

**NATIONAL STANDARDS AND SOCIAL PROGRAMS:  
WHAT THE FEDERAL GOVERNMENT CAN DO**

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## **NATIONAL STANDARDS AND SOCIAL PROGRAMS: WHAT THE FEDERAL GOVERNMENT CAN DO**

In recent years, continuing federal reductions to transfers to the provinces for social programs have prompted concerns about whether the federal government can continue to ensure that these programs adhere to national standards. These concerns, in turn, represent but one dimension of a broader debate over appropriate roles for the federal government.

This paper focuses on the federal capacity to influence the setting of nation-wide standards for provincial social programs and subsequent provincial adherence to these standards. This issue is logically distinct from the issue of what the federal role should be, but conclusions about the federal capacity do have implications for this broader debate. What is appropriate will be determined, in part, by what is possible.

Conclusions about the current capacity of the federal government require the bringing together of the several different kinds of information that establish the structure of this paper. Part I provides an historical overview, focusing on the post-war period during which the modern social safety net was substantially created, and outlines some long-term trends. Part II examines the respective constitutional powers of the federal and provincial governments, and their evolving practical significance. Part III discusses some of the political institutions, practices and processes through which the federal government interacts with provincial governments, and which permit greater or lesser degrees of influence. Part IV gives specific attention to two of the practical factors that determine the actual impact of historical roles, constitutional powers and political processes: political will and money. A final section briefly states some general observations and a basic conclusion about the federal capacity to influence provincial social programs.

## **PART I: HISTORICAL BACKGROUND**

### **A. The Era of “Cooperative Federalism”**

Beginning before World War II, the federal government gradually established a social policy role as an initiator of national programs and national standards, in some cases in areas at least partly within the provincial jurisdiction. Examples of programs that to some extent owe their existence to this role include: the original old age pensions (1927); social assistance (1927, 1937, 1951, 1954 and, comprehensively through the Canada Assistance Plan, 1966); hospital insurance (1957); and Medicare (1966). Most accounts of the development of Canada’s social safety net explain these initiatives and the heightened role of the federal government that they involved, in terms of three central factors:<sup>(1)</sup>

- First, the traumatic experiences of depression and war had generated new broadly shared public expectations and humanitarian ideals, supported by the emergence of Keynesian economics, all of which favoured a major expansion of governmental activity in the social policy sphere.
- Second, Ottawa retained a degree of policy leadership, at least during the late forties and early fifties. The federal government was able to employ the policy development strength of the federal public service (relatively greater than that of most provinces) to develop proposals for innovative social programs and standards; these responded initially to the demands of reconstruction as well as to more basic shifts in expectations about the role of government.
- Third, the federal government employed its greater fiscal strength to persuade the provinces, through conditional grants, to cooperate with federal initiatives that would otherwise have exceeded provincial fiscal capacities. The role of federal-provincial cooperation during this period (notably in the creation of the social safety net) has led it to be widely portrayed as the era of “cooperative federalism,” in contrast to subsequent eras more strongly characterized by conflict and, in some policy sectors, competition.

While this overview captures essential relationships, it is misleading unless qualified by the following key points:

- Federal-provincial cooperation was not always easily attained, and in some cases was not attained at all. For example, the major package of reconstruction proposals and initiatives (including ambitious shared-cost programs in the health and social

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(1) See Ronald Manzer, *Public Policies and Political Development in Canada*, University of Toronto Press, Toronto, 1985, p. 56 ff.

policy sectors) presented by the federal government to the provinces in 1945 was rejected over the course of two years of discussions. Ontario and Quebec took the lead in criticizing the proposals on the grounds that they would place the provinces in a subordinate position within areas of their own jurisdiction.<sup>(2)</sup>

- Federal policy leadership was relatively transitory. While this leadership was amply apparent in the early fifties, the growth of provincial governments during this period (stimulated in part by early conditional grant programs) rapidly translated into stronger provincial policy capacities and assertiveness. Beginning with hospital insurance in 1957, which was modelled on plans already in operation in Saskatchewan and British Columbia, a shift took place in the role of federal legislation away from that of establishing federally developed programs and towards that of ensuring the national application of models pioneered, to a greater or lesser extent, by individual provinces.<sup>(3)</sup>
- There was growing provincial dissatisfaction with conditional grant arrangements as the fifties proceeded. Increasingly, provincial governments were resistant to specific federal conditions for assistance. As well, conditional grants were seen as distorting the activities of provincial governments and channelling scarce funds away from areas in which the federal government was not fostering activity, to areas in which provincial spending was required in order to obtain the federal grants. In Quebec, the hostility of Duplessis to the trend towards interventionist government enabled him to limit these distortions through the only available expedient, non-participation in some of the programs and the forgoing of grants.
- Following the 1960 election of the Lesage government, Quebec pressed Ottawa to vacate the fields in which shared-cost programs had been established in the fifties, arguing that the programs were now well established, and that public support provided a sufficient guarantee of their continuation. Federal legislation permitting provinces to “contract out” of various social programs and receive a tax abatement in lieu of federal grants, was passed in 1965. Quebec subsequently opted out of all the major shared-cost programs. While other provinces did not follow suit (in some cases because of concerns that the new arrangement would not provide adequate resources), they did continue to resist what they perceived as excessive federal conditions attached to the shared-cost programs.
- By the mid-1960s, as the final pieces of the modern safety net were being put in place, the federal government was already explicitly renouncing the level of federal influence that had characterized the conditional grant era. A 1966 statement by the

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(2) See Paul Barker, “The Development of the Major Shared-Cost Programs in Canada,” in R.D. Olling and M.W. Westmacott, eds., *Perspectives on Canadian Federalism*, Prentice-Hall Canada Inc., Scarborough, 1988, p. 197 ff.

(3) For a discussion of various aspects of the development of provincial governments, see Richard Simeon, “Regionalism and Canadian Political Institutions,” in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality*, Third Edition, Methuen, Toronto, 1977, p. 292 ff.

Hon. Mitchell Sharp, Minister of Finance, affirmed that governments should be accountable to their own electors for taxing and spending decisions, and recognized that the cumulative effect of shared cost programs in areas of provincial jurisdiction was to distort provincial priorities and erode the fiscal responsibility of provincial governments.<sup>(4)</sup> Consequently, standards in new programs (e.g., Medicare) were couched in terms of general principles rather than the detailed administrative requirements of, for example, the hospital insurance program.

## B. Programs and Standards as of the Early Seventies

As of the early seventies, the major federal-provincial social safety net programs were as follows:

- **Canada Assistance Plan:** Established in 1966 to consolidate earlier programs into an expanded program providing assistance (welfare, work activity programs, nursing homes, home care and a range of other services) to persons in need or likely to become in need, the plan was funded on a 50/50 federal-provincial cost shared basis.

### **Standards:**

- left provinces free to administer programs, including establishment of levels of assistance, eligibility criteria, comprehensiveness and delivery methods;
  - precluded provinces from establishing residency requirements for eligibility; and
  - required provinces to establish, by law, an appeals procedure.
- **Equalization:** Expanded in 1967 to provide provinces having relatively weak revenue-raising capacities with annual grants determined by a formula based on a 10-province average, the program aimed to ensure that all provinces could provide citizens with reasonably comparable levels of public services at reasonably comparable rates of taxation.

### **Standards:**

- unconditional formula, no specific service or service levels specified.
- **Hospital Insurance:** This was established to provide nation-wide coverage for in-patient services at the ward level in an active treatment hospital, hospital for the convalescent, or hospital for the chronically ill. Federal legislation setting out requirements and cost-sharing arrangements was passed in 1957; between 1958 and 1961, provinces either integrated previously existing plans or established new plans. Under the federal legislation, provinces received an annual per capita grant for in-patient services equal to 25% of their national per capita cost and 25% of their provincial per capita cost.

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(4) Cited in Canada, Parliament, *Fiscal Federalism in Canada*, Report of the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, Minister of Supply and Services, August 1981, p. 30.



**Standards:**

- Legislative authority for federal-provincial agreements that provided for:
  - universal coverage (residency defined in federal regulations/no waiting periods);
  - uniform terms and conditions (i.e., no means testing, subsidies or additional charges for high-risk groups);
  - provision of specified services at specified charges (with provinces having the option to include a range of additional services);
  - adequate service standards, backed up by provincial licensing, inspection and supervision of hospitals;
  - public administration, specified to include:
    - establishment of provincial hospitals planning division;
    - provincial approval of hospital budgets;
    - provincial approval of purchases of furniture and equipment;
    - other requirements as specified in federal regulations; and
  - authorized charges to patients permitted in a province (but with subtraction of equivalent amounts from the federal transfer to that province).<sup>(5)</sup>
- **Medicare:** Established in 1968 under 1966 legislation to create a nationwide system of health insurance, Medicare was federally funded on a per capita basis at 50% of the national average cost of insured medical services; these included medically necessary hospital care, including meals, supplies, tests and many outpatient services; medically necessary physician care; and surgical-dental services requiring a hospital.<sup>(6)</sup>

**Standards:**

- Legislative requirements as follows:
  - coverage of all medically required services provided by medical practitioners, as recognized by the province, on uniform terms and conditions;
  - eligibility subject to a residency requirement of no more than three months (members of the Canadian Forces, R.C.M.P. and prisoners not eligible);
  - at least 95% of the eligible residents of the province to be entitled to payments (at least 90% during the first two years of the plan);
  - reasonable access to insured services to be provided on the basis of an authorized schedule of payments that:

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(5) See *Hospital Insurance and Diagnostic Services Act, 1957*, c. 28, s. 1., esp. sections 3, 5 and 8, and Canada, Privy Council Office, Federal-Provincial Relations Division, *A Descriptive Inventory of Federal-Provincial Programs and Activities as of September 30, 1973*, Ottawa, 1974, p. 214-15. See also Malcolm G. Taylor, *Health Insurance and Canadian Public Policy*, Institute of Public Administration of Canada, McGill-Queen's University Press, Kingston and Montreal, 1987, p. 239.

(6) "Fiscal Federalism in Canada" (1981), p. 53.

- enables reasonable compensation to practitioners; and
  - does not require charges to insured persons or create other barriers that would impede reasonable access;
  - full portability of benefits elsewhere in Canada; and
  - public administration of medical services (either by government or by a fully accountable non-profit agency).<sup>(7)</sup>
- **Post-Secondary Education (PSE):** A federal-provincial post-secondary education transfer replaced federal grants to universities in 1967, responding to funding requirements generated by the arrival of the baby boom cohort at the post-secondary education level. The transfer involved a combination of tax points and cash, with the federal contribution equal to either 50% of total post-secondary education operating costs in a province, or a per capita grant of \$15 (approximately 50% of national post-secondary operating costs).

**Standards:**

- Unconditional formula, no federal standards.<sup>(8)</sup>

**C. Developments since the Early Seventies**

The greater flexibility achieved in the social programs of the mid-sixties did not dispel underlying provincial pressures for greater independence. These pressures were reflected, for example, in the arrangements established by the *Family Allowances Act* of 1974 which (in addition to dramatically increasing benefits) allowed the provinces to define their own family entitlement regimes, based on the age and number of children.

During the early and mid-seventies, there were a number of major attempts at social policy reform, culminating in the federal-provincial Social Security Review of 1973 to 1976. These initiatives were largely unproductive of significant reform, however. The decreased capacity of the two levels of government to reach agreements reflected constraints on the fiscal capacity of the federal government that resulted from the economic problems of the seventies: oil shocks, “stagflation,” lagging national productivity and rising unemployment. These fiscal tensions added to divergencies over policy (reflecting independent provincial policy development capacities) and

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(7) See *Medical Care Act, 1966-67*, c. 64, s. 1.

