

# The Government of Canada's Contradictory Approach to Federal-Provincial Relations

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## ABSTRACT

The Government of Canada's approach to intergovernmental relations often appears contradictory. As one political scientist described it, the approach "has alternated between trying to reinforce its authority and devolving its own powers." This paper tests this assessment by addressing this question: is the pattern described evident in the case of the Government of Canada's handling of its maternity and parental benefits program? The paper demonstrates that it is. It argues further that federal ambivalence about the constitutional vision it wishes to champion appears to be a significant factor to explain the contradictory nature of the Government of Canada's approach to relations with the provincial governments.

## 1. INTRODUCTION

The Government of Canada's approach to federal-provincial relations is an odd one. In one scholar's words, it "has alternated between trying to reinforce its authority and devolving its own powers" (Clarkson 2002, 76). This paper tests and offers an explanation for this assessment. It traces the federal government's views on the constitutionality of the unemployment insurance program in order to determine if Clarkson's characterization is applicable in the case of maternity and parental benefits, which are funded out of the unemployment insurance program. In other public policy areas, namely, labour force training and environmental policy, Canadian scholars

have shown fairly convincingly that the federal government way of dealing with the provincial governments has been, first, to assert its authority over the area, then to surrender jurisdiction, and then, in its negotiations with the provinces, to give up far more than it needs to. Especially confounding about the approach of the federal government is that it cedes jurisdiction even when the courts uphold its authority. Is this pattern evident in the Government of Canada's treatment of maternity and parental benefits? This is the paper's central concern.

What might explain the federal government's reluctance to use the powers that the constitution has given it? This paper suggests that Carolyn Tuohy's theory of institutionalized ambivalence, supplemented by Rocher and Smith's clashing constitutional visions, represents a reasonable explanation for the contradictory behaviour of the Government of Canada.

The paper opens by outlining Tuohy's theory and Rocher and Smith's constitutional visions. The next section discusses the federal maternity and parental benefits programs. It examines previous research on unemployment insurance, as well as a number of historical documents and court cases in an effort to determine if the pattern that Clarkson and others have identified holds in the case of maternity and parental benefits and how Tuohy's ambivalence theory applies.

## 2. THE THEORY: INSTITUTIONALIZED AMBIVALENCE

Tuohy has argued that the Canadian policy process is distinguished by ambivalence; that is, "ambivalence about the appropriate roles of the state and the market, about national and regional conceptions of political community, and about individualist and collectivist concepts of rights and responsibilities" (Tuohy 1992, 4). Though most other countries experience a degree of ambivalence, in Canada it "extends to the very legitimacy of the state itself and to the identity of the political community" (*Ibid.*, 5). The ambivalence "is 'built in' to the structures of the state" (*Ibid.*). As a result, Canadians constantly find themselves pulled in competing directions.

Tuohy explains that the roots of Canada's institutionalized ambivalence lie in the country's relationship with the United States, in relations between Québec and the rest of Canada, and in Canadian regionalism. It can also be said to lie in the ambivalent feelings of the country's founders regarding the establishment of Canada as an independent, autonomous country. Peter Russell has stated that "The political élites who put Confederation together were happy colonials" (2004, 12). Indeed, their motivations may have had more to do with resisting American expansionism and promoting more inter-colonial trade than with creating a self-determining and democratic country on the northern half of the continent.

One of the political structures into which ambivalence is embedded is the Canadian constitution itself. On its face, it provides for a relatively centralized federation. However:

In practice, the Canadian federation shows a mix of centralist and decentralist elements. It is one of the most fiscally decentralized in the world....On the other hand, the principle of a federal "spending power" has developed over time, allowing the federal government to spend, and to attach conditions to its spending, in areas of exclusive provincial jurisdiction (*Ibid.*, 6).

One result of the country's constitutional ambiguity is Canada's particular brand of federalism, which functions, Tuohy argues, without a definitive division of powers. Indeed, one can argue that federal and provincial governments have tended to regard federal constitutional powers as 'tradable assets'. According to Tuohy, the fact that the division of federal and provincial jurisdiction is never resolved means that the competing views about region and country "are always in play and are addressed anew with new policy issues" (*Ibid.*, 52). Another result is the excessive resort to élite accommodation, a process that, as Tuohy notes, has "limited constitutional grounding" and "only tenuous lines of accountability to the electorate"

(*Ibid.*, 30). In addition, élite accommodation, or executive federalism, has tended to generate a preoccupation with the jurisdiction issue but insufficient attention to substantive policy concerns.

It can be argued as well that the several omissions from the *Constitution Act, 1867*, such as an amending formula, a Supreme Court, an independent treaty power, and a credible Upper House represent clear demonstrations of institutionalized ambivalence.

Institutionalized ambivalence can also be said to be a consequence of judicial interpretations of the constitution. The clear intention of the country's founders to create a strong central government was thwarted by the rulings of the Judicial Committee of the Privy Council, a British entity that served as Canada's final court of appeal until 1949, leaving decision-makers confused and conflicted about which vision of the country to take seriously.

What are those visions of the country? Rocher and Smith provide one answer in their identification of four, often clashing, constitutional visions in Canada.

#### **The equality of the provinces vision**

This vision can refer either to the equality of the provincial governments with the federal government, or to the equality of the provinces with each other.

The first interpretation – the equality of the two levels of government – stresses provincial autonomy. It sees each level as being sovereign in its areas of jurisdiction and able to act independently of the other. The implications of this interpretation are profound. As Rocher and Smith point out, "In this view, the provincial premiers have as much right to represent citizens as does the Prime Minister of Canada." The central government "is not in a position to speak for provincial interests" (Rocher, Smith 2003a, 24). Thus, the federal government is just another government in Canada.

