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THE MEECH LAKE ACCORD AND THE SPENDING POWER PROPOSALS: FUNDAMENTALLY FLAWED*

Introduction and Overview

Among the more controversial provisions of the Constitutional Accord recently concluded by the First Ministers are those involving a limitation of the federal spending power. Under the Meech Lake Accord, the federal government is required to provide reasonable compensation to any province that decides to opt out of new national shared-cost programs in areas of exclusive provincial jurisdiction, if the province carries on a program or initiative compatible with the national objectives.[1]

The federal government argues that the purpose of the provision is not to define or extend the spending power of Parliament, but simply to limit it in certain specific circumstances to accommodate some of Quebec's longstanding objections to the unrestricted exercise of the power. To support its position, it points to subsection 2 of proposed section 106A of the Constitution Act, 1867 that states that "nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces." Indeed, according to the federal government, the spending power is in fact strengthened since it is now explicitly mentioned in the Constitution. Ironically, this view is also shared by many critics who are opposed to any acknowledgment of the right of the federal government to spend in areas of provincial jurisdiction under any circumstances, however circumscribed.[2]

In my view, the constitutional limitations on the federal spending power are fundamentally flawed for three critical reasons. First and foremost, the federal government has failed to appreciate the broader, intan-

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gible importance of national social and economic programs in contributing to our sense, however fragile, of shared national community. Such programs reflect our commitment to helping out the weaker regions and to reducing inequalities of income and wealth among individual Canadians. In short, the proposed spending power limitations are at odds with our commitment to promoting greater social justice and a fairer, more compassionate society.

The Meech Lake Accord proposals will severely constrain the federal government's ability to initiate new programs and impose critical national standards in a variety of areas that may require national action in the future. Examples include child care, a comprehensive disability insurance scheme, a national science and technology strategy, a national commitment to improve the quality and accessibility of post-secondary education, the integration of our social assistance and employment policies, new services to cope with our aging population, and environmental protection. Instead, we will end up with a patchwork quilt of national social and economic programs—a checkerboard Canada guided by cash register politics—something that will increasingly attenuate our sense of national community.

A second fundamental flaw in the proposed constitutional limitations on the spending power relates to their ambiguity and the effective shift of important political powers to an ill-equipped judiciary. The spending power of both the federal and provincial governments already has a secure, albeit unwritten, constitutional basis, and the absence of an explicit reference in the Constitution has enhanced its utility as a means of injecting needed flexibility into the all too rigid federal–provincial division of powers that has existed in more or less the same form since 1867. The spending power has permitted the federal government to respond sensitively to emerging issues of national importance, notably, medicare, post-secondary education, and social assistance policies. And in response to provincial criticism, administrative options have been built into programs that have allowed Quebec, for example, to opt out of the Canada Assistance Plan (CAP) with fiscal compensation, and to vary the nature of family allowances, without impairing the necessary federal leadership role. For the future, it is critical to maintain a similar degree of flexibility.

Yet the Meech Lake Accord will inevitably detract from this flexibility and severely impair the future evolution of the spending power as an instrument for change. More importantly, its constitutional entrenchment transfers critical powers to ill-equipped judges to decide a whole range of essentially political/policy questions such as what consti-

tute "national objectives," or when a "program or initiative" is "compatible with" such initiatives so that a provincial government is entitled to reasonable compensation.

If some explicit constitutional limitation is judged to be necessary, then as was suggested in the 1969 federal discussion paper on "Federal–Provincial Grants and the Spending Power of Parliament," the final solution of the constitutional position must logically be considered only within the framework of a more comprehensive settlement of the division of powers and responsibilities between the two levels of government. To do otherwise amounts to a serious abdication of federal leadership in constitutional negotiations. As Donald Smiley has succinctly noted, "Embodying the restriction on the spending power in an inflexible manner in the constitution may well amount to a resolution of recent political difficulties at the cost of hobbling future policy makers in meeting the [economic, political and social] problems which will undoubtedly confront them."[3]

A final reason why the spending power proposals are fundamentally flawed is that they set in motion undesirable political dynamics that will seriously damage our coherence as a nation and our ability to pull together to meet the national and international challenges that lie ahead. In this connection, the spending power proposals must be assessed in the overall context of the Accord, which involves a substantial devolution of power to the provinces and significant shift of political dynamism on matters of national importance away from the federal Parliament, as well as the undermining of the Charter of Rights and Freedoms. The most relevant provisions of the Accord include the distinct society clause, the constitutional entrenchment of at least two annual first ministers' conferences, the extensive veto powers over constitutional change given to the provinces, and the effective transfer to the provinces of the power to appoint members of the Supreme Court of Canada and the Senate—two critical national institutions.

The political dynamics generated by the spending power proposals will compound and accelerate this shift of power to the provinces. Perhaps most importantly the provisions make it far too easy for provinces to opt out of a shared-cost program with compensation. This not only raises the spectre of significant variations among provinces with respect to, for example, child care arrangements, but also puts in question the willingness of the federal government to even attempt to implement any such initiative at all. More specifically, why would the federal government proceed to initiate and develop a new program and incur the heat of raising the necessary tax revenue, only to transfer the

money anonymously to the provincial government, which will reap the political credit for the delivery of the program or initiative?

The relationship between the spending power provisions and the Charter of Rights and Freedoms must also be assessed. For in addition to gravely weakening the federal government, the Accord undermines the Charter and our commitment as a people to respect and promote basic rights and freedoms. This is most evident in the distinct society clause, which will permit the Quebec government to override the Charter. But more generally, the application of the Charter to most provisions of the Accord is seriously and unacceptably in doubt as a result of the specific reference to certain Charter rights in only a couple of the Accord provisions.

Constitutional reform is not simply a matter of First Ministers and the trading of executive, legislative and judicial powers with little consideration for the rights of individuals who will inevitably be affected by the changes. The proposals to impose constitutional limitations on the spending power are no exception, and it is important to ensure that our Charter rights, particularly the broad guarantees of equality, can still be asserted against both levels of government in the exercise of their spending power. Thus, at the very least, a new section should be inserted in the Accord that explicitly states that nothing in the Accord affects any of our basic rights and freedoms in the Charter.

But this is only a second-best solution. The Meech Lake Accord and the spending power provisions are fundamentally flawed. It is necessary to go back to the constitutional bargaining table to seek a better accord that will more effectively accommodate Quebec's special concerns with respect to linguistic and cultural security, but that will also ensure that Canada continues to function coherently as one nation. And this time all Canadians must be allowed and encouraged to participate in creating any new arrangements that will so fundamentally influence our evolution as a nation for years to come. In this way, we can all examine in a constructive manner the significant challenges to the Canadian society and economy that lie ahead and the respective federal and provincial roles in meeting those challenges. Nothing less than the future of Canada as a progressive, dynamic nation is at stake.

