ spending power proposal as dangerous.

Centralists see some real possibilities, however, on the direct transfer side of the equation, perhaps following Tom Kent’s recent work on

how the equalization provisions of the *Constitution Act, 1982* provide an open door to federal participation in child care, family support and human capital investment. The limitation here is a skepticism about whether transfers can do the heavy lifting in these fields: tax credits for sports might not create sports and recreation programs; tax credits for daycare might not create enough spaces or enough educational quality. The creation of foundations, such as for the Millennium Scholarships, provides a way of getting around the lack of administrative capacity associated with transfers, but it is hard to believe that foundations would have the ability to manage anything more than boutique programs.

Democratic concerns

Beyond these normative perspectives, which reflect organized political constituencies, one can add some concerns about democratic accountability that are important, if not clearly rooted in any political constituency. As a first cut, one could rehearse the long-standing critique of the democratic deficit in intergovernmental policy-making and Canadian executive federalism. There are certainly many nuances to, and ongoing experimentation with, executive federalism that make across-the-board condemnations of its democratic shortcomings lapse into caricature (Simeon and Nugent 2008; Simmons 2008). The emphasis on collaboration and on “public,” rather than legislative, accountability nevertheless makes democratic participation and oversight complicated and difficult. Negotiation remains in the hands of the executive, with little legislative oversight or formal legal channels for citizens to claim rights against government (Cameron 2004; Baier 2008). Beyond this more general concern is a more specific one of accountability in the system, given the lack of a strong statutory basis for social policy-making to date. Barbara Cameron (2007) usefully demonstrates how provincial accountability to the federal government under the Canada Assistance Plan was not just about federalism, but also about Parliament keeping the federal executive accountable for the spending of federal money in interprovincial agreements. The current system of intergovernmental agreements, by contrast, has a weak statutory basis, with expenditures often tucked into omnibus budget bills. There is little legislative debate or ratification of the purposes and principles motivating such agreements, or of the programs and institutions

they set in place. The result is a loss of executive accountability to the legislature and a reduction of the ability of citizens to use the courts to compel governments to respect statutory rights and obligations (see also Simeon and Nugent 2008).

There are thus important issues about this form of policy-making that renew long-standing critiques about the national and democratic shortcomings of Canadian intergovernmental policy-making. Given the persistence of the cleavages and constituencies that produce these critiques, the long-run ability of the federal government to exercise leadership in this manner might depend on finding mechanisms to defuse or accommodate aspects of these critiques. In terms of Quebec nationalism, the forms of asymmetry in recent agreements stand as interesting experiments in flexibly fitting intergovernmental relations around a conception of binationality. It seems that the Quebec public also sees them in that light. It is nevertheless too much to expect intergovernmental relations to do the heavy lifting of defining the political community. The limits of possible asymmetry within these types of agreements have largely been reached with current practice, but would be unlikely to suffice for a future Quebec government with a stronger program of autonomy or a more ambitious program of developing a distinctive Quebec social citizenship. Further movement toward responding to the nationalists' concerns would require action at the political and constitutional levels so as to open space at the level of policy negotiations.

For centralists, the issue might be less pressing, as one finds relatively few voices calling for national standards these days. At the same time, the international trend is for the logic of social citizenship to trump the logic of territorial diversity (Banting 2006b). In the Canadian case, this is evident in that the loss of federal legitimacy in policing national standards in health and social services following the 1995 budget did not lead so much to a push for provincial autonomy as to the development of proposals for the interprovincial management of pan-Canadian social citizenship (Warriner and Peach 2007). Should Canadians decide to embark on another wave of social policy building — in home care or child care, for instance — they might demand a return to more stringent federal oversight on transfers to the provinces. Indeed, citizens' engagement initiatives around the Premiers' Advisory Council on the Fiscal Imbalance uncovered strong public support for

common standards and conditional transfers (Maxwell, MacKinnon, and Watling 2007). In this light, proponents of the current model might do well to push further on developing institutions to increase transparency and participation, and thereby demonstrate the social learning potential of this new form of governance. Part of this involves disentangling the accountability and social learning elements of reporting so that the one does not block the other (Saint-Martin 2004). Along these lines, Jane Jenson (2004) has called for “meeting places” for the ongoing review and discussion of evidence and social policy assumptions. The Canadian Council on Social Development (2004) has likewise proposed the creation of a pan-Canadian organization of stakeholders to measure investments and results, to proactively share innovations and to favour citizen participation in formulating priorities and policy. This might usefully go hand-in-hand with legislative measures to hold the government executive accountable, such as creating standing committees on intergovernmental relations to review intergovernmental agreements (following Simeon and Cameron 2002) and to review and comment on the annual reports required by these agreements.