The second interpretation – the equality of the provinces with each other – is expressed in two statements of the Calgary Declaration, a document cobbled together by the provincial governments after the constitutional wars of the late 1980s and early 1990s and accepted by all governments in Canada except that of Québec. One states: “All provinces, while diverse in their characteristics, have equality of status.” The second reads: “If any future constitutional amendment confers powers on one province, these powers must be available to all provinces.”

While the first interpretation denies the subordination of the provincial level of government to the federal, the second denies the special status of any one province.

The first interpretation is similar to what has been called “collaborative federalism,” which, say Cameron and Simeon, is “characterized more by the principle of co-determination of broad national policies than by either the Ottawa led co-operative federalism of the post-World War II period or the more competitive federalism of later periods” (Cameron, Simeon 2002, 49). Proponents of this approach see the governance of Canada “as a partnership between two equal, autonomous, and interdependent orders of government that jointly decide national policy” (*Ibid.*). Examples of collaborative federalism at work in Canada include the Agreement on Internal Trade, the health care accords of 2000 and 2004, the federal-provincial accord on the environment, and recent international trade policy.

### **The nationalizing vision**

In this vision, the basis of political identity is Canada itself, not a province and not one of Canada's internal nations. It is a vision, say Rocher and Smith, that sees Canada as more than the sum of its parts. Since it privileges the federal level of government, it “tends also to be centralizing.” Rocher and Smith identify three versions of the nationalizing vision: the view of the Fathers of Confederation; the view of the social democrats of the 1930s; and the Pierre Trudeau view, as expressed in the patriation and amendment of the constitution in 1982.

With respect to the view of the Fathers of Confederation, it appears that there were varying degrees of support among the founders for the idea of a strong central government for Canada. Nevertheless, they all signed an agreement that equipped the federal government with substantial powers. Indeed, Bayard Reesor identifies ten powers set out in the *Constitution Act, 1867* that, in his opinion, “contradicted the federal principle.” Among them are the power to strike down provincial legislation; the power of Parliament to declare “works” under provincial jurisdiction to be for the general advantage of Canada and, therefore, to bring them under federal jurisdiction; the power of Parliament to legislate for the “peace, order, and good government” of Canada; and the power of Parliament to spend its money as it sees fit (Reesor 1992, 80-82).

The second version developed during the Great Depression. F.R. Scott and others argued that the federal government needed the necessary powers to be able to intervene in the economy and society to “alleviate some of the worst effects of the Great Depression and to get Canada back on the road to economic recovery” (Rocher, Smith 2003a, 35). Interestingly, in a comment related to the thesis of this paper and published originally in 1931, Scott gave another reason for the disintegration of federal power, namely, “...the attitude of the leaders of the Dominion parties of recent years. They seem to have wished to hand over as much as possible to the local legislatures” (Scott 1977, 47).

The third version of the nationalizing vision came with the election of Pierre Trudeau in 1968. “In this view, Canadian political identity overrode regional and national political identities” (Rocher, Smith, 35). It is strongly opposed to asymmetrical federalism or special status for Québec. Both the process of constitutional change and the substance of the *Constitution Act, 1982* reflected the Trudeau version of the nationalizing vision. With regard to the former, Rocher and Smith write:

At various points in the process of negotiating the constitutional amendment of 1982, the Trudeau government threatened to proceed with constitutional change unilaterally, without the consent of the provinces. In doing so, Trudeau appealed explicitly "over the heads" of the provincial leaders to the people. This strategy stressed the symbolic dimension of the federal government's role as the sole government of all Canadians and the provinces as spoilers in the system (*Ibid.*, 36).

Thus, "...the Trudeau government attempted to undercut the provincial governments and to solidify citizens' loyalty to the national, i.e., federal level of government" (*Ibid.*). With respect to the substance of the *Constitution Act, 1982*, the Charter of Rights and Freedoms was designed to "cement the attachment of Canadians to the federal level of government....All Canadians enjoyed these rights equally, thus strengthening national sentiment" (*Ibid.*).

It should not escape notice that, in describing the nationalizing vision, Rocher and Smith write: "Taken to its extreme, this centralizing dynamic permits the federal government to appropriate the authority to define a 'national interest'" (2003b, 9-10). That a federal government desire to define the national interest could be described as "extreme" is illustrative of how far the provincial autonomy advocates have taken their argument.

### **Asymmetrical federalism**

As used by Rocher and Smith, asymmetrical federalism emphasizes the multinational character of Canada. It proposes constitutional reforms that recognize Canada's internal nations. The vision has its origins in the compact theory of Confederation, a much-criticized theory that "views Confederation as a pact between the two founding nations" (*Ibid.*, 28). In practical terms, this dualism requires an arrangement in which the Québec government has constitutional powers that other provincial governments do not have; hence, the phrase, asymmetrical federalism.

Asymmetry is espoused not only by many Québécois writers. Aboriginal groups, too, have demanded a new type of relationship with Canada. Indeed, they seek to re-cast the relationship between the federal government and Aboriginal peoples "on a nation-to-nation basis." They propose a new order of government in which Aboriginal nations have the necessary powers to pursue their own path of political, economic and cultural development. The rise of a pan-Aboriginal nationalism "has rendered obsolete the dualist vision of Canada" (*Ibid.*, 33). It has given way to the three-nations understanding of Canada, necessitating a new division of powers, through further decentralization or "the granting of special status for Québec or the First Nations..." (*Ibid.*).