I The Spending Power and Our Sense of National Community

The value of national social and economic programs, including those in areas of exclusive provincial jurisdiction, in contributing to our sense of national community has been underestimated to date. It was certainly not sufficiently appreciated by the federal government in negotiating the Meech Lake Accord.

To begin with, the quantitative and qualitative importance of the federal spending power to individual Canadians can be gauged by examining the annual inventory of federal–provincial programs published by the Federal–Provincial Relations Office. The highlights for the fiscal year 1985–86 have been summarized by Frank Carter in a recent article entitled "How to Tame the Spending Power."[4]

In 1985–86, federal cash transfers to the provinces amounted to $20.2 billion, and the value of federal tax transfers equalled $6.9 billion. The total $27 billion accounted for 19.4% of the federal spending estimates for that year.[5]

With respect to total provincial revenues for 1985–86, major federal transfers for equalization, welfare assistance and post-secondary education are estimated to represent over 40% of provincial revenues in the Atlantic provinces, over 30% in Quebec and Manitoba, 20% to 25% in British Columbia, Saskatchewan and Ontario, 13% in Alberta, and 70% in Yukon and the Northwest Territories. Finally, with reference to specific joint programs, the federal government transferred over $5 billion with no strings attached to the have-not provinces under the equalization program, $3.5 billion for welfare assistance under the Canada Assistance Plan, $4.5 billion for provincial medicare and hospitalization, $1 billion for extended health care, $2 billion for post-secondary education, and $7 billion in tax point transfers under the Established Programs Financing arrangements for health care and post-secondary education.

The need for such massive transfers is of course closely related to the gap between the expenditure responsibilities of the provinces and their revenue raising capacities—something that varies significantly among provinces. As Maslove and Rubashewsky note in the 1986 edition of *How Ottawa Spends*, "some provinces can provide a package of public services at lower tax rates than others, either because the fiscal capacities of the provinces differ or because the per capita costs of providing services differ due to factors such as population density. Thus, if as a matter

of equity, all Canadians should receive these services at similar costs, the financial involvement of the federal government is required."[6]

To some extent, this fiscal gap is addressed explicitly through unconditional transfers to provincial governments under the equalization program. The commitment to such equalization was given constitutional status in section 36 of the Constitution Act, 1982. Subsection (1) provides that "Parliament and the legislatures, together with the government of Canada, and the provincial governments, are committed to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities, and (c) providing essential public services of reasonable quality to all Canadians." Subsection (2) then goes on to set out expressly the commitment of Parliament and the government of Canada "to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Some observers, notably conservative economists whose overriding fixation with reducing the federal deficit leads them to advocate the elimination of virtually all federal spending on shared-cost programs, argue on efficiency grounds that all federal fiscal transfers to the provinces should now be funnelled through the equalization program on an unconditional basis.[7] The current Intergovernmental Affairs Minister in Quebec, Gil Rémillard, goes even further. He argues that this is now constitutionally required under section 36 and that Ottawa's spending authority for public services can be exercised only through the unconditional equalization system and not through conditional grants whereby Ottawa attempts to impose national standards.[8]

In sharp contrast, other constitutional experts believe that section 36 will not be given any real meaning by judges and will therefore have little impact on federal–provincial fiscal arrangements. According to Andrée Lajoie, for example, section 36 is a declamatory clause expressing a vague statement with no real application. "At best it serves an ideological purpose."[9]

Still others argue that the current equalization program that equalizes provincial fiscal capacities only to a Representative Five Province Standard itself violates section 36, which now requires the payments to conform to a Representative National Average Standard in order to discharge the obligation to ensure "reasonably comparable public services."[10] Alternatively, compliance with section 36 may require a complete shift in the basis of the program to the equalization of real income per capita rather than the equalization of tax rates among provinces.

Finally, section 36 may also require conditions to be attached to the equalization grants so as to link the payments, for example, to the elimination of interprovincial barriers to trade or to adjustments in the provincial minimum wage.[11]

The impact of section 36 of the Constitution Act, 1982 on the federal spending power and federal–provincial fiscal relations, in general, is clearly controversial and will be discussed further in Part II of this paper. It is sufficient to emphasize here that the advocates of eliminating or severely restricting the federal government's ability to attach conditions to transfers to the provinces are prominent among those who fail to appreciate or prefer to ignore the importance of the spending power in building our sense of national community.

The rationale for using the federal spending power to enable Parliament to contribute towards programs in fields of provincial jurisdiction and establish minimum national standards is perhaps most clearly expressed in the 1969 federal government Discussion Paper. The argument was made that the justification "is to be found in the very nature of the modern federal state—in the economic and technological interdependence, in the interdependence of the policies of its several governments, and in the sense of community which moves its residents to contribute to the well-being of residents in other parts of the federation."[12]

In terms that presage those of the debate almost twenty years later, the Discussion Paper went on to provide examples of the interdependence that dictated federal action: "The effectiveness of pollution control, for example, affects the people in neighbouring provinces; provincial educational systems contribute or fail to advance the economic growth of Canada as a whole; and the equality of opportunity across the country, or the lack of it, affects the well-being of Canadians generally. . . . Moreover, the mobility of Canadians—increasing year by year—itself creates a kind of interdependence: a person in almost any part of Canada, accustomed to the expectation that his children will sooner or later move to other parts of the country, develops an interest in the public services in other provinces as well as public services in his own province—hospital and medical care being the most obvious examples."[13] More generally, since a province will inevitably wish to avoid incurring costs that will provide benefits to other provinces or other residents, a federal role is essential to ensure an optimal level of spending.[14]

In retrospect, it is now very clear that the major shared-cost programs, particularly in the area of social policy, have been extremely

important to the process of social integration in Canada. As Keith Banting has recently pointed out, universal social programs represent one of the very few spheres of shared experience for Canadians, an important aspect of our lives which is common, irrespective of region or language. As the national debate over the Canada Health Act demonstrated, for example, our national health care program has a natural constituency right across this country in a way that the National Energy Program never could.[15]

The federal government is the only government in our federal system that brings the national perspective to bear on such critical issues as: "What in terms of living standards, and particularly in terms of public services, does it mean to be a Canadian citizen?"[16] Equally, it is clear that if there is a national interest in the provision of certain public services, the federal government has a critical role to play in establishing national minimum standards and some measure of uniformity across provinces.