(8) See *Fiscal Federalism in Canada* (1981), p. 59 ff.

continuing jurisdictional sensitivities (especially in Quebec after the 1976 election of a Parti Québécois government).<sup>(9)</sup>

### 1. The EPF Arrangements of 1977

Provincial governments became progressively more dissatisfied with the inflexible requirements of the hospital insurance agreements, and with the federal audit that determined shareable costs. At the same time, Ottawa was increasingly concerned about the fact that its rapidly escalating health and post-secondary education transfers were essentially beyond its control, being determined by provincial spending levels. The result was the move from cost-sharing to block funding achieved in the Established Program Financing (EPF) arrangements set out in the Federal-Provincial Fiscal Arrangements and *Established Programs Financing Act, 1977*.<sup>(10)</sup>

The EPF replaced 50/50 conditional grants for Hospital Insurance, Medicare and Post-Secondary Education with a combination of

- a single block grant, equal to 50% of federal cash contributions in 1975-76, indexed to three-year average nominal GNP and provincial population growth;
- the transfer to the provinces of 13.5% Personal Income Tax and 1% corporate tax points, topped up with a transitional cash payment, where needed to bring the value of the tax points up to the value of the 'other' 50% of the 1975-76 grant; and
- supplementary elements, such as a cash grant to compensate provinces for the termination of the 1972 Revenue Guarantee Program, and the Extended Health Care component, consisting of an indexed per capita cash grant to cover extended health care services previously cost-shared 50/50 under the CAP.

Provincial flexibility was increased because the EPF transfer detached federal funding from provincial spending for each of the programs involved; thus, the provinces were no longer obliged to spend in order to get federal money. It is noteworthy, however, that the federal government retained the ability to withhold its contribution where a province failed to meet the

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(9) See, for example, Keith G. Banting, *The Welfare State and Canadian Federalism*, Second Edition, McGill-Queen's University Press, Kingston and Montreal, 1987, p. 75, and Derek J. Hum, "Social Security Reform during the 1970s," Chapter 3 of Jacqueline S. Ismael, ed., *Canadian Social Welfare Policy - Federal and Provincial Dimensions*, Institute of Public Administration of Canada, McGill-Queen's University Press, Kingston and Montreal, 1985, p. 33 ff.

(10) It is noteworthy that this move responded primarily to pressures from Ontario and Quebec; most of the smaller provinces would have preferred a reformed cost-sharing arrangement (Barker (1988), p. 209).

criteria set out in hospital insurance and Medicare legislation.<sup>(11)</sup> As well, the EPF arrangements contained a provision for federal-provincial consultations concerning post-secondary education policies with national implications.<sup>(12)</sup>

The formal preservation of the federal government's capacity to apply penalties did not, however, forestall debate about whether or not standards were being maintained. Thus, in hearings of the 1981 parliamentary task force on fiscal arrangements, it was alleged that a number of provinces were taking advantage of the fact that federal money was no longer tied to specific programs to divert funds to programs outside the health and education sectors, and that this threatened to undermine standards.<sup>(13)</sup>

## **2. The *Canada Health Act***

During the late seventies, medical practitioners in a number of provinces began to resort to extra-billing in growing numbers, in an attempt to counter the effect of inflation on provincially established fees for services. This resulted in growing public pressure for more effective controls than were provided by hospital and medical insurance legislation, which did not prohibit user fees or extra billing so long as they did not compromise "reasonable access."

The federal response, which prompted strong protests from several provinces, was the *Canada Health Act* of 1984. This provided for penalties where provincial hospital insurance or Medicare systems contravened the following federal requirements:

- comprehensiveness (all "medically required" services provided by hospitals, medical practitioners and dentists);
- universal coverage, on uniform terms and conditions, to all residents except members of the Canadian Forces and R.C.M.P., prisoners, and those who have not met provincial residency requirements (which may not exceed three months);
- portability (temporary coverage outside the province of residence);
- reasonable access to insured services, unimpeded by charges or other barriers, and reasonable compensation to service providers;

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(11) Hon. Allan J. MacEachen, Minister of Finance, Submission to the Parliamentary Task Force, cited in *Fiscal Federalism in Canada* (1981), p. 71.

(12) See John F. Graham, "Funding of Universities in Canada," in Thomas J. Courchene, David W. Conklin and Gail C.A. Cook, eds., *Ottawa and the Provinces: The Distribution of Money and Power*, Vol. 1, Ontario Economic Council, Toronto, 1985, p. 326.

(13) *Fiscal Federalism in Canada* (1981), p. 75-76.

- public administration (either directly by government, or by an agency monitored by and responsible to government);
- reporting of required information to the federal government; and
- recognition of the federal contribution in publications and advertising.

The *Canada Health Act* specifically provided for dollar-for-dollar reductions to federal EPF transfers for revenues gained by user charges or money paid for services subject to extra billing. Substantial public support for the legislation enabled its passage, in the face of significant opposition from provincial governments and many doctors.

### 3. The Canada Health and Social Transfer

The final significant structural change in federal-provincial social program transfer arrangements took place more than a decade after the *Canada Health Act*. It reflected a significant worsening, during the early 1990s, of the underlying pressures that had been shaping social program arrangements for over two decades. In particular, the failure of the Meech Lake Accord revived and intensified Quebec nationalism, while the impact of the 1991 recession in Ontario (the province that in 1990 had generated 47% of federal revenues) heightened fiscal pressures on the federal government and fostered this province's increasingly confrontational "Ontario-first" approach to intergovernmental affairs.<sup>(14)</sup> More specifically, it responded to pressures created by the federal cap on CAP transfers to B.C., Alberta and Ontario (see Appendix I), which had introduced a progressive disparity into this transfer.

The Canada Health and Social Transfer (CHST), established in 1995, combined the EPF and CAP transfers in a single block transfer. Under the CHST,

- federal cash transfers were reduced by some \$2.5 billion for 1996-97 and an additional \$2 billion for 1997-98, from projected amounts under previous programs;
- CAP cost-sharing eligibility rules were replaced, allowing provinces greater scope for innovation as well as the option of diverting funds to unrelated programs;
- principles set out in the *Canada Health Act* were retained, along with the previous CAP prohibition of residency requirements for access to social assistance; and

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(14) See Judith Maxwell, "The Social Role of the State in a Knowledge-Based Economy," in Patrick Grady, Robert Howse, Judith Maxwell, *Redefining Social Security*, Government Competitiveness Project, School of Policy Studies, Queen's University, Kingston, 1995, p. 34.

- the federal government committed itself to work with provincial governments and citizens to develop “values, principles and objectives” for the new transfer.<sup>(15)</sup>

The 1996 long-term funding commitments for the CHST (see Appendix I) respond to the apprehensions of many social policy analysts that, as introduced in 1995, the CHST would have seen the federal cash transfer “decline steadily and rapidly (after the initial cuts) ...to disappear entirely early in the next century.”<sup>(16)</sup>

#### 4. Fiscal Trends

Recent attempts to preserve some federal leverage based on cash transfers do not reverse the evolution that the federal role in funding social programs has undergone since the mid-seventies. While this evolution is suggested by the structural changes discussed above, it is only fully apparent in the cumulative impact of the series of de-indexations, caps and cuts applied to federal transfers over the past three decades. (For a listing of major fiscal restraint measures, see Appendix I.)

Attempts have been made to quantify the impact on the provinces of federal fiscal restraint. For example, the Canadian Tax Foundation found that, between 1986-7 and 1994-5, the combined effect of federal restraint measures had been to reduce transfers to the provinces under the EPF and CAP by a cumulative total of some \$35 billion (about four times the total annual transfer as of the mid-eighties).<sup>(17)</sup>

While figures of this kind are inherently arbitrary (there is no clear reason for selecting 1985 arrangements as a basis for identifying “reductions”), they nevertheless provide a useful indication of the global trend in federal funding. They are supported by a second set of figures, which indicate that since the early seventies federal transfers have become less important as a percentage of provincial revenues:

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(15) Department of Finance Canada, “Canada Health and Social Transfer: Backgrounder,” at <http://www.fin.gc.ca/fedprove/chstbe.html>, 2 October 1996, p. 1.

(16) Sherri Torjman and Ken Battle, “Can We Have National Standards?” *Caledon Institute of Social Policy*, May 1995, p. 1.

(17) Drawn from a table cited in Thomas J. Courchene, “Canada’s Social Policy Deficit: Implications for Fiscal Federalism,” Chapter 3 of Keith G. Banting, Douglas M. Brown and Thomas J. Courchene, *The Future of Fiscal Federalism*, School of Policy Studies, Queen’s University, Kingston, 1994, p. 99.

Percent of Total Provincial Revenues Obtained from Federal Grants<sup>(18)</sup>

	Nfld.	P.E.I.	N.S.	N.B.	Que.	Ont.	Man.	Sask.	Alta.	B.C.
1970-1	62.2	61.5	47.1	47.3	29.1	17.2	31.7	28.2	23.5	17.6
1980-1	46.8	51.5	45.5	43.5	21.8	17.6	36.4	15.7	7.9	15.2
1990-1	45.6	43.7	36.6	39.8	18.9	11.1	27.9	23.2	14.9	12.3

### 5. Standards: Then and Now

It is useful, finally, to consider the possible impact of intergovernmental pressures, the more flexible arrangements that responded to them, and declining federal funding on the national standards for provincial social programs. While a full exploration of this question would require detailed attention both to standards and levels of actual enforcement, some initial conclusions are suggested by even a general comparison. The chart below suggests several observations:

- First, there appears to have been substantial continuity in the framework of standards, despite the transfer payment reductions and increased provincial assertiveness of the seventies and eighties.
- Second, the most noteworthy change is the replacement of detailed administrative requirements with more general norms or principles. In some cases (e.g., health care access), these appear to involve strengthened (i.e., higher) standards, while in others (e.g., hospital service standards) there appears to have been at least a nominal decline.
- Third, a number of central elements in Canada's safety net -- including welfare benefit levels and services -- have never been subject to national standards. This reminds us that the adequacy of the social safety net depends on multiple factors, of which the presence of standards, national or otherwise, is only one.

(18) Based on Table in Robin Boadway and Frank Flatters, "Fiscal Federalism: Is the System in Crisis?" Chapter 2 of Banting, Brown and Courchene (1994), p. 41.