### **The rights-based constitutional vision**

In this vision, Rocher and Smith explain, "...the rights-bearers anchor their constitutional vision around individuals and groups as rights-bearers..." (*Ibid.*, 38). Rocher and Smith see three versions of this vision. First, the Trudeau perspective has a significant rights dimension. It sees the Charter of Rights and Freedoms as adding a critically important aspect to the Canadian identity. A second version emphasizes collective rights, that is, the rights of certain communities in Canada, such as women, Aboriginal peoples, and ethnocultural minorities. These groups represent "the entry of non-territorial equality concerns into constitutional discourse" (*Ibid.*). Significantly, according to Rocher and Smith, "They see the role of the federal level of government as very important because only the federal level of government can create a level playing field for equality-seeking groups throughout the whole country" (*Ibid.*). For these groups, the protection of the Charter and their Charter rights is paramount. The third version of the rights-based vision attaches collective rights to Canada's internal nations or national communities such as the Aboriginal nations and the Francophone Québec nation.

The handling by the Government of Canada and the provincial governments of the policy area discussed next reflects a conflict of constitutional

visions, primarily between the equality of the provinces vision – that is, the equality of the provinces with the federal government – and the nationalizing vision. As we shall see, such a conflict can occur not only between levels of government but also *within* the federal government.

### 3. MATERNITY AND PARENTAL BENEFITS

Does the Government of Canada's handling of its maternity and parental benefits initiatives exemplify its ambivalence regarding its own powers? Three points should be made at the outset: first, these benefits, also referred to as special benefits, provide payments to workers whose employment is interrupted by pregnancy or the need to provide child care; Ottawa has been providing maternity benefits for over thirty years and parental benefits for almost fifteen years; secondly, the programs are financed out of the unemployment insurance (UI) fund, not out of general revenues; and thirdly, unlike training and the environment, the constitution does identify the federal government as the jurisdiction responsible for UI.

Until World War I, care of the unemployed in Canada was seen to be mainly the responsibility of the municipal governments. However, when the war ended and soldiers began returning home in large numbers, the federal government view of the problem started to evolve and new ideas made it to the political agenda. In 1918, Ottawa passed the *Employment Offices Coordination Act*, a cost-shared program with the federal government subsidizing provincial employment offices. In 1919, the federal Royal Commission to Investigate Industrial Conditions in Canada recommended a compulsory social insurance system covering old age, unemployment, sickness and invalidity. In 1919 also, the International Labour Conference recommended national UI and the federal Liberal Party adopted a resolution urging the federal government to establish a comprehensive social insurance program which would include, among other things, protection against unemployment and maternity benefits (Pal 1988, 35-36).

The momentum toward a national UI scheme stalled in the 1920s as its constitutionality emerged as a serious consideration. The weight of opinion held that it was a provincial responsibility. Undeterred and encouraged by the Roosevelt New Deal in the U.S., Conservative Prime Minister Bennett drafted an unemployment insurance plan and approached the provinces for support for a constitutional amendment. Ontario and Québec refused. With an election in the offing, the Bennett government passed the *Employment and Social Insurance Act*, modeled on the British plan. The legislation provided for a flat-rate benefit, financed by contributions from employers, workers and the state and covering about two-thirds of the work force.

In 1935, Canada's longest-serving Prime Minister, William Lyon Mackenzie King, leader of the Liberal Party, returned to power. Opinion on his views on unemployment insurance is divided. Leslie Pal, for instance, suggests that King's concern about the constitutionality of a federal UI plan was a legitimate one (Pal 1988, 37). James Struthers, however, argues that the constitutional consideration was merely a convenient excuse for inaction (Struthers 1983, 10). In any event, King referred the *Employment and Social Insurance Act* to the Supreme Court of Canada for a determination of its constitutional validity. The Act was struck down by the Court in 1936, a decision that was upheld by the Judicial Committee of the Privy Council. According to Lord Atkin,

There can be no doubt that, *prima facie*, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature (*Attorney General for Canada v. Attorney General for Ontario* [1937] A.C. 355 at 365).

In 1939, three factors combined to change King's mind about UI. The first was the outbreak of war. For King, it was "clear that unemployment insurance will be indispensable in

coping with the problem of re-establishment" (Struthers, 198). In other words, UI would be necessary for the reconstruction of the war-time economy. Secondly, the resistance of the premiers to a constitutional amendment giving Ottawa jurisdiction over UI dissipated. The newly elected premier of Québec, Adélard Godbout, was more receptive to an amendment than his predecessor and Alberta Premier Aberhart indicated that he would not stand in the way if most of the other provinces were agreeable to a constitutional amendment (*Ibid.*, 198-199). Thirdly, the Cooperative Commonwealth Federation (CCF) was emerging as a major political force on the Left, providing workers and farmers with an alternative to the Liberal Party. As a result, in July 1940, the British Parliament amended the *British North America Act*, (now known as the *Constitution Act, 1867*), giving the federal government jurisdiction over UI and shortly thereafter the federal government enacted the necessary legislation.

Although its report was submitted after the decision to amend the constitution had been made, the Royal Commission on Dominion-Provincial Relations provided additional support for federal control of UI. It recommended strongly that "...the Dominion alone should have jurisdiction over unemployment insurance..." (Canada 1940, 39). For the Commissioners, the experience of the 1930s was "conclusive evidence that unemployment relief should be a Dominion function" (*Ibid.*, 24). It warned, however, that federal responsibility for social welfare services "...should be deemed an exception to the general rule, and as such should be strictly defined" (*Ibid.*).

Significantly, the Commissioners also recommended that UI benefits be available not only to those whose employment was interrupted for economic reasons. They wrote:

So long as cash payments only are provided there is no reason why insurance against unemployment resulting from illness should not be dealt with along with other unemployment,

and we recommend that the Dominion should have the necessary powers to do this (*Ibid.*, 40).

As we shall see, whether UI should be only for those whose unemployment is caused by economic developments was an issue for the Québec Court of Appeal.