In this connection, it is interesting to note that Claude Forget, a former Minister of Social Affairs in Quebec, argues that the federal spending power has been and continues to be the most important method for harmonizing social policies in Canada.[17] Although he also argues for a form of constitutional restriction, he emphasizes that the federal power to initiate shared-cost programs and to impose national standards must not be impaired. Instead, the federal government should restrict the spending power to the pursuit of (1) national standards determining the program in question, and the expenditures that may legitimately be made in connection with it; and (2) national standards determining who is entitled to benefits or payments from a given program, and under what conditions.

In emphasizing the need to maximize flexibility in the exercise of the federal spending power in areas of exclusive provincial jurisdiction, one must acknowledge of course that certain national social programs, notably medicare, have been "born in the provinces" and that the provinces have frequently acted as catalysts for reform.[18] But it does *not* follow that "it is usually far more difficult to mobilize the national electorate in favour of a new social initiative than it is a provincial electorate" or that "national politics is [necessarily] preoccupied with mediating among competing regional, cultural and linguistic interests and that it is within the less diverse provincial units that economic and social issues occupy central stage."[19]

The very nature of a federal system such as ours encourages valuable experiment and innovation in a wide range of areas by *both* levels

of government. Often, the initiative for progressive change will occur at the provincial level; but we must then ensure that the federal government has the ability, as it did in respect of medicare, to devise a national program with national standards to ensure that all Canadians can benefit from such progressive initiatives. Furthermore, as recent experience demonstrates all too clearly, the provinces do *not* exhibit a general tendency towards social progress, especially under conditions of fiscal restraint.

The implementation of a comprehensive national disability insurance scheme based on social insurance principles and involving the elimination of lawsuits as a means of compensation is an example of a future national initiative involving the exercise of the federal spending power and the imposition of national standards relating to public administration, comprehensiveness, accessibility, portability and universality, similar to medicare. Yet the federal government would be building on progressive initiatives in a number of provinces, notably, Quebec's public system of no-fault, no-tort automobile insurance that is now integrated with the workers' compensation system, and major social reforms under way in Ontario.[20]

In my view, the Meech Lake Accord limitations on the exercise of the federal spending power in areas of exclusive provincial jurisdiction will gravely undermine the federal government's ability to establish national programs with minimum national standards. Not only will the courts be involved in deciding essentially political questions and thereby hamstringing our elected representatives, but the ease with which provinces can opt out will mean that we will end up with, for example, significant regional variations in a future child care program or a future environmental protection initiative. This, in turn, will result in unacceptable distinctions among Canadian citizens depending on one's province of residence and will increasingly attenuate our sense of national community.

II Excessive Ambiguity and an Inappropriate Role for the Judiciary

The second fundamental flaw in the proposed constitutional limitations on the spending power relates to their ambiguity and the unacceptable shift of important political powers to an ill-equipped judiciary. In order to better understand this criticism, it is necessary to outline the existing

constitutional basis for the spending power and the nature of the concerns expressed by the provinces, especially Quebec, in the constitutional reform discussions over recent years. It will then be possible to assess whether any explicit constitutional limitation is in fact desirable and, if so, in what form.

The "spending power" has been defined in a number of ways for constitutional purposes. Perhaps the most useful is the definition set out by the late Elmer Driedger in 1981: "Spending power means the power of Parliament to make payments to people or institutions or governments for a purpose, the subject matter of which is not necessarily one in relation to which it may exclusively make laws."[21]

Although this definition may appear at first glance to be somewhat convoluted, such a formulation is necessary because, as Driedger points out, the legislative power in the Constitution Act of 1867 is conferred by reference to *classes of subject*. The key sections—sections 91 and 92—do not list *purposes*. Thus both levels of government may carry on many activities of a business or commercial character or may spend money on something, the subject matter of which falls within the exclusive legislative powers of the other level of government. When the federal government, for example, gives money to a university, this is not making laws in respect of education. Or when British Columbia owns and operates a ferry service between the mainland and Vancouver Island, this does not involve making laws in respect of navigation and shipping—an area of exclusive federal responsibility.

The specific constitutional source for the spending power is the subject of some debate. According to the late Frank Scott, spending is a valid exercise of the Crown prerogative power and the only constitutional requirement for Crown gifts is that they must have the approval of Parliament or of the legislature.[22] Making a gift is not the same as making a law. Generosity is not unconstitutional and the federal government may attach conditions to any gift and establish criteria that must be met by the recipient.

Other commentators, such as Donald Smiley, Joseph Magnet and Gerald LaForest, prefer to ground the spending power on a combination of the federal legislative authority in respect of public debt and property (s.91(1A)) and taxation (s.91(3)), and the power in s.102 to spend the Consolidated Revenue Fund.[23] This approach draws support from the following comments of Lord Atkin in the leading case, *Reference re Employment and Social Insurance Act*, in 1937: "That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public inter-

est to individuals, corporations or public authorities, could not as a general proposition be denied."[24]

Lord Atkin, however, then went on to establish certain parameters to this ability to spend and to attach conditions to the receipt of the funds. After examining the proposed federal legislation to establish a national program of employment and social insurance he found it unconstitutional in that it was clearly legislation in relation to a subject matter within provincial jurisdiction—property and civil rights. Ultimately a constitutional amendment was required which explicitly transferred legislative responsibility for unemployment insurance to the federal government.[25]

The *Employment and Social Insurance Act* case established the basis for the rather imprecise limitations on the federal spending power that have evolved over the years. In general, the legal interpretation has ensured that the federal government has reasonably broad powers to make payments to persons, institutions and governments and to attach conditions thereto, provided that the program or initiative cannot be characterized as legislation or regulation directly in respect of a subject matter of provincial legislative power.[26]

Certainly the federal government has not hesitated to exercise this power with respect to a wide range of both unconditional and conditional transfers. The most prominent examples of payments to individuals are family allowances and old age security.[27] The three major shared-cost programs involve medicare, transfers for post-secondary education, and the Canada Assistance Plan.