National Standards

Early Seventies	Now
<p><u>Health</u></p> <ul style="list-style-type: none"> <li>- comprehensive coverage (all medically necessary services)<sup>1</sup></li> <li>- universality (uniform terms and conditions)               <ul style="list-style-type: none"> <li>- Medicare required coverage of only 95% of residents</li> </ul> </li> <li>- access               <ul style="list-style-type: none"> <li>- no standard (hospitals), authorized charges to user permitted</li> <li>- reasonable access (Medicare), limited user charges permitted</li> </ul> </li> <li>- residency requirements               <ul style="list-style-type: none"> <li>- none permitted (hospital)</li> <li>- up to three months permitted (Medicare)</li> </ul> </li> <li>- service standards               <ul style="list-style-type: none"> <li>- hospitals: “adequate,” with provincial licensing/monitoring</li> <li>- Medicare: no service standards</li> </ul> </li> <li>- public administration               <ul style="list-style-type: none"> <li>- detailed requirements (hospital)</li> <li>- general principle (Medicare)<sup>2</sup></li> </ul> </li> <li>- no federal recognition requirement</li> </ul>	<p><u>Health</u></p> <ul style="list-style-type: none"> <li>- comprehensive coverage (all medically necessary services)<sup>1</sup></li> <li>- universality (uniform terms and conditions)</li> <li>- access               <ul style="list-style-type: none"> <li>- reasonable access, no user charges</li> </ul> </li> <li>- residency requirements               <ul style="list-style-type: none"> <li>- up to three months permitted</li> </ul> </li> <li>- no service standards</li> <li>- public administration               <ul style="list-style-type: none"> <li>- general principle</li> </ul> </li> <li>- federal contribution to be recognized in publications, advertising</li> </ul>
<p><u>Social Assistance</u></p> <ul style="list-style-type: none"> <li>- benefit levels: no standards</li> <li>- residency requirements: prohibited</li> <li>- appeals procedure (in law): required<sup>3</sup></li> </ul>	<p><u>Social Assistance</u></p> <ul style="list-style-type: none"> <li>- benefit levels: no standards</li> <li>- residency requirements: prohibited</li> <li>- appeals procedure: not required</li> </ul>
<p><u>Post-Secondary Education</u></p> <ul style="list-style-type: none"> <li>- no standards</li> </ul>	<p><u>Post-Secondary Education</u></p> <ul style="list-style-type: none"> <li>- no standards</li> </ul>
<p><u>Equalization</u></p> <ul style="list-style-type: none"> <li>- no standards</li> </ul>	<p><u>Equalization</u></p> <ul style="list-style-type: none"> <li>- no standards</li> </ul>

Notes

1. While the *Hospital Insurance and Diagnostic Services Act* set out a list of required services, and provided for agreements that could add to it, subsequent legislation has simply referred to medically necessary services.
2. Private insurance companies could be designated to administer the plan on a non-profit basis as agents of the provincial government (as a result of pressure from Ontario).
3. The difference here may be more apparent than real. According to Derek P.J. Hum (*Federalism and the Poor: A Review of the Canada Assistance Plan*, Policy Study Series, Ontario Economic Council, Toronto, 1983, p. 40), the right to appeal had, as of 1983, “failed to materialize to any appreciable extent” because of the inadequacy of public information, and because appeal boards tended to act as extensions of provincial welfare departments.



## **PART II: THE JURISDICTIONAL BASIS**

The capacity of the federal government to influence the provinces is ultimately a product of the powers constitutionally vested at the federal level. It is therefore appropriate to outline these powers before examining, in Part III, the kinds of influence that they enable.

The constitutional basis for federal action within what have come to be seen as the health and social policy fields can be understood only in the light of three fundamental processes of change that have operated since the enactment of the *British North America Act* in 1867.

- First, today's Constitution differs somewhat from that enacted in 1867 as a result of formal constitutional amendments, notably those that transferred responsibility for unemployment insurance to the federal government (1940) and replaced the provincial responsibility for old age pensions with one concurrently held by both provincial and federal governments (1951 and 1964).<sup>(19)</sup> The main impact of these changes has been to enlarge the federal jurisdiction, and thus the federal capacity to set national standards directly in social policy areas for which it has acquired responsibility.
- Second, as a result of judicial interpretations, many of the provisions of today's Constitution have a meaning different from that intended in 1867. The story of evolving judicial interpretations, and their decentralizing impact on the federation, has been widely told.<sup>(20)</sup> In general, expansionary interpretations of provincial jurisdictions (such as "property and civil rights"), in combination with restrictive interpretations of federal powers (such as the "peace, order and good government"), have had the effect of preserving provincial jurisdiction over most of the emerging health and social policy sector.
- Third, the provinces have "emerged," evolving from extremely rudimentary structures to become a level of government politically and administratively counterbalancing the federal government. One aspect of this change is the dramatic increase in importance of what is now seen as the social policy sector. At the time of Confederation, this sector (incorporating areas such as health, education and welfare) was assumed to be a sphere of minimal governmental activity. As these areas have come to be seen as central to the role of government, the provinces have acquired heightened visibility and political legitimacy. This development has added force to a tradition of provincial assertiveness and a gradual shift in the political centre of

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(19) See, for example, Leslie A. Pal, "Federalism, Social Policy, and the Constitution," Chapter 1 of Ismael (1985), p. 12 ff.

(20) See, for example, Martha Fletcher, "Judicial Review and the Division of Powers in Canada," Chapter 7 of Meekison (1977), p. 100 ff.

gravity in favour of the provinces which dates back to the very early days of Confederation.<sup>(21)</sup>

- Fourth, the vast expansion of the scope of government since 1867 has generated a series of new policy fields not anticipated by the Fathers of Confederation and which have not proven to be assignable exclusively to either level of government. Examples of such fields, none of which is mentioned in the sections of the Constitution dealing with federal and provincial powers, include: the environment, culture, communications, regional development, industrial strategies, manpower and training, fitness and sports, health, tourism and science policy.<sup>(22)</sup> Within the new policy fields, both federal and provincial governments act, using the various legislative powers ascribed to them in the Constitution, as interpreted by the courts.
- Fifth, the expansion of government did not merely involve the opening up of new areas in which to legislate, it involved a substantial broadening of government activity beyond the realm of legislation and regulation. Thus, while the Fathers of Confederation appear to have envisioned government as primarily regulatory, supported by minimal levels of taxing and spending, governments today engage in four broad categories of activity: regulation, taxation, the provision of services, and spending. Direct federal initiatives within the social policy sectors typically involve a combination of these, each of which (with the exception of regulation) also has potential influence upon provincial governments.<sup>(23)</sup>

The five changes described have had profound impacts on the constitutional basis for federal influence within the social policy fields. They have determined the practical meaning of the federal powers. More fundamentally, they have defined the jurisdictional questions in response to which these powers have been clarified, and shaped the political and intergovernmental context in which a federal role can be put into practice. The resulting federal powers, described by policy field, are as follows:

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(21) While, in recent years, there has been a widespread tendency to ascribe this tendency to the forces of nationalism in Quebec and decentralist pressures from the Western provinces, it is noteworthy that Ontario played a central role in counterbalancing the federal government at earlier junctures. See Garth Stevenson, *Ex Uno Plures - Federal-Provincial Relations in Canada, 1867-1896*, McGill-Queen's University Press, Montreal and Kingston, 1993, p. 48 ff.

(22) See Garth Stevenson, "The Division of Powers," in Richard Simeon, Research Coordinator, *Division of Powers and Public Policy*, Vol. 61 of the studies commissioned by the Royal Commission on the Economic Union and Development Prospects for Canada, University of Toronto Press, Toronto, 1985, p. 92 ff.

(23) See Stevenson (1985), p. 75 ff.

## A. Education

By virtue of section 93 of the *Constitution Act, 1867*, provincial governments have the exclusive power to make “laws in relation to education,” and are thus responsible for the establishment and administration of schools and universities.

Under section 93(4), the federal government has a power to enact laws to implement constitutional provisions related to denominational schools, should the provinces fail to do so. This power has never been used, however. The federal government also has certain narrow responsibilities incidental to various heads of federal power, including responsibility for operating schools on military bases and Indian reserves.<sup>(24)</sup>

More problematically, the federal government’s acquisition in 1940 of jurisdiction over unemployment insurance has provided it with the constitutional basis for an enhanced role in manpower training, beyond its previous role, based on the spending power, as an initiator and co-funder of cost-shared programs. Provinces have varied in their acceptance of a stronger federal presence, however; in several cases, they claim that all training is a subspecies of education, and therefore a purely provincial matter, and have moved aggressively to establish their own training initiatives. Thus, for example, Quebec, Ontario, and British Columbia in the early nineties created structures that either competed with (or in the case of Quebec, pre-empted) the Canadian Labour Force Development Board initiatives that the federal government sought to establish beginning in 1991.<sup>(25)</sup> More recently, the federal government has moved to substantially vacate this field (see p. 24 below).

The spending power remains, however, a central basis for federal involvement in this field. It enables both direct and indirect participation. Indirect participation consists of the post-secondary education cash and tax transfer to the provinces (now a component of the CHST), and funds provided for minority official language education and second official language instruction through the Department of Canadian Heritage. Direct participation includes aid to students (loans, grants and tax measures), and direct support for various aspects of post-

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(24) See Peter W. Hogg, *Constitutional Law of Canada*, Third Edition, 1992 Carswell, Scarborough, Ontario, 1992, p. 1227 ff.

(25) Rodney Haddow, “Federalism and Training Policy in Canada: Institutional Barriers to Economic Adjustment,” Chapter 14 of Francois Rocher and Miriam Smith, eds., *New Trends in Canadian Federalism*, Broadview Press, Toronto, 1995, p. 353 ff.

secondary education, notably research (through federal contracts and granting councils). As well, the Department of Indian and Northern Affairs supports the post-secondary education of Indian and Inuit students.<sup>(26)</sup>

## **B. Health**

Although the *Constitution Act, 1867* assigned jurisdiction over hospitals to the provinces, it made no mention of the various additional components of the modern field of health policy and related programs. Reflecting this, the courts have deemed health to be an “amorphous topic,” where one level of government (or possibly both) may act, depending on the purpose and effect of the particular health measure involved.<sup>(27)</sup> Both levels of government thus have come to be active in this field, using the various jurisdictional bases given them by the *Constitution Act, 1867* and subsequent interpretation.

Provincial jurisdiction over property and civil rights (as interpreted by the courts) has become a major source of provincial regulatory authority within the health field. It provides a basis for regulating: (a) the manufacture and sale of food and drugs; (b) occupational health and safety (through labour relations and standards) in most sectors of the economy; (c) the licensing of physicians, nurses and other health professionals and (d) medical and hospital insurance plans.<sup>(28)</sup>

The provinces are the major players with respect to the provision of facilities and services. In addition to clear jurisdiction over hospitals and asylums, the provinces have been given extensive authority over public health on the grounds that it falls within the class of local or private matters made provincial responsibilities by the constitution. The provinces also administer provincial medical insurance plans, reflecting their regulatory authority.

The federal government’s jurisdiction over the criminal law authorizes it to proscribe and punish conduct that is dangerous to health, notably with respect to food and drugs. In addition to the responsibility for marine hospitals and quarantine conferred in 1867, the federal government has come to provide health services for Indian and Inuit people (as a result of

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(26) Government of Canada, “Improving Social Security in Canada. Federal Support to Post-Secondary Education: A Supplementary Paper,” Minister of Human Resources Development, 1994, p. 15 ff.

(27) Hogg (1992), p. 476.

(28) *Ibid.*, p. 476 and 149.

its general jurisdiction concerning these groups). Certain services are also provided to residents of the Yukon, federal government employees, immigrants and civil aviation personnel. The federal government regulates food and drugs, inspects medical devices, administers health care insurance, and provides general health information services. As well, it can address issues of occupational health and safety in federally regulated economic sectors, through jurisdiction over labour relations and standards.<sup>(29)</sup>

The federal spending power has been used to considerable effect in the health care sector, as has been seen in Part I of this paper. In addition to its use in launching hospital insurance and Medicare at the national level, the spending power is also the basis for diverse other federal activities in the health care sector, including the funding of medical research.<sup>(30)</sup>

### **C. Income Support**

The income support category is not mentioned in the Constitution, but the term has come to be employed by social policy analysts in recognition of the shared practical effect of a range of constitutionally distinct programs, all of which provide financial support based on an assumption of need. Two major types of such programs are: welfare-type non-contributory programs, whose eligibility tests focus on demonstrated need or membership in a designated group assumed likely to be in need, and insurance-type contributory programs which provide assistance to individuals who have contributed to them from previous income.

#### **1. Social Assistance**

The capacity of provincial governments to make welfare payments to individuals has never been questioned. It is founded on the constitutional jurisdiction over “charities and eleemosynary institutions,” supported by jurisdiction over “municipal institutions,” “property and civil rights,” and “matters of a merely local or private nature in the province.”<sup>(31)</sup>

The federal government has no specific jurisdiction relating to social assistance payments or services, but the general “peace, order and good government” power has been

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(29) Nancy Miller Chenier, “Health Policy in Canada,” Current Issue Review 93-4, Library of Parliament, Parliamentary Research Branch, p. 2-3, and Hogg (1992), p. 475 ff.