Since 1940, the *Unemployment Insurance Act* has been amended several times. The most comprehensive reforms came in 1971; among other important measures, the *Unemployment Insurance Act, 1971* authorized the payment of special benefits to women who gave birth to a child, for a fifteen-week period including their confinement. This was the first time that UI contained such a provision. The reforms were based on a 1970 white paper which, in turn, was based on an intensive 1969 study of the UI program.

The 1969 report has little to say about the constitutional context, for the obvious reason:

The present power for the Canadian Parliament to legislate in this respect [that is, unemployment insurance] is not open to question as far as constitutional law is concerned. The antecedents that led to the enactment of the 1940 British North America Act Amendment are irrelevant from a legal point of view; the Westminster Parliament had the power to amend one of its own statutes, and this is what it did in this case (Canada 1969b, 4).

The report's authors warn, however, that any benefits paid under the program, such as maternity, sickness and retirement benefits, must be indisputably related to unemployment; otherwise, its constitutionality could be contested.

The 1970 Government of Canada white paper also has little to say about the constitutional validity of UI. However, it does state that, "In looking at the problems of unemployment it becomes clear that it is the

federal government which must continue to play a vital role in their solution" (Canada 1970a, 7). Yet another federal government paper, *Income Security and Social Services*, addresses the constitutional issue at greater length. Published in 1969 as one of several working papers on the Constitution under the name of Prime Minister Pierre Trudeau, it deals with the constitutional aspects of social policy and strongly endorses exclusive federal control of UI. It states:

The case for exclusive federal powers over unemployment insurance...lies in the nature and the source of the forces which give rise to unemployment, and hence the need for unemployment insurance, and the capacity of governments to deal with these forces. It is generally accepted that general unemployment is the product of a complexity of economic forces which are national and international in character. It rarely can be said to be the consequence of purely local forces. Moreover, the provincial and local governments cannot by themselves bring under control the forces that cause unemployment; to do so requires the full panoply of economic powers associated with a nation – fiscal, monetary, debt management, trade, and balance of payments policies, and indeed selective economic measures. Even these, to be fully effective, must be complemented by international economic arrangements. The viability of unemployment insurance, in other words, depends upon the successful use by the federal government of these instruments of economic policy: if they fall under federal jurisdiction, so should unemployment insurance (Canada 1969a, 80).

The paper then sets out another reason for federal control of UI:

The second reason...lies in the uneven costs of unemployment insurance, as between the provinces. Certain provinces suffer from higher levels of

unemployment than do others, with the result that payments in these provinces tend to be relatively higher, and contributions to the unemployment fund from them tend to be relatively lower. It would be unreasonable, clearly, to ask these provinces to assume responsibility for unemployment insurance (*Ibid.*, 82).

It ends the discussion on UI with this firm declaration: "It follows, as Canada learned during the 1930s, that responsibility for unemployment insurance must be placed with the government which has the power to combat unemployment, and has the capability of meeting the consequences of unemployment – the Parliament and Government of Canada" (*Ibid.*).

Despite these unequivocal declarations of federal authority, the bill that was eventually adopted by Parliament contained an important concession to provincial autonomy. Section 64(5) of the *Unemployment Insurance Act, 1971* reads as follows:

Where under a provincial law any allowances, monies or other benefits are payable to an insured person in respect of sickness or pregnancy that would have the effect of reducing or eliminating the benefits that are payable under this Act to such insured person in respect of unemployment caused by that illness or pregnancy, the premium payable under this Act in respect of that insured person shall be reduced or eliminated as prescribed but subject to paragraph (a) of section 65.

In other words, if a provincial government established its own program providing for maternity or sickness benefits, the federal program would cease to operate in that province. It is not clear why the federal government offered this concession given its strongly held view that UI is a federal responsibility. It had the assurance of the 1969 study of UI, and Cabinet documents from 1971 reveal that the Cabinet Committee on Federal-Provincial Relations knew that "legal opinion was consistent with the

proposal that loss of earnings due to sickness and maternity should be covered by insurance rather than welfare" (Canada 1971, 22). In addition, the Committee noted that "...it is only lately that Quebec has been challenging the legality of the sickness and maternity clauses on constitutional grounds. Before this, Québec had simply argued that the clauses would create problems as they were incompatible with the philosophy of their social policy" (*Ibid.*). The Cabinet also had the report of the Royal Commission on the Status of Women in Canada, submitted in September 1970. The Commission had studied maternity leave and considered various ways for the federal government to provide this protection, finally agreeing that it could "best be done through the federal Unemployment Insurance Plan" (Canada 1970b, 87). It argued that "Both unemployment insurance and paid maternity leave are intended to provide compensation for temporary loss of earnings, and the unemployment insurance plan already has a system for drawing contributions from the same sources that would be contributing to paid maternity leave" (*Ibid.*, 87-88). It therefore recommended,

that the *Unemployment Insurance Act* be amended so that women contributors will be entitled to unemployment benefits for a period of 18 weeks or for the period to which their contributions entitle them, whichever is the lesser, (a) when they stop paid work temporarily for maternity reasons or (b) when during a period in which they are receiving unemployment benefits, they become unable to work for maternity reasons.

Notwithstanding these assurances and expressions of support, the government went ahead with subsection 64(5). It may be that, with the 1970 October crisis still fresh in its memory, the Cabinet may have wished to avoid irritating Québec. In any event, subsection 64(5) represents yet another example of the federal government asserting its jurisdiction over an area and then ceding it to the provinces, even though it was not necessary to do so (*Ibid.*, 88).