The provincial criticism of the exercise of the federal spending power has generally focussed on conditional grants and subsidies to governments which, it is argued, constrain provincial freedom to determine their expenditure priorities and the range and quality of service. Thus unconditional transfers for equalization purposes or for post-secondary education have not been a real source of controversy, at least not since the Established Programs Financing arrangements of 1977, which no longer tied federal transfers to the health care and post-secondary education costs of the provincial government, but only to the growth in the economy (GNP) and provincial populations.[28]

Transfers under the Canada Assistance Plan are also not particularly controversial since they involve very minor conditions, notably the commitment by the province not to refuse welfare assistance to those in need on the basis of the recipient's province of origin and to establish a procedure for appealing administrative welfare decisions. Moreover, under the CAP, special administrative arrangements were concluded that

have allowed Quebec to opt out completely and receive equivalent tax-point concessions in lieu of cash transfers, following Quebec's insistence that its social services not be subject to national standards.

The provinces have been voicing increasing concerns, however, over the rigid CAP requirement for needs-testing as the means of determining a person's eligibility for social assistance. This is preventing an urgent reorientation of social assistance towards the provision of a wider range of social services on a universal basis regardless of need, and the provision of income supplements to encourage people to seek and maintain meaningful work. Perhaps ironically for the provinces, as a review of CAP opens up, pressure is already mounting from social policy groups for even wider reforms that involve the implementation of firm national standards for both income support and social services, similar to proposals made during the social security review in the 1970s.

The most recent and well-publicized federal–provincial dispute over the use of the federal spending power to impose national standards arose in respect of the Canada Health Act. Transfers for medical care and hospital insurance have always been highly conditional: the provinces are required to ensure that their plans conform to firm national standards in respect of accessibility, universality, transferability, comprehensiveness and public administration of programs. These conditions were confirmed in the new fiscal framework established in 1977 by the Established Programs Financing Act.

In 1983–84, the federal government reacted to widespread concerns that extra-billing practices and hospital user fees were seriously eroding the universality and accessibility of provincial medicare programs. The Canada Health Act was subsequently enacted, which imposed severe financial penalties on any province that did not take steps to ban extra-billing and user fees.

Despite much strong provincial criticism, all provinces have now complied with the legislation and none has chosen to challenge it in the courts. Legal challenges have been brought, however, by the Canadian Medical Association and, more recently, by the Ontario Medical Association in respect of Ontario's Health Care Accountability Act.[29] In addition to arguments based on the infringement of certain Charter rights of doctors[30] and a broad attack on the constitutionality of any national standards imposed by the Canada Health Act, the medical associations argue that to the extent that the application of national standards has been extended to matters that have nothing to do with accessibility but that relate to the management of the health insurance programs, the federal government has acted unconstitutionally. More

specifically, paragraph 12(2)(b) of the Canada Health Act provides for the right to arbitration when there are disputes between the provincial governments and provincial medical associations. As Claude Forget notes, this provision would have the effect of making the rates for medical fees established under arbitration or conciliation a national standard that has nothing to do with accessibility.[31] If the courts ultimately decide that such a provision is valid, this may amount to a major extension of the federal spending authority. Clearly, regardless of the outcome, the case will serve to clarify further the parameters of the federal spending power.

The legal challenge to the Canada Health Act remains at a preliminary stage and one can expect to see further arguments raised. One of these will be that the punitive financial sanctions imposed on the provinces infringe section 36 of the Constitution Act, 1982, in that they prevent a provincial government from discharging its constitutional obligation to provide reasonably comparable public services at reasonably comparable levels of taxation. Such an argument would certainly mesh well with the view of provincialists such as Gil Rémillard, noted earlier, that section 36 now precludes the federal government from imposing national standards altogether and will ultimately require the federal government to make all transfers for public services pursuant to the unconditional equalization program.[32]

In my view, however, this interpretation of section 36 is wrong and indeed denies the relevance of our federal structure and the importance of retaining the ability of the federal government to harmonize provincial social and other policies to national standards. One can equally and more persuasively argue that national standards and conditions are essential to a proper discharge of the constitutional commitment to promote equal opportunities for the well-being of Canadians; to further economic development to reduce disparity in opportunities; and to provide essential public services of reasonable quality to all Canadians (section 36(1)). Moreover, a recent court decision involving a taxpayer's challenge to federal spending to fund provincial programs on health, welfare and post-secondary education held that section 36 in fact authorized the federal government to undertake such spending.[33]

The trend in public opinion in Canada today is towards a greater federal role in setting national standards not only with respect to health care, social policies and education, but also in a wide range of other areas of public policy such as environmental protection. For example, just as there was widespread national support for the Canada Health Act, pressure is rapidly increasing for the reimposition of conditions on

transfers for post-secondary education. In particular, the 1985 Johnson Report entitled "Giving Greater Purpose to the Federal Financing of Post-secondary Education and Research in Canada"[34] highlighted how, in the absence of any conditions or incentives, the provinces have allowed their grants to universities and colleges to fall off significantly, while federal transfers to the provincial governments have steadily grown with increases in GNP and population in accordance with the current Established Programs Financing arrangements.

Given the national interest in high-quality, post-secondary education, it is important as a minimum first step for the federal government to require the provinces to escalate their support for universities and colleges at the GNP rate, as suggested in the Johnson Report. Future conditions might also involve ensuring the portability of all credentials, whether technical, educational or professional, greater access to provincial institutions by out-of-province residents, an enhanced role for the federal Secretary of State in the Council of Ministers on Education, the allocation of more funds to basic and applied research, more cooperative education programs, and changes in the traditional tuition system. In this connection, it is interesting to note that the Canadian Association of University Teachers recently called for new federal legislation modelled on the Canada Health Act—a Post-Secondary Education Financing Act, which would require provinces to meet specific objectives with respect to funding levels, accessibility, academic freedom, financial assistance to students and the removal of barriers to disadvantaged groups.

Pressure for an enhanced federal role in establishing national standards will also emerge as governments begin finally to undertake a fundamental review of social assistance and employment policies and seriously consider the possibility of integrating the tax and transfer systems. At the very least this will likely result in more national standards attached to transfers for social assistance under the Canada Assistance Plan, especially in respect of income support levels and the range and quality of social services. In addition, already a variety of specific provincial welfare practices have come under attack, notably, the so-called "man in the house rule" and the recovery of inadvertent overpayments in such a way as to push the recipient below the poverty level.[35] The federal government may well consider it desirable in the near future to ensure the elimination of these practices in all provinces. At the same time, however, existing CAP requirements such as for needs-testing (discussed earlier) may be dropped or substantially changed.

Certainly there is no lack of possible future federal–provincial friction in respect of existing and future shared-cost programs. The

critical question is whether the potential friction is such as to require a constitutional limitation on the federal spending power, and if so, how?