(30) *Fiscal Federalism in Canada* (1981), p. 51 ff.

(31) Leslie Pal, “Social Policy and the Constitution,” Chapter 1 of Ismael (1985), p. 12.

accepted by the courts as a basis for some assistance programs, notably the Family Allowance, which was upheld on this ground in 1957.<sup>(32)</sup> Given that this power applies only outside the provincial jurisdiction, its utility as a basis for broad federal activity in this area is questionable, however.

The federal spending power has proven to be the central basis for federal involvement in this field. It has been invoked by the federal government as a basis for payments to individuals, payments to institutions, such as grants for the purpose of funding administrative improvements, experimentation and welfare research; conditional grants to provinces; and unconditional transfers such as the CHST and equalization payments.<sup>(33)</sup>

## 2. Social Insurance

The 1867 Constitution was interpreted by the Judicial Committee of the Privy Council as giving jurisdiction over social insurance-type programs to the provinces, as a species of insurance. After federal legislation that would have established a national social insurance program in response to the depression had been struck down by the courts in 1937, the federal government and the provinces agreed to a constitutional amendment giving the federal government exclusive jurisdiction over unemployment insurance. When attention turned to contributory pensions in the fifties and sixties, the 1937 court decision prevented the federal government from establishing any pension program directly linked to the taxes or contributions used to finance it. In 1951, with provincial agreement, the Constitution was amended to enable the federal government to operate old age pensions; in 1964, an additional amendment expanded this jurisdiction to include supplementary benefits such as survivors' and disability benefits. Federal jurisdiction over pensions and supplementary benefits did not confine the existing provincial jurisdiction, which was made paramount in the event of a conflict between federal and provincial laws.

The provinces retain general jurisdiction over contributory programs outside unemployment insurance; workers' compensation programs thus remain an exclusive provincial responsibility. As well, paramountcy within the pension jurisdiction enabled the provinces to press the federal government for explicit guarantees when the *Canada Pension Plan Act* was

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(32) Banting (1987), p. 52.

being drafted. Accordingly, this provides: (1) that any changes to the plan must be approved by two-thirds of the provincial governments representing at least two-thirds of the population, and (2) that any province may opt out with compensation and establish its own plan. Thus far, the government of Quebec has been the only province to do this.<sup>(34)</sup>

The federal spending power is of limited importance within the social insurance sector because federal jurisdiction enables the federal government to establish federal programs, and because of the nature of these programs as funded by contributions.

### **PART III: INTERGOVERNMENTAL PROCESSES**

The powers just outlined can be used by the federal government in some areas to deliver social programs directly. In the provincial jurisdiction, the powers provide the basic tools with which the federal government can attempt to influence provincial programs and standards.

This section provides a status report on major types of federal influence upon provincial governments. It is organized in two parts, to reflect the reality that intergovernmental relations are in virtually continuous evolution, and that at any given moment in the history of the federation some types of influence have been in stasis or decline, while others have been gaining importance.

The distance traversed since 1867 may be suggested by the fate of what originally appear to have been envisioned as two key sources of the federal government's capacity to manage the federation. The power of disallowance given to the federal government in 1867 allowed it unilaterally to disallow any provincial law within one year of its passage; the related power of reservation allowed the Lieutenant Governor of a province to reserve a bill for the "pleasure of the Governor General in Council" and provided that a reserved bill would have no effect unless approved at the federal level. As the provinces have emerged as a distinct level of government, however, this high level of federal influence has become less and less acceptable politically, even though the powers remain in the Constitution. The power of disallowance has not been used at all since the 1940s, and not extensively since the turn of the century, while the

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(cont'd)

(33) *Ibid.*, p. 53.

(34) *Ibid.*, p. 50.

power of reservation has likewise fallen into disuse. Attempts to use these powers today would undoubtedly provoke enormous political controversy and could also be open to judicial rejection as violating a constitutional convention. In short, the evolving system has left them aside.

## **A. Major Mechanisms**

### **1. Taxation: National Standards through the Back Door**

The power to tax is dealt with in general terms in the *Constitution Act, 1867*. The federal government is given unrestricted powers to tax, while the provincial governments are awarded the power of direct taxation within the province (i.e., taxes demanded from the persons intended to pay them, rather than indirect taxes, which can be passed on to customers) and powers of licensing.

In the years since 1867, the taxation system has come to perform a number of critical functions additional to that of revenue-raising. It is a major means of economic management, and also “an important vehicle for delivering social benefits to Canadians.”<sup>(35)</sup> An example is the child tax benefit, which (as a refundable credit) has the effect of “topping up” the incomes of poor families on welfare, those on unemployment insurance, and those relying on low wage jobs.<sup>(36)</sup> Refundable tax credits are paid directly in the form of a cheque rather than in the form of reduced taxes and thus benefit those earning little or no taxable income. They provide a major potential means for federal income support, up to and including a national guaranteed income. Federal tax credits can contribute directly to the meeting of national standards for income support, and can also contribute indirectly by altering the provincial tax base and triggering involuntary provincial tax benefits.

In addition, the tax credit mechanism has potential uses as a means of maintaining standards widely outside the area of income support. For example, it could provide a 100% refund for money spent on user fees or other medical charges, and thus (in theory, at least)

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(35) Ken Battle and Sherri Torjman, “Federal Social Programs: Setting the Record Straight,” Caledon Institute of Social Policy, Ottawa, Spring 1993, p. 5.

(36) Negotiations for the harmonization of federal and provincial measures to create an enriched National Child Benefit (incorporating a federal commitment of \$600 million in new funds announced in the February 1997 budget) continue as this is written.



maintain standards of accessibility without the punitive reduction of transfers upon which the *Canada Health Act* relies.

**Limits:** The use of the tax system to ensure adherence to national standards is, however, limited in four important ways:

- Federal assistance through this mechanism goes to individuals rather than governments. It is therefore more likely to work against provincial governments' adherence to standards. It would encourage provincial governments to lower to the greatest possible extent the benefits a federal tax credit was designed to supplement (or increase to the maximum extent charges to be compensated), thus freeing up provincial funds.
- Tax credits/refunds can increase incomes to a pre-established standard, or compensate for provincially permitted charges, but cannot provide other varieties of program support, or directly compensate for deficiencies in provincial programs.
- Non-cost-shared federal financing is required, through forgone federal tax revenues, making tax credits difficult to increase in an era of fiscal restraint.
- Provincial counter-actions are broadly available. First, the Constitution gives provinces as well as the federal government the power to levy direct taxes. Indeed, federal unilateralism in this area could fracture the harmonization of federal and provincial taxation (sales taxes being the exception) achieved during the 1940s, and provoke a regression to the "tax jungle" of earlier times.<sup>(37)</sup> As well, provinces could lower benefits or reduce services, thus eroding the practical effect of federal tax credits.

## **2. The Federal Spending Power: National Standards C.O.D.**

The Constitution does not explicitly define a "spending power," either of the federal government or the provinces. Both levels of government have therefore felt free to spend revenues outside their areas of substantive jurisdiction. In the case of the federal government, a spending power can be inferred from the powers granted to levy taxes (implying the raising of revenue), to legislate in relation to public property, and to appropriate federal funds.<sup>(38)</sup>

The array of federal-provincial cost-shared programs created during the post-war period, implies an extremely wide potential scope for the federal spending power. It is noteworthy that the Supreme Court, in a 1991 case in which the government of British Columbia

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(37) For a discussion of the complex forms of intergovernmental cooperation involved in current taxation arrangements, and the problems they superseded, see *Fiscal Federalism in Canada* (1981), p. 43 ff.

(38) Hogg (1992), p. 150.

attempted to have the unilateral federal cap on CAP transfers declared unconstitutional, specifically affirmed the federal Parliament's right to authorize grants to the provinces for use within their fields of jurisdiction, and to impose conditions on the recipient provinces.<sup>(39)</sup> This interpretation reflects precedent. The Hon. Monique Bégin's account of the development of the *Canada Health Act*, for example, stresses the painstaking attention given to the drafting of legislation so that it could not be construed as an intrusion on the provincial jurisdiction, but would apply solely to the use of the federal spending power.<sup>(40)</sup>

The central advantage of the spending power is precisely that the absence of constitutional definition enables an extremely wide application. Reflecting this, the spending power has provided the constitutional basis not only for a multitude of federal-provincial transfers over the years, but also for grants and loans to private firms or individuals, the tax expenditure provisions of the *Income Tax Act*, and the commercial activities of the federal government.

**Limits:** While use of the spending power does not appear to be seriously constrained by the Constitution, it remains subject to important fiscal and political limits.

- Use of the spending power to initiate new programs relies on the availability of new federal money, following the pattern of the cost-shared programs of the fifties and sixties. Fiscal constraints now applying to both the federal and provincial governments limit the likelihood of major new programs.
- Use of the spending power to induce provincial compliance with federal program standards or objectives requires the existence of cash transfers which can be made subject to conditions. It is thus in tension with long-standing pressures from some provinces for increasing provincial revenue-raising capacities to match spending needs (disentanglement).
- Federal use of the spending power has long provoked political resistance from Quebec and, in varying degrees, from other provinces, on the grounds that it represents an intrusion into provincial jurisdictions.<sup>(41)</sup> Thus, aggressive use of this

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(39) *Ibid.*, p. 152-3.

(40) See Monique Bégin, *Medicare - Canada's Right to Health*, Optimum Publishing International Inc., Ottawa, 1987, p. 104 ff.

(41) For a specific account of the impact of this on intergovernmental relations, see A.W. Johnson, "Federal-Provincial Fiscal Relations: An Historical Perspective," in Vol. 2 of Courchene, Conklin and Cook (1985), p. 126 ff.

power could threaten the broader fabric of intergovernmental cooperation required by a workable federal system.

- In the 1996 Speech for the Throne, it was announced that the federal government would not use its spending power to create new shared-cost programs in areas of exclusive provincial jurisdiction without the consent of a majority of the provinces. Furthermore, all new programs would incorporate provisions for individual provinces to opt out with compensation, provided they established “equivalent or comparable” initiatives.
- Where provinces have sufficient fiscal capacity and political support, they can counter federal spending power initiatives by:
  - refusing to establish initiatives “equivalent or comparable” to new federally initiated programs;
  - absorbing financial penalties levied by the federal government against existing transfers;
  - using the provincial spending power to compensate third parties for reductions in federal payments reflecting the application of federally developed national standards, thus (in theory) minimizing financial pressure to adhere to them; and
  - reducing or reallocating provincial spending.

### **3. Shared or Divided Policy Fields: National Standards by Gamesmanship**

Shared, contested or overlapping policy fields create a subset of potential intergovernmental activity involving the capacity of both levels of government to regulate and/or provide services within a policy field. Thus, each level of government has a range of possible opportunities to influence the other level, depending on their respective jurisdictions, activities involved, existing intergovernmental arrangements, and prevailing political imperatives.