Since 1971, a considerable amount of attention has been paid to unemployment insurance, including the maternity benefits provision, by public policy-makers, by interest groups and by the courts. The Supreme Court of Canada, for instance, in a 1979 case, *Bliss v. Attorney General of Canada*, came down with a highly significant decision on pregnancy benefits. It was asked to determine if a section of the *Unemployment Insurance Act*, which set out the limitations for the receipt of pregnancy benefits, was inoperative because it violated the equality-before-the-law clause of the *Canadian Bill of Rights* (Canada's first attempt at human rights legislation, now mostly dormant because of the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* and the passage of human rights acts by all of the provinces and by the federal government). In ruling that the section did not offend the *Canadian Bill of Rights*, the Supreme Court of Canada affirmed that the provision of pregnancy benefits is a valid federal program. Writing for a unanimous Court, Justice Ritchie stated:

As I have indicated, s. 30 and s. 46 [the clauses in question] constitute a complete code dealing exclusively with the entitlement of women to unemployment insurance benefits during the specified part of the period of pregnancy and childbirth; these provisions form an integral part of a legislative scheme enacted for valid federal objectives....

Two years earlier, the Supreme Court of Canada was asked to consider whether the regulations of the *Unemployment Insurance Act, 1971* allowing the Unemployment Insurance Commission to include, within the definition of insurable employment, self-employment and employment not under a contract of service, (a.k.a. an employment contract), were *ultra vires* of Parliament (*Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996). Writing for a unanimous Court, Justice Beetz declared that they were not. He noted that it was in 1946 that Parliament first made UI benefits available to the self-employed or those



not working under a contract of service, if the work is indistinguishable from that of those who work under a contract of service. He noted further that in 1956 Parliament made benefits available to fishers, even though they are self-employed and do not work under an employment contract.

As a result of this ruling, the Court approved the expansion of the scope of UI beyond who was to be included by the original legislation. As a Canadian Labour Congress brief stated, the Court rejected the argument that "the scope of s. 91(2A) should be ascertained by reference to the framers' understandings of the limits of 'unemployment insurance'..." (2004, 6). The Court refused "to confine Parliament's jurisdiction to insurance against the unemployment of employees under a contract of service..." (*Ibid.*, 11).

A third important ruling came in 1989. In *Brooks v. Canada Safeway*, the Supreme Court of Canada determined that a Canada Safeway health plan, under which pregnant women were ineligible for benefits, was discriminatory. Chief Justice Dickson, writing for a unanimous Court, stated:

It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work...If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason...In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at pp. 1237-1238).

What the Court affirmed here is that pregnancy is a valid reason for temporary absence from work and should be treated no differently than other causes of temporary unemployment. Again, the

importance of this decision will become apparent at a later point.

In 1981, the Trudeau government established a Task Force on Unemployment Insurance which did not look at the constitutional issues involved but did argue that "...UI maternity benefits have come to be regarded as a necessary form of income support and an acceptable role for UI with its objective to protect the economic security of workers in Canada" (Canada 1981, 67).

Shortly after it assumed power, the Conservative Mulroney government set up its own Commission of Inquiry to study unemployment insurance. The Commission did not discuss the constitutional aspects of UI but, as part of its research effort, it asked former Professor and former Senator, Gérald-A. Beaudoin, to review these issues. He was asked specifically:

From a constitutional viewpoint, does the definition of unemployment insurance cover such things as self-employment interruptions..., sickness, maternity and adoption benefits, employment services and job creation programs which may be components of an unemployment insurance scheme (1986, 17)?

With respect to maternity benefits, Mr. Beaudoin said simply: "We must conclude from the Bliss case that under s. 91.2A the Parliament of Canada may legislate in relation to payments to pregnant women" (*Ibid.*, 19).

In its brief to the Commission of Inquiry, the Canadian Advisory Council on the Status of Women addressed the suggestion that maternity benefits be removed from the UI program. In the Advisory Council's view, "...it is entirely appropriate that these benefits should be included in the program..." (1986, 23). Its basic argument went as follows:

Child-bearing and child-rearing are activities which parents undertake on

behalf of society as a whole. We believe that society should ensure that those who undertake this vital work do not suffer a financial penalty for doing so. Given that the majority of women in their child-bearing years are already in the work force, we consider it essential that they be entitled to a replacement of lost earnings when those earnings are interrupted as a result of child-bearing or parenting responsibilities. Because UI is still a social insurance program, these benefits are given to women workers as a matter of right based on their earnings and contribution record (*Ibid.*, 23-24).

The brief also referred to the constitutional aspect. According to the brief, there is "a constitutional basis for federal authority over special benefits like those for maternity and adoption, *as long as they are included in the program*" (*Ibid.*, 24). [Emphasis in original.] However,

It is not clear that the federal government would retain jurisdiction if benefits were removed from the program. Canadian women's rights to earnings replacement while on maternity leave might then depend on provinces developing their own programs. Thus, a national program, with national standards, available to all women regardless of where they live, might be jeopardized (*Ibid.*).

In other words, a maternity-leave-benefits program, funded out of general revenues, could be found to be unconstitutional, leaving Canada with a patchwork of such programs.

In the mid-1980s, the Conservative Mulroney government also established a Task Force on Child Care which included maternity benefits in its review. It pointed out that benefits for maternity have been provided through UI since 1971 "in recognition that an employee's earnings can be interrupted not only by job loss, layoff, or illness, but also by maternity" (Canada 1986, 24). It recommended that "birth and

adoption benefits continue to be provided through the vehicle of the Unemployment Insurance program" (*Ibid.*, 376).

Assertions of federal authority over UI, in the form of legislative amendments that expanded the availability of UI benefits, came frequently in the 1980s and 1990s. In 1984, as a result of an amendment to the *Unemployment Insurance Act, 1971*, pregnant women became eligible for regular benefits during the eight weeks preceding and the six weeks following the birth of their child. Also, special parental benefits were made available for persons adopting a child. In 1988, changes to the Act allowed fathers to obtain special benefits when they took care of a newborn because the mother was ill or disabled. In 1990, the Canadian Parliament granted parental benefits to adoptive or biological fathers or mothers, and in 2000, parents whose child was born or adopted after December 30, 2000 became entitled to receive parental benefits for almost one year.