To sum up

These normative evaluations, and potential institutional responses to them, highlight how the definition of the Canadian political community and of appropriate relations between governments seems once again amenable to change. The tools of statecraft for intervening in this environment, as well as the language and concepts we use to make sense of it, nevertheless require some renewal and modification. The Conservatives’ spending power bill, as described in the 2007 Speech from the Throne, is an attempt to signal a change in how the federal government approaches the definition of the political community and how it manages its relations with the provinces. I am nevertheless quite skeptical of this proposal’s purchase on current forms and practices of intergovernmental relations. The fuzziness of its wording and its unilateral, self-imposed nature raise questions about how it would relate to federal-provincial relations, even as traditionally understood. More importantly, the proposal seems out of phase with how the federal government has recently used the spending power to create a pan-Canadian social space. The proposal looks back to the use of the spending power

to police national standards, when its recent use has had more to do with agenda setting and creating new forms of public accountability. It also looks to please the provinces by restraining the power to police standards, yet there is evidence that some provinces would be happier simply to see the federal government bring more money to the table.

This is not to say that there are not concerns about the use of the spending power to set agendas and create reporting mechanisms. Quebec nationalists point to a “federative deficit,” centralists to the misuse of the power and some academics to the democratic shortcomings of its recent use. A more effective statecraft around the spending power, and the federal leadership it enables, would involve deciding whether to continue on the current path of collaborative federalism or to construct an alternative — be it provincialist, binationalist or pan-Canadian nationalist. It is not particularly helpful to speak about controlling the spending power in a manner that appeals to provincialists and Quebec nationalists, and then to propose a mechanism that promises little or no change to federal social policy participation.

Given that there currently does not appear to be an alignment of political forces in favour of an alternative, effective statecraft might start from the collaborative model and consider what internal adjustments might reduce the strength of the critiques offered to date. Are there ways of improving the capacity for interprovincial social learning and sharing best practices, such as Jenson’s “meeting places,” given the understandable provincial resistance to existing reporting practices? The left-centralist critiques of the new forms of federal leadership put far too much blame on federal-provincial relations for the slow progress on social policy renewal and expansion over the past decade and not enough on the lack of political will at both the federal and provincial levels to invest in social policy. But it remains that the full potential of learning mechanisms has not been exploited to date, and that more could be squeezed from policies even in this period of restrained social purpose.

One could likewise ask if there are ways of fleshing out forms of asymmetry that would allow Quebec to participate more fully in the sharing of policy knowledge and to withdraw more unconditionally from pan-Canadian frameworks. Would the development of a tradition of an unconditional opt-out for Quebec be worth exploring? This is a highly prospective question, but if federal leadership takes the form of

agenda setting, reporting and learning, one wonders if removing the threat of being enmeshed in a pan-Canadian agreement (flowing from a federally set agenda) with particular reporting requirements might, in fact, invigorate Quebec's willingness to share in the discussion and dissemination of social policy innovations (see Vaillancourt 2002).

As it stands, the Conservatives' spending power proposal should allow the emergent form of federal social policy leadership to tick along pretty much as is, with all its strengths and weaknesses. In a period in which some flexibility and experimentation appears to be possible, one hopes that the language of change may yet be connected more closely to initiatives with some purchase on current practice.

Notes

- 1 Even if this treatment was open to all provinces, it was clearly sold as a sign of the federation's recognition of Quebec's distinctiveness.
- 2 Noël (2000), Warriner and Peach (2007) and Courchene (2008) provide overviews of these and other proposals to limit the spending power.
- 3 Much as with real-life beauty contests, provincial officials note that these rely on a subjective and questionable standard of what constitutes beauty, a standard whose attainment is not always preferable, sometimes unhealthy and occasionally downright dangerous.
- 4 The exceptions here would be the health agreements after the CFHCC report, which reintroduced escalator clauses.
- 5 An example is the potential of a deep and enduring rift in the legitimacy of the spending power in Quebec and in the rest of the country — or, indeed, the difficulty of reconciling the Conservative base in both Quebec and the rest of Canada (Bickerton 1997), despite apparent success to date (Gibbins 2006).
- 6 The novelty of this field should not be overstated if one looks back to the *War Nurseries Act* and negotiations within the context of the Canada Assistance Plan. What was new over the past decade, however, was the treatment of child policy in the framework of early childhood education, as well as the consideration of this policy field as a headline field on its own terms, and not simply as part of social assistance/social services.
- 7 The money also made the provinces more pliable in concluding SUFA (see Noël 2000; Warriner and Peach 2007).
- 8 As an aside, it is likewise telling that Ottawa can now rely on newly created organizations such as the Health Council to

strengthen a pan-Canadian understanding of health policy, as well as to do the political dirty work of shaming the provinces.