The development of the Canada and Quebec pension plans illustrates some of the dynamics that can apply within a shared policy field. Old age pensions are a concurrent jurisdiction with provincial paramountcy, which enabled Quebec to opt out of the Canada Pension Plan (CPP) at its inception. Mobility and equity considerations created a strong incentive, however, for the harmonization of the national and Quebec plans. The government of Quebec outlined a pension regime at a 1963 federal-provincial conference that offered broader coverage, higher benefit levels, and stronger redistributive impacts than the scheme being proposed by Ottawa. This created pressure on the federal government to enhance its own proposals, in order to reassert policy leadership and demonstrate that the federal system could

deliver pensions as attractive as the one proposed by Quebec. The resulting CPP/QPP arrangement in effect embodied standards reflecting the Quebec model.<sup>(42)</sup>

**Limits:** Four general limitations apply to federal action within shared policy fields as a means of influencing standards:

- Federal leverage is not consistently available across the full range of policy fields, being highly dependent on the unique particulars of each situation.
- The influence available is oblique, relying on the presence of political imperatives or other motivating factors to induce provincial governments to respond.
- The duplication and overlap that may enable federal influence has drawn increasing criticism in recent years, reflecting both public resentment of its real or perceived costs to the taxpayer and, intergovernmentally, a synergy between Quebec nationalism and decentralist pressures from Ontario and the West. As it is reduced, opportunities for influence which it created will also be reduced.
- The federal government has announced a series of self imposed limits, involving federal withdrawal (subject to federal-provincial agreement on specific terms) from a number of shared policy fields, including:
  - Labour Market Training: the government has publicly recognized this field as a provincial responsibility, is phasing out purchases and funding of training, and is shifting to the provinces active employment measures and some \$2 billion of related funding; and
  - Social Housing: the federal administrative role in social housing is being transferred, leaving the federal government a role confined to social housing on Indian reserves and other functions not directly related to social policy objectives.<sup>(43)</sup>

#### **4. Charter Rights and Affirmations: National Standards through Constitutional Politics**

Since 1982 (1985 for equality rights), the *Canadian Charter of Rights and Freedoms* has emerged as a powerful national standards mechanism. As interpreted by the courts, its provisions concerning mobility rights, minority language education rights, and equality rights, among others, create a series of national standards with which Canadians can demand that both federal and provincial governments comply.

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(42) Banting (1987), p. 74.

(43) For a status report, see Government of Canada, "Renewing the Canadian Federation: A Progress Report," Background Document for the First Ministers' Meeting of 20-21 June 1996, Ottawa, 1996.

The Charter also affirms certain standards applying to intergovernmental relations. Although questions remain as to its enforceability, section 36 affirms the commitment of both federal and provincial governments to broad principles of equalization: promotion of equal opportunities, reduction of regional disparities, and provision of essential public services of reasonable quality to all Canadians.

Had they been successful, subsequent efforts at constitutional reform would have extended the role of constitutionalized national standards. The 1992 Charlottetown Agreement, for example, proposed the entrenchment of a statement of principles of the Canadian social and economic union, to be monitored by an intergovernmentally established mechanism. Discussion leading up to this proposal had given rise to a number of more wide-ranging “social charter” or “social covenant” ideas, which proposed constitutional entrenchment of a variety of positive social and economic rights, including a right to adequate housing, food and other basic necessities, medical care, education, and an improved environment. The reappearance of proposals along these lines may be anticipated in future constitutional rounds.<sup>(44)</sup>

In general, the constitutionalizing of national standards provides a powerful means of securing those standards that can be made justiciable.<sup>(45)</sup> Non-justiciable charters or covenants are not subject to enforcement through the courts, although they may be an element of the constitutional context that the courts could consider in reaching decisions. As the frequency of references to section 36 of the Charter in debates about equalization may suggest, constitutionalized commitments can become a reference point for public debate, and for assessing the performance of governments.<sup>(46)</sup>

**Limits:** While constitutional charters and related instruments can be powerful protectors of national standards, they have a number of inherent limitations as mechanisms enabling federal influence:

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(44) See Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution - Perspectives on a Social Union for Canada*, Carleton University Press, Ottawa, 1992, Appendices II-V, *et passim*.

(45) Katherine Swinton, “Federalism, the Charter, and the Courts: Rethinking Constitutional Dialogue in Canada,” Chapter 15 of Karen Knop *et al.*, eds., *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, UBC Press, Vancouver, 1995, p. 300.

(46) Section 36 of the *Canadian Charter of Rights and Freedoms* commits Canadian governments in principle to equal opportunities and public services of reasonable quality, and commits the Canadian government to making equalization payments for those purposes.

- The unique circumstances of 1982 permitted a degree of federal unilateralism now substantially precluded by the amending procedure which requires that amendment proposals (including any proposed national standards) must be carefully crafted to respond to regional and intergovernmental imperatives, in order to gain the support of at least seven provincial legislatures representing at least 50% of the population.
- The *Act Respecting Constitutional Amendments*, which received Royal Assent on 2 February 1996, subjects future amendments to an additional requirement: no federal Minister will place an amendment before Parliament in the absence of the required regional support in B.C.; the prairie provinces; Ontario; Quebec and the Atlantic provinces. In addition to reducing the likelihood of amendments, this legislation reduces the scope for unilateral federal influence upon future negotiations by increasing the ability of various combinations of provinces to stop amendments.
- Non-justiciable charters or covenants provide a doubly indirect means of federal influence: their entrenchment is subject to intergovernmental and political consensus and their interpretation and application are carried out primarily through political debate and the electoral process.
- Constitutionalized standards rely on the general language required by an instrument subject to limited and infrequent modification. Unless Canadians are prepared to accept the interpretative decisions of non-elected judges as major determinants, in practice, of social program standards, justiciable charters remain subject to significant limitations as a source of meaningful standards. The limitation of inherent generality also applies to non-justiciable standards.

##### **5. Intergovernmental Agreements: National Standards through Executive Federalism**

As has been seen, the creation of the modern social safety net involved a range of formal intergovernmental agreements, several of which set out detailed national standards applying to the programs they created. As the federal government's ability to exercise dominant influence over such negotiations by wielding the spending power and other traditional federal strengths has waned, however, the nature of these negotiations has altered. It is thus useful to discuss the intergovernmental agreement process separately from the types of influence applying within it, as a mechanism through which the federal government might influence provinces.

Intergovernmental agreements exist across an extensive range of policy fields, testifying to the capacity of the federal and provincial governments to collaborate in the

discharge of joint responsibilities.<sup>(47)</sup> At the same time, most general assessments of trends in intergovernmental relations conclude that the potential for stalemate has increased since the fifties, reflecting the absence of decisive leverage on either side of the federal-provincial negotiating table.<sup>(48)</sup>

An important test of the present capacity of the process to deliver national standards in the social policy sector is currently underway. As this is written, discussions announced with the 1996 budget are continuing between the federal government and the provinces in order to jointly develop “values, principles and objectives” which can govern the CHST and, more generally, the diverse programs and practices that define the social union.<sup>(49)</sup> A Federal-Provincial-Territorial Council on Social Policy Renewal was created in 1996 to coordinate provincial/territorial participation in these discussions and, at the Annual Premiers’ Conference in August of 1997, was mandated to work with the federal government to develop a framework agreement addressing cross-sectoral issues such as the development of common principles.<sup>(50)</sup> Provincial pressure for joint approaches to the definition and enforcement of standards in specific sectors, such as health, has not met with unqualified federal enthusiasm, however. At a meeting of federal, provincial and territorial health ministers on 11-12 September 1997, federal Health Minister Allan Rock maintained the position that interpretation and enforcement of the *Canada Health Act* are federal responsibilities. It thus remains to be seen whether substantive social program standards can be achieved through the intergovernmental agreement process.

**Limits:** Leaving aside limitations connected to the federal government’s diminished fiscal and related clout within the process, the intergovernmental agreement process remains subject to several inherent limitations as a means of federal influence:

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(47) For an inventory of current agreements, see Government of Canada, Privy Council Office, *Federal-Provincial Programs and Activities - A Descriptive Inventory, 1993-1994 and 1994-1995*, Minister of Public Works and Government Services, Ottawa, 1995.

(48) See, for example, Donald V. Smiley, “An Outsider’s Observations of Federal-Provincial Relations among Consenting Adults,” Chapter 16 of Olling and Westmacott (1988).

(49) Department of Finance Canada, “Canada Health and Social Transfer: Background” (1996), p. 1.

(50) See News Release, Thirty-Eighth Annual Premiers’ Conference, “Social Policy Renewal,” Canadian Intergovernmental Conference Secretariat Reference 850-061/009, p. 2.

- The capacity of the current federal-provincial intergovernmental process to deliver meaningful standards on a consensus basis (reflecting significant federal influence or otherwise) remains uncertain. At a minimum, it is subject to constraint by extraneous political tensions and imperatives.
- The federal government cannot directly compel provinces to adhere to standards set out in intergovernmental accords and agreements; attempts at indirect enforcement (fiscal penalties, counter-actions) are of uncertain effectiveness.
- It remains to be seen whether public reaction to potentially important standards in areas such as health and social assistance will differ from the public resistance to “behind closed doors” processes which has come to be recognized as a significant limit upon what governments can achieve in constitutional reform.

### **B. Alternatives to Unilateralism: The Orchestration of Standards**

The traditional ways in which the federal government has exerted influence on behalf of national standards for matters within the provincial jurisdiction appear, for a variety of reasons, to be of diminishing effectiveness in the contemporary environment.

First, use of the spending power, tax system, and direct federal action within shared policy fields all require federal expenditures. In the short term at least, this puts them in conflict with the severe fiscal restraints required to attain deficit reduction objectives.

Secondly, they involve a degree of federal unilateralism. This has always been a source of federal-provincial difficulties, even during what has since come (somewhat erroneously) to be seen as the golden age of federal-provincial cooperation in the 1950s. More recently, political resistance to federal unilateralism has increased in response to diminishing federal transfers. It is predictable that the combination of the long-standing political and more recent fiscally driven sensitivities will continue to result in provincial resistance to anything perceived as federal unilateralism.

Several available modes of federal influence minimize concerns about spending and intrusion but imply that the federal role of directly establishing and enforcing national standards will be replaced by a role as the orchestrator of processes of consensus-building that generate national standards. By definition, these standards rely less on control-compliance relationships between the federal government and individuals or other governments, and more on



democratic processes for which articulated standards provide significant reference points. Some possibilities:

### **1. National Standards by Public Demand: The Power of Persuasion**

The federal level of government possesses a substantial political and communications presence across Canada, irrespective of the popularity of individual governments. A popular Prime Minister and cabinet are uniquely able to influence public expectations and the political demand for standards. Modern communications technologies enhance this capacity, which also reflects relatively high levels of media attention resulting from the “marketability” of nationally known political figures.

The capacity of national leaders in Canada to appeal directly to the people “over the heads” of provincial governments and politicians is illustrated by the constitutional negotiations of the early eighties. The federal government deliberately highlighted its Charter proposals within what was presented as a people’s package, while portraying the provincial government package as reflecting parochial ambitions and a self-interested obsession with expanded powers. While the precise impact of this strategy remains open to conjecture, and provincial agreement to a Charter was obtained partly through federal concessions in the course of negotiations, it remains true that a *Charter of Rights and Freedoms* was ultimately accepted by most provincial leaders, despite long-standing provincial resistance to such proposals.<sup>(51)</sup>

Furthermore, the emergence of new policy fields in which both the federal and provincial governments share responsibilities, as outlined in Part II of this paper, has typically been accompanied by the emergence of new groups of stakeholders who deal on a continuing basis with both levels of government. Where the federal government can successfully recruit support for values, objectives or national standards within such groups, provincial governments may come to adhere to these standards simply as a result of provincial consultative and democratic processes.

**Limits:** As a means of influencing the standards governing provincial social programs, direct appeals to the people have two inherent limitations:

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(51) Central concessions were the insertion of the notwithstanding clause and the reflection of provincial demands within the amending formula. For a discussion of the broader federal strategy, see Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, Douglas E. Williams, ed., McClelland and Stewart Inc., Toronto, 1995, esp. p. 194 ff.