Despite these declarations of federal jurisdiction, the maternity benefits opting-out clause survived the 1996 overhaul of the *Unemployment Insurance Act*, renamed the *Employment Insurance Act* (EIA). Now section 69(2), the clause is virtually identical to section 64(5) of the previous Act but, significantly, the possible causes of unemployment that would trigger eligibility for receipt of UI benefits were increased to include injury, quarantine and child care. This, too, can be seen as an assertion of federal authority. The new section 69(2) reads:

The [Unemployment Insurance] Commission shall, with the approval of the Governor in Council, make regulations to provide a system for reducing the employer's and employee's premiums when the payment of any allowances, money or other benefits because of illness, injury, quarantine, pregnancy or child care under a provincial law to insured persons would have the effect of reducing or eliminating the special benefits payable to those insured persons.

In a confidential interview, a senior official at Human Resources and Skills Development Canada explained that during the review of the legislation there was no thought given to the possibility of removing the opting-out provision.

This is somewhat puzzling given that no province sought to make use of the provision since its insertion in legislation in 1971.

In 1996, the secessionist Parti Québécois government announced its intention to introduce a maternity and parental benefits plan for workers, to be implemented if and when the federal government vacated the field in Québec. It subsequently initiated talks with the federal government to implement the plan, as provided for in section 69(2) of the Act. The talks began in February 1997 and ended in August 1997 without producing an agreement.

A confidential interview with a federal official, who was close to the negotiations, shed light on the motivations of the two governments.

In this official's recollection, the Québec government insisted on a large transition fund – in effect, a subsidy, amounting to between \$100 million and \$150 million. It did so, according to the official, because it wanted to establish an exceptionally generous parental insurance program without having to increase premium rates, at least in the short term. Extra cash from Ottawa would make this possible. Understandably, the federal government was not willing to do this for the secessionist government.

By 2000, when Québec tried to re-open the negotiations, the federal position had hardened. Reluctant in the first place to transfer the programs, the Government of Canada had received a revised legal opinion that stiffened its resolve to resist devolution. The new legal opinion held that section 69(2) was not as clear as it appeared to be and that the federal government's discretion regarding devolution was wider than first thought. The official stresses, though, that the revised legal opinion was of secondary importance. What was primary

was that the federal government really did not want to hand over the programs.

In March 2002, the Government of Québec asked the Court of Appeal of Québec to determine the constitutionality of sections 22 and 23 of the *Employment Insurance Act*, the sections authorizing payment of maternity and parental benefits. Under section 22, "...benefits are payable to a major attachment claimant who proves her pregnancy." Similarly, under section 23, "...benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption..." In each case, the Act provides details on eligibility requirements and the duration of receipt of benefits.

The four questions that the Québec Court of Appeal was asked to address are:

Does section 22 of the Employment Insurance Act constitute an infringement of the jurisdiction of the provinces, particularly the jurisdiction with respect to property and civil rights or matters of a merely local or private nature pursuant to subsections 92(13) and 92(16) of the Constitution Act, 1867?

Does section 23 of the Employment Insurance Act constitute an infringement of the jurisdiction of the provinces, particularly the jurisdiction with respect to property and civil rights or matters of a merely local or private nature pursuant to subsections 92(13) and 92(16) of the Constitution Act, 1867?

Is section 22 of the Employment Insurance Act *ultra vires* the Parliament of Canada, particularly as regards the jurisdiction relating to unemployment insurance pursuant to subsection 91(2A) of the Constitution Act, 1867?

Is section 23 of the Employment Insurance Act *ultra vires* the Parliament of Canada, particularly as regards the

jurisdiction relating to unemployment insurance pursuant to subsection 91(2A) of the Constitution Act, 1867?

With respect to the first two questions, the Québec Court of Appeal ruled in *Attorney General for Québec v. Attorney General for Canada* [2004] that the measures established by sections 22 and 23 of the Act do, in fact, fall within the jurisdiction of the provinces, specifically subsection 92(13) or subsection 92(16), that is, property and civil rights or matters of a merely local or private nature in a province.

For the last two questions, the Québec Court of Appeal looked at three types of historical documents in order to ascertain the framers' intent in making the 1940 constitutional amendment; they were the report of the Royal Commission on Dominion-Provincial Relations; the correspondence between the Prime Minister of Canada and the Premiers of Québec during the period in question; and the House of Commons debates on the amendment. The Court concluded that the 1940 amendment "was aimed at enabling federal authorities to set up a plan to insure individuals against lost income following the loss of their job for economic reasons, not following the interruption of their employment for personal reasons."

The pregnancy and parental benefits contemplated in sections 22 and 23 of the *Employment Insurance Act* are not at all part of the unemployment insurance canvas conceived in 1940. These special benefits are not paid further to the loss of a job for economic reasons; rather, they are paid further to the interruption of an individual's employment because of a personal inability to work.... These benefits must be seen instead as an assistance measure for families and children - that is, as a social assistance measure and a laudable one at that (*Attorney General for Québec v. Attorney General for Canada* 2004, 28).

The Court agreed that the benefits "are not totally dissociated from the notion of employment..." but, in its view, they are not at all what the framers had in mind when they added unemployment insurance to section 91 of the *Constitution Act, 1867*.

On February 23, 2004, the federal government filed an appeal with the Supreme Court of Canada, which heard the case in January 2005.