In my view, there is no need for an explicit constitutional limitation at this time. As discussed above, the spending power already has a secure constitutional base and has been, and will continue to be, sufficiently circumscribed through legal interpretation. In addition, Quebec's particular concerns have been accommodated over the years such as through the opting-out provisions under the Canada Assistance Plan or the arrangement to allow for provincial variation of family allowances in 1974. Such administrative options can continue to evolve to meet future contingencies.

The exercise of the federal spending power is fundamentally a question of politics and public policy, and sufficient flexibility is critical. As Driedger succinctly concluded, conditional grants may create political problems, but not constitutional or legal ones. Disputes should therefore be settled by intergovernmental agreement and, for example, ratified by statute.[36]

In any event, to entrench limitations on the power as proposed in the Meech Lake Accord is unacceptable for a number of reasons. First, it will result in a transfer to the judicial branch of critical power to determine government policy and alter spending priorities. As one observer notes: "Not even the staunchest advocate of judicial activism can successfully argue that [Supreme Court Justices] Brian Dickson or Bertha Wilson are the best qualified persons to determine whether the education policies of Bill Vander Zalm or the health policies of Robert Bourassa are 'compatible with the national objectives.' "[37]

Moreover, as the recent landmark decision in *The Minister of Finance of Canada* v. *Robert James Finlay* indicates,[38] the Supreme Court of Canada is prepared to expand significantly its rules of standing to permit private individuals with a sufficiently direct and personal interest to bring legal challenges in respect of government spending pursuant to federal–provincial shared-cost arrangements. More specifically, the court has allowed Finlay to sue the federal Minister of Finance for a declaration that the federal payments to Manitoba under the Canada Assistance Plan are illegal and for an injunction to stop them as long as the province fails to comply with the conditions set out in the arrangements. When this development is combined with the new constitutional role for the courts in respect of national shared-cost programs set out in the Meech Lake Accord, we can undoubtedly expect a spate of lengthy, expensive and more often than not counter-productive legal challenges by a wide range of individuals and public authorities.

The noted constitutional and legal philosopher, Ronald Dworkin,

has suggested that a distinction should be drawn between matters of principle and matters of policy in determining the appropriate parameters for the role of the judicial branch.[39] Judges are suited by their training and their role to decide questions of principle and have a duty to protect the rights of individuals and minorities against the encroachment of others and restrain the pursuit of the majority interest in politics. Elected governments and legislatures, on the other hand, have the competence, authority and duty to make policy and, in the constitutional context, to enact measures that will make the community as a whole better off. Although it is of course difficult in practice to distinguish between principle and policy, the spending power limitations in the Meech Lake Accord clearly shift the resolution of important matters of policy to the judiciary. This will seriously impair the ability of our elected representatives to act in the national interest.

Beyond this overriding concern over the unacceptable abdication of power to the judiciary, specific criticisms of the Meech Lake Accord provisions focus on their unacceptable ambiguity, the ease with which provinces can opt out of national programs, and the inability of the federal government to establish firm minimum national standards.

John Whyte, the Dean of Queen's University Law School, has set out no less than six areas where serious questions of interpretation will arise, all of which will "create immense disincentives to the federal government to embark on social welfare or other programs."[40] These questions can be summarized as follows:

(1) What is a national shared-cost program? Does it require a particular type of financing formula such as matching grants?
(2) What is meant by spending in an area of "exclusive provincial jurisdiction"? Does there only have to be a provincial aspect to the expenditure program? If so, the spending power provisions will be given a very wide application.
(3) What is a "program or initiative"?
(4) What is "reasonable compensation"?
(5) What is a "compatible" program or initiative, and who will determine the compatibility?
(6) What counts as "national objectives"? Is it not likely that they will apply only to the broader ends or aims of the program in question, and therefore preclude the imposition of national standards or the means to those ends? Does the federal government have the exclusive right to determine the national objectives?

Constitutional expert Eugene Forsey argues that the reference to a "program established by the Government of Canada" will mean that the national objectives could be set by a pronouncement of the Government in a White Paper, a speech by the Prime Minister or Minister most directly concerned; and the courts might rule on the basis of this that a provincial program or "initiative" was eligible for compensation. "Parliament would, again, be subordinated to the courts, and provinces might be able to raid the federal treasury for support of mere tokenism."[41] In addition, it is clear that "national objectives" mean much less than "national standards" since, in contrast to the spending power provisions, the immigration provisions in proposed section 95B(2) of the Constitution Act, 1867 *do* explicitly mention "national standards and objectives."

The Canadian Council on Social Development (CCSD), along with many others, notes that "national objectives" can be interpreted as the lowest common denominator of provincial compliance, and if "compatible with" is interpreted as "not in opposition to," we are in danger of losing both the federal role in, and the national character of, social policy. In addition, it is clear that there are inexorable pressures on provinces to use their limited fiscal resources in ways that may not be in the best interests of the Canadian population as a whole. Notable examples include "the use of extra-billing and user fees to limit access to health care, or the current trend for provinces to reduce social assistance payments to levels well below even the provincially determined level of need for certain groups of people."[42] More generally, the CCSD concludes that the excessive ambiguity of the provisions will impede the urgently required *national* efforts to develop a new approach to income security, social services and employment opportunities.

Al Johnson, a former Deputy Minister of Health and Welfare and a veteran of federal–provincial negotiations over a wide range of shared-cost programs such as medicare and post-secondary education, argues that medicare would not have been possible under the Meech Lake Accord rules.[43] Both Alberta and Ontario were vigorous opponents of the federal plan for ideological reasons. They preferred to leave the operation of health insurance schemes to the private insurance companies and disagreed with the principles of universality and comprehensive coverage. Under the Meech Lake Accord, John Robarts could have opted out of the program and given Ontario's share of the money to the private insurance companies, or used it to build new highways. The federal government retains no effective bargaining lever to entice recalcitrant provinces into the scheme. Medicare would have been doomed.

Jack London, another constitutional expert and a member of the federal Task Force on Child Care, argues that the Meech Lake Accord gravely diminishes the federal incentive, both political and bureaucratic, to initiate or engage in a significant national day care program because the appeal of a national, homogeneous impact would be gone.[44] In particular, the opting-out provisions will effectively preclude a strong unilateral federal initiative in committing substantial expenditure to day care and, in any event, the provinces would get all the political credit. Since it is not clear that the provinces would be required to adhere to national standards with respect to, for example, unlicensed suppliers and non-profit day care centres, we will likely end up with an inadequate patchwork system in a balkanized Canada.