- 9 Some may see these arguments as more properly those of sovereignists, but they are largely shared by francophone federalists in the Quebec Liberal Party, who have called for an end to the fiscal imbalance and for respect for the division of powers set out in sections 91 and 92 of the Constitution, and who have criticized the weakness of the Conservatives' planned spending power initiative.

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Debating the Federal
Government's Role in
Social Policy:
Rapporteur's Report

Keith Banting

The roundtable held on June 12, 2008, explored the nature of the federal government's involvement in social policy and the role of the spending power in the Canadian federation. The catalyst for the discussion was the 2007 Speech from the Throne, in which the federal government proposed to introduce legislation specifying rules to govern the federal spending power. The proposal, which is consistent with ideas at the centre of constitutional negotiations since the Meech Lake Accord, states:

Our Government believes that the constitutional jurisdiction of each order of government should be respected. To this end, guided by our federalism of openness, our Government will introduce legislation to place formal limits on the use of the federal spending power for new shared cost programs in areas of exclusive provincial jurisdiction. The legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs. (Government of Canada 2007)

While the federal proposal was the precipitating event bringing roundtable participants together, their deliberations adopted a broader perspective, exploring the interface between two enduring axes of Canadian political debate. The first seeks to define the social role of the state, and the development and management of public programs that respond to the social needs of Canadians. The second focuses on the effective functioning of the federation, balancing the dualist, regional and pan-Canadian realities of the country. These two dimensions of our political life have coexisted in an uneasy relationship since the country took its first halting steps toward a welfare state almost a century ago. In attempting to define the contemporary role of the federal government in social policy, the roundtable embraced a debate inherent in the very nature of Canada.

Participants in the roundtable approached the issues from different starting points. Some were animated in the first instance by the large social policy challenges before us: the need to reinvigorate a health care system that was once the envy of the world but is now under strain; the need to develop a post-secondary education sector that meets the demands of a knowledge-based society; the enduring need to combat poverty and social exclusion, especially among marginalized and vulnerable groups; and the need to accommodate the increasing importance of cities. Rising to the challenges before us, in the view of this

group of participants, requires concerted national effort involving the cooperation of stakeholders and all three orders of government. But participants did not see such a coordinated national effort emerging, and several argued that Canada faces a crisis of leadership.

Others participants were motivated in the first instance by concern about the functioning of the federation. While they were less likely to think Canada is at a crisis point at the moment, they saw long-standing problems on which we seem to be making little progress: Quebec's place in the country and the province's unresolved concerns about constitutional change; tensions in the relationship between the federal and provincial governments generally; and conflicts generated by resource rents, which are transforming fiscal federalism and threatening the equalization program. These participants also outlined a significant agenda before the country.

These two perspectives converged to generate a lively debate about the social role of the federal government. For the most part, the debate pivoted around the place of the federal spending power in the governance of social programs. The doctrine of the spending power holds that "the federal Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate" (see Hogg 2001, 6-15). This doctrine has been challenged, however, both politically and judicially, and has been a recurring source of federal-provincial conflict for half a century. The status of the federal spending power was a staple item during the successive rounds of negotiations over constitutional change from the 1960s onwards. Whether the agenda was short or long, the spending power was there. When the will for further constitutional negotiations collapsed after the defeat of the Charlottetown Accord, the federal and provincial governments sought to establish more informal rules for the use of the federal spending power, most clearly in the Social Union Framework Agreement (SUFA), which the federal government and nine provinces signed in 1999. But SUFA failed to resolve the issues.

The roundtable debate over the spending power was lively, rich and nuanced. The discussions were informed by the papers by Peter Graefe and Hamish Telford, which were focal points for parts of the day.

But participants also drew on their considerable experience and expertise in the field. No comprehensive consensus was expected, and none emerged. But points of considerable agreement did emerge, sometimes in surprising places.

The debates that took place can be understood by examining four aspects of the core question that participants tackled: Do we have a problem? What are the criteria for choice? What are the options before us? and What are the prospects for change?

Do We Have a Problem?

Two answers to this question emerged around the table. Some participants insisted that the federal role in social policy and the spending power continue to represent a serious problem. Others were convinced that the real problems have faded in practice, and that the spending power has become a non-issue.