In its factum to the Supreme Court of Canada, the federal government argued that the only object of the disputed sections is to provide monetary benefits, on a temporary basis, to those who have lost their employment income. Significantly, it adds that, "ils n'ont ni pour objet, ni pour effet, de créer un régime de *congé* de maternité ou encore de *congé* parental" (*Attorney General for Canada* 2004, 14). [Emphasis in original.] (Neither their purpose nor their effect is the creation of a maternity or parental leave program.) It contends further that the Québec Court of Appeal erred in describing the benefits as social security measures. Rather, "la caractéristique essentielle de ces prestations" (the essential characteristic of these benefits) is to provide

un revenu temporaire aux femmes enceintes ou aux parents qui ont payé des cotisations et occupé un emploi assurable pendant le nombre d'heures requis et qui perdent leur revenu d'emploi en raison d'une grossesse ou pour prodiguer des soins à un jeune enfant (*Ibid.*, 22).

(temporary income for pregnant women or for parents who made contributions and worked in insurable employment for the required number of hours and who lost their employment income because of a pregnancy or in order to take care of a young child).

The factum describes federal competence in social welfare matters in broad terms and denies that they are exclusively the responsibility of the provinces. It states:

Les mesures de bien-être ou de sécurité sociale pour réduire la pauvreté ne sont pas une matière assignée par la *Loi Constitutionnelle de 1867* à la compétence exclusive des provinces, contrairement à ce qu'a affirmé la Cour d'appel. Il s'agit plutôt d'un sujet diffus, comme la culture, la santé ou l'environnement. Les méfaits de la perte de revenu d'emploi, de la maladie ou de la pollution, sont des réalités omniprésentes qui confrontent tous les ordres de gouvernement, qu'ils soient fédéral ou provinciaux. Ils ne sont pas l'apanage de la compétence exclusive de l'un ou de l'autre. Le mieux-être de tous les habitants du Canada est un objectif commun à chaque ordre de gouvernement (*Ibid.*, 26).

(Welfare or social security measures to reduce poverty are not a matter assigned by the *Constitution Act, 1867* to the exclusive jurisdiction of the provinces, contrary to what the Court of Appeal asserted. Rather it is a diffuse subject, like culture, health or the environment. The ravages from loss of employment income, from illness or from pollution, are omnipresent realities which confront all orders of government, whether they be federal or provincial. They are not the prerogative of either one jurisdiction or the other. The betterment of all of the citizens of Canada is a common objective of each order of government.)

The factum ends by observing that maternity benefits have been provided for over thirty years "et sont intégrées aux contrats de travail de plusieurs travailleurs. Depuis toutes ces années, les législatures provinciales n'y ont vu aucun obstacle constitutionnel" (*Ibid.*, 39). (and have become integrated into the collective agreements of several workers. For all these years the provincial legislatures did not see any constitutional obstacle).

The Supreme Court of Canada's decision was delivered in October 2005. In a unanimous judgment, the Court rejected the Québec government's contention that the federal government had exceeded its jurisdiction by providing a social program through the *Employment Insurance Act*. In upholding the federal case, the Supreme Court ruled that maternity benefits are in pith and substance a mechanism for providing replacement income during an interruption of work. It stated:

This is consistent with the essence of the federal jurisdiction over unemployment insurance, namely the establishment of a public insurance program the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment (*Reference re: Employment Insurance Act (Can.)*, ss.22 and 23, 2005 SCC 56, para. 68).

As far as parental benefits are concerned, they, too, are

in pith and substance a mechanism for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child, and that it can be concluded from their pith and substance that Parliament may rely on the jurisdiction assigned to it under s. 91(2A) of the *Constitution Act, 1867* (*Ibid.*, para. 75).

The justices concluded:

A generous interpretation of the provisions of the Constitution permits social change to be taken into account. The provincial legislatures have jurisdiction over social programs, but Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth or care for children. The provision of income replacement benefits during maternity leave and parental leave does

not trench on the provincial jurisdiction over property and civil rights and may validly be included in the EIA (*Ibid.*, para. 77).

Surprisingly, on May 21, 2004, seventeen months before the Supreme Court of Canada delivered its ruling, federal Ministers, under a new Prime Minister, Paul Martin, announced that the federal and Québec governments reached an agreement-in-principle on the devolution of the maternity and parental benefits plan. It stipulated that it would hold regardless of what the Supreme Court decided. On March 1, 2005, almost eight months before the Supreme Court handed down its decision, the Final Agreement between the Government of Canada and the Government of Québec was signed. The Agreement reiterated that it would hold regardless of the Supreme Court's determination.

The Agreement provides that the federal government will reduce the EI premium rate by an amount equivalent to the portion of the premium rate covering maternity and parental benefits. This means that the federal government will not collect roughly \$750 million from Quebecers. This amount is equal to the cost of a full year of EI maternity and parental benefits in Quebec. The premium reduction takes effect on January 1, 2006 when Quebec's program commences.

The methodology used to calculate the EI premium rate reduction for Quebecers will apply to other provinces and territories that want to establish their own parental insurance plan.

The Agreement also provides that claimants receiving benefits will continue to receive benefits if they move to another province or territory.

The Government of Canada agreed to let Québec use the federal Record of Employment form and the Social Insurance Number. According to a federal "Backgrounder" on the Agreement, "This will result in substantial savings to Quebec, as it will not have to develop and maintain its own forms or systems, and will ease the administrative burden on Quebec

employers while at the same time providing them with savings." Federal government generosity was also displayed by its agreement to contribute a one-time payment of \$200 million to Québec. Again according to the "Backgrounder," this was done in "recognition of the significant investment required to implement Quebec's benefits program." *It is precisely the kind of payment that the Liberal Jean Chrétien government refused to make in the first round of negotiations in the late 1990s.*

Why did the Government of Canada not wait for the Supreme Court decision before negotiating a deal with Québec? If it won the case, which it did, its bargaining position would have been strengthened considerably. Most probably, the Martin government's eagerness to get a deal with Québec had to do with the federal election, held in June 2004, a month after the agreement-in-principle was signed. Reeling from the aftermath of a scandal involving members of the federal Liberal Party in Québec, the Martin government may have thought that an agreement with Québec would pay off for them electorally. It apparently had a minimal impact.