Even a supporter of the Meech Lake Accord, constitutional lawyer Andrew Petter, acknowledges certain unacceptable ambiguities in the provisions.[45] It is not clear, for example, whether "national objectives" will be limited to "subject matter" objectives such that child care funds must be spent on "child care." It is also not clear whether tax deductions and tax credits fall within the definition of "national shared-cost programs."

Finally, many observers have noted the ambiguity with respect to the application of the provisions to "programs established . . . after the coming into force of this section." It is not clear whether future extensions or amendments to medicare, for example, will qualify as post-Accord programs and therefore be subject to the opting-out provisions. If this interpretation is accepted, existing national programs could be seriously eroded.

All the foregoing concerns apply to a wide range of future initiatives that may be desirable, especially in new areas where the division of legislative authority is not clear. For this reason, it is preferable, in my view, to retain maximum flexibility in the exercise of the federal spending power and to avoid explicit constitutional limitations. But, if such limitation is nevertheless considered essential, it must be determined only after a full and free public debate and in the context of a review of the current division of powers to account explicitly for the new areas of concern.

In this connection, the 1969 federal proposal is instructive.[46] It consisted of four prongs. First, there would be an explicit constitutional provision conferring on Parliament the power to make *unconditional* grants to the provinces. This power would be unrestricted, beyond perhaps some general commitment to the elimination of regional disparities. Second, no decision would be made with respect to the power

to make payments to "persons or institutions" in matters of provincial jurisdiction, until consideration had been given to the distribution of legislative powers. Third, there would be no constitutional restriction of Parliament's ability to make grant-in-aid programs involving only some of the provinces, and therefore no compensation would be available for non-participating provinces.

Finally, conditional grant-in-aid programs involving all of the provinces *would* be subject to constitutional restriction. The federal government would not proceed with a program unless a "national consensus" existed, such consensus to require the agreement of three of the four senatorial districts and at least two western provinces and two Atlantic provinces. The federal government would then compensate the *citizens* of a non-participating province by a sum equal to the average per capita payment to participating provinces multiplied by the province's population.

I would still agree with Donald Smiley who criticized this proposed compensatory mechanism on the grounds that it is tantamount to rewarding individuals by Parliament "as the by-product of the frustration of national purposes by the government which represents them."[47] Nevertheless, in stark contrast to the Meech Lake Accord, at least the proposals do not make it too easy to opt out. Moreover, the 1969 proposals preserve the incentive for the federal government to initiate new programs by allowing the federal government to retain the political credit for any tax revenues raised and stipulating that the fiscal compensation goes to the citizens of the non-participating province, not the provincial governments. In addition, although still unsatisfactory, the 1969 proposals ensure that at least five provinces would participate in a uniform national program and thereby decrease the chances of a patchwork quilt result. In contrast, under the Meech Lake Accord, any number of provinces can opt out.

A more innovative proposal to limit the financial spending power has been put forward recently by Frank Carter, a former Deputy Secretary of the Cabinet for federal–provincial relations and subsequently, from 1977 to 1984, a special advisor on the Constitution.[48] Carter suggests that the Constitution provide that monies otherwise payable to a province that opts out of a shared-cost program would be kept in a fund until after the holding of the first provincial election following the elapse of a three-year period. If, after the election, the province still refused to participate, the accumulated funds (and the monies payable thereafter) would be paid by the federal government to the people, but in a way that would facilitate its retrieval by the provincial government

through its own taxes. According to Carter, this arrangement would recognize the ultimate sovereignty of a province in fields of its own jurisdiction. At the most, it would impose delay and an electoral test on a province wishing to stay on its own. At the least, it would provide an incentive for both sides to seek solutions.

The Carter proposals certainly merit consideration in future constitutional reform discussions. They have the particular value of emphasizing the need to consult and meaningfully involve the people of Canada in any new initiative and might contribute to more open, responsive government at both levels.

III The Dangers of a Balkanized Canada

A final fundamental flaw in the proposed constitutional limitation on the federal spending power relates to the unacceptable political dynamics that are generated, particularly when viewed in the context of the overall Meech Lake Accord and other relevant provisions in the existing Constitution. More specifically, the spending power provisions, however limited in scope, are simply part of an overall agreement that incorporates a serious and, in my view, debilitating shift of power and dynamism from the federal Parliament to the provinces. Canada is already one of the most decentralized federations in the world; the Meech Lake Accord will potentially make us ungovernable. And when this is combined with the undermining of our Charter, it will certainly impair progress towards greater social justice and a fairer, more compassionate society.

In examining the overall context of the Meech Lake Accord, four sets of provisions must be singled out: the new amendment procedures, the constitutional entrenchment of the First Ministers' Conferences, the provincial role in appointments to both the Senate and the Supreme Court of Canada, and the distinct society clause, particularly its effect in undermining the Charter.

With respect to the amendment procedures, the Accord proposes to extend the rigid requirement for the unanimous consent of all provinces to cover changes to critical national institutions—the Senate and the Supreme Court of Canada—as well as for the establishment of new provinces. In addition, it loosens and expands the general amending procedure to permit opting out with fiscal compensation by any province that dissents from any amendment affecting the division of powers.

The extension of the unanimity rule means that the chances for any meaningful change to our federal institutions, notably Senate reform

so that the Senate can more effectively protect and represent the interests of the weaker regions, are now extremely remote. But even more importantly, giving the provinces such extensive veto powers increases their bargaining leverage in virtually any area of federal-provincial negotiations. This ability to use the threat of the veto to extract concessions on unrelated matters opens the door to political blackmail and paralysis, and risks effectively immobilizing national efforts to achieve greater social and economic justice.

The loosening of the general amendment procedure means that it is now far too easy for a province to opt out of future adjustments to the division of powers that may be required to meet the critical challenges that lie ahead, notably in the areas of environmental protection, telecommunications, science and technology, education and the integration of our employment and social assistance policies. More generally, as Garth Stevenson notes, "the opting-out procedure suggests that a province's adherence to Canada is only conditional and that the province is free to accept or reject national decisions depending on whether it finds them convenient."[49]

Constitutional amendments have occasionally been required in the past to permit the implementation of national programs, notably, unemployment insurance (s.91(2A)) and pensions and supplementary benefits (s.94A).[50] One must ask oneself what would have happened to the nature of our national unemployment insurance scheme if Quebec or any other province had been able to opt out with full fiscal compensation. At the very least, our ability to meet the national challenge of devastating levels of unemployment would have been severely compromised. Yet the Meech Lake Accord would now allow such an unacceptable situation to arise in respect of any future constitutional amendments pursuant to the general amending formula.[51]

The constitutional entrenchment of annual First Ministers' Conferences both on the economy and other matters, and on the Constitution, is a second element of the Meech Lake Accord that will compound the debilitating shift of power away from Parliament to the provinces. In effect, we are creating an unaccountable third level of government that may eventually reduce the federal Parliament and provincial legislatures to mere ratification chambers in respect of decisions taken by the First Ministers. The federal cabinet and the Prime Minister will no longer speak for Canada. Instead, eleven First Ministers will collectively speak for Canada, and our position in international and domestic issues will inevitably be fragmented and reduced to the lowest common denominator of rival provincial interests. Again, in combination with the spending power limitations, it will become increasingly difficult for the federal

government to carry out its critical leadership role in pursuit of the national interest and to strengthen the national community.