For the government of Quebec and many Quebec commentators, the federal spending power represents a long-standing, unresolved constitutional problem. In the mid-1950s, Quebec's Royal Commission on Constitutional Problems asked: "What would be the use of a careful description of legislative powers if one of the governments could get around it and, to some extent, annul it by its taxation methods and its fashion of spending?" (Quebec 1956, vol. II, 217). This constitutional argument retains contemporary force, and emerged during the discussion, in which the federal spending power was described as a "wild card" with which the federal government seeks to trump the constitutional division of power.

Complaints about the federal spending power were not limited to Quebec voices. Historically, the attitude of other provinces to the spending power has been shaped less by constitutional doctrine and more by pragmatic assessments of recent experience with the federal government. In this context, the 1995 federal budget continues to haunt federal-provincial relations. That budget unilaterally restructured federal transfers to the provinces, and imposed significant cuts in the amount of money flowing through them. The roundtable heard that provinces generally do not regard the federal government as a principled funding

partner, and do not believe it is capable of responding effectively to the social problems Canadians face. Irritants persist, especially in a number of smaller federal-provincial initiatives. One province was reported to be walking away from federal money because it would not accept the terms and conditions associated with it. Indeed, despite the promise of “open federalism,” one participant was moved to ask whether there had been any real change at the coal face of federal-provincial relations since the election of the current federal government.

These assessments were vigorously challenged during the roundtable. For some, federal intervention in major provincial programs is simply no longer an important reality. The shift to block funding of the major programs, which began in 1977, and the reduction in federal conditions with the termination of the Canada Assistance Plan in 1995 have significantly reduced Ottawa’s role in the design and management of provincial social programs. In law, the principles embedded in the *Canada Health Act* still apply to the Canada Health Transfer, but the act no longer seems to be enforced as vigorously as it was in the 1980s and 1990s, when the federal government reduced its transfers to several provinces deemed falling afoul of its provisions. As Peter Graefe (in this volume) emphasizes, the federal role in areas such as health care, post-secondary education and social services in recent years has not involved laying down national “standards.” The federal government has used negotiations over adjustments in intergovernmental transfers as mechanisms to signal priorities, suggest solutions and gather provinces together to make a collective commitment to addressing them, each in its own way. Since the election of the Conservative government, even this role has faded.

Other factors have also reduced tensions. The federal government is clearly less committed to social intervention. One participant argued that the federal spending power traditionally has been used to pursue redistributive agendas, but there has been a major decline in the appetite for redistribution. Others added that, even if the federal government wished to pursue social goals, it is less able to do so. Although there was a brief period in the late 1990s and early 2000s when Ottawa had the fiscal resources to engage in new social initiatives, those days are gone. Major increases in block transfers to the provinces and significant federal tax cuts have eliminated Ottawa’s fiscal room for manoeuvre, reducing its capacity to intervene in provincial jurisdiction. “Ottawa

is broke,” one colleague pronounced, noting as well that most provinces have been enjoying fiscal surpluses in recent years.¹ As a result, the issues of the future have to do with access to tax revenue, especially tax revenues from carbon, and the related questions of interprovincial equity and revenue for cities. Another colleague summed up this interpretation in simple terms: critics concerned about the federal spending power are “fighting old wars that are not relevant to today’s Canada.”

While there were different views of whether we currently face a serious problem, no one denied the long history of intergovernmental conflict over the federal role in social policy and the spending power. The roundtable was offered different interpretations for this troubled history. For some, the problem is simply “imperial” overreach by a federal government whose ambitions habitually overflow the boundaries of its jurisdiction. But others pointed to deeper forces. For some, the problem is that the wording of the Constitution reflects the assumptions about the role of the state in nineteenth-century Canada, a rural society with decidedly modest expectations of government. As a result, such modern responsibilities as social security, health care and income protection do not appear in the list of responsibilities allocated by sections 91 and 92 of the *Constitution Act*; jurisdiction over these areas has to be inferred from other, more general headings of power, and conflicting inferences are hardly surprising. From this perspective, intergovernmental frictions are the inevitable result of a nineteenth-century constitution confronting twenty-first-century problems.

For others, the tensions are rooted in multiple nationalisms. The core reality from their perspective is the divide between Quebec and the rest of Canada, reflecting the distinctive identities of a multinational state and the competitive nation-building projects that those identities have nurtured over the years. Hamish Telford (in this volume) argues that these identities generate conflicting conceptions of citizenship: a universalist conception that promises equal social benefits for all Canadians, and a differentiated conception that calls for social benefits to reflect the distinctive cultures across the country. As one participant added, these conflicting conceptions of citizenship and federalism are permanent features of Canada, with roots running back to the Confederation period, and conflict over the social role of the federal government reflects their uneasy coexistence.