- Attempts to bring political pressure to bear on provincial governments can easily provoke a political counter-reaction. The Canadian federal system has, however, shown considerable resilience in the face of provincial leaders' often highly emotional critiques of federal actions having provincial impact.
- The effectiveness of public appeals is conditional upon the policy development strength of the federal level, reflected in proposals for national standards that can stand up to public examination and debate. In the absence of this strength, a more populist and political approach to national standards, by mobilizing opposition, could actually reduce the federal capacity to act.

## 2. National Standards and the “Information Age”

Commentaries on the combination of technological and social changes (often lumped together in phrases such as “the information revolution”) widely recognize its immense potential impact on government. Indeed, the existence of increasingly educated and politically sophisticated publics, the dispersion of information traditionally viewed as the preserve of “experts,” and growing public disenchantment with governments are central sources of the “reinventing government” initiatives that have recently arisen in many western countries.<sup>(52)</sup>

In Canada, consequences of these trends have been strikingly visible in constitutional politics since the mid-eighties. The failure of the Meech Lake Accord is widely recognized as signifying that constitutional reform can no longer rely upon negotiations conducted behind closed doors under conditions of relative public indifference. While it has been argued that the Charter has had a special role in fostering the development of constitutional involvement outside traditional intergovernmental circles, it is likely that participatory pressures and populist suspicions similar to those that arose during the Meech Lake process would have arisen even in the absence of the Charter.

Outside the constitutional process, as government devolves responsibilities upon individuals and attempts to become more responsive in discharging its remaining roles, public information will become increasingly important as the base upon which publics judge institutions and formulate and apply standards. If the federal government desires enhanced performance standards in areas such as education or manpower training (assuming the success of current

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(52) See David Osborne and Ted Gaebler, *Reinventing Government*, Addison-Wesley Publishing Company, Reading, Mass., 1992. These themes are usefully related to developments in Canada in F. Leslie Seidle, ed., *Rethinking Government: Reform or Reinvention?*, Institute for Research on Public Policy, Montreal, 1993.

devolutionary initiatives), the provision of high quality performance information which permits voters in the provinces to compare local performance with others may prove to be a potent means of fostering such standards.<sup>(53)</sup>

Centrally, a federal role in supplying (or ensuring the supply of) such high quality performance information would support democratic processes of public accountability and responsiveness with respect to provincial programs. Indirectly, it could foster adherence to national standards, seen more as prevailing norms rather than as standards imposed unilaterally by the federal government or arrived at through intergovernmental bargaining.

**Limits:** While potentially very broad in scope, the use of information to inspire adherence to standards is subject to substantial uncertainties in any given policy field. In particular:

- The impact of increased performance information may be negated by the absence of public agreement on purposes or appropriate standards;
- Increased information provides no guarantees that specific performance standards will be accepted by governments, or met; and
- Federal information initiatives could provoke provincial counter-initiatives, a federal-provincial “war of statistics,” public information overload, and increased cynicism.

### **3. National Standards by Interprovincial Consensus**

The annual Premiers’ Conference provides a mechanism for enabling provincial leaders to work towards consensus on common issues, including standards for matters within the provincial jurisdiction. Recent years have seen a number of proposals which argue for a degree of federal withdrawal from standard-setting in such matters and for the capacity of provincial governments to jointly establish standards on their own.

For example, the 23 August 1996 Premiers’ Conference considered a paper jointly sponsored by Ontario and Alberta which proposed broad reforms along these lines. This proposal

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(53) Public response to the annual *McLean’s* Magazine survey of universities may provide an indication of the public appetite for comparative performance information relating to public institutions, and of the immediate impact of this on practices within these institutions. This issue has become the magazine’s most popular issue, in terms of newsstand sales, and routinely triggers a flood of comments and inquiries. (See Robert Lewis, Foreword to “The *Maclean’s* Guide to Universities,” *Maclean Hunter*, Toronto, 1996, p. 4.)

was not accepted, as result of opposition from many of the smaller provinces; however, it remains a good illustration of the larger provinces' perspectives on standard-setting within their jurisdiction. The paper advocated the substantial disentanglement of the two levels of government and (among other changes) the concentration of full responsibility for the design and delivery of health care, welfare and education in the hands of provincial governments.<sup>(54)</sup>

This proposal would have eliminated federal-provincial cash transfers for social programs, and shifted tax points to the provinces to enable them to finance such programs autonomously. Pan-Canadian aspects of social program responsibilities would not have been addressed through federal leadership or influence, but by the provinces through an interprovincial accord that would have guaranteed portability and mobility and established principles and standards. It is recognized that the viability of such a proposal would hinge on the capacity of the provinces to actually deliver such an accord, and abide by its terms.

By definition, the central objective underlying this interprovincial consensus approach is not to provide a mechanism for federal influence, but to replace that influence. The history of federal arrangements suggests, however, that unintended consequences are likely to accompany any such major change. One possible unintended consequence might be to release the federal government from the constraints of federal-provincial bargaining and enable it to develop and publicly advocate positions based solely on national interest considerations. While this is not a form of influence *per se*, it could enhance the credibility and impact of the political appeals discussed above.

**Limits:** The use of interprovincial accords and agreements has, in theory, unlimited scope within the provincial jurisdiction. Any federal influence achievable within, or through, an interprovincial consensus process would, however, be subject to some practical limits applying to that process:

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(54) See Thomas J. Courchene, *Access - A Convention on the Canadian Economic and Social Systems*, Working Paper Prepared for the Minister of Intergovernmental Affairs, Government of Ontario, August 1996, esp. p. 16-19. Although it does not advocate the Courchene approach, it is noteworthy that the more recent Report of the Quebec Liberal Party Committee on the Evolution of Canadian Federalism ("Quebec's Identity and Canadian Federalism - Recognition and Interdependence," Quebec Liberal Party, December 1996) asserts that Quebec should actively participate in interprovincial decision-making processes directed to the achievement of common standards in areas such as social assistance (p. 34-37), and affirms the potential effectiveness of these processes.

- The need for consensus among provincial governments in practice makes them less likely to achieve standards than the federal government acting unilaterally, because:
  - consensus would have to reflect the views of 10 premiers and governments; and
  - consensus would have to rely upon public support (or at least the absence of significant opposition) in all provinces (rather than the more varied preconditions for federal action); and
- The inability of the provinces to apply fiscal penalties, and limited ability to apply alternative sanctions would mean that such standards were not readily enforceable.<sup>(55)</sup>

#### **PART IV: TWO PRACTICAL CONSIDERATIONS**

The above review of traditional modes of federal influence provides a clear basis for perceptions of diminished federal influence over social programs within the provincial jurisdiction. Equally, however, it suggests that diminished influence should not be equated with negligible influence. The two key determinants of whether, and how effectively, potential federal influence will actually be exercised are (1) political will and (2) the availability of federal money. These warrant separate discussion.

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(55) The Courchene paper (1996) argues that a degree of “enforcement” would be achieved, for example, by:

- legislative “manner and form” provisions reducing the likelihood of future amendments,
- political pressure (supported by credible monitoring and public reporting of governmental performance) and, ultimately, by
- the capacity of provinces to punish a recalcitrant province by refusing to grant mobility rights to its residents (in the context of Courchene’s proposal, this would take place within the framework of a “social union” from which individual provinces could be expelled), p. 29-31.

The second of these is arguably important; however, the first would be of limited value in restricting the activity of sovereign legislatures and the third, even if made possible by such required changes as amendment of the Charter, would provide only a one-time draconian response whose use for minor defaults would not be credible.

## **A. Political Will**

In a democratic system, the existence of political will within governments cannot be seen as an independent variable, expressing solely the intentions of politicians. Rather, it results from a complex interplay of factors, including the motives and policy commitments of individual politicians; the perceived political risks, costs and benefits of action; public demand for substantive policy; and the practical capacity of governments to act. This capacity reflects, in turn, factors such as the presence of the required fiscal, jurisdictional and other resources and the degree of legitimacy that citizens accord to particular governments and politicians. Several of these factors have a special significance for federal action on social program standards.

### **1. Intergovernmental Pressures**

Prevailing federal-provincial dynamics are of central importance in determining the outcome of issues relating to national standards for social programs. It is not difficult to predict the continuation of pressures on the federal government to reduce its influence in this sphere, both within areas of provincial jurisdiction and within areas where both levels of government are able to act. These pressures have been virtually continuous since the inception of the federation, beginning with the early province-building efforts of Ontario.<sup>(56)</sup> In recent years, they have been propelled centrally by the emergence of modern Quebec nationalism, growing assertiveness among the Western provinces and, since the recession of the early 1990s, Ontario's fiscally driven resentments.

An indication of the current direction of these pressures is provided by a December 1995 report that was endorsed by the Premiers of all provinces except Quebec as a basis for discussions on renewing the federation, and forwarded to the Prime Minister for response at the 1996 First Ministers' Conference.<sup>(57)</sup> The report calls for, among other things:

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(56) See Stevenson (1993), esp. chap. 3, p. 48 ff.

(57) Ministerial Council on Social Policy Reform and Renewal, *Report to Premiers*, December 1995. While this paper was not endorsed by the Government of Quebec, it is noteworthy that December 1996 Report of the Quebec Liberal Party Committee on the Evolution of Canadian Federalism called broadly for a rebalancing of federal and provincial roles within the federation and, on several key issues, adopted the language of the Ministerial Council report (see, for example, p. 71-72).

- Subjection of federal activity in areas of provincial responsibility to intergovernmental consultation and provincial/territorial agreement;
- Fiscal disentanglement (resources to be shifted to the provinces to allow them to perform their responsibilities independently);
- Acceptance of the principle that federal spending within provincial or shared jurisdictions should not allow the federal government to dictate program design; and
- Termination of the current federal role as the sole interpreter and enforcer of the *Canada Health Act*, establishment of a “federal-provincial/territorial process” to clarify its requirements, and a “federal-provincial/territorial structure” to resolve differences over interpretation.

At their August 1997 Annual Meeting, premiers reviewed and approved a progress report on the themes set out a year earlier, as well as a paper providing more detailed options for the management of the social union.<sup>(58)</sup> The decision to seek a broad framework agreement with the federal government to deal with cross-sectoral issues such as common principles, use of the federal spending power, and new dispute resolution mechanisms, indicates the directions that provincial governments may be expected to pursue in the near term.

## 2. Public Opinion

Public opinion is another key factor in the formation of political will. In the context of federalism, it provides a major potential counterbalance to intergovernmental pressures and can become an important operative factor where such pressures are based only on bureaucratic or political self-aggrandizement. For example, advocacy of a substantial devolution of powers by Alberta Premier Donald Getty in the early stages of the Charlottetown process faded rapidly in the face of opinion poll results which indicated little support among Alberta voters for a major transfer of powers.

Recent opinion polls suggest that Canadians are increasingly ambivalent about the appropriate role of the federal government in maintaining national standards in Medicare and other social programs. On the one hand, there is clear support for the programs (at least for those providing direct benefits widely to the public). Reflecting this, a *Globe and*

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(58) See Provincial–Territorial Council on Social Policy Renewal, *Progress Report to Premiers*, July 1997 and *New Approaches to Canada’s Social Union – An Options Paper*, 29 April 1997.

*Mail/Environics* poll conducted 18 December 1996 to 15 January 1997 found that, in a sample of 2,000:

- 57% favoured increased spending on government programs (versus 35% favouring continued deficit cutting), while health care programs ranked second on the list of program priorities, chosen by 25% (31% chose infrastructure/job creation).<sup>(59)</sup>

As well, the annual year-end poll conducted for *Maclean's* Magazine and the CBC found that, of those interviewed:

- 80% feared that government pensions might disappear by 2005, while 61% viewed this as unacceptable; and
- 64% feared that meaningful unemployment insurance might disappear by 2005, while 77% viewed this as unacceptable.