Third, the Meech Lake Accord effectively hands over the power of appointment to the Supreme Court of Canada and the Senate—two key national institutions—to the provincial governments. This represents a very serious abdication of federal responsibility with respect to both the judicial and legislative branches of our national government and an unacceptable alteration of our federal system.

The character of the Supreme Court will gradually be transformed since it is inevitable that the provincial nominees will be ideologically inspired. The impact on the nature of the Court's decisions in respect of our basic rights and freedoms guaranteed in the Charter and on issues of federal–provincial division of powers will be potentially very far-reaching.[52]

Similarly, the Senate will be transformed into a body that simply reflects the untidy sum of rival provincial government interests. Moreover, there is nothing to ensure that the Senate will not stalemate or frustrate the activities of our national legislators in the House of Commons. Furthermore, really meaningful Senate reform is precluded by the virtually unattainable requirement of the unanimous consent of all provinces for any future amendments regarding the Senate.

Finally, a general underlying danger of the Meech Lake Accord is its effect in undermining our commitment to respect and promote basic rights and freedoms guaranteed in the Charter. The concern over the status of the Charter vis-à-vis the Accord arises as a direct result of the distinct society clause which, in the view of many constitutional experts, gives the Quebec government the power to override the Charter.[53] The addition of Article 16 in the early hours of the morning on June 3rd which singles out the rights of aboriginal peoples and our commitment to multiculturalism in the Charter for special recognition simply confirms this view. In addition, the recent Supreme Court decision in the Separate School Funding case indicates, among other things, that political compromises in the Constitution will take precedence over Charter rights in certain circumstances.[54] To resolve this unacceptable situation, at the very least a new section should be inserted in the Accord that explicitly states that nothing in the Accord affects any of our basic rights and freedoms guaranteed in the Charter.

A clear statement of the supremacy of the Charter is as important to the spending power provisions as to all the other provisions in the Accord. More specifically, given the very real potential for significant variations among provinces in respect of national programs, if such programs can be implemented at all, it is clear that our rights to equality

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and mobility will be adversely affected. As the Canadian Advisory Council on the Status of Women succinctly points out, national shared-cost programs are fundamentally about equality and our commitment to equal opportunity.[55] It is therefore critical that the Charter, particularly the equality and mobility guarantees, applies to the spending power provisions.

But ensuring that the Charter takes precedence over the Accord is only a second-best solution. In my view, the Meech Lake Accord and the spending power provisions are fundamentally flawed. It is my hope that our First Ministers will recognize the need to go back to the constitutional bargaining table and seek a better accord that will more effectively accommodate Quebec's special concerns with respect to linguistic and cultural security, but that will also ensure that Canada continues to function coherently as one nation. An open and extensive public debate will provide a constructive opportunity for all Canadians to examine the significant challenges to the Canadian society and economy that lie ahead and the respective federal and provincial roles in meeting those challenges. It will allow all Canadians to discuss alternatives to the Meech Lake Accord that really *will* result in a stronger, more responsive national government, rather than lead to national disintegration. Nothing less than the future of Canada as a progressive dynamic nation is at stake.

Notes

1. Clause 7 of Constitutional Accord, 1987; proposed s.106A, Constitution Act, 1867.
2. The most notable of these critics are the nationalists in Quebec.
3. Donald Smiley and Ronald Burns, "Canadian Federalism and the Spending Power: Is Constitutional Restriction Necessary?" (1969) 17 Can.Tax J. 467, at p. 479.
4. Frank Carter, "How to Tame the Spending Power" (October 1986) Policy Options pp. 3–7.
5. In fiscal year 1986/87, $28.6 billion in cash and tax points were transferred from the federal government to provinces and municipalities for programs with joint or intergovernmental administration. This represented almost one-quarter of the federal budget.
6. A. Maslove and B. Rubashewsky, "Cooperation and Confrontation: The Challenges of Fiscal Federalism" in *How Ottawa Spends 1986* (1986) pp. 95–118, at p. 97.
7. See, for example, William Watson, "Section 36 Federalism" (June 1987) Policy Options and William Watson, "Simpler Equalization" (October 1986) Policy Options.

8. Gil Rémillard, "Ottawa Cannot Impose its National Standards" *Le Devoir*, June 1, 1984.
9. Andrée Lajoie, "Education—The New Offensive By Spending Authorities" *Le Devoir*, March 6 and 7, 1984.
10. See, for example, Peter Cumming, "Federal-Provincial Fiscal Arrangements and the Search for Fiscal Equity Through Reformulation of the Equalization Program" in Ontario Economic Council, *Ottawa and the Provinces*, Vol. 1 (1985) pp. 96–124.
11. See, for example, Yves Rabeau, "Bien-être social—ou bien-être provincial: vers une refonte du programme de péréquation" (1986) Cdn. Public Administration pp. 237–258.
12. Government of Canada, *Federal-Provincial Grants and the Spending Power of Parliament* (1969) pp. 20–22.
13. *Ibid.*
14. In economists' terms, this is the so-called externality rationale.
15. Keith Banting, "Universality and the Development of the Welfare State" John Deutsch Institute, Queen's University (1985) pp. 7–14.
16. Malcolm Taylor, *Health Insurance and Canadian Public Policy* (1978) p. 181.
17. Claude Forget, "The Harmonization of Social Policy" in Mark Krasnick (Research Coordinator), *Fiscal Federalism* (1986) (Macdonald Commission Studies Vol. 65) p. 97. Forget prefers to use the idea of "harmonization" to analyze public affairs in Canada, rather than the traditional ideas of centralization and decentralization.
18. Andrew Petter, "Meech Won't Stall Social Reform in the Provinces" *The Globe and Mail*, June 30, 1987.
19. *Ibid.*
20. See generally D. Coyne, "Compensation Without Litigation" (April 1986) Policy Options, for details of the various related initiatives under way or under study.
21. Elmer Driedger, "The Spending Power" (1981) 7 Queen's Law Journal 124, at p. 125.
22. Frank Scott, "The Constitutional Background of the Tax Agreements (1955) 2 McGill Law Journal 1.
23. See, for example, Smiley and Burns *supra*. note 2; Joseph Magnet, "The Constitutional Distribution of Taxation Powers In Canada" (1978) 10 Ottawa L. Rev. 473, 476; Gerald LaForest, *The Allocation of Taxing Power under the Canadian Constitution* (Canadian Tax Foundation, 1967); see also Ken Hansson, "The Constitutionality of Conditional Grant Legislation" (1967) 2 Man. L.J. 191, 194.
24. *Reference Re. Employment and Social Insurance Act* (1936) 3 D.L.R. 644 (J.C.P.C.).
25. Section 91 (2A) of the Constitution Act, 1867 was enacted in 1940.
26. The most recent case to follow the *Reference Re. Employment and Social Insurance Act* and to uphold the constitutionality of the major shared-cost programs involving medicare, post-secondary education and social assistance