Yet another interpretation saw the tensions as a reflection of Canadian democracy. Members of Parliament who support federal intervention in social policy come from across the country, including Quebec and Alberta, whose provincial governments are particularly sensitive to such intervention. These MPs are convinced that the voters sent them to Ottawa to help solve the leading problems of the day, problems that often sprawl across jurisdictional boundaries. The same democratic impulses explain why federal priorities can shift rapidly from, for example, public health to pharmacare to wait times. MPs ignore the anxieties and concerns of the electorate at their peril. No one should have been surprised, therefore, that, during the 2005-06 election campaign, the Conservative Party, which ran on a pledge of “open federalism,” also promised as one of its “five key priorities” to introduce a patient’s wait-time guarantee, even though health care is an area of provincial jurisdiction. The underlying reality is that Canada does not have a deep federal culture; most citizens are unaware of the precise boundaries of federal and provincial jurisdiction and impatient with constitutional excuses. They want their governments to cooperate in solving the compelling problems they face in their daily lives.

What Are the Criteria for Choice?

When debate turned to possible solutions, it quickly became clear that participants brought different criteria for choice to the table. Conflicting criteria make consensus an elusive goal, but the diverse standards of judgment around the table faithfully reflected larger debates in the country.² At least four criteria were interwoven in the discussions.

Constitutionalism

For constitutionalists, the core criterion for choice is the text of the *Constitution Act*. From this perspective, the federal principle as articulated in sections 91 and 92 is the fundamental premise of governance in Canada, an overriding norm that cannot be altered except through the formal amending procedure. One participant captured the constitutionalist spirit by observing that “the Fathers of Confederation knew of what they spoke” and that “every government that violates sections 91

and 92 tests the basic federal contract.” In this view, sections 91 and 92 represent a steel framework through which all contemporary problems must be managed. That framework is not to be adapted, finessed or bypassed in the name of modern complexity.

Functionalism

For functionalists, there is an urgent need for flexibility in our system of governance. The spirit of 1867 is ill-equipped for the challenges of the twenty-first century, and the roles of the different orders of government need to adapt to meet the challenges of today. In the contemporary world, however, complex issues seldom fall neatly into watertight compartments. Rather, they sprawl messily across jurisdictional boundaries, and the art of governance necessarily involves multi-level coordination at the national and even the supranational level. The big issues confronting Canada — health care renewal, developing learning systems for a knowledge-based economy, investing in children, renewing municipal infrastructure — all require a level of institutional flexibility and collaboration that seems to elude us. From this perspective, the spending power is one of the very few sources of institutional flexibility we have, and we should be wary about discarding it or constraining it so tightly that it ceases to serve this function.³

During the discussions, the role of cities often stood at the intersection of the constitutionalist and functionalist logics. For functionalists, the status of cities in the Constitution is woefully inadequate for the modern age; cities, they contend, require secure jurisdictional and fiscal capacities that far transcend their current status as dependencies of provincial governments. A direct relationship between the federal government and cities, which exists in many federations, was a self-evident need. For constitutionalists, however, the current constitutional structure remains the bedrock of governance in Canada, and any federal transfers related to the problems facing cities should pass first through provincial coffers.

Identity

Conceptions of identity and citizenship represented a third criterion for choice. This approach reflects a dualist conception of Canada, one rooted in the history of two founding peoples and their shared

journey within a single state. From this perspective, the key to governance is accommodating the aspirations of both Quebec and the rest of Canada. Such an accommodation does not necessarily require perpetual fidelity to the details of the 1867 Constitution. The rest of Canada, for example, might choose to evolve toward higher levels of collaboration and joint federal-provincial decision-making in areas of overlapping jurisdiction. But the system needs to accommodate higher levels of asymmetry so that Quebec can maintain autonomy within its historic areas of jurisdiction.

Political management

The logic of political management reflected a fourth criterion for choice. This conception is rooted in the view that disagreements about the federation and the spending power are permanent features of the Canadian experience. The different theories of the federation displayed at the roundtable have been part of our collective debates since Confederation, and have demonstrated impressive durability over time. They are permanent features of Canadian politics, and cannot be reconciled in any single theory or simple solution. As a result, the goal must simply be to manage the contending visions of the country and the tensions they generate. The task of institutional reform, therefore, is not to seek some grand reconciliation, but to find means of mediating the tensions a bit better than we have done in the past. This is perhaps not a stirring cause, but, for some participants, it is the heart of federal governance in this country.

These four distinct criteria for choice were brought to bear as the roundtable debated the alternative courses of action before the country.