To summarize this discussion of maternity and parental benefits: in the late 1930s, a consensus emerged that responsibility for UI ought to reside with the federal government and the constitution was amended accordingly. From 1940 to 1971, the *Unemployment Insurance Act* was amended several times, culminating in a major overhaul in 1971. Prior to passage of the new legislation, several federal documents assured the Cabinet of the constitutional validity of the legislation, including the provision on maternity benefits. These documents include the 1969 study of the UI program, the 1970 white paper, and a federal working paper on the constitutional aspects of income security and social welfare. In addition, Cabinet had a legal opinion confirming that delivering maternity benefits through the UI program was constitutional. And the Royal Commission on the Status of Women in Canada recommended to the Cabinet that the *Unemployment Insurance Act* be amended to include maternity benefits. Despite these assurances and its own vision of

UI, the Government of Canada inserted into the 1971 amendments a clause requiring the federal government to cease delivering benefits to, and taking contributions from, the citizens of any province that established its own maternity leave program. From 1971 to 1996, at least two Supreme Court of Canada decisions and two federal task forces upheld the constitutionality of the federal maternity benefits program. The several legislative amendments passed during this period expanding the availability of benefits, including parental benefits, represented clear assertions of federal authority. Yet the maternity-benefits opting-out provision survived the legislative reforms of 1996, despite the absence of any provincial take-up of the option since its insertion in legislation in 1971. Most recently, the federal government, faced with a constitutional challenge from Québec to the validity of the maternity and parental benefits clauses in the *Employment Insurance Act*, chose to agree to a deal with Québec on devolution even before the Supreme Court of Canada could decide on the constitutionality of the provisions. When the Court did decide, it upheld the federal case.

We can, therefore, deduce that the Government of Canada approach to the maternity and parental benefits programs is consistent with the assessment offered by Stephen Clarkson and others: that is to say, despite its declarations of jurisdiction over UI, and despite judicial and other support for the federal legislation, the federal government chose to give the provinces the option of taking over the maternity and parental benefits programs if they wanted to. In the clash of constitutional visions between the equality of the provinces vision (that is, the equality of the provinces with the federal government) and the nationalizing vision, it is the former which won out with the Canada-Québec Agreement on maternity and parental benefits. Since all provinces were offered the same kind of arrangement made with Quebec, the Agreement could not be said to exemplify asymmetrical federalism.

As noted earlier, federal ambivalence about its own powers was demonstrated in other areas,

particularly labour force training policy and environmental policy. Since the early 1900s, the Government of Canada has asserted its right to be involved in occupational training policy and has transferred funds to the provinces for that purpose. The provinces had considerable latitude in determining how those dollars would be spent. Despite federal declarations that it needs to be involved in labour force training, and has the constitutional authority to be involved, and even though the provinces always played a central role in deciding where federal dollars would go, the Government of Canada announced in 1995 that it would withdraw from the field of worker training. The main reason for this decision was the near victory of the secessionist forces in the 1995 referendum on Québec secession. Aside from this reversal of tradition on the part of the federal government, the ambivalence of the Government of Canada was illustrated, in a very graphic way, when, on the one hand, it agreed to the insertion in the Labour Market Development Agreements that it signed with each province and territory of a clause acknowledging labour force training to be a provincial responsibility, but, on the other, it insisted on a role for itself in several areas of skills development, including job training for young people. To a significant extent, labour force training policy in Canada is set by a confederal body, the Forum of Labour Market Ministers.

In environmental policy, the approach of the federal government has been even more peculiar. As with labour force training, the Government of Canada frequently demonstrated its right and authority to be involved in environmental policy. However, unlike worker training, the environment is a field where the courts agreed with the federal claim – no fewer than five times! And yet, according to Kathryn Harrison, a Canadian political scientist who specializes in environmental policy, after the court decisions came down, “the federal government was more, rather than less, deferential to the provinces...” (Harrison 2003, 319). Thus, it signed with the provinces, except Québec, a Canada-Wide Accord on Environmental Harmonization, managed by a confederal body, the Canadian

Council of Ministers of the Environment. Even with several court victories under its belt, plus strong political support for federal involvement in environmental policy-making, and a record of episodic but significant environmental activism, the federal government still embraced the equality of the provinces vision, as expressed by the Environmental Harmonization Accord.

#### 4. CONCLUSION

This paper has attempted to ascertain the degree to which the federal government's handling of its maternity and parental benefits programs is consistent with the view that, in federal-provincial relations, Ottawa's approach has "alternated between trying to enforce its authority and devolving its own powers." After discussing the four constitutional visions identified by Rocher and Smith, the paper turned to the maternity and parental benefits programs and showed that, despite repeated assertions of authority, the federal government still felt impelled to offer control of the maternity benefits program to the provinces, and to keep the offer open for several years. Thus, Clarkson's assessment was found to be valid.

What is particularly perplexing about the federal government approach is that it cedes jurisdiction even when its authority is upheld by the courts. On at least three occasions, decisions from the country's highest court supported federal UI policy. Given this support and that of assorted studies, why would the Government of Canada still agree to devolve a popular social program, one that enabled it to make a direct connection with the citizens of a province with a not insignificant secessionist movement? This study seems to demonstrate the validity of our theory, which suggests that clashing constitutional visions, an outcome of Canada's institutionalized ambivalence, can cause shifting approaches to federal-provincial relations. The Government of Canada, uncertain about its role in Québec and the vision it wanted to promote in the province, eventually fell victim to pressure from Québec politicians, whose position was strengthened by a pending federal election and the Liberal Party's scandal-related problems in the province.

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