is *Winterhaven Stables Ltd. v. A.G. (Canada)*, (1986) 29 D.L.R. (4d) 394 (Alta. Q.B.). The decision is currently under appeal. See also *Central Mortgage and Housing v. Coop College Residence Inc.* (1975) 13 O.R. (2d) 39 (Ont.C.A.).

27. Family allowances were upheld as a valid exercise of the federal spending power in *Angers v. M.N.R.* [1957] Ex. C.R. 83. Old age security payments initially were made pursuant to explicit federal authority in section 94A of the Constitution Act, 1867. However, the contribution element has now been completely phased out, and OAS payments are funded entirely from federal revenues.
28. Note, however, that following the federal Finance Minister's announcement in 1985 that the rate of increase in equalization payments would be reduced to achieve savings of $2 billion by 1990, the Quebec finance minister has threatened legal action to challenge the proposed cutback. The other have-not provinces are equally upset.
29. See Amended Statement of Claim, Supreme Court of Ontario File #1217/85. *The Canadian Medical Association, Dr. James MacPhee and Ruby Evelyn Kelly v. AS (Canada) and AG (Ontario)*.
30. Sections 7 and 15 of the Charter.
31. Forget, supra note 17, p. 112.
32. See discussion supra at notes 8 and 9.
33. *Winterhaven Stables Ltd. v. A.G. (Canada)*, supra note 26.
34. The Johnson Report was submitted to the Secretary of State in February 1985.
35. Ontario has recently taken legislative steps to eliminate the "man in the house" rule. The recovery of overpayments practice is currently under attack in Manitoba: see *The Minister of Finance v. Robert James Finlay* discussed infra, note 37.
36. Elmer Driedger, supra note 21.
37. Mark Crawford, "Supreme Court Opened Door to a Constitutional Deal" *The Gazette*, May 27, 1987.
38. *The Minister of Finance of Canada v. Robert James Finlay* (1986) 33 D.L.R. (4d) 321 (S.C.C.).
39. See Ronald Dworkin, *Law's Empire* (1986).
40. John Whyte, Memorandum for the CCSD Concerning the Meaning and Potential Impact of Section 7 of the 1987 Constitutional Accord, August 13, 1987 (mimeographed).
41. Eugene Forsey, Submission to the Special Joint Committee on the 1987 Constitutional Accord, July 1987 (mimeographed).
42. Letter to the Prime Minister, May 22, 1987. See also CCSD Brief to the Special Joint Committee on the 1987 Constitutional Accord, August 25, 1987 (mimeographed), and the similar range of concerns raised by the Canadian Advisory Council on the Status of Women in its brief to the Special Joint Committee, August 20, 1987 (mimeographed).
43. Al Johnson, Submission to the Special Joint Committee on the 1987 Constitutional Accord, August 1987 (mimeographed). See also Leonard Shifrin,

"Ottawa's Boasting of Day Care Is Nonsense" *The Toronto Star*, July 13, 1987.

44. Jack London, "How Meech Lake Would Balkanize Canada" *The Toronto Star*, May 20, 1987.
45. Andrew Petter, supra note 18.
46. See federal government Discussion Paper, supra note 12. Note that the federal government again suggested the possibility of negotiating spending power limitations during the constitutional negotiations in 1978, but subject to the caveat that "restrictions on the federal spending power should not deprive us of effective means to achieve such national goals as equal treatment of Canadians, regardless of their residence and alleviation of disparities among provinces and regions." See "An Agenda for Change": notes for comments by the Prime Minister at the Constitutional Conference, Tuesday, October 31, 1978.
47. Smiley and Burns, supra note 3.
48. See Carter, supra note 4.
49. Garth Stevenson, "Constitutional Amendment: A Democratic Perspective" 1984 Socialist Studies p. 269.
50. Note that in the 1969–71 constitutional reform debates leading to the abortive Victoria Charter, Quebec focused on a key amendment to section 94A that would have given the provinces effective overriding authority in matters of social policy and over all programs relating to income distribution and social security such as family allowances, youth allowances, manpower training allowances and unemployment insurance. As the federal government noted in its 1969 Discussion Paper, the Quebec approach reflected a particular view of the Constitution and "the case for programme integration." More specifically, Parliament ought not to have the power to spend except where it has the power to regulate. Instead a single authority—the provincial government—should be able to integrate programs in the fields of income redistribution and social security and adapt every program to the specific demographic, income and regional structure of the province, without taking into account the situation in the rest of the country. See federal government Discussion Paper supra note 12, pp. 18–20.
51. It should be noted that the current general amending formula does allow a dissenting province to opt out of amendments relating to "education or other cultural matters," with fiscal compensation. These were viewed as areas of particular concern to Quebec.
52. See, for example, the concerns expressed by the Canadian Bar Association in its submission to the Special Joint Committee on the 1987 Constitutional Accord, August 1987 (mimeographed).
53. See, for example, the submission of Professor Raymond Hébert to the Special Joint Committee on the 1987 Constitutional Accord, August 1987 (mimeographed).
54. See, for example, the following comments of Madame Justice Wilson in *Reference Re Bill 30, An Act To Amend The Education Act* (June 1987) at p. 48:

"It was never intended . . . that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

55. Canadian Advisory Council on the Status of Women, Brief to the Special Joint Committee on the 1987 Constitutional Accord, August 20, 1987 (mimeographed).