The Options before Us

Historically, Canada has never developed a single, integrated public philosophy of federalism or a single model of federal-provincial relations. In fact, federal-provincial relations on social policy have incorporated three models, each with its own decision rules, and the balance among them has evolved over time as government priorities and relationships have shifted.

- *Classical federalism*: In this model, the two orders of government operate exclusively and independently within their own jurisdictions. In the full version of this approach, each government is responsible for designing its own programs and raising its own revenues to finance them, and remains accountable exclusively to its own electorate. This model emphasizes autonomous decisions by both orders of government, with minimal efforts at coordination even when decisions at one level have implications for the other.
- *Shared-cost federalism*: In this model, the federal government offers financial support to provincial governments on specific terms. In practice, the substance of such programs has tended to be hammered out in bargaining between the two levels. In formal terms, however, the model involves each government's making separate decisions. The federal government decides when, what and how to support provincial programs; and provincial governments decide whether to accept the money and the terms. As a result, this model contains the potential for unilateralism, as became clear when the federal government began to cut its financial commitments to provincial programs during the 1980s and 1990s.
- *Joint-decision federalism*: In this model, the formal agreement of both levels of government is required before change is possible. Unilateralism is not an option here. The major Canadian example is the Canada Pension Plan (CPP), changes in which require the formal agreement of the federal government and two-thirds of the provinces representing two-thirds of the total population — in effect, nothing happens unless formal approval is given by both levels of government.

As one participant astutely observed, the underlying reality generating the debate is the erosion of the traditional shared-cost model. The key question is whether Canada should shift to a more classical model in social policy, with each level of government acting independently, or move toward the joint-decision model, with the two orders of government managing an interdependent set of programs collaboratively in accordance with an agreed set of decision rules.

The classical model did have supporters among the participants at the roundtable. From this perspective, the goal is not to define rules

governing the exercise of the federal spending power, as such a step would formally recognize and thereby legitimate the power;⁴ rather, the real goal is to eliminate the spending power and to confine the federal government exclusively to its own jurisdiction. Different versions of this approach surfaced in the discussions. Some participants embraced this model only for shared-cost programs. Stronger versions, however, anticipated the elimination not only of the shared-cost instrument but also of the use of the spending power to sustain direct transfers to individuals and institutions. The broadest definition of this approach that surfaced during the deliberations included, as an illegitimate use of the federal spending power, federal tax subsidies for such things as film production, suggesting a constraint that would reach deeply into federal taxation policy.

Such a highly decentralized version of the classical model tends to generate considerable resistance, especially outside Quebec. Attempts to square this particular circle lead naturally to an interest in asymmetry in federal-provincial relations, building on tentative steps in this direction in recent years. Telford suggests that Quebec — but only Quebec — be extended a comprehensive right to opt out of federal programs with *unconditional* financial compensation.

The debates around the table made it clear, however, that interest in asymmetry, even radical asymmetry, was not limited to Quebec. There was considerable discussion of whether section 94 of the *Constitution Act* could become an instrument of wider asymmetry. Section 94 enables Parliament to establish uniformity of laws in relation to property and civil rights in Ontario, New Brunswick and Nova Scotia, and now presumably all provinces except Quebec, as long as the provinces agree. Such an approach would have advantages. Section 94 is a formal constitutional mechanism, and programs established through it would not linger in a constitutional shadow, as do programs sustained by the spending power. Section 94 would also change the optics of provincial choice: provinces would opt “in” to a federal program based on section 94, as opposed to opting “out” of a federal proposal based on the spending power. But, as participants pointed out, section 94 has important limits: it does not apply to Quebec, and it does not guarantee compensation for nonparticipating provinces. Such compensation would have to be “read into” the section by governments and the courts or negotiated

separately by governments outside the ambit of the section. Several participants felt that section 94 could not fully meet what they saw as a real need in the Constitution: a clause allowing for formal interdelegation of legislative authority between orders of government.

Moreover, reliance on section 94 might not change the fundamental political dynamics underlying new federal initiatives. The federal government undoubtedly would want a majority of provinces to opt in before launching any new program under section 94. But to ensure that a majority opts in, Ottawa would have to require nonparticipating provinces to operate comparable programs to qualify for compensation, otherwise no province would join. Since sustaining this condition would be difficult if Quebec were entitled to unconditional compensation, the political dynamics swirling around section 94 might not represent a major departure from current practice.