On the other hand, the universal health care and relatively generous social safety net traditionally viewed as “sacred trusts” appear, according to the same poll, to be viewed with growing scepticism. While health care and other social services continue to be among the half dozen priority issues identified by Canadians, of those interviewed:

- 81% anticipated a two-tiered health care system by 2005, while 47% said such a system would be acceptable; and
- 79% anticipated that private charities may take over social service roles, while 53% found this acceptable.<sup>(60)</sup>

There is evidence, as well, of public resistance to punitive actions taken by the federal government against provinces that violate federally proclaimed standards. An Insight Canada Research poll, taken in November 1995 (shortly after the application of federal penalties to several provinces over facility fees) found that, of those interviewed:

- 39% supported the federal government's decision to penalize provinces, while 57% opposed the federal decision and 5% were unsure.<sup>(61)</sup>

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(59) Edward Greenspon and Hugh Winsor, “Spending Increase Favoured, Poll Finds,” *Globe and Mail* (Toronto), 23 January 1997, p. A-1 and A-5.

(60) “Canada in the Year 2005,” *Maclean's*, Vol. 109, No. 53, 30 December 1996/6 January 1997, p. 23 ff and p. 46 ff.

(61) Jim Bronskill, “Ontario Residents Don't Want Federal Crackdown on Provinces,” *The Ottawa Citizen*, 26 August 1996, p. A-3.



For more detailed information on the polls summarized above, along with 1995 poll results contrasting with some of their findings, see Appendix II.

In conclusion, at least two important elements of the political will “equation” reduce the likelihood that the federal government can develop and sustain the will for aggressive use of the various strategies available to it for influencing social programs within the provincial jurisdiction.

## **B. Money**

A second general factor that determines the practical scope of federal influence is the availability of federal funds. As noted above, the current fiscal constraints on the federal government severely limit the availability of new money for new programs (and new or newly emphasized national standards). Furthermore, it must be recognized that recent progress with deficit-reduction has been significantly aided by low interest rates. When the business cycle inevitably brings higher rates, the size of the national debt ensures that interest costs will pose a major challenge to governments. Thus, although new money may be available intermittently and for a limited number of carefully selected initiatives, federal-provincial transfers will be subject to global restraint patterns for the foreseeable future.

A full exploration of the probable impact of scarce money on the federal government’s ability to use its potential influence would necessarily be complex, since the impact will be greater on some modes of influence (e.g., the spending power) than on others (e.g., populist appeals). It can be concluded, however, that it will remain necessary to be extremely selective in using the types of influence that depend directly upon spending (notably the spending power itself), and that types of influence which do not tie national standards directly to the federal capacity to fund them (e.g., the alternative options discussed in Part III, B) will have a major advantage under foreseeable conditions.

Many of the concerns raised about recent trends in the area of national standards have tended to focus narrowly on the federal spending power. Even within this narrower focus, however, the relation between declining federal transfers and national standards is complicated. There are at least three possible relations:

1. Reduced federal transfers may have rendered some provinces (or may do so in the future) unable to maintain social safety net standards to which they are fully committed;
2. Provincial governments may be actively interested in deviating from national standards (in order to save money or for other reasons) and cash transfers may be, or may become, insufficient to enable the federal government to penalize such deviations effectively; and/or
3. Reductions to federal transfers may have eroded (or may erode) the provincial political will to maintain national standards (perhaps by removing a factor which had previously moderated resentments over federal influence).

It is important to recognize the differences among these arguments, which are sometimes combined by critics seemingly intent only on compiling as many criticisms of transfer cuts as possible. Arguments (1) and (2) make contrary and incompatible assumptions about the intentions of provincial governments. If, for example, provinces are said to be forced to depart from federal standards as a result of transfer reductions, federal penalties are unlikely to solve the problem (indeed, logically, more severe penalties will exacerbate the problem). Argument (3) raises a possibility that is also implicit in argument (2): that the impact of transfer reductions has to be understood primarily in political terms, rather than narrowly fiscal terms. The key determinant of the impact of a reduction would thus be how it is perceived by provincial politicians and the public, rather than its direct impact on the fiscal capacity of a province.

### **1. The Provincial Capacity Argument**

The first argument — that cuts to federal transfers have eroded the capacity of provinces to adhere to national standards — depends on matters lying well beyond the scope of this paper. These include a province's potential for improved program efficiency (enabling its absorption of transfer cuts) and the need for global assessments of provincial programs in order to explore the possibility of reallocations from elsewhere in a provincial budget. It remains noteworthy that claims focusing on provincial capacities require supporting arguments of this sort if they are to be convincing.

It is also noteworthy that this argument has not been extensively made by the people with the most to gain by making it: provincial premiers. For example, premiers who argued at the 20-21 June 1996 First Ministers' Conference that declining federal contributions should be reflected in a declining federal role in standard-setting did not claim that provinces had become incapable of adhering to *National Health Act* standards, but rather that the federal government had ceased to have a legitimate claim to a role as the unilateral guardian of standards.<sup>(62)</sup> This may suggest that the capacity of provinces to adhere to national standards has not yet disappeared (although this remains a future possibility).

## 2. The Effectiveness of Penalties

The second argument expresses concerns that date back at least to the early nineties. At that time, the National Council of Welfare, among others, calculated that the various de-indexations and freezes applied to the EPF transfer since the eighties would in the near future reduce the transfer to a level that would be fully covered by the value of its tax point component (as early as 1996-7 in the case of Quebec).<sup>(63)</sup> At this point, it was feared, the absence of a cash component to the transfer would disable the federal government from applying (or threatening) fiscal penalties in order to dissuade provinces from violating federally established standards. In particular, the *Canada Health Act* standards would be undermined, because they rely on provisions authorizing Ottawa to reduce the cash component of the EPF (or, now, the CHST) on a dollar-for-dollar basis for any province permitting unauthorized charges to patients.

The 1995 budget, which announced the CHST, prompted a renewal of these concerns. Thus, for example, a Caledon Institute of Social Policy publication developed projections indicating that cash transfers under the CHST (i.e., all federal cash payments for both the programs previously covered by EPF and social assistance programs) would disappear between the years 2006 and 2011 in most provinces and in others (e.g., Quebec) as early as 2004. Their conclusion was blunt:

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(62) See Jack Stilborn, "Federal-Provincial Relations," Library of Parliament, Parliamentary Research Branch, CIR 93-10E, p. 14.

(63) See Allan M. Maslove, "Reconstructing Fiscal Federalism," Chapter 3 of Frances Abele, ed., *How Ottawa Spends*, Carleton University Press, Ottawa, 1992.

The rapid diminution of federal transfer payments surely will cripple if not kill federal influence over provincial health and human services years before the money runs out. ... there is no protection for Medicare without federal dollars; the dollars provide the enforcement clout.<sup>(64)</sup>

The long-term CHST funding commitments announced in the 1996 federal budget would appear to address such concerns. Still of interest, however, is the question of how large the cash component of the transfer needs to be in order to preserve its potential effectiveness in penalizing provinces. Is the 1997-98 cash floor of \$12.5 billion, which will apply between now and the year 2000 when the cash component is projected to begin to increase, enough?<sup>(65)</sup> By province, the 1997-98 allocation is as follows (in millions of dollars):<sup>(66)</sup>

B.C.....	1,517
Alberta.....	956
Saskatchewan .....	418
Manitoba.....	496
Ontario.....	4,022
Quebec.....	3,876
New Brunswick.....	332
Nova Scotia .....	429
Prince Edward Island .....	60
Newfoundland.....	281
Northwest Territories .....	36
Yukon.....	17

The recent conflict between the federal government and Alberta over facility fees may be taken as an illustrative case. Following a lengthy dispute with Alberta over the practice of permitting “facility fees” (i.e., user fees claimed to cover operating costs of a facility, rather than service costs), the federal Minister of Health announced that Alberta’s failure to replace the arrangement with either full public funding, or full private funding and exclusion from public support would be penalized. Starting in November 1995, a \$422,000 per month penalty was

(64) Ken Battle and Sherri Torjman, “How Finance Re-Formed Social Policy,” Caledon Institute of Social Policy, Ottawa, April 1995, p. 8 and 9.

(65) On 2 June 1997, it was announced that better-than-expected progress on deficit reduction would enable the cash component of the CHST to be maintained at \$12.5 billion, rather than declining to the \$11 billion originally projected.

(66) Department of Finance Canada, “Canada Health and Social Transfer: Backgrounder,” Departmental Internet Home Page, 2/10/96, p. 3.

levied against federal EPF transfers to Alberta; this amount matched provincial receipts from the facility fee on a dollar-for-dollar basis.

The penalty levied against Alberta between November 1995 and June 1996 is equivalent to an annual penalty of \$5,064,000, or only about 0.52 % of the 1997-98 CHST transfer to Alberta. In other words, even as the federal capacity to penalize reaches its low point, it would still enable the federal government to impose a penalty 200 times greater than that actually levied against Alberta. This suggests that the federal capacity to penalize is not undermined by CHST funding levels.

The 1 July 1996 retreat of the Alberta government on the issue of facility fees would support this optimism. Under an agreement with the federal government announced in May, the provincial government assumed interim responsibility for paying the facility fees charged by private clinics, while regional health authorities were to negotiate longer-term contracts with the clinics. In other words, Alberta complied (if belatedly) with federal requirements.

While the case of Alberta dominated the news media, three other provinces were also subjected to penalties over facility fees in November 1995:

- Manitoba was subjected to a monthly penalty of \$49,000 in relation to facility fees charged at six ophthalmology and surgical clinics.
- Newfoundland was subjected to an initial penalty of \$20,000, revised on the basis of subsequent information to a monthly penalty of between \$8,000 and \$11,000, in relation to facility fees charged by one abortion clinic.
- Nova Scotia was subjected to an initial penalty of \$20,000, revised on the basis of subsequent information to a monthly penalty of between \$4,000 and \$9,000, for the same reason.

These three provinces have not altered facility fee practices in response to federal sanctions, despite having sustained cumulative penalties (as of September 1997) of at least \$1,150,000 (Manitoba), \$180,000 (Newfoundland), and \$130,000 (Nova Scotia).<sup>(67)</sup>

The persistence of facility fee practices in three provinces would appear to refute any general conclusions suggested by the Alberta case. Furthermore, it calls into question the

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(67) Information provided by an official of Health Canada, supplemented by figures contained in Mark Kennedy, "Provinces Continue to Flout Medicare," *The Ottawa Citizen*, 30 September 1997, p. A-6.

assumption that the fiscal impact of the penalties is the key to explaining their consequences, since the dollar-for-dollar basis for calculating the fees (and thus their net impact) is the same in all cases. The most obvious distinguishing feature of the Alberta case is that the dollar figures involved were higher, and that they prompted substantially greater media and public attention. This suggests that governments are less influenced through the direct fiscal impact of penalties than through the “political loop,” centering on public dissatisfaction over what are perceived to be forgone provincial revenues and local benefits.

### **3. The “Political Loop” - A Concluding Note**

The case of the British Columbia welfare residency requirement appears to support conclusions suggested by the impact of facility fee penalties. In early November 1995, British Columbia announced a three-month residency requirement for social assistance recipients, to take effect on 1 December 1995; the federal government responded to this violation of Canada Assistance Plan standards (subsequently incorporated in the CHST) by withholding the \$47-million final payment due to British Columbia under the CAP for 1995. This penalty considerably exceeded the \$25 million the B.C. government had estimated its measure would save annually. The residency requirement was not withdrawn until 6 March 1997, however.