Inevitably, discussion of asymmetry sparked an exploration of the role of members of Parliament. Should MPs from a more autonomous province be restricted from voting on matters over which the federal government does not have jurisdiction in their province? Clearly, it would be difficult to operate a parliamentary system if the cabinet had to rely on different majorities according to the subject matter under debate. This debate has not been limited to Canada: since the devolution of considerable jurisdiction to the assemblies in Scotland and Wales, questions have been raised about the role of MPs from those regions in Westminster, the Parliament of the United Kingdom. However, the roundtable did not agree on the seriousness of this constraint. One participant pointed out that Canadians did not object to Quebec MPs voting on changes to the CPP, which does not apply generally in that province.⁵ Other participants replied, however, that, although Canadians may tolerate limited asymmetries in practice, sweeping asymmetry inevitably would spark challenges about the legitimate role of MPs from more autonomous provinces.

While the classical model, modified perhaps by asymmetry, did capture attention, most of the discussion centred on variants of greater joint decision-making, focusing in particular on an increasing role for the provinces in governing the exercise of the federal spending power. Strikingly, the proposal advanced by the federal government in the 2007 Speech from the Throne received remarkably little attention. Both Graefe

and Telford conclude that the federal proposal would be of marginal significance, and they point to several limitations. The proposal would be enacted as ordinary legislation, not embedded in the Constitution, as proposed in both the Meech Lake and Charlottetown accords. The proposal refers only to new shared-cost programs, and would not apply to changes in existing shared-cost programs; as a result, it would not preclude further unilateral federal cuts in existing transfers. Finally, since the proposal refers only to shared-cost programs, not to direct federal transfers to individuals and institutions, it would not constrain initiatives such as the Millennium Scholarships, the Canada Research Chairs, the Canada Foundation for Innovation or the Canada Learning Bonds, which provinces denounced as “boutique” programs in the late 1990s. Nor, to use examples from the current Conservative government, would the proposal constrain initiatives such as the Universal Child Care Benefit or the host of small tax credits the government has introduced for social purposes ranging from textbooks to children’s sports.

There was little dissent from this diagnosis around the table. There was general agreement that adoption of the federal proposal as outlined in the Speech from the Throne would make very little difference to the real world of intergovernmental relations as they are practised today. For these reasons, perhaps, Quebec was reported to be unenthusiastic about the proposal.

Participants put their faith in other mechanisms. Some argued for a resumption of annual meetings of first ministers or interprovincial accords through the Council of the Federation. But most striking were the repeated suggestions for the negotiation of a new and stronger SUFA. Time clearly has dulled memories of the painful negotiations leading to the original agreement and the widespread disenchantment that emerged soon afterwards. For many participants, the time is ripe to strengthen the agreement. For some, the key to an improved framework is joint decision-making about direct federal transfers to individuals and institutions. For others, revival of proposals for a dispute resolution mechanism is essential. But there was strikingly little dissent about the potential value of a new round of negotiations. One participant recalled that it was Lucien Bouchard, a Parti Québécois premier, who signed the interprovincial accord on the social union that preceded the final round of bargaining with Ottawa that led to SUFA. The implication was that,

with a different approach from the federal government, it is not inconceivable that Quebec might sign a stronger agreement.

Participants also discussed the potential of reporting requirements to contribute to national collaboration. After the 1995 federal budget, many analysts argued that Canada could move toward a more consensual and flexible social union by relying on information and monitoring systems. The essential idea was that a national approach to major social problems could be achieved not through the imposition of federal standards, but through enhanced reporting and auditing systems that would compare provincial programs and achievements on a standardized basis. Such a reporting system would entail enhanced accountability to provincial electorates rather than to the federal government, which, in turn, would enhance the information base on which provincial voters could draw to assess provincial policies. Inspiration was drawn in part from the European Union's "open method of coordination," which seeks to enhance convergence in social programs among its member states. Graefe tracks the influence of this approach in the late 1990s and early 2000s, when the federal Liberal government sought to use negotiations over existing intergovernmental transfers as a mechanism not to set national standards, but to define priorities and directions for change and to have provinces commit to a reporting process with comparable indicators of progress. The current Conservative government has adopted the same approach to wait times in health care.

Participants drew a sharp distinction between reporting as an instrument of heightened accountability of provincial governments to their own electorates, and reporting as a mechanism of policy convergence across provinces. The first purpose did have support: requiring provinces to define their own norms could be married with comparative reporting and third-party assessment, enhancing public awareness and debate. But not everyone was convinced. For one participant, provincial governments are already highly accountable in fields such as health care, perhaps excessively so. Premiers have difficulty getting colleagues to serve as health minister, and their tenure in the portfolio tends to be nasty, brutish and short.