The federal government obtained British Columbia’s agreement to withdraw residency requirements by undertaking to bring the original penalty into line with the dollar-for-dollar penalties applied to other provinces; this meant reducing the penalty to just over \$20 million (reflecting actual savings to the province achieved by the residency requirements). As well, it was agreed that a national multilateral process for considering issues of internal mobility would be established, with a two-year timeframe. It may also be noteworthy that the agreement about residency requirements coincided with a second agreement beneficial to the province, whereby federal funding for the settlement of immigrants would be increased by \$67.2 million over three years.<sup>(68)</sup>

The fact that the residency requirement persisted for well over a year after the application of federal penalties may have reflected the political appeal of the requirement within British Columbia (the government portrayed its stance as a valiant attempt to maintain assistance

levels, despite inflows of recipients from provinces that had recently lowered benefits, and despite the federal 5% cap on CAP transfer growth applying to B.C.). Also reflected may have been other circumstances, such as the apparent absence of a clear federal intention to continue penalization. In any event, it is significant that the requirement was not cancelled as a result of heightened federal penalties, but rather by more positive inducements.

More broadly, provincial premiers' comments on the transfer fee reductions of recent years provide considerable evidence of the salience of political considerations in determining provincial reactions. As noted above, at the 20-21 June 1996 meeting of First Ministers, several premiers supported a proposal that federal and provincial governments jointly participate in interpreting and applying the *Canada Health Act* on the grounds that the federal government's influence should decline to reflect the recent decline in its fiscal contribution. Provincial positions were not dictated by fiscal determinism. The impact of federal fiscal withdrawal (and perhaps, in some cases, of fiscal penalties) was primarily on the willingness of provincial leaders to accept continuing federal influence.

## **PART V: GENERAL OBSERVATIONS AND CONCLUSIONS**

Considered together, the historical, constitutional and intergovernmental perspectives developed in this paper suggest six general observations, and one fundamental conclusion:

1. The classification of intergovernmental relations into periods of "cooperative" and "executive" federalism has enhanced popular understanding of some complex realities; however, abstracted from actual events, the classification misleadingly suggests that relations among governments have evolved in a series of distinct phases separated by momentous watersheds. This ignores the very considerable degree of continuity in Canadian federalism.

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(cont'd)

(68) See British Columbia, Government Communications Office, "PM, Premier Settle B.C. Residency Dispute, Agree to New Co-operation on Mobility, Immigration and Asia-Pacific," News Release dated 6 March 1997.

2. The role of the federal government in establishing and maintaining national standards has always been subject to limits, even at the apogee of what has come to be seen as the era of cooperative federalism. To a greater extent than is sometimes acknowledged, provincial compliance with standards reflects the interplay of various factors including public support for these standards, and support within provincial governments.
3. Provincial resistance to federal unilateralism in setting national standards is not primarily a response to federal reductions in transfer payments, although these have certainly given provincial premiers a new basis for complaints. On the contrary, resistance to federal influence specifically within provincial social programs was amply in evidence by the mid-sixties, well in advance of significant fiscal constraints.
4. The importance of federal penalties in ensuring that provinces comply with national standards is more political than financial, and in most cases is probably very limited. Recent cases suggesting increased provincial willingness to depart from standards probably result from other factors (increased fiscal and political pressures on provincial governments, to which diminishing federal transfers have undoubtedly contributed).
5. The diminished federal fiscal capacity to penalize remains more or less intact and thus cannot be the cause of increased provincial non-compliance with standards. If shrinking cash transfers were to erode the federal capacity to penalize, provincial responses would be determined by political perceptions rather than the direct fiscal impact of penalties, and might therefore be less dramatic than anticipated by social policy analysts in the early nineties.
6. The array of mechanisms through which the federal government can influence provincial governments has remained remarkably stable over the years. What have changed are the multiple factors within the intergovernmental universe that establish the practical potential of each mechanism. Though current trends appear to be eroding the potential of traditional command-compliance mechanisms, that of more diffuse forms of influence may be increasing.



## **PART VI: CONCLUSION**

The fundamental conclusion of this paper is that the scope for federal influence over provincial social programs and standards is clearly more restricted than it was during the immediate post-war period. It is equally clear that the causes of this change go far beyond the reductions to transfer payments that have been taking place since the seventies. It follows that efforts to increase federal influence, should this be desired, will need to take account of the evolving character of the federal system rather than attempting to recover a world that was already in the process of disappearing 30 years ago.

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## APPENDIX I: FEDERAL CAPS AND CUTS, 1972-1995

Responding to the combined impact of fiscal, intergovernmental and other pressures, the federal government has, since at least the mid-seventies, been engaged in what has been widely portrayed as a retreat from the social policy role established during the immediate post-war period. Major milestones in this development are:<sup>(69)</sup>

- Federal post-secondary education (PSE) contribution capped at 15% - **1972**
- CAP “replacement funds,” negotiated to compensate provinces which had lost cost-sharing by making certain extended services universal - **1974**
- Federal Medicare payments for 1976-77 capped at 13% growth over 1975-76 - **1975**
- Established Programs Funding (EPF) program created - **1977**, replacing 50/50 conditional grants for Hospital Insurance, Medicare and Post-Secondary Education with a combination of a block grant, indexed to population and GNP growth, and a transfer of tax points. This arrangement initially increased the federal share of aggregate program costs, but from 1978-9 it began to decline.
- Equalization formula modified to preclude payments to any province where per capita personal income exceeds the national average (thereby precluding payments to Ontario, which would otherwise have qualified) - **1981**
- EPF renewed, minus the revenue guarantee cash grant -**1982**
- Equalization program renewed, replacing the “national average” formula with a five-province standard which eliminated the growth in entitlements resulting from the impact of Alberta oil revenues under the earlier formula - **1982** Other features:
  - a three-year transitional payment provision, under which entitlements resulting from the new standard were topped-up to the level which the previous standard would have established; and
  - a ceiling on grant increases based on GNP growth, and floors precluding drops of more than 5%, 10% or 15% depending on the fiscal strength of an individual province.
- Post-secondary Education component of EPF capped at 6% growth (“Six and Five” restraint program - **1983**

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(69) Events 1985-1993 based on summary in Battle and Torjman (1993), p. 14 ff.

- Post-secondary Education component capped at 5% growth - **1984**
- Federal-Provincial Agreement on the Enhancement of Employment Opportunities for Social Assistance Recipients, 1985: for purpose of encouraging training and other employability enhancement measures for welfare recipients. (**Q: cost impact?**) - **1985**
- Federal transfers under EPF partially de-indexed (from adjustment reflecting increase in GNP to adjustment proportional to GNP increase minus 2%) - **1986**
- Federal EPF transfers frozen at their 1989-90 level for years 1990-91 and 1991-92, then indexed to GNP growth minus 3% - **1990**
- Cap on CAP: welfare and social services cost-sharing transfers to the three wealthiest provinces (Ontario, Alberta and B.C.) limited to maximum increase of 5% per year for 1990-91 and 1991-92 - **1990**
- Freeze on federal EPF transfers extended for three years, through 1994-95, after which indexation to GNP growth minus 3% to take effect - **1991**
- Cap on CAP (maximum 5% annual growth in transfers to Ontario, Alberta and B.C.) extended for three years, through 1994-95 - **1991**
- Equalization program renewed for a five-year period with a modified funding formula expected to increase grant growth rates from around 3% to 5% - **1994**
- Cap on CAP (maximum 5% annual growth in transfers to Ontario, Alberta and B.C.) extended for an additional year (through 1995-1996), along with a general freeze on payments for the Post-Secondary Education component of EPF - **1994**
- Canada Health and Social Transfer (CHST) established **1995**, combining the EPF and CAP transfers in a single block transfer which reduced federal funding by some \$2.5 billion for 1996-97, and an additional \$2 billion for 1997-1998, compared with funding levels projected under previous transfers.
- CHST further elaborated - **1996**. Main points:
  - long-term funding established, frozen at 1997-98 levels of \$25.1 billion for 1998-99 and 1999-2000, then indexed to GNP growth rate minus 2% for 2000-01, GNP growth minus 1.5% for 2001-02 and GNP growth minus 1% for 2002-03;
  - cash transfers do not fall below \$11 billion, and begin to grow after 2000-2001; and
  - allocation among provinces will, in stages, reduce distortions created by the cap on CAP by coming to reflect two factors:
    - current CHST share, adjusted for interprovincial population shifts, and
    - provincial share of the Canadian population.

**APPENDIX II: FURTHER POLL RESULTS**

1. *Globe and Mail/Environics* poll (taken 18 December 1996 - 15 January 1997) details:

Question: If the federal government decided it has some extra money to allocate as it approaches the next budget, to which of the following areas do you think most of the money should go?

	Atlantic	Quebec	Ontario	West	Total
Building/construction to create jobs	30	38	29	26	31
Health care	27	26	24	24	25
Reducing taxes	13	6	9	10	9
Child benefits in low income families	11	10	13	16	13
Reducing federal deficit and debt	11	17	19	21	18
CBC and other cultural institutions	-	-	2	2	1
Don't know					
No answer	7	3	4	1	3

2. Another recent poll supports the *Maclean's* CBC poll findings on public attitudes concerning universal access versus a two-tiered health care system. A mid-September 1996 Gallup poll produced the following results:<sup>(70)</sup>

(70) R. Gary Edwards and Jon Hughes, "Public Remains Divided on Two-Tiered Health Care," *The Gallup Poll*, Vol. 56, No. 67, Gallup Canada Inc., Toronto, 19 September 1996.

Question: Thinking about Canada’s health care system, would you be strongly in favour, somewhat in favour, somewhat opposed or strongly opposed to offering two levels of service to Canadians: a basic level of service funded by the government and available to all Canadians, and for those who wished to do so the option of paying for any additional services they wanted?

Results:

	Support	Favour	Oppose	Strongly Oppose	Unsure
Atlantic Canada	12%	25%	12%	45%	6%
Quebec	17%	35%	13%	29%	6%
Ontario	14%	24%	17%	36%	10%
Prairies	19%	36%	14%	26%	4%
B.C.	14%	26%	13%	41%	7%
Overall	15%	29%	15%	34%	7%

These results contrast with those obtained in a wide-ranging study of public attitudes carried out by Ekos Research Associates Inc. in August 1995. In this poll, 53% of a sample of 3,000 ranked equal access for all Canadians as the aspect of health care having the greatest importance to them personally (followed by 31%, quality of health care services; 9%, health of the Canadian population; and 8%, cost of the system). Furthermore, 60% disagreed with the statement that “individuals should be allowed to pay extra to get quicker access to health care services,” while only 28% agreed (with 11% neither agreeing nor disagreeing). (See Ekos Research Associates Inc., *Rethinking Government 1995 - Final Report*, Submitted to Rethinking Government Sponsors, 12 July 1996, Ekos Research Associates Inc., Ottawa and Toronto, 1996, p. 35.)

Public resistance to punitive actions on the part of the federal government against provinces which violate federally proclaimed standards is not evenly distributed across Canada’s regions. The Insight Canada Research poll (discussed in text) produced the following results:<sup>(71)</sup>

(71) Jim Bronskill, “Ontario Residents Don’t Want Federal Crackdown on Provinces,” *The Ottawa Citizen*, Ottawa, 26 August 1996, p. A-3.

Question: Do you support or oppose the federal government's decision to penalize provinces that allow facility fees to patients in private clinics receiving medically necessary services?

Results:

	Support	Oppose	Unsure
Atlantic Canada	25%	69%	6%
Quebec	42%	53%	5%
Ontario	41%	53%	7%
Prairies	36%	60%	3%
B.C.	38%	59%	3%
Overall	39%	57%	5%