Much more attention focused on the role of reporting mechanisms as instruments of pan-Canadian convergence. But participants tended to be skeptical. One dismissed such provisions as "loin cloth

federalism”: such requirements may have allowed Ottawa to save political face after the collapse of conditionality, but they are largely meaningless, as witnessed by the apparent inability of the Health Council of Canada to say anything critical about any province. Other participants complained about the weakness and opacity of the reports that have emerged. In his careful review of such instruments, Graefe comes to similar conclusions, emphasizing the resistance of provincial governments to reporting that could be used to blame and shame them. One participant summed up the view by observing that we certainly are not getting \$52 billion worth of information. Reporting requirements did have a few supporters, who argued that comparative reporting contributes to a general process of social learning across provincial boundaries. But the overall tone of the conversation was cautious: we should be “realistic” about the potential role of reporting and benchmarking across provinces.

As this summary suggests, the debate stayed mainly within the traditional confines of federal-provincial relationships, but Telford presents one option that steps outside these habitual boundaries: a justiciable social charter embedded in the Constitution. Predictably, questions were raised during the deliberations about the wisdom of relying on the courts to define social programs, but there was also agreement that ideas that initially seem impracticable can, over time, come to be seen as quite serious options. The social charter is one of those ideas. Its time may not have come, but its supporters remain committed.

Prospects for Change

Participants were generally skeptical that major change is likely in the near term. Significant constitutional change tends to be triggered by crises, such as military defeat or regime collapse, or by massive shifts in political forces within a country. The reality is that Canada, fortunately, is not in such a crisis. Nor do we seem to be moving strongly to a new balance of political forces — federal politics in recent years has reflected continuing eddies, not strong currents. It is therefore difficult to see the political dynamics that could generate a significant shift in the processes by which governments in Canada manage the federation.

Nevertheless, as we have seen, two signposts for the future did emerge from the roundtable. First, the federal government's proposal in the 2007 Speech from the Throne excited remarkably little interest among participants. At best, it represents a modest step toward the institutionalization of current intergovernmental practices as they relate to new shared-cost programs in areas of exclusive provincial jurisdiction. In defence of the government's commitment, this is consistent with the patterns of constitutional change in other countries: in noncrisis periods, constitutional reform tends to institutionalize existing practice. In this sense, moving from intergovernmental practice to federal legislation might prove to be a precursor step to the eventual constitutionalization of a set of rules governing the federal spending power. Even if one takes such a long-term perspective, however, the federal proposal remains a modest step. It is perhaps not surprising that the commitment seems becalmed; finding a solution is not simple. Without greater enthusiasm from Quebec, such legislation might not enhance the legitimacy of the federation in that province. But a stronger proposal limiting direct transfers to citizens and institutions, which might appeal to Quebec and other provincial governments, would be a difficult sell for any federal government. It would also risk sparking determined opposition from defenders of the federal role in the rest of the country. Finding a magic formula that would contribute to reconciliation in the country as a whole remains a formidable challenge.

In the meantime, participants pointed in another direction. The surprise, at least to this rapporteur, was the extent of interest in a new round of intergovernmental negotiations to develop a new and stronger SUFA. Undoubtedly, an effort to move beyond SUFA would quickly run up against the same hard issues, such as the role of direct federal transfers to individuals and institutions. A roundtable of federal and provincial officials who would have to negotiate such an accord might not have been so optimistic. But our roundtable reflected an underlying faith in the historic process of federal and provincial governments sitting down together and attempting to work out tough issues. For many participants, the time is ripe for an attempt to reach agreement on a more comprehensive set of rules of the road for social policy. The current government has shown a distinct aversion to anything resembling federal-provincial diplomacy over major issues in the federation. Perhaps we are missing an opportunity.

Notes

- 1 Confirmation of this assessment might also be seen in the virtual absence of any discussion during the roundtable of the idea of a “fiscal imbalance.”
- 2 One missing dimension was the relative absence of criteria drawn from economics. While economic considerations figured in the discussion from time to time, participants seldom drew explicitly on the principles developed in the literature on public finance and public economics over the last half-century. The canonical view of the appropriate allocation of functions in federal states is relevant to questions about the role of the federal government in social policy, but did not figure in our deliberations.
- 3 Interestingly, one participant who was opposed in principle to the federal spending power was also worried about the lack of flexibility in the Constitution, arguing that we need to develop new and different mechanisms of constitutional flexibility in order to adapt to a changing world, including an explicit power of legislative interdelegation.
- 4 This tendency was evidenced, for example, by the celebratory references to the historical role of the federal spending power in the SUFA agreement.
- 5 It is perhaps worth noting that the Canada Pension Plan is not a clean test of the argument as changes to the plan also require the consent of a majority of provinces representing two-thirds of the population. As a result, there is no possibility of changes to the plan being driven exclusively by a federal government based predominantly in the non-participating province